

**A CRITICAL ANALYSIS OF THE ADMINISTRATION OF THE RIGHT  
TO JUSTICE IN ZAMBIA SINCE 1964**

**By**

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### Declaration

I MULEYA HAKAYUWA, Computer No. 26130475, hereby declare that this dissertation has been produced by me and the work presented in it is my original research work. Where other sources of information have been used, they have been duly acknowledged. I genuinely believe that this dissertation has not been previously submitted for the award of a degree at the University of Zambia or another University.

Signed:.....*Muleya*.....

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## **Certification**

I recommend that this Obligatory Essay prepared under my supervision by:

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Entitled

**“A Critical Evaluation of the Administration of the Right to Justice in Zambia  
since 1964”**

be accepted for examination. I have checked it carefully and I am satisfied that it fulfils the requirements relating to the format as laid down in the regulations governing Directed Research Essay.

Signed:.....

Ms. Misozi Lwatula  
(Supervisor)

Date:.....

## **Dedication**

This dissertation is dedicated to my dear mum, Emmah Muchimba Syakayuwa, who taught me at a young age to work hard in school and that the best inheritance I could ever get from her was education, thereby, enabling me to undertake such a study today.

## **Acknowledgements**

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## List of Cases

1. Alex Soteli Chambala v. Zambia Communication No. 856/1999, UN. Doc. CCPR/C/78/D/856/1999 (2003)
2. Amnesty International v. Zambia, African Commission on Human and Peoples' Rights, Comm. No. 212/98 (1999).
3. Attorney General v. Roy Clarke (Appeal No. 96A/2004)
4. Chiiko Bwalya v. Zambia, Communication No. 34/1988, U.N. Doc. CCPR/C/48/D/314/1988 (1993)
5. Chiluba and Others v. Attorney General 2007/HP/FJ/004
6. Christine Mulundika & Others v. The People (1995 – 1997) Z.R. 20
7. Fred Mmembe and Bright Mwape v. Attorney General 1996/HP/1199
8. Harry Mwanga Nkumbula and Simon Kapwepwe v. United National Independence Party (1978) Z. R. 378 (H.C.)
9. Kalenga v. Zambia Communication No. 326/1988, CCPR/C/48/D/326/1988
10. Kambarange Mpundu Kaunda v. The People (1990 -1992) ZR 215 (SC)
11. Lee Habasonda & SACCORD v. Minister Home Affairs & Attorney General 2004/HP/1094
12. Legal Resources Foundation v Zambia, Communication No. 211/98, 2001
13. Lewanika & Others v. Chiluba (1998) Z.R. 79
14. Marbury v. Madison (1803)
15. Mazoka & Others v. Mwanawasa & Others (2005) Z.R. 138
16. Nkumbula v. The Attorney General (1972) Z.R. 111 (H.C.)
17. Roger Chongwe v Zambia, Communication No. 821/1998
18. The People v. Mpombo (SSN/09/2010)
19. The Resident Doctors Association of Zambia v. The Attorney General, SCZ No. 12, 2003
20. Zambia National Holdings Limited and United National Independence Party v The Attorney General (1994) S. J. 22 (S.C)

**List of Statutes**

1. The Constitution of Zambia 1991(as amended in 1996), Chapter 1 of the Laws of Zambia
2. The Criminal Procedure Code Chapter 88 of the Laws of Zambia
3. The Independence Constitution of Zambia, 1964
4. The Inquiries Act Chapter 41 of the Laws of Zambia
5. The Judicature Act Chapter 24 of the Laws of Zambia
6. The One Party Constitution of Zambia, 1972
7. The Penal Code Chapter 87 of the Laws of Zambia
8. The Preservation of Public Security Act Chapter 112 of the Laws of Zambia
9. The Prisons Act Chapter 97 of the Laws of Zambia
10. The Public Order Act Chapter 113 of the Laws of Zambia
11. The State Security Act Chapter 111 of the Laws of Zambia
12. The United States of America Constitution
13. The Zambia Police Act Chapter 107 of the Laws of Zambia

**List of International Legal Instruments**

1. Convention on the Elimination of all Forms of Discrimination Against Women 1979
2. International Covenant on Civil and Political Rights 1966
3. International Covenant on Economic, Social and Cultural Rights 1966
4. International Covenant on the Elimination of Racial Discrimination 1965
5. United Nations Charter 1945
6. Universal Declaration of Human Rights 1948

## List of Acronyms

ANC	African National Congress
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
DPP	Director of Public Prosecution
FNDP	Fifth National Development Plan
HRC	Human Rights Commission
ICCPR	International Convention on Civil and Political Rights
ICESCR	International Convention on Economic, Social and Cultural Rights
LRF	Legal Resources Foundation
MCC	Member of Central Committee
MMD	Movement for Multiparty Democracy
NCC	National Constitution Conference
NGO	Non Governmental Organisation
NPP	National Progressive Party
UDHR	Universal Declaration on Human Rights
UN	United Nations
UNIP	United National Independence Party
UPND	United Party for National Development
UPP	United Progressive Party

# Chapter 1 Justice and its Origins

## 1.0 Introduction

The right to justice is one of the basic human rights provided for in various international instruments.<sup>1</sup> This right denotes the administration of the due process of the law through the rule of law. It is one right that cuts across all the other rights in that the benefit of these human rights is determined by the extent to which they are enjoyed by the people with respect to how they are fairly administered by those charged with the responsibility. It is the responsibility of governments to provide equitable justice and protection of fundamental human rights and freedoms for the benefit of all. Without prejudice or discrimination, all are entitled to basic human rights.

Whilst the administration of equitable justice and correction of the offender takes away some of the offender's fundamental freedoms such as freedom of movement and association, it does not take away the offender's rights to food, health, education, decent and humane treatment, and many other freedoms that are not in conflict with the objectives of incarceration and correction.<sup>2</sup> The link between human rights, democracy and development is central to the positive growth of States. At the dawn of the 21<sup>st</sup> century, nations of virtually every region in the world recognised the role of the rule of law and the protection of human rights in their own political and legal systems as a critical factor in nation building and good governance.<sup>3</sup>

The doctrine of human rights has come to play a significant role on the domestic and international scene. The role is that of benchmark, being a standard of assessment and criticism for domestic institutions, a standard of aspiration for their reform, and a standard of evaluation for their policies and practices of international economic and political organisations. Human rights have also served as bases for standard setting, monitoring

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<sup>1</sup> International Covenant on Civil and Political Rights, Article 14; Universal Declaration of Human Rights, Articles 7, 10

<sup>2</sup> National Audit of Prison Conditions in Zambia, May 2009. Page 3

<sup>3</sup> M. Ndulo, Good Governance: The Rule of Law & Poverty Alleviation, Democratic Reform in Africa: Its impact on Governance & Poverty Alleviation, Ohio: Ohio University, 2006. Page 1

reporting and advocacy by nongovernmental organisations at both domestic and international levels of world politics.<sup>4</sup> Respect for human rights is one of the bedrocks for democracy.

## **1.1 Statement of the Problem**

The judiciary and its attendant justice system is a topical subject in contemporary Zambia. The need for rightly upholding the law and justice is on the increase. Regularly, newspapers carry articles asserting that the Zambian judiciary is corrupt, partial, and miscarry justice among others. It has been observed incessantly by people from different walks of life that the judiciary lacks independence.<sup>5</sup> People are despondent with the judiciary as they feel that they have been robbed of their justice by the institution expected to dispense off justice equally without fear or favour.

Disparities have been cited in the adjudication of cases in Zambia and this has caused a lot of concern and apprehension in society and the media thereby bringing into question the respect and confidence in the judiciary which is bestowed with the custodianship of justice.<sup>6</sup> Furthermore, the draft constitution unlike the current has the 'right to justice' clearly stipulated therein.<sup>7</sup> This could be an indication of the significance placed on the fair administration of justice. The judiciary is thus expected to apply the law equally without taking irrelevant considerations into account. In recognition of the significance of the right to justice, human rights instruments both at international and regional levels contain provisions that guarantee the right to justice.

Similarly, the current developments in Zambia affirm the need for good governance in the administration of justice. One such development is the 'Access to Justice Programme' which commenced in 2006 alongside the Fifth National Development Plan (FNDP). The Programme adopts a sectoral approach which includes improved communication, cooperation, and coordination among justice institutions and other stakeholders as one of its

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<sup>4</sup> C.R. Beitz, Human Rights as a Common Concern, American Political Science Review – Bowdoin College, Vol. 95, No. 2, June 2001. Page 269 at <http://academic2.american.edu/~dfagel/beitz-humanrightsaspoliticalconcern.pdf> [accesses on 2 July 2010]

<sup>5</sup> The Post, 3<sup>rd</sup> October, 2010, A Disgraced Judiciary

<sup>6</sup> The Post, 16 August, 2010, Politics and Justice in Zambia

<sup>7</sup> Draft Constitution of Zambia, 2010, Article 44

specific objectives.<sup>8</sup> The broad challenges identified by this programme as limiting access to justice include the following: limited communication, cooperation, and coordination among the key justice delivery agencies as well as non-sector actors; existing case backlog; inequitable spread of justice agencies, institutions, and low user confidence in them; low public and user awareness of the justice system; and the need for legislative reform.

This is but a tip of an iceberg pointing to some of the problems faced by justice institutions which this study undertakes to explore.

## **1.2 Objectives of the Study**

The aim of this study is to examine and assess the effectiveness of the judiciary and relevant authorities in the administration of justice from the first to third Republics of Zambia. The research will in effect explore the potency of the Zambian justice system. Accordingly, the objectives of the study are as follows:

- a) Critically review the legal systems in the three regimes, assess their respective effectiveness;
- b) Ascertain the administrative structures in place in the different regimes;
- c) Ascertain the institutions in place in the different republics;
- d) Determine the degree of fairness exercised in the administration of the right to justice;
- e) Establish the root of the continued and escalating concern for maladministration of justice;
- f) Identify any weaknesses in the systems if any;
- g) Suggest measures for improving the administration of justice in Zambia.

The questions to be answered include:

### **Part I**

- a) What was/is the legal system in place in each of the republics?
- b) What were/are the administrative structures in place in each of the republics?
- c) What laws were/are in place relating to justice?

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<sup>8</sup> Zambia Police News: Issue No. 003 2009. Page 19

- d) What has been the role of International Covenants in all the republics?
- e) What are the attributes of a good legal system structure?

## Part II

- f) What institutions were/are in place for purposes of justice in the respective republics?
- g) What roles do these institutions play
- h) Any relationships between or amongst the institutions?
- i) What are the attributes of a good legal institutional framework?

## Part III

- j) How effective, useful, or valuable was each legal system?
- k) How did the institutions bestowed with the responsibility of guaranteeing and administering justice discharge their noble duties?
- l) How fair or just was/is the administration of the right to justice by those responsible in the respective republics?
- m) What are the root causes of malpractices, miscarriage of justice, and injustices occasioned to the people and society?
- n) Why the continued and escalating outcry and concern for maladministration of justice? Why is it that the call for justice is on the increase forty six (46) years after Zambia attained her independence?
- o) What are the weaknesses in the system? Any strengths?

## Part IV

- p) How effective was/is the Zambian judiciary in applying the law vis-à-vis the right to justice?
- q) Has the rule of law been upheld in all the republics? If not, how has it been with respect to the right to justice administration?
- r) How independent is the Judiciary?
- s) What are the attributes of a good justice system; a system that stands the test of time?
- t) What measures could be put in place to improve the administration of justice in Zambia?

## Part V

- u) Does the Zambian current legal system have adequate laws to guarantee the protection of the right to justice?
- v) Did every regime have ample laws in relation to justice?
- w) What was/or is the relationship amongst the three arms of government (The Executive, Legislature and Judiciary)?
- x) What is the role of each arm of government in the administration of justice?
- y) How fair has the Zambian justice system been?
- z) What are the consequences of maladministration of justice?

### **1.3 Significance of the Study**

This study attempts to establish the root causes of injustice in the Zambian system and accordingly bring to attention what should be done to ensure that justice, one of the bedrocks of democracy is sturdily enshrined in the Zambian legal system. The study will also seek to underscore the grave consequences of an unjust system of administration.

### **1.4 Research Methodology**

The research was based on desk review of books and articles by various scholarly writers on the subject, internet search, relevant legislation, court judgments/decided cases, reports for commissions of inquiry, international covenants/instruments, and newspaper articles complimented with semi-structured interviews and administration of structured questionnaires. The interviews were selected representatively to cover most of the groups of the populace and these include the ordinary Zambian, NGOs, the Church, the Media, Political Parties, Government officials (from all the regimes) Judiciary, Legislature, Executive, NCC, legal academicians, constitutional lawyers, human rights activists, legal practitioners, and the Law Association of Zambia among others.

### **1.5 What is Justice?**

Justice is one notion that has a plethora of definitions. It must be appreciated from the outset that defining justice is complex. According to Pollock, definitions of justice cover concepts such as fairness, equality, impartiality, and appropriate rewards or punishment. In his discourse, he states that justice is not something people should be grateful for but rather,

something that they have a right to insist on; and that justice concerns rights and interests more often than needs.<sup>9</sup> Similarly, Black's Law Dictionary<sup>10</sup> defines "justice" as the fair administration of laws whereas Webster's Dictionary<sup>11</sup> defines "justice" as, the maintenance or administration of what is just, especially by impartial adjustment of conflicting claims or the assignment of merited rewards or punishments; the administration of law, especially the establishment or determination of rights according to the rules of law or equity; the equality of being just, impartial or fair; and the principle or ideal of just dealing or right action.

## 1.6 Origins of the Concept of Justice

The western legal system evolved from the need to tame wild justice that was tearing apart early civilization. Justice as is known dates back to sixth century B.C. Athens with the genius of Solon who came to power in revolutionary times with a mission to put an end to the cycles of retaliatory violence that had plagued Greece for centuries. Athens wanted peace and order, and turned to the man who had communicated his vision of social order and the need for justice through his poetry.<sup>12</sup>

The foundation for democratic systems of governance was in consequence laid down by this man Solon through enactment of constitutions that gave birth to democracy. He instituted changes and established a legal code that brokered a non-violent social revolution and transformed the passion for vengeance into a justice system. This system was based on rule of and equality before the law, a redistribution of power through law, and resolution of conflict through a public court system with juries of peers in an adversarial process before the presiding judge. Religion was separated from the administration of justice for the first time in human history. Solon converted private revenge into public justice. He harnessed wild justice and made it a central part of democracy.<sup>13</sup>

Justice thus originates from the Greek word *dike*, which is associated with the concept of everything staying in its assigned place or natural role. According to Plato, justice consists of

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<sup>9</sup> J. M. Pollock, *Ethics in Crime and Justice*, Wadsworth: Thompson Learning Inc., 2004. Page 78

<sup>10</sup> Black's Ninth Law Dictionary, West: Thompson Reuters Business, 2009.

<sup>11</sup> Webster's Ninth New Collegiate Dictionary, Springfield, MA: Merriam-Webster, 1984.

<sup>12</sup> W. A. Borden, A history of justice: origins of law and psychiatry, *American Academy of Psychiatry Newsletter*, Vol. 24, No. 2, 1999. Page 12-14 at [http://www.aapl.org/newsletter/N242hist\\_justice.htm](http://www.aapl.org/newsletter/N242hist_justice.htm) [accessed on 5 July 2010]

<sup>13</sup> W. A. Borden, A history of justice: origins of law and psychiatry. Page 12 - 14

maintaining the societal status quo whilst for Aristotle, a notable Greek, believed that justice exists in the law and that the law is the unwritten custom of all or the majority of men which draws a distinction between what is honorable and what is base.<sup>14</sup> In attempting to define natural justice, Aristotle stated that equality was not the same for everyone meaning that equality can only be measured for people in the same group or status.<sup>15</sup>

Furthermore, the Roman Theorists on the other hand underscored that the law should be applied in equal manner to all regardless of their station in life. The great Roman Jurist Dometius Ulpanius defined justice as 'the constant and perpetual will to allot everyman his due'.<sup>16</sup> The definition of justice is thus mainly dependent on a particular society and also the writers' philosophical inclination and belief of the law. This paper will, therefore, approach the subject of justice from a naturalist school of thought view and will particularly examine the procedural and substantial justice. According to naturalists, justice can only be achieved through the law and the law should conform to what is just thereby respecting, cultivating and protecting the dignity of all peoples irrespective of their status in society.<sup>17</sup>

### **1.7 Justice and the Rule of Law**

The sources of law in Zambia include the Constitution, Acts of Parliament and subsidiary legislation, judicial decisions, English common law, equity, statutes and customary law. In addition to these, there is International law only applicable to Zambia where she has ratified or acceded to the bilateral or multilateral agreements.<sup>18</sup> Zambia is a member of the African Union, United Nations and other regional and international organizations and has signed and ratified many international instruments. Regrettably, only a few have been domesticated leading to fears that Zambia lacks the requisite commitment. Zambia follows the doctrine of dualism as such the international instruments are not self executing. At Independence, Zambia inherited English laws and almost all are still applicable whereas in England the same laws have either been amended or repealed severally as the case may be. The question to be answered here is whether Zambia might be applying laws that are outmoded.

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<sup>14</sup> J. M. Pollock, *Ethics in Crime and Justice*. Page 79

<sup>15</sup> A. Walsh & C. Hemmens, *Law, Justice and Society*, New York Oxford: Oxford University Press, 2008. Page 28

<sup>16</sup> A. Walsh & C. Hemmens, *Law, Justice and Society*. Page 28

<sup>17</sup> A. Walsh & C. Hemmens, *Law, Justice and Society*. Page 40

<sup>18</sup> M.M. Munalula, *Legal Process: Zambian Cases, Legislation and Commentaries*, Lusaka: UNZA Press, 2004. Page 89

The rule of law and administration of justice work mutually. Studies have shown that there are weaknesses in the operation of the rule of law in Zambia.<sup>19</sup> The Zambia Rule of Law Assessment Report outlines the limiting issues which include among others, Zambia being a party to several treaties including human rights treaties and yet the rights enshrined in these treaties are not given legal effect in the absence of an implementing legislation as mentioned above. Proposals for implementing legislation such as the one to respect gender equality and proscribe gender based violence in furtherance of the United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) have been pending for years. Other proposals to strengthen the rule of law and improve the administration of justice are at various stages of preparation and review which processes appear to move slowly and uncertainly.

Furthermore, the report states that the Constitution allows the President to exercise broad discretion in granting and withdrawing judicial status at the highest level. This is widely perceived as undermining judicial independence. The report also states that delays in the administration of justice impacts the guarantee of human rights protections, manifested in long periods that indigent defendants who cannot arrange for bail must serve in pre-trial detention.

In addition, another report by the African Human Rights initiative, states that justice systems in Africa tend to work slowly and are laden with bureaucratic procedures that impede the effective delivery of justice. The justice systems are said to be defective and consequently have slowed down development and prevented Africans from realizing their full potential. The report further states that there should, therefore, not only be the advocating and championing of the rule of law but the law must be applied accordingly and accessible to all.<sup>20</sup>

The administration of Justice was the theme of a series of African conferences organized in the 1950s and 1960s as the colonial era was coming to an end. The conferences produced broad agreement on four principal goals and these are: a professional magistracy, to provide safeguards against abuses of judicial power; specialized courts, to improve quality and efficiency; separation of powers, to diminish risks of executive influence on judicial

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<sup>19</sup> Zambia Rule of Law Assessment, June 2009. DPK Consulting – A Division of ARD, Inc. Page 6

<sup>20</sup> African Human Security Initiative: The Criminal Justice System in Zambia, Enhancing the Delivery of Security in Africa, April 2009. Page 111 at [www.africanreview.org/docs/zambia/mono159.Pdf](http://www.africanreview.org/docs/zambia/mono159.Pdf) [accessed 6 August 2010]

decisions; and unification of national legal systems, to encourage equal justice based on a single body of law and a single justice system.

These goals regrettably continue to present challenges for the advancement of the rule of law in Zambia.<sup>21</sup>

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<sup>21</sup> Zambia Rule of Law Assessment, June 2009. DPK Consulting – A Division of ARD, Inc. Page 5

## Chapter 2: The Zambian Legal Framework

### 2.1 Introduction

A constitution is the fundamental and organic law of the nation that establishes the institutions and apparatus of government, defines the scope of governmental sovereign powers, and guarantees individual civil rights and civil liberties.<sup>22</sup> The Zambian Constitution is the Supreme law of the land and any law inconsistent with it is null and void to the extent of the inconsistency.

Most constitutions prescribe the different functions performed by the three organs of government and the relationships between the organs is guided by two formulae of good governance and freedom, namely, the doctrine of separation of powers and the theory of the rule of law.<sup>23</sup> Strict adherence to the rule of law is the sure way of ascertaining integration of essential aspects of justice with a legal system.<sup>24</sup> The rule of law is a collection of ideas and principles promulgated to guide law makers, administrators, judges and law enforcement agencies.<sup>25</sup> The paramount facet of the rule of law is the idea that both the rulers and the governed are equally subject to the same law of the land. The observation of the rule of law is supposed to result in justice, which, the Roman Emperor Justinian defined as “the set and constant purpose which gives to every man his due. The law is the practical expression of justice, for the precepts of law are these: to live honestly, to injure no one and to give every man his due.”<sup>26</sup> Although the rule of law can be violated, the fact that it is in existence serves as a source for legitimacy and for this reason, the rule of law has been called the most important legal principle in the world.<sup>27</sup>

Three elements have been identified as tenets for the rule of law which are the recognition of the supremacy of certain fundamental values and principles; values and principles must be committed to writing; and system of procedures that hold the government to these principles and values must be in place.<sup>28</sup>

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<sup>22</sup> Black's Law Dictionary, 2009: 9<sup>th</sup> Edition. Page 353

<sup>23</sup> G. W. Kanyeihamba, Constitutional and Political History of Uganda, Kampala: LawAfrica Publishing (U) Ltd., 2002. Page 263,266

<sup>24</sup> A. Walsh & C. Hemmens, Law, Justice and Society. Page 43

<sup>25</sup> G. W. Kanyeihamba, Constitutional and Political History of Uganda. Page 269-270

<sup>26</sup> G. W. Kanyeihamba, Constitutional and Political History of Uganda. Page 270

<sup>27</sup> A. Walsh & C. Hemmens, Law, Justice and Society. Page 44

<sup>28</sup> A. Walsh & C. Hemmens, Law, Justice and Society. Page 44

The first element is relatively unproblematic as many modern organised societies recognise the fundamental values they hold supreme whilst the second element, which in the contemporary world is the nation's constitution, has not been so much of an issue. The third element, however, has been problematic as it determines whether a country honours its fundamental values in practice as well as theory.<sup>29</sup> For the law to be consistent with justice, it is said to be so only if the nation recognises the values held supreme and the procedures followed by the servants of the law are, and are perceived as, fair and equal.<sup>30</sup>

## **2.2 Justice and the Laws of Zambia**

The Constitution of Zambia is the supreme law of the land. Any law that is inconsistent with the constitution is held void to the extent of the inconsistency.<sup>31</sup> The Zambian Constitution creates a number of institutions and public bodies in a bid to secure the protection of fundamental rights and freedoms. Any interference of any of the fundamental rights and freedoms is an assault to justice. The Constitution is thus, the bedrock of justice administration in Zambia supported by Acts of Parliament, subsidiary legislation, judicial decisions, English common law, equity, statutes, and customary law. The ensuing paragraphs will be exploring provisions relating to justice administration in selected acts and statutes.

### **2.2.1 The First Republic of Zambia**

The period under review runs from 1964 to 1972 and will examine the Constitution, Electoral Act, Public Order Act, Human Rights Commission Act, Zambia Police Act, Emergency Powers Act, State Security Act, Preservation of Public Security Act, Prisons Act, Penal Code and Criminal Procedure Code for the respective periods.

#### **2.2.1.1 The Independence Constitution 1964**

At Independence, Zambia inherited laws from England and with time, amendments and repeals were effected to some Acts as occasioned. The Protective provisions for fundamental rights and freedoms of the individual were enshrined in the 1964 Constitution under Chapter III and Sections 13 to 30 of the Act. Section 20 outlined provisions securing the right to protection of the law for criminal offences as well as civil rights and obligations. Section 20(9) provided that:

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<sup>29</sup> A. Walsh & C. Hemmens, *Law, Justice and Society*. Page 44

<sup>30</sup> A. Walsh & C. Hemmens, *Law, Justice and Society*. Page 44

<sup>31</sup> The Constitution of Zambia, 1991 (as amended in 1996). Article 3

“Any court or other adjudicating authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time.”

And Section 20(1) provided that:

“If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.”

The sections above are instructive of the existence of the doctrine of separation of powers and independence of the judiciary in the laws during the first republic.

### **2.2.2 The Second Republic of Zambia**

The second Republic ran from 1973 to 1991. Prior to this period, the nation underwent substantial change in its political order. On 25<sup>th</sup> February, 1972, President Kenneth Kaunda as he then was, made a historic statement informing the nation that Government had decided that Zambia shall become a One Party Participatory Democracy and that practical steps would be taken to implement the decision.<sup>32</sup> Following that development, His Excellency the President of the Republic of Zambia, Dr. Kenneth Kaunda, by Statutory Instrument No. 46 of 1972, appointed a Commission of Inquiry spearheaded by Mr. Mainza Chona, to consider and recommend changes in the Constitution of the Republic of Zambia, the Constitution of the United National Independence Party and matters related thereto necessary to bring about the establishment of a One-Party Participatory Democracy in Zambia.<sup>33</sup> This was by virtue and in exercise of the powers conferred upon the then President by the Inquiries Act, 1967. In his address, Dr. Kenneth Kaunda stated that the envisaged change to a One-Party State was precipitated by the loud and clear voices of the overwhelming majority both verbally and in writing.<sup>34</sup>

The Commission was mandated to consider changes necessary to bring about and establish One Party Participatory Democracy in Zambia and matters incidental to or connected to the aforesaid. Accordingly, the Commission examined the constitution of the Republic of Zambia; the practices and procedures of the Government of the Republic; considered the Constitution of the United National Independence Party; the nature of the Presidency,

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<sup>32</sup> Report of the National Commission on the Establishment of a One-Party Participatory Democracy in Zambia, 1972. Page 1

<sup>33</sup> Report of the National Commission on the Establishment of a One-Party Participatory Democracy in Zambia, 1972. Page i

<sup>34</sup> Report of the National Commission on the Establishment of a One-Party Participatory Democracy in Zambia, 1972. Page 1

methods of election including the important question of whether or not a Presidential candidate shall be eligible for re-election, and if so, after how many terms; the nature and structure of Government in general including the relationship between Cabinet, Parliament and the Central Committee of the Party; the nature and structure of Parliament itself and its relationship to, for example the National Council of the Party; the relationship between various political and administrative, elected and appointed bodies ranging from Village Productivity and Village Political/Section Committees to the Cabinet and the Central Committee of the Party; the code of leadership for Parliamentarians and other leaders in order to qualify for various positions in which supreme power normally vested in the people, is exercised by them indirectly on behalf of the people; the supremacy of the Party vis-a-vis Government administration; the amount of freedom of the people to form pressure groups based on tribal loyalties or for particular purposes; the role of the Labour Movement and other specialised organisations in the Nation in the formulation of Government Policies; the participation of Public Servants in politics and Government; and the system of discipline in the Party, Government and Public Service; and the freedom of candidates to stand for elections at local or national level.<sup>35</sup>

Further, the commission, in their consideration and recommendation were to pay due regard and adhere to the following principles as cardinal, inviolable and built in safeguards of One Party Participatory Democracy in Zambia: that Zambia shall continue to be a Sovereign Republic; that Zambia must continue to build a humanistic society; that all Citizens must continue to enjoy complete equality; the supremacy of the rule of law and independence of the Judiciary shall continue to be maintained; that the fundamental rights and freedom of the individual shall be protected as provided under Chapter III of the Constitution of the Republic of Zambia; that the right of the individual to freely choose leaders and representatives to Parliament and many other democratic institutions, national and local, shall be fully preserved; that the supreme power must be vested in the people and everything shall be done to ensure that power is exercised by them directly where possible, and indirectly through the established democratic representative institutions; that there shall be complete freedom among the people to participate at local and national level through institutions under people's own control; that Zambia is part and in the front-line of the continent-wide revolutionary movement which seeks to liberate Africa and rid the Continent of all forms of imperialism,

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<sup>35</sup> Report of the National Commission on the Establishment of a One-Party Participatory Democracy in Zambia, 1972. Page viii

colonialism, racism and foreign exploitation which have plagued the African people in the past; that Zambia's geo-political position demands a strong and purposeful Government and a united nation if the Zambian revolution is to succeed; that there shall be no room for complacency and for lofty ideas; that Zambia is permanently opposed to exploitation of man by and the people of Zambia will persist relentlessly in their struggle for self-reliance and the establishment of protective measures against possible exploitation by foreign and local economic interests. The people of Zambia will continue to fight against the establishment of economic, social, political and cultural classes in order to guarantee the equality of all human beings in a humanistic society.<sup>36</sup>

The major outcome of the Mainza Chona Commission was the recommendation for the institution of the One-Party State and accordingly the enactment of a new and second Constitution of Zambia Act 1973.

#### **2.2.2.1 The 1973 Constitution**

Like the 1964 Constitution, the One-Party State Constitution also contained the bill of rights of which Article 20 also referred to provisions securing the protection of the law. The provisions under this article were virtually included verbatim. The doctrine of separation of powers a pre-requisite to the effective administration of the rule of law and independence of the judiciary were equally enshrined in the laws of the second republic.

From the fore-going, it is evident that the Terms of Reference (TORs) for the Mainza Chona Commission were predetermined and consequently the mode of procedure was also flawed. The Commission's task was to consider changes necessary to bring about and establish One Party Participatory Democracy. Consequently, the Commission did not entertain any arguments advanced for or against the establishment of the One-Party System. Petitioners were out rightly advised that the Commission was not tasked to listen to such discussions.<sup>37</sup>

Another striking feature of the 1973 constitution was section 38 (2)(b) which provided that, to be president, one had to be a member of the Party. This clause was not only discriminatory but was a violation or infringement of the people's right to enjoy without any hindrance their freedom of assembly and association with other persons and in particular to

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<sup>36</sup> Report of the National Commission on the Establishment of a One-Party Participatory Democracy in Zambia, 1972. Page xi

<sup>37</sup> Report of the National Commission on the Establishment of a One-Party Participatory Democracy in Zambia, 1972. Page 3

form or belong to any political party for the protection of their interests. The right to form or belong to any political party was accordingly shattered.

The preamble of the 1973 Constitution also recognised that individual rights of citizens including freedom, justice, liberty and equality are founded on the realisation of the rights and duties of all men in the protection of life, liberty and property, freedom of conscience, expression and association within the context of the National Constitution notwithstanding its non-binding nature.<sup>38</sup> Notwithstanding the non-binding nature of preambles, this statement demonstrates that free enjoyment of right to justice among others is cardinal to guaranteed protection of the people's rights and freedoms.

### **2.2.3 The Third Republic of Zambia**

Zambia has gone through different phases of her political life and the search for an ideal constitution has continued. The third Republic singly has had three Constitutional Review Commissions appointed namely the Mvunga (1990), the Mwanakatwe (1993) and the Mungomba 1993) Commissions.<sup>39</sup> With 44 years after attaining her independence, Zambia is still searching for a constitution that will stand the test of time. The question one may ask is, why the continued search? The probable response could be discontentment with all the Constitutions enacted to-date and the failure by those in government to submit to the will of the governed. A constitution is expected not only to provide for the rights of the people but rather to guarantee the fundamental freedoms and rights catalogued therein.

In the late 1980s, pressure mounted on the government of President Kaunda by different interest groups advocating for the re-introduction of the multi-party democracy. This led to the appointment of the Constitution Review Commission headed by Professor Patrick Mvunga.

The ToRs for the Mvunga Commission were to examine and determine a system of political pluralism that would ensure a government which would be strong enough to rule the Zambian people and ensure the personal liberties of the people, but without prejudice to the generality of this power. This entailed the following: examining and determining a system of Government that would ensure the separation of the powers of the Legislature, the Executive

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<sup>38</sup> The Constitution of Zambia 1973, Preamble, Par. 5

<sup>39</sup> S. Mwale, Constitutional Review: The Zambian Search for an Ideal Constitution. Page 1-3 at [www.ictr.org.zm/downloads/simsonafcast.doc](http://www.ictr.org.zm/downloads/simsonafcast.doc), A Paper presented at the 10<sup>th</sup> African Forum for Catholic Social Teachings Working Group Meeting, 2 May 2006, Nairobi, Kenya. [accessed 5 December 2010]

and the Judiciary so as to enhance the roles of these organs; examining and determining the status in relation to the Government of the ruling Party which has won the election; looking into the composition and functions of the various organs of the State and recommend their modality of operation; examining in detail guidelines as contained in His Excellency's Speech of September 1990...and recommend how best the resolutions and submissions could be enshrined in the Constitution; and examining any other issues related to or incidental to the ToRs.<sup>40</sup>

The Mvunga Constitution Review Commission recommendations brought about a marked end of the One-Party rule and ushered in the multi-party political system that was long overdue, under the 1991 Constitution.

### **2.2.3.1 The Constitution of Zambia 1996**

The current Constitution as amended in 1996 also provides that the judicature shall be independent, impartial and subject only to the Constitution and the law, and shall conduct themselves in accordance with the law.<sup>41</sup> The Constitution also provides that the judiciary shall be autonomous and administered in accordance with the provisions of an act of parliament.<sup>42</sup> The judiciary is thus the organ that is vested with power to dispense justice according to the law, deriving the power thereof from the Constitution. Similarly, the current Bill of Rights provides for fundamental rights and freedoms under Section III of the Constitution.

Another Constitution Review Commission was appointed by the then President, Fredrick Chiluba in 1993, the Mwanakatwe Commission. This Commission unfortunately had most of its recommendations rejected by the Government as such dubbed as lacking the popular legitimacy as it did not take into account most of the submissions of the people. Notable amongst the recommendations rejected, was the adoption of the Constitution through a Constituent Assembly.

### **2.2.4 The International Legal Instruments**

Zambia, in addition to local statutes, has an obligation to implement the provisions of International Covenants and Treaties that she has ratified. The instruments include the

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<sup>40</sup> The Mvunga Commission Report, Constitution Report 1990. Page 2

<sup>41</sup> The Constitution of Zambia, 1991 (as amended in 1996) Article 91(2)

<sup>42</sup> The Constitution of Zambia, 1991 Article 91(3)

Universal Declaration for Human Rights (UDHR) 1948, the International Covenant for Civil and Political Rights (ICCPR) 1966, International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966, Convention on the Elimination of All Forms of Gender Discrimination 1979; Committee on the Elimination of Discrimination Against Women.

Regrettably, though Zambia has signed and ratified many of such treaties, little if not nothing has been done to domesticate the provisions of the international covenants. This is as a result of the dual system of law Zambia uses. This notwithstanding, the obligation for Zambia to guarantee the rights of individuals enshrined in these covenants remains.

When all has been said and done, justice demands total respect of peoples rights and dignity by upholding the laws of the State.

## Chapter 3: The Zambian Institutional Framework

### 3.1 Introduction

Justice administration in Zambia involves several institutions, both governmental and non governmental institutions.<sup>43</sup> These institutions are either created by the Constitution or an Act of Parliament. The institutions include the Judicature, Ministry of Justice, Office of the Director Public Prosecutions (DPP), the Police, the Legal Aid Board and the Human Rights Commission. With such institutions with well meaning functions, one would hope that the justice system operates according to the rule of law and democratic principles and values. This notwithstanding, the situation obtaining on the ground may not be as expected.

### 3.2 The Judicature

The Judiciary of Zambia is an independent arm of the government and a creature of the Constitution. It consists of the Supreme Court of Zambia, the High Court of Zambia, the Industrial Relations Court, the Subordinate Courts, the Local Courts, and such lower Courts as may be prescribed by an act of Parliament.<sup>44</sup> The Judicature is administered in accordance with the Judicature Administration Act.<sup>45</sup> The Act is intended to strengthen the autonomy and independence of the Judiciary and is headed by the Chief Justice, with the day to day management being undertaken by the Chief Administrator. The Constitution provides that Judges, members, magistrates and justices shall be independent, impartial and subject only to the Constitution and the law. They shall also conduct themselves in accordance with the code of conduct promulgated by parliament.<sup>46</sup> The constitution also prescribes the tenure of office for judges of both the Supreme Court and High Court as sixty five years of age and can only be removed from office for inability to perform the functions of the office, whether arising from infirmity of body or mind, incompetence or misbehaviour and cannot be removed except in accordance with the provision.<sup>47</sup> Furthermore, the Constitution provides that the Judicature shall be autonomous and administered in accordance with the Judicature

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<sup>43</sup> Matibini P., Access to Justice and the Rule of Law: An Issue Paper presented for the Commission on Legal Empowerment of the Poor. Page 12 at [www.undp.org/legalempowerment/reports/National%20Consultation%20Reports/Country%20Files/26\\_Zambia/27\\_3\\_Access\\_to\\_Justice.pdf](http://www.undp.org/legalempowerment/reports/National%20Consultation%20Reports/Country%20Files/26_Zambia/27_3_Access_to_Justice.pdf) [accessed 1 June 2010]

<sup>44</sup> The Constitution of Zambia, 1991, Article 91(1)

<sup>45</sup> Chapter 24 of the Laws of Zambia

<sup>46</sup> The Constitution of Zambia, 1991, Article 91(2)

<sup>47</sup> The Constitution of Zambia, 1991, Article 98

Administration Act Chapter 24 of the Laws of Zambia.<sup>48</sup> Autonomy of the judiciary is cardinal in ensuring justice delivery.

The roles or core functions of the Judiciary include the administration of justice through resolving disputes between individuals, and between the state and the individual; interpretation of the constitution and the laws of Zambia; promotion of the rule of law and contribute to the maintenance of order in society; safeguarding the constitution and upholding democratic principles; and protecting human rights of individuals and groups<sup>49</sup>

Regrettably, the role of the judiciary has not been appreciated by most Zambian people. The populace has lost the confidence in the judiciary and have called them all kinds of names such as,

“Stupid judgements by stupid judges”.<sup>50</sup>

The people are totally disgruntled as they feel that the judiciary has set such dangerous precedents that will be very difficult to overturn in future. Others have stated that the Judiciary is using court privileges to frustrate free expression in the country and defend their bad decisions. It has also been said of the judiciary that their judgments are politically influenced and that this was creating frustration and anger in the nation, a recipe for instability.<sup>51</sup>

Despite the many complaints and loss of confidence in the Zambian Judiciary by the people of Zambia generally, one high profile government official who faced prosecution on corruption charges under the late President Levy Mwanawasa and acquitted under the Rupiah Banda Administration had this to say,

“I think the judiciary in this country is very strong, anywhere in the world you will never find a government losing a case to an individual, so you can understand from that point or from that perspective that the judiciary is very strong in this country.”<sup>52</sup>

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<sup>48</sup> The Constitution of Zambia, Article 91(3)

<sup>49</sup> The Judiciary, at [www.statehouse.gov.zm/index.php/the-government/judiciary](http://www.statehouse.gov.zm/index.php/the-government/judiciary), 16 December 2009 [accessed 21 October 2010]

<sup>50</sup> The Zambian Economist, at [/www.zambian-economist.com](http://www.zambian-economist.com), Friday 2 April 2010 [accessed 15 November 2010]

<sup>51</sup> Postzambia.com: Judiciary is being used, at [www.postzambia.com/post-read\\_article.php?articleId=17399](http://www.postzambia.com/post-read_article.php?articleId=17399), 18 January 2011 [accessed 15 February, 2011]

<sup>52</sup> Lusakatimes.com, Zambia's Judiciary the Best in Africa , at [www.lusakatimes.com](http://www.lusakatimes.com), January 3 2011 [accessed 15 February 2011]

The official stated that the laws of Zambia are the strongest in comparison to the rest of Africa, because European friends had informed him that he was the luckiest person to be acquitted against the government, meaning that the laws of this land and the judiciary are a perfect institution but that people may tend to be selective in their own wisdom.

Many Zambians, however, are of the view that the judiciary is vicious to the innocent or those not sympathetic to their political ideals but friendly to their party cadres. It has been said time and again, that the judiciary is allowing the Executive to interfere in its discharging of its noble duty. A catalogue of criticisms has been leveled against the judiciary and government of the day as evidenced by articles in newspapers. The people of Zambia believe that ruling governments have the habit of interfering in the work of the judiciary and the judiciary has not had enough backbone not to allow such interference. The people also believe that the Judiciary is capable of defending its own decisions, regrettably though, the principle of 'separation of powers' has throughout the republics been seriously undermined.

In one newspaper article, the public had this to say,

"In the recent past, many careless statements were made by Rupiah Banda and some of his Cabinet ministers prior to and immediately after the acquittal of Frederick Chiluba, indicating serious interference in the administration of justice. The issue of Chiluba's acquittal and the Director of Public Prosecution Chalwe Mchenga's subsequent refusal to appeal the acquittal are fresh on our minds. The executive has been quite preoccupied with issues of the judiciary. That is the interference we are talking about. The judiciary is capable of defending its own decisions. But that some decisions especially the Chiluba acquittal and the refusal to appeal were not made by the judiciary itself, the executive took it upon itself to defend what it decided upon. The arguments of the executive in defending the DPP are surely faulty and a fallacy."<sup>53</sup>

Another seemingly injustice is said to have been occasioned in the case of case of *The People v. George Wello Mpombo*<sup>54</sup> where the accused was charged with a count of dishonoured cheque contrary to Section 33 (1) of the National Payment Systems Act Number 1 of 2007 as read with the Bank of Zambia Act Chapter 387 of the Laws of Zambia. The particulars of the case are that, the accused, on the 18<sup>th</sup> day of December, 2009 with intent to defraud, willfully and dishonestly did issue one cheque number 000014 to Colywn Company Ltd in the sum of ZMK10,000,000.00 on insufficient funded account namely Standard Chartered Bank Number 0100120696200 which rendered such a cheque dishonoured. The court held that the accused committed the charged offence. The public once more had this to say,

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<sup>53</sup> The Post, Administration of Justice, 3 January 2010

<sup>54</sup> SSN/09/2010

“Looking at the cases of Mr. Chiluba, MP Mushili, Mr. Mpombo and Ms Changwe reveals a lot of disparities. Chiluba’s acquittal and now that the London judgment cannot be registered in Zambia remains a mystery. Mushili who was going to defraud the government and the people of Zambia out of millions of Kwacha was only told to sweep offices, nothing else. Minister Changwe who’s cheque bounced is still a free lady. Yet Mpombo’s bounced check has sent him to prison and a fee. Could these be normal discrepancies?”<sup>55</sup>

Furthermore, Mr. Hakainde Hichilema of the United Party for National Development (UPND), a political opponent to the current ruling Movement for Multiparty Democracy (MMD) government had this to say after the arrest of Post Editor Fred Mmembe who was sentenced to four months imprisonment with hard labour by a senior resident magistrate for contempt of court:

“Zambia’s justice system has collapsed...Definitely we understand that everything is political and the magistrate could have looked at things from one way.”<sup>56</sup>

The contempt charges arose from an article published in The Post edition of August 27, 2009 titled ‘The Chansa Kabwela case: A comedy of errors’ authored by US-based Zambian professor of law, Muna Ndulo.

### **3.3 The Ministry of Justice**

The Ministry of Justice is responsible for ensuring justice, the rule of law, and the legislative protection of human rights and freedoms in Zambia. The Ministry of Justice has two chambers, namely, the Attorney General’s (AG) and the Director of Public Prosecutions (DPP). The Ministry supervises three statutory bodies including the Legal Aid Board.<sup>57</sup> From the fore-going, it can be established that the office of the DPP is not independent.

### **3.4 The Office of Director of Public Prosecutions**

This is a very crucial office in the dispensation of criminal justice. This office is also created by the Constitution.<sup>58</sup> The DPP is vested with the power to institute and undertake criminal proceedings. The DPP also has power to take over and continue any such criminal proceedings instituted or undertaken by any other person or authority. Furthermore, the DPP has power to discontinue, at any stage before judgement is delivered, any proceedings.<sup>59</sup> The DPP’s appointment by the President is equally subject to ratification by the National Assembly. There have also been public concerns with the quality of prosecution services in the country. Delays in disposal of criminal cases, congestion in remand prisons and high

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<sup>55</sup> Lusakatimes.com, Politics and Justice in Zambia, 16 August, 2010

<sup>56</sup> The Post, Zambia’s Justice System has collapsed. 6 June 2010

<sup>57</sup> Matibini P., Access to Justice and the Rule of Law. Page 14

<sup>58</sup> The Constitution of Zambia, 1991, Article 56(1)

<sup>59</sup> The Constitution of Zambia, 1991, Article 56(2)

levels of acquittals have been cited as evidence of inefficiency in the prosecution service. The prison population as of May 2009 was almost three times what the normal capacity for prisons is. An audit conducted revealed that there were 14, 377 inmates against the holding capacity of 5,265.<sup>60</sup>

The current DPP has also been criticised severally by the public. He has been said to have lost morality to represent that office as a result of the manner in which he has been handling cases. He is said to have compromised his professional ethics by responding to the whims of political demands instead of exercising his independence as provided in the Constitution.<sup>61</sup>

### **3.5 The Police**

The Zambia Police Service is a critical government department. This is where all criminal proceedings commence from. The Police Force in Zambia has been found to be intimidating to the people especially where many people do not know or understand their fundamental and basic rights as such the indigent have not benefited much from this service. And for persons charged with criminal offences, many have been tortured in the prison cells in some cases leading to death contrary to the constitutional provisions of presuming every person charged with a criminal offence innocent until proved or has pleaded guilty.<sup>62</sup>

### **3.6 The Prisons**

The Prisons Service was created under the Prisons Act.<sup>63</sup> This was for purposes of managing and controlling prisons. Currently the prisons are in a deplorable state. A physical inspection revealed that they were run down. Findings among others were that inmates cook on firewood; food served on sacks; non-functional toilets and showers leading to the use of the bucket system and thatched showers; cells with poor ventilation and illuminations; non segregation of inmates, rundown uniforms, lack of women facilities and to crown it all, overcrowding.<sup>64</sup>

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<sup>60</sup> National Audit of Prison Conditions in Zambia, May 2009. Page 96

<sup>61</sup> The Post, Office of the DPP has become a travesty of justice, 23 December 2009

<sup>62</sup> The Constitution of Zambia, Article 18(1) (a)

<sup>63</sup> Chapter 97 of the Laws of Zambia

<sup>64</sup> National Audit of Prison Conditions in Zambia. Page 85-110

The prison conditions are in no doubt inhuman and degrading contrary to provisions of the Constitution<sup>65</sup> and International Instruments<sup>66</sup> proscribing subjecting persons to torture or to inhuman or degrading punishment or other like treatment.

### **3.6 The Legal Aid Board**

The Legal Aid Board was created by the Legal Aid Act, 1967 with an objective to provide for legal aid in civil and criminal matters and causes to persons with insufficient means to engage legal practitioners to represent them.<sup>67</sup> The Legal Aid Board, though now a Body Corporate, it is still linked to the Ministry of Justice which still recruits, disciplines and determines the conditions of service for legal aid personnel and is still responsible for mobilising and disbursing resources to the board.<sup>68</sup>

The lack of autonomy of the Legal Aid Board in my considered view makes it difficult to carry out their functions with independence. By virtue of its link and dependence on the Ministry of Justice, a government department, it is unarguably susceptible to government interference.

The Legal Aid Board presence is not in all the districts of Zambia. The board is seriously understaffed thus caseloads are inevitable. Consequently, the legal aid is restricted to accused persons with serious criminal cases.<sup>69</sup> This is an obvious injustice occasioned to persons accused of lesser offences.

### **3.7 The Human Rights Commission**

The Human Rights Commission (HRC) was established following the 1996 constitutional amendments and is provided for in Part XII of the Constitution of Zambia.<sup>70</sup> The Commission is also established by the Constitution and guarantees its autonomy.<sup>71</sup> It is not established under the control of any ministry. This should mean that the performance of its duties is not subject to the direction or control of any person or authority.

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<sup>65</sup> The Constitution of Zambia 1991, Article 15

<sup>66</sup> ICCPR, Article 7

<sup>67</sup> African Human Security Initiative: The Criminal Justice System in Zambia. Page 92

<sup>68</sup> African Human Security Initiative: The Criminal Justice System in Zambia. Page 93

<sup>69</sup> African Human Security Initiative: The Criminal Justice System in Zambia. Page 94

<sup>70</sup> Committee on Economic, Social and Cultural Rights: Thirty-fourth session at [www.ohchr.org/english/bodies/cescr/docs/HR.CESCR.NONE.2004.8.pdf](http://www.ohchr.org/english/bodies/cescr/docs/HR.CESCR.NONE.2004.8.pdf) Page 2 [accessed 21 November, 2010]

<sup>71</sup> The Constitution of Zambia, 1991, Article 125(1),(2)

An essential aspect of independence and autonomy is the ability of the Commission to exercise independent decision-making power in its day-to-day work. Independent legal status should be of a level sufficient to permit the institution to perform its functions without interference or obstruction from any public or private entity. The Commission tenders its report concerning its activities during the financial year to the President.<sup>72</sup>

The functions of the Commission are stipulated under Section 3 of the Human Rights Commission Act.<sup>73</sup> It has a broad mandate to promote and protect human rights outlined in its Act. The functions are basically protective, promotional, educative and advisory. To fulfill its mandate, the Commission is empowered to protect and promote human rights for all in Zambia through investigation of allegations of human rights abuses; investigation of any mal administration of justice; visiting prisons and other places of detention and related facilities with a view to assessing and inspecting conditions of the persons held in such places and make recommendations to redress existing problems; a continuing programme of research, information and education to enhance the respect for and protection of human rights; and facilitating the rehabilitation of victims of human rights abuses. The Commission also possesses a monitoring and advisory function, and is empowered to propose effective measures to prevent human rights abuses as well as do all such things as are incidental or conducive to the attainment of the functions of the Commission.

Despite the well articulated functions of the Commission and commendable work, a lot more still remains undone. The Zambia Human Rights Commission reported in 2009 that infringements of people's rights continued. The violations included among others, unlawful deprivation of life; unlawful detentions; poor and life-threatening prison conditions; and that police brutality, and torture continued to be everyday occurrences in Zambia's police cells and prisons. The Chair of the Commission also stated that people were generally subjected to unacceptable delays in receiving justice due to lack of resources and capacity. Additionally, he said that the Government of Zambia has restricted the right to freedom of expression, especially in relation to the National Constitutional Conference then which included threats against journalists critical of the National Constitutional Conference, such as in 2007 when

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<sup>72</sup> Committee on Economic, Social and Cultural Rights: Thirty-fourth session at [www.ohchr.org/english/bodies/cescr/docs/HR.CESCR.NONE.2004.8.pdf](http://www.ohchr.org/english/bodies/cescr/docs/HR.CESCR.NONE.2004.8.pdf). Page 3

<sup>73</sup> No. 39 of 1996

President Mwanawasa warned critics that challenging the National Constitutional Conference Act amounted to treason.<sup>74</sup>

It was stated in the 2009 Human Rights Report that the government's human rights record remained poor, and it deteriorated during the year in a few areas. Human rights problems included an unlawful killing; torture, beatings, and abuse of suspects and detainees by security forces; official impunity; life-threatening prison conditions; arbitrary arrests and prolonged pretrial detention; long trial delays; arbitrary interference with privacy; restrictions on freedom of speech, press, assembly, and association; government corruption; violence and discrimination against women; child abuse; trafficking in persons; discrimination based on sexual orientation and against persons with disabilities; restrictions on labor rights; forced labor; and child labor.<sup>75</sup>

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<sup>74</sup> Human Rights Watch Zambia, Events of 2009 at [www.hrw.org/en/node/79215](http://www.hrw.org/en/node/79215) 2009 Events on Zambia [accessed: 4 January, 2011]

<sup>75</sup> US Embassy Lusaka Zambia, 2009 Human Rights Report at <http://zambia.usembassy.gov/2008human.html> [Accessed 27 January 2011]

## **Chapter 4: Justice and Enforcement of the Law**

### **4.1 Introduction**

This chapter will be assessing how the establishments bequeathed with the responsibility of guaranteeing justice discharged their respective duties to date. The chapter will consider the decisions passed and actions taken by the authorities over the years and furthermore, the chapter will endeavour to ascertain the causes of miscarriage of justice.

Generally, the Zambian Constitutions enacted during the three Republics, do have good provisions relating to the right to justice save for some that will be discussed later in this chapter. This chapter will, therefore, examine various cases adjudicated upon during the three Republics and determine the extent of justice administration of each republic on a balance of scales.

As laid down in Chapter 1, Webster's Dictionary defines 'justice' as follows:

“The maintenance or administration of what is just, especially by impartial adjustment of conflicting claims or the assignment of merited rewards or punishments; The administration of law; especially the establishment or determination of rights according to the rules of law or equity; The equality of being just, impartial or fair; The principle or ideal of just dealing or right action.”

One of the prominent features of all democracies is the supremacy of the rule of law. The 'rule of law' entails rule by the principles of law and not men. This principle proscribes arbitrary administration of laws. The chapter will, therefore, consider the concept of 'administration of justice' using the above definition, applicable laws in each republic, procedures and application of concepts such as the 'rule of law'.

### **4.2 First Republic Administration**

This first republic is the regime that came into being with the attainment of Zambia's independence headed by Dr. Kenneth David Kaunda under the United National Independence Party (UNIP) on 24<sup>th</sup> October, 1964. At Independence, Zambia was a pluralistic State. She had three political parties being UNIP, African National Congress (ANC), and National Progressive Party (NPP).<sup>76</sup> However, UNIP from the beginning was opposed to multiparty system and desired a one-party state which system the government of Kaunda believed would be ushered in not by an act of government but by the people's wishes through the ballot.

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<sup>76</sup> A.W. Chanda, *Zambia: A Case Study in Human Rights in Commonwealth Africa*. JSD Dissertation presented to Yale Law School, USA, 1992. Page 404

Unfortunately for Kaunda and his government, this hope did not materialise as expected in that the ANC increased its popularity.<sup>77</sup> Consequently, ANC was subjected to intense harassment by the ruling government in an effort to induce its members to defect to the ruling party then, UNIP. This maltreatment and discrimination in a bid to do away with other parties was demonstrated in *The People v. The Speaker of the National Assembly, Hon. R. M. Nabulyato, ex parte Harry Nkumbula*<sup>78</sup> in which case the speaker attempted to deny the ANC recognition as a parliamentary party. The ANC leader, Harry Mwanga Nkumbula, gave notice to the Speaker to address his case according to the constitution, however, the Speaker refused to act on his notice on the ground that he was not recognised as the leader of a political party in the National Assembly. This denial was challenged by Nkumbula in the High Court and the Court held that the Speaker's action was wrongful.

The harassment persisted and early in 1972, as a lead up to the complete divest of opposition parties, Kaunda banned one of the parties, the United Progresssive Party (UPP) and ordered the detention of their leader Simon Kapwepwe and 122 of his followers.<sup>79</sup> Kaunda did not end there but continued with his resolve to rid of the multiparty system by announcing in the same year 1972 that the Cabinet had decided that Zambia should become a one-party state in response to demands by what he called 'overwhelming majority of the people'. In the announcement, Kaunda stated that hundreds of messages were received appealing for establishment of a one-party system of government.<sup>80</sup> The opposition attempted to stop this shift to no avail. The ANC in particular were opposed to the establishment of the one-party state and consequently challenged the action of government in Court. In *Harry Mwanga Nkumbula v. A/G*<sup>81</sup> the petitioner sought a declaration to the effect that the government's decision was likely to violate rights guaranteed to him by the constitution as it existed at that time, namely, the right to assemble freely and associate with other persons and in particular to form political associations, the right to express and receive opinions, and freedom from discrimination on the ground of political opinion as provided in the 1964 Constitution.<sup>82</sup> The petitioner contended that these rights could not exist or be enjoyed uninhibited under a one-party system because of the incompatibility between them and the system. He asserted

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<sup>77</sup> A.W. Chanda, *Zambia: A Case Study in Human Rights in Commonwealth Africa*. Page 405

<sup>78</sup> HP/4/1970

<sup>79</sup> A.W. Chanda, *Zambia: A Case Study in Human Rights in Commonwealth Africa*. Page 415

<sup>80</sup> The Chona Constitutional Review Commission.

<sup>81</sup> (1972) Z. R. 111 (H.C.)

<sup>82</sup> Constitution of Zambia, 1964: Sections 23, 22, & 25.

further that a one-party system was manifestly contrary to the spirit of the constitution as reflected in the Bill of Rights. The court held that it had no power, by order or declaration, to prevent the carrying into effect of an intention to amend the constitution in a perfectly lawful manner. The Court stated that the petitioner would have been entitled to redress had he shown that before an amendment, the government did take steps to prohibit the expression of opinion against the introduction of a one-party state. Despite the petitioner alleging that such steps to prohibit were taken, the Court had a way of explaining it away in favour of the ruling government.<sup>83</sup>

Despite strong opposition of the introduction of the one-party state, the One-Party System was introduced in 1973.

### **4.3 Second Republic Administration**

It was during this period that the One-Party Government of Kaunda introduced some amendments to the Independence Constitution which birthed the 1973 Zambia Constitution. This Constitution provided for existence of one political party which was UNIP and proscribed the formation or attempt to form any political party or organisation other than UNIP or even to belong to, assemble or associate with, or express opinion or do any other thing in sympathy with such political party or organisation.<sup>84</sup>

Another striking new article is the one that provided for sole candidature for presidency reading as follows:

“The members of the General Conference shall elect a person to be the President of the Party, and such person shall be the sole candidate in an election to the office of President (herein referred to as “the Presidential candidate”).”<sup>85</sup>

This, in my considered view, is a display of the highest form of greed, subjugation and tyranny, consequently violating people’s fundamental rights to compete impartially and without discrimination for presidency.

The United National Independence Party proceeded to hold yet another meeting of their General Conference in September 1978 where amendments to the procedure for election of a Presidential and Members of the Central Committee (MCC) candidates were proposed. The

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<sup>83</sup> A.W. Chanda, *Zambia: A Case Study in Human Rights in Commonwealth Africa*. Page 419-420

<sup>84</sup> Constitution of Zambia Act, 1973, Article 4(1), (2)

<sup>85</sup> The Constitution of Zambia Act, 1973, Section 38(3)

proposed amendments were to amend the UNIP Constitution to include Article 50(2) requiring a candidate to indicate his intention to stand for the office of President of the Party not less than one day before the date of the General Conference and Article 50(9) that required one to have been a member of the Party (UNIP) for not less than five years to be eligible for presidency. The General Conference amid opposition went ahead and adopted the amendments by 'acclamation'. These amendments were challenged in *Harry Mwanga Nkumbula and Simon Mwansa Kapwepwe v. The Attorney General*.<sup>86</sup>

Despite not succeeding in this case, the appellants in their submissions demonstrated that filing nominations was inhibited for Nkumbula who attempted and the other appellant, Kapwepwe was barred by the five years requirement for membership. This kind of administration in my considered view reveals that the introduction of the One-Party Government was a sham. It was not the will of the people but simply an architect of Kaunda and a select few who either were to benefit from that kind of design or were simply marionettes.

The 27 years of the Kaunda rule was described as authoritarian and mostly single-party rule characterised with suppression of any form of criticism against the government. The period of this rule has been further described as a time where people were robbed of their freedom to express themselves and associate. And late Professor Alfred Chanda of blessed memory (M.H.S.R.I.P) wrote:

“The pervasion of democracy was the most striking feature of the 17 years of one-party rule in Zambia. Both the Party and government were completely dominated by one man, President Kaunda, who ran the country much the way he pleased. The majority of the people were completely shut out of the political system. The rulers were not accountable to the people because of the absence of free and fair elections and the severe limitations placed on freedom of expression, and freedom of association and assembly. The suppression of basic human rights by the regime was the main reason why the people demanded an end to one-party rule and later, when they had the chance, they voted Kaunda and UNIP out of office.”<sup>87</sup>

The provisions of the one-party Constitution made President Kaunda a dominant player in the political scene enabling him to exercise considerable influence over the Legislature. This dominance is said to have been fortified by the declaration of the state of emergency by the last British Governor of Northern Rhodesia, Sir Evelyn Hone on 25<sup>th</sup> July, 1964 which state

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<sup>86</sup> (1979) Z.R. 267 (S.C.)

<sup>87</sup> A.W. Chanda, *Zambia: A Case Study in Human Rights in Commonwealth Africa*. Page 471

of emergency lasted for the entire 27 years of the Kaunda rule. The President had power to detain without trial, declare curfews and control assemblies.<sup>88</sup> Violations emanating from these powers ended many in detention for unacceptable periods.

In *Kalenga v. Zambia*<sup>89</sup> the author was arrested by the police on 11 February 1986 and forced to spend a night in a police lock-up. The following day a police detention order was issued against him pursuant to Regulation 33(6) of the Preservation of Public Security Regulations which allowed the President to authorize the administrative detention of persons accused of political offences for an indefinite period of time for ‘purposes of preserving public security’. He was only informed of the charges against him on 13 March 1986, which is over one month after his arrest. Subsequently, he was kept in detention on charges of being one of the founding members and having sought to disseminate the views of a political organisation, called People’s Redemption Organisation, an organisation considered illegal under Zambia’s one-party Constitution; and also of preparing subversive activities aimed at overthrowing the regime of the then President Kenneth Kaunda. The author was kept in detention until 3 November 1989, following a Presidential Order for his release. The author was still kept under surveillance by the Zambian authorities after his release. Mr. Kalenga alleged in his submission that he was denied his passport, thereby restricting his freedom of movement. He also claimed that he was as a former political prisoner, he was subjected to harassment and intimidation by the authorities, which also reportedly denied him access to governmental and private financial institutions.

Similarly in *Alex Soteli Chambala v. Zambia*<sup>90</sup> the author was arrested and detained without charge on 7 February 1987. He was also served with a Police Detention Order pursuant to Regulation 33(6) of the Preservation of Public Security Act on 12 February 1987. On 24 February 1987, the Police Detention Order was revoked, but on the same day he was served with a Presidential Detention Order pursuant to Regulation 33(1) of the Preservation of Public Security Act. The grounds of the detention were served on the author on 5 March 1987 stating that he was being detained for receiving and keeping an escaped prisoner, Henry Kalenga, at his house, whom the author knew was detained for offences under the Preservation of Public Security Act; that he assisted Mr. Kalenga in his attempt to flee to a

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<sup>88</sup> S. Mwale, *Constitutional Review: The Zambian Search for an Ideal Constitution*.

<sup>89</sup> Communication No. 326/1988, CCPR/C/48/D/326/1988

<sup>90</sup> Communication No. 856/1999, UN. Doc. CCPR/C/78/D/856/1999 (2003)

country hostile to Zambia; and that he never reported the presence of Mr. Kalenga to the Security Forces. He was detained for over one year without any production before the court or a judicial officer after which he applied for release. On 22 September 1988, the High Court of Zambia decided that there were no reasons to keep him in detention. Nevertheless, the author was only released in December 1988 when the President revoked his detention. According to the author, the maximum prison sentence for the offence he was charged with was 6 months.

It is evident from these cases that despite the right decision by the Court, the powers of the President were what mattered without which the duo could not smell their release. This demonstrates how powerless the judiciary can be rendered by the Executive even though the supreme law of the land provides for their complete independence to administer justice accordingly notwithstanding the provisions that the accused should have been afforded a fair hearing within a reasonable time.<sup>91</sup>

This tyrannical regime lasted from 1973 up until 1991 which marked the beginning of the multiparty system in Zambia.

#### **4.4 Third Republic Administration**

The 1991 elections ended the 27 years of one-party regime. Zambia was heralded as a model for Democracy in Africa with Fredrick T. J. Chiluba as its President. Conversely, the Chiluba early years, were said to have had made progress toward respect for civil and political rights, with some liberalising reforms. But by 1993 the reforms appeared to have bunged up and the Chiluba government is said to have increasingly resorted to the same methods used under Kaunda's rule to suppress criticism. The one-party mindset was unfortunately apparent once more in the Chiluba regime. Anyone criticising the MMD government was regarded as a critic of democracy.<sup>92</sup>

By 1996, State intimidation of opposition increased substantially when Kenneth Kaunda announced a formal return to politics with the avowed aim to contest the country's 1996 presidential elections. Serious violations of human rights and intimidation of those in the legal system and harassment of opposition political parties was the order of the day. These

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<sup>91</sup> The Constitution of Zambia, 1973, Article 20(1), 27

<sup>92</sup> Human Rights Watch, Zambia: Elections and Human Rights in the Third Republic, December 1996, Vol. 8, No. 4 (A), at: <http://www.hrw.org/reports/1996/Zambia.htm>, Page 1 [accessed 12 February 2011]

abuses were said to be a legacy of the Kaunda years as well as the result of new initiatives by the Chiluba government.<sup>93</sup>

Akin to the Kaunda government, the Chiluba government exhibited an overbearing attitude by rejecting the recommendation by the Mwanakatwe Constitutional Review Commission in 1995, that major constitutional reforms be agreed by a Constituent Assembly and subjected to a referendum. Consequently, the 1991 Constitution as amended in 1996 has a controversial provision, Article 34, which requires the person standing for presidency to be a Zambian Citizen born to parents who are Zambian by birth or descent.<sup>94</sup>

Responding to this enactment, the Legal Resources Foundation (LRF), a Zambian based Non Governmental Organisation (NGO) that has an Observer Status with the African Commission, submitted a complaint against Zambia to the African Commission on Human Rights and People's Rights.<sup>95</sup> The Complainant alleged that the Zambian Government had enacted into law, a constitution which was discriminatory, divisive and violates the human rights of 35 percent of the entire population. The LRF alleged further that the Constitution (Amendment) Act of 1996 had not only violated the rights of its citizens, but had also taken away the accrued rights of other citizens, including the first President, Dr. Kenneth Kaunda. Furthermore, the LRF alleged that the amended constitutional provisions are in contravention of international human rights instruments in general and the African Charter on Human and People's Rights in particular.

This case had been taken to the Supreme Court of Zambia, with the Complainant seeking a declaration that Articles 34 and 35 of the amended Constitution are discriminatory; a declaration that Parliament lacks the power to adopt a new constitution; and an injunction restraining the President then, Fredrick Chiluba from assenting to the constitution. However, whilst the case was pending in court, the Complainant stated that, the ruling party dominated parliament went ahead to adopt and enact the controversial constitution which the President assented to a week later and the Complainants case was thrown out of court. The Supreme Court being the highest Court of jurisdiction in Zambia, all the local remedies had been exhausted.

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<sup>93</sup> Human Rights Watch, Zambia: Elections and Human Rights in the Third Republic. Page 1

<sup>94</sup> Human Rights Watch, Zambia: Elections and Human Rights in the Third Republic. Page 2

<sup>95</sup> Legal Resources Foundation v. Zambia, African Commission on Human and Peoples' Rights, Comm. No. 211/98 (2001)

This provision was undeniably targeted at excluding former President Kaunda from re-contesting elections after he affirmed his return to politics. It is my considered view that the egotistic attitude from the previous republics continued in the third Republic. The Chiluba government regrettably did nothing but replicate to some considerable degree the greed that existed in the first and second Republics.

One of the tenets of democracy which has been trumpeted throughout all the Republics is freedom of expression. Unfortunately this has never been taken kindly since the first Republic, and the third Republic has not been exempted. The ruling government has always ensured that they 'shut the mouths of critics by any means' including intimidation and arresting those that were and are 'found wanting' according to them. This kind of intimidation has not only ended with civilians but extended to the judiciary which should be the sentinel of justice, seeing some judges relieved of their duties before the expiration of their tenure of office. This government has also seen a number of journalists detained all for expressing their views. The Parliament of Zambia sentenced to jail Fred M'membe, Editor of the Post as it then was, Bright Mwape, the Managing Editor, and Lucy Sichone, the columnist in 1996 for an indefinite period in absentia for writing articles claiming that certain parliamentarians lowered the dignity of the House. The trio were prisoners of conscience for expressing their views only to be released the following month after the High Court ruled that they had been wrongly sentenced in absentia.<sup>96</sup>

This is one judgment that in my considered view was an act of bravery on the part of the Judge especially when in the centre of a renowned domineering Executive. Regrettably such fearless and heroic gallant nobles in gowns never lasted despite their security of tenure enshrined in the Constitution. The Executive always found its way to flush them out of the system quietly in circumstances that cannot be reasonably explained. Thus, the country has had sadly, some judges serving at the pleasure of the appointing authority, the President. The question to be asked is what amounts to freedom of expression, the reason being that arrests have been effected even for legitimate criticism against the government.

President F. T. J. Chiluba's tenure of office for presidency expired in 2001 when late President Levy Mwanawasa S.C was elected President, still in the third Republic.

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<sup>96</sup> Fred M'membe and Bright Mwape v Attorney General, 1996/HP/1199

His presidency came with a resolve to enhance democracy and good governance. For instance, in 2003, the Ministry of Justice under his leadership constituted the Electoral Reform Technical Committee to review the electoral legislation and to propose comprehensive electoral legislative reforms. This was aimed at addressing the loss of voter confidence in the electoral system in the aftermath of 2001 elections which resulted from flaws that were noticed in the electoral legislation and practice, for instance, the presidential petition process and the use of public media.<sup>97</sup>

Mwanawasa continued his fight for good governance through his zero tolerance to corruption policy. This sent many shivers in all sectors of the country especially when this saw the Second Republican President, Fredrick Chiluba with others, charged for abuse of office. This was hailed by many Zambians and outsiders as well as an act not only of gallantry but leading to the emancipation of Zambia from the corruption siege. Unfortunately for his government too, with the good successes he recorded, cases of mal administration of justice were recorded. One such injustice occasioned to the people is the 2001 election petition, which elections ushered him to presidency.<sup>98</sup> In this case, after the late President Mwanawasa was declared the winner of the 2001 elections, the losing opposition political parties jointly petitioned the Supreme Court challenging the election results. The petitioners were demanding that the Court should declare the 2001 election results null and void and that the winner then be declared not duly elected for the reason that the elections were allegedly fraudulent. The petitioners also claimed that ballot boxes were transported without seals; and that the elections were characterised with bribery, corruption, illegal practices and misconduct. According to the petitioners, this robbed the electorate a free and fair elections. *The petition was amazingly unsuccessful despite the Supreme Court acknowledging that there were flaws, incompetence and negligence of duty on the part of the Electoral Commission of Zambia (ECZ). The Court found that, in total, there were 36 allegations and the 6 out of the 36 were partially proved, with the remaining 30 not proved. The Supreme Court held that on evidence there was no basis upon which to find that the elections were rigged and not free and fair but that, while the elections were not totally perfect, they were substantially in conformity with the law and practice.*

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<sup>97</sup>S. Mwale, *Constitutional Review: The Zambian Search for an Ideal Constitution*. Page 4

<sup>98</sup>*Mazoka and Others v. Mwanawasa and Others*, 2005, Z.L.R.P.138

The above case is an obtrusive example of an assault on the people's justice. This case was not only decided as such but it took almost the entire first term of the late President Mwanawasa's term before it could be disposed of. This kind of behaviour should neither be tolerated nor entertained in a democracy. It is certainly an embarrassment to the institution bestowed with custodianship of peoples' justice, the Judiciary.

However, on a scale of balances, his tenure of office was the most progressive which allowed for such magnitude of unimagined freedom of expression for the media and the people of Zambia. He has gone down in the Zambian history, still as a President who ran the country not by the rule of man but the rule of law. It should also be noted that it was during his term of office that the mode of adopting the new Constitution through a Constituent Assembly was passed.

President Mwanawasa's term lasted until his demise on 19<sup>th</sup> August, 2008. May his Soul rest in Eternal Peace.

After the death of President Mwanawasa, President Rupiah Banda was elected President in the same 2008. His part first term comes to an end this year, 2011 when Zambia goes to polls once more. In my considered view, the Rupiah Banda rule has not just seen serious miscarriage of the law but that it has been humorous. Humorous in the sense that unwarranted arrests have been effected. One case in hand is the famous Chansa Kabwela case.

Equally, the case of *The People v. George Wello Mpombo*<sup>99</sup> demonstrates how impartial the administration of justice can be. This is a case where the accused was charged with a count of dishonoured cheque contrary to Section 33 (1) of the National Payment Systems Act Number 1 of 2007 as read with the Bank of Zambia Act Chapter 387 of the Laws of Zambia. The particulars of the case are that, the accused, on the 18<sup>th</sup> day of December, 2009 with intent to defraud, willfully and dishonestly did issue one cheque number 000014 to Colywn Company Ltd in the sum of ZMK10,000,000.00 on insufficient funded account namely Standard Chartered Bank Number 0100120696200 which rendered such a cheque dishonoured. The court held that the accused committed the charged offence. This,

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<sup>99</sup> SSN/09/2010

notwithstanding, others that committed similar offences were not treated the same way. And this is what the public had to say:

“The Justice Sakala led judiciary and the Banda administration is like two pregnant women trying to nurse each other. Looking at the cases of Mr. Chiluba, MP Mushili, Mr. Mpombo and Ms Changwe reveals a lot of disparities. Chiluba’s acquittal and now that the London judgment cannot be registered in Zambia remains a mystery. Mushili who was going to defraud the government and the people of Zambia out of millions of Kwacha was only told to sweep offices, nothing else. Minister changwe who’s cheque bounced is still a free lady. Yet Mpombo’s bounced check has sent him to prison and a fee. Could these be normal discrepancies?”<sup>100</sup>

This indeed only goes to show that the fight for a Judicature without interference of the Executive is not yet in view. What then should Zambia do?

#### **4.6 Effect of Subsidiary Laws and International Instruments**

The number of constitutional reviews commissioned since Zambia’s independence is a pointer to dissatisfaction by the people of Zambia in the supreme law of the land. Zambia has had generally good laws provided for in the Constitution in all respective republics, particularly the Bill of Rights. However, subsequent amendments as those that enshrined the one-party rule and sole presidency in the second republic and the requirement for one to be born of parents who are Zambians by birth or decent in the third Republic, simply watered down the potency of the fundamental rights and freedoms as provided in the Bill of Rights. Consequently the fundamental rights and freedoms of individuals have effectively been rendered meaningless. Several cases, as catalogued above, were handled contrary to the provisions in the Constitution guaranteeing the fundamental rights and freedoms of individuals with impunity.

This was perpetuated by enactment of subsidiary laws that turned the rights of the people guaranteed in the Bill of Rights a mockery. Such statutes include the Inquiries Act, the State Security Act, and the Preservation of Public Security Act.

The Preservation of Public Security Act allows for detaining persons with political offences for an indefinite period of time ‘for purposes of preserving public security’. This is not justified and is contrary to the Constitution and International Covenants to which Zambia has ratified and is a Signatory. Any such actions amount to grave violations of people’s rights and freedoms.

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<sup>100</sup> Lusakatimes.com, Politics and Justice in Zambia, at [www.lusakatimes.com/2010/08/16/politics-justice-zambia/](http://www.lusakatimes.com/2010/08/16/politics-justice-zambia/) 16 August, 2010 [accessed 14 October 2010]

It is my considered view that the most intense of these violations were mostly carried out in the Kaunda regimes. The actions were not simply unjust but were totally brutal and unacceptable. However, as time progressed through to the third Republic, the violations even though still around have been diminished. This can be attributed to the committed involvement of the Church, Civil Society Organisations and other interested parties that have continued to point out and criticize the government accordingly.<sup>101</sup>

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<sup>101</sup> S. Mwale, Constitutional Review: The Zambian Search for an Ideal Constitution. Page 5

## **Chapter 5: Conclusion and Recommendations**

### **5.1 Introduction**

This chapter will endeavour to bring to light what could be done to found a legal system that has its root firmly established in the rule of law, commanding the respect of the people and standing the test of time. The chapter will also bring out the inferences, lessons learnt, and recommendations. Measures will also be suggested and advanced for improving the administration of justice in Zambia.

### **5.2 Forms of Injustice**

Injustice comes in varieties and this paper, although particularly considered political and civil rights, it should be noted that mal administration of justice is not limited to these rights but also extends to economic, cultural and all other rights as emancipated in International Covenants. From the fore-going chapters, it is clear that Zambian ruling governments have been at the centre stage of imposing unfair treatment to the people that they should have been protecting. The governments in power were and still continue to use State machinery and resources to perpetuate their unjust conduct. Fundamental rights of the people have been violated throughout the three Republics with impunity. The people of Zambia have in many cases been deprived of their liberties such as denial of voting rights, due process of the law, rights to freedom of speech or religion and inadequate protection from cruel and unusual punishment.<sup>102</sup>

### **5.3 Cost of Injustice**

The price of injustice is grave. It has cost devastation and ruin for many nations. We have seen countries that as a result of failure to change governments through the ballot, the people have ended up in the bush as rebels, fighting ruling governments, and in the process costing lives of many innocent civilians in a bid to restore their fundamental rights and liberties. It has been written that political policies that justify injustice can do immeasurable harm to societies. People who have been oppressed for too long a time would do the unimaginable when they come to their realisation of what others are doing to them.<sup>103</sup> The case of apartheid in South Africa, events leading to the genocide in Rwanda, and now the revolutions taking place in the Arab World particularly Tunisia, Egypt and Libya are excellent examples

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<sup>102</sup> M. Maiese, Addressing Injustice. Page 1 at [www.beyondintractability.org](http://www.beyondintractability.org), June 2006 [accessed 10 December 2010]

<sup>103</sup> P.P.L. Hennie, Injustice, Violence and Peace: The Case of South Africa, 1977. Page 1 at <http://books.google.co.zm> [accessed 10 January 2011]

of what oppression and violation of peoples' rights can do. The oppression that many Zambians have undergone has left them without asserting their right to self-determination.<sup>104</sup> The repression has been so deep as to deprive such persons their dignity and worth of the human beings.<sup>105</sup>

The Zambian people could no longer put up with the administration of the one-party rule which was characterised by detentions without trial for long periods of time and total suppression of the right to freedom of expression and political affiliation. Consequently the people mounted pressure on the Kaunda Government until they succumbed. The Zambian people should be grateful for the smooth transition because in many cases, this kind of autocratic and dictatorial tendencies can lead to violence and serious bloodshed of innocent civilians. This must be a good lesson to all in leadership and those aspiring to be in leadership to ensure that they deliver to the people as is expected of them by the Constitution and statutes that are in conformity with the supreme law of the land.

#### **5.4 Reforming the Justice System**

Reforming the administration of the justice system, in my considered view, would not be ideally achieved without first addressing the root causes of injustice. It is a fact that Africa has seen a lot of dictators and tyrants of presidents. These leaders have done all they know how to cling to power, thereby occasioning injustice at all cost. History has shown that even those who ascended to power with good intentions to serve the country and the people soon became corrupt.<sup>106</sup> It is also believed that for many leaders, stepping down poses the risk of being held accountable for past deeds, primarily for disappearance of opposition leaders and public funds.<sup>107</sup> Other reasons advanced as causing many leaders to hold on to power include the absence of institutional framework for succession, the attitude of the governed where they see the leaders as the specially appointed, obsession for royal or chiefly treatment including accolades, appellations and the payment of homage.<sup>108</sup> Consequently, to secure their stay in power, many heads of State have orchestrated all kinds of injustice to the governed.

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<sup>104</sup> ICCPR, Article 1

<sup>105</sup> Charter of the United Nations, 1945, Preamble

<sup>106</sup> Problem of succession in Africa. Page 3 at <http://www.ethiopianreporter.com/english/index.php> [accessed on 10 January, 2011]

<sup>107</sup> African Presidents step down, pack up, and head home to retire. Page 1 at <http://rebrandafrica.blogspot.com/2011/01> [Accessed on 10 January, 2011]

<sup>108</sup> Problem of succession in Africa. Page 3

The foregoing reasons notwithstanding, it is my considered view that economic ills and poverty in Africa are primarily the root causes of injustice exhibited by many African leaders. All the other reasons advanced are simply ancillary in my view. Politics, it appears, has been used by many politicians as a business where inexpensive money can be realised without taking much risk as is the case for private individuals. Once politicians rise to power, they take advantage of their respective positions to do nothing but achieve their main aim of enriching themselves with their families and friends. In furtherance of this objective, these leaders have occasioned diverse injustices and as their friends reduced in number, they become increasingly paranoid and oppressive.<sup>109</sup> Selfishness is the robe of many African leaders. They would rather die in power than hand over to another individual.<sup>110</sup> They are so egocentric to the extent that wealth and political empires have been built around their families, consequently no succession plans have been established thereby ending up with handpicked individuals to run for presidency as was the case with former President Chiluba and the Late President Mwanawasa as well as with Malawi's former President Bakili Muluzi with the incumbent President Bingu Wa Mutharika.<sup>111</sup>

Furthermore, even with the supreme law of the land providing for protection of the people's rights in Zambia for instance, subsidiary laws have been enacted not necessarily to uphold the rule of law but to either deal with some individual or to protect the framers' own interests and gains. A glaring example under the Chiluba regime is the enactment of a non-bailable offence for theft of motor vehicle and the constitutional amendment requiring that for one to be elected President, both parents must be Zambian by birth or descent. This kind of protectionist behaviour is rooted in poverty that grips many African nations. Genuine good governance in my considered view is far from being realised not only in Zambia but the rest of Africa. How would one possibly explain the resistance by the sitting presidents in Zimbabwe, Ivory Coast, Egypt, Libya and other countries to relinquish power after 20, 30, 42 years etcetera as the case may be? It can only be insatiable greed and simply the desire to be 'worshipped' among others. The leaders of most Least Developed Nations (LDCs) are gripped with unquenchable greed for individual wealth. They are plainly in those positions for themselves and not for the electorate. Zambia like many other African countries needs leaders that are not only selfless but are also focussed, committed and dedicated to bringing

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<sup>109</sup> Problem of succession in Africa. Page 3

<sup>110</sup> The case of Ivory Coast and Libya

<sup>111</sup> Problem of succession in Africa. Page 2-3

about economic independence to their nations. The country must have leaders that place human value over above material value. This fight, nevertheless, should not be left to the leaders but the principles of development should be nurtured in all the Zambian people and ensure that change commences from private lives. The people should develop shared values and interests for a better politically and independent Zambia. With economic independence, we are certain of seeing presidents in the likeness of Nelson Mandela peacefully leading the nation and stepping down without any resistance for others to carry on the mantle.

If Zambia and the rest of Africa were economically independent, I am persuaded that the governed would not see the injustice occasioned by many presidents in Africa as history has witnessed. It is nonetheless also important that institutions of governance such as the Police, the Judiciary, the Legislature and the Executive embrace their duties and responsibilities as is required by the law.

The police should account for their actions and treatment of the accused in their custody because according to the Constitution, anyone charged with an offence has to be presumed innocent until proved guilty through the due process of the law.<sup>112</sup> The Zambia Police Force has been known for their intimidating of the civilians and brutality. This can be changed by properly training and continually capacity building the police force to match the trends in the ever evolving world.

The judiciary on the other hand is a very fundamental institution for effective justice administration. The onus to dispense justice accordingly in my view predominantly rests on them. They are the institution bestowed with the custodianship of justice. The judiciary should, therefore, discharge their noble duty as provided for in the Constitution. The Constitution is plain when it comes to independence of the judiciary and should be adhered to strictly. Judges should realise that they have security of tenure. However, much more needs to be done to ensure that this security is indeed secure by removing any provisions in the Constitution that can cripple this security. One of these crippling provisions is the appointment of the judges by the President. This has made many judges serve at the pleasure of the president instead of serving the people that voted the President into power. There is also need for judges that are simply fearless so as to administer justice according to the law without any partiality.

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<sup>112</sup> The Constitution of Zambia, 1996, Article 18(2)

The Legislature is equally important in the journey to real justice. Justice is not only through judgments pronounced but should be noted that the basis of these judgments is the written law. If, therefore, the legislators enact unjust laws, how then is the judiciary expected to deliver justice to the people. Justice is not all about the law, but fundamental to justice is whether the laid down laws are good or bad. Zambia, regrettably is known for passing retrogressive laws by the ruling government using its dominant parliament per time. The Legislature should rise to the challenge and realise that they are to be held accountable to the people and thus should never allow laws that violate individual rights and liberties. A review of the Penal Code of Zambia revealed in my considered view such inconsistencies too deep to fathom. How for instance is one expected to understand why the framers of the law would have conceived as just to punish the offence for forgery by imprisonment for life<sup>113</sup> whilst the offence of kidnapping in order to murder has a sentence of 10 years only<sup>114</sup>. Similarly, other offences against morality are considered a misdemeanour, punishable only for five years imprisonment<sup>115</sup>? Isn't this a way of encouraging people to perpetuate such offences because they know that at the end of the day the punishment is bearable compared to life imprisonment? Additionally, why would the framers find it appropriate that certain cases of defamatory matter be privileged?<sup>116</sup> The framers of the law need to go back to the drawing board and realise that such kind of laws can be a recipe for discord and disenchantment. In enacting laws, the legislature should have it mind that regard for fundamental rights and freedoms are at the heart of the right administration to justice. It is also important to ensure that our Legislators have the necessary skills and education to enact laws otherwise a repeat of expensive experiences of the three republics will be unavoidable.

The Executive equally should ensure that their governments are inclusive. The leaders should learn to embrace diverse political participation. The decisions carried out by the executive should respond to the will of the people. The people should be given the opportunity to debate, participate in the formulation, execution and monitoring of state policies.<sup>117</sup> The deliberate acts of harassing journalists and anyone who stood for their rights should cease. There is also great need to crop a culture of responsibility in the leaders and also leaders that listen to the electorate and act accordingly. The government should

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<sup>113</sup>The Penal Code, Chapter 87 of the Laws of Zambia, Section 348

<sup>114</sup> The Penal Code, Section 255

<sup>115</sup> The Penal Code, Sections 159, 161

<sup>116</sup> The Penal Code. Section 15

<sup>117</sup> M. Maiese, Addressing Injustice: June 2006. Page 1

absolutely respect the independence of the judiciary and let them run their affairs without any meddling as has been the case.

The Office of the Director of Public Prosecutions should also be allowed to discharge its duties according to the law. There should be no intrusion of any kind by the State. The power of the DPP to enter a *nolle prosqui* at any time should be done with a high sense of responsibility and not for the benefit of the ruling government.

The laws in place also need to be considered time and again. Zambia inherited its laws from the former Colonial masters, Britain and most of these laws still appear in our statute books. There is need to review the laws and align them to the modern age in conformity with the Constitution and International Covenants. The Law Development Commission should be well resourced to ensure that Zambia is current and champion this cause. It is a known fact that Zambia has a plethora of conflicting laws as enumerated in the previous chapters. The Constitution has not been spared and there is need to have laws in this fundamental document and ensure that no discriminatory and barbaric laws are in place. Further, that any laws that are inconsistent with the constitution should be held null and void to the extent of the inconsistency.<sup>118</sup> The independence of the judiciary should be totally guaranteed not to permit the Executive in any way to meddle in its affairs, thereby interfering in discharging its duties

Furthermore, laws such as those in the Inquiries Act, State Security Act and the Preservation of Security should indeed show that they were enacted for the preservation of public security and not for selfish reasons as was exhibited especially in the first republic. Fair trial should not only be on paper but a reality.<sup>119</sup> Safeguards should be enacted to guarantee that there is no arbitrariness and violation of rights for freedom of expression or belonging to, or holding different political opinion, which rights have often been the targets of the whims of governments to inhibit any such conduct. It is my sincere hope that the Constituent Assembly poised to bring about our next constitution, will result in the production of a constitution that will stand the test of time otherwise it would have been another opportunity for wasting precious government resources.

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<sup>118</sup> Christine Mulundika & Others

<sup>119</sup> The Constitution of Zambia, 1991(as amended in 1996), Article 18(1)

## 5.5 Founding a Firm Legal System

After all has been said and done, there is need for governments in power to learn from nations that have gone ahead of them. The United States of America is one such nation with a remarkable Constitution, a constitution that survived centuries and any form of change. Its basic ground rules were so thoroughly fashioned that it has had only 26 amendments since its enactment in 1787. For over 224 years, the US Constitution has guided the government institutions and has been its basis for political stability, individual freedom, economic growth, and social progress. With minor changes, it has stood the test of time. History has it that it took over 11 years to create this instructive and successful document. Originally designed to provide legal framework for governing 4 million people but now serves the needs of more than 280 million people.<sup>120</sup> It is this same Constitution which saw the first black man, President Barack Obama ascend to the highest office of the land without any hindrance because the framers had their focus and priorities in the right place.

The US Constitution is built on six basic principles. These are deeply ingrained in the mindset and landscape of US Government. The principles are popular sovereignty; checks and balances; limited power of the government; separation of branches and federalism.<sup>121</sup>

The popular sovereignty principle states that the source of governmental power lies with the people. This belief stems from the concept of the social contract and the idea that government should be for the benefit of its citizens. If the government is not protecting the people, it should be dissolved. Limited government on the other hand entails that the government power is limited to the power it is given by the people. The US government does not derive its power from itself. It must follow its own laws and it can only act using powers given to it by the people.

Further the US Government is divided into three branches so that not one branch has all the power. Each branch has its own purpose either to make the laws, execute the laws, or interpret the laws. The judiciary, legislature and executive are in reality independent.

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<sup>120</sup> The Foundation of Liberty, History Lesson 1, at [www.etaf.org/demo/history\\_11/instructiontutor](http://www.etaf.org/demo/history_11/instructiontutor) [accessed on 15 December 2010]

<sup>121</sup> Overview of United States Government and Politics: Founding Principles at [http://americanhistory.about.com/od/governmentandpolitics/a/amgovoverview .htm](http://americanhistory.about.com/od/governmentandpolitics/a/amgovoverview.htm) [accessed on 15th December 2010]

Moreover, in order to further protect the citizens, the constitution has a system of checks and balances. Basically, each branch of government has a certain number of checks it can use to ensure that the other branches do not become too powerful or overbearing.

For Judicial Review in the US, it allows the Supreme Court to decide whether acts and laws are unconstitutional.<sup>122</sup> And the sixth principle, federalism is one of the most complicated foundations of the US. This is the idea that the central government does not control all the power in the nation. States also have powers reserved to them.

For Zambia with a history of enacting 3 or 4 Constitutions in a space of 47 years, as the search for a legitimate constitution continues, there are a lot of lessons that can be drawn from nations as the US that have shown the world what true democracy stands for. Zambia's dismal past experience in these three Republics should be used to create a better nation by the use of well thought and deliberated laws and ensuring that the governance system is sound.

## **5.6 Conclusion**

The right administration of justice does not only lie in the laid down law and procedures. It is influenced by attitudes of those bestowed with the responsibility as well. This paper has revealed that even with good protective provisions in place, leaders have always found a way of mal treating the people for their own good and injustices have been the order of the day not only in Zambia but many African countries. Therefore, in my considered view, poverty and unquenchable greed for wealth, is the origin of this unfairness and if nothing is done to economically liberate Zambia and empower the people, it shall be a vicious cycle and the trend is likely to continue unabated. Zambia has had considerably good legal and institutional frameworks which have been wasted away by insensitive and inconsiderate leaders. Self-centredness and economic challenges are at the centre of this political injustice paradox. There is, therefore, a definite need to deal with the root cause and change the way we attempt to ensure true justice, democracy and the rule of law in Zambia by considering Zambia's economic emancipation earnestly or else these principles shall remain on paper only and not a true reflection of the reality.

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<sup>122</sup> Marbury v. Madison 5 U.S. (1 Cranch) 137; 2 L. Ed. 60 (1803)

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