

POLICE, STATE SECURITY FORCES AND CONSTITUTIONALISM OF HUMAN RIGHTS IN ZAMBIA

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I. POLICE AND STATE SECURITY FORCES IN ZAMBIA

A. Introduction

Zambia was a British colony of Northern Rhodesia from 1889 to 1963.¹ It attained independence from Britain as a Republic within the Commonwealth of Nations on October 24, 1964 under an Independence Constitution attached to the Zambia Independence Act of 1964.² The Constitution of 1964 was a multi-party constitution which lasted until 1973 when a one-party system of government was introduced pursuant to the One Party Constitution of 1973.³ The party presently in power is the United National Independence Party (UNIP).⁴ Currently, therefore, Zambia functions with a strong executive presidency governed by Kenneth Kaunda, its only president

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To the author's knowledge, this is the first ever study on police, state security forces and human rights practices in Zambia other than the Country Reports on Human Rights Practices by the United States Department of State, referred to in this article.

¹ See generally ZAMBIA: A COUNTRY STUDY (I. Kaplan 3d ed. 1987).

² The two were incorporated into the Zambia Independence Order in Council, No. 1652 STAT. INST. 4477 (1963).

³ ZAMBIA CONST. (1973). The text of the Constitution is appended to the Constitution of Zambia Act, No. 27 Z. GOV'T GAZETTE 191 (Supp. 1973).

⁴ For a detailed discussion on constitutional ramifications of UNIP and the one-party state, see generally, Mwalimu, *The Influence of Constitutions on the Development of a Nation's Law and Legal System: The Case of Zambia and Nigeria*, 8 ST. LOUIS U. PUB L. REV. 157 (1989).

since independence, with the advice of the Central Committee, Cabinet and Parliament.⁵

B. Historical Development and Current Structure

Pre-colonial policing in Zambia functioned through unwritten customary laws of the indigenous people.⁶ The advent of British colonial rule in Northern Rhodesia altered the political landscape of the country. The British South African Company (B.S.A. Company) of Cecil Rhodes was granted a Royal Charter in 1889.⁷ This instrument recognized the authority of the Company to acquire and exploit mineral rights in North-Western and North-Eastern Rhodesia in exchange for colonial armed protection against threats to local chiefs in the territories.⁸ To provide this military protection, a small constabulary was formed in 1891.⁹ It primarily functioned as a buffer against Arab slave traders and protected commercial interests of the B.S.A. Company. Two sections of the constabulary, the North-Eastern and Barotse Native Police, were established under the Barotse Land North-Western Rhodesia Order in Council (1899).¹⁰ In North-Eastern Rhodesia, police were subject to the North-Eastern Rhodesia Order in

⁵ *Id.* at 167. It is believed that article 4 of the Constitution of 1973 which entrenched the supremacy of UNIP as the sole political party has been repealed to accommodate the opposition parties, in particular, the Movement for Multi-Party Democracy (MMO). However, this amendment has not been received anywhere in the United States. Elections are scheduled to take place in October of 1991. These elections are being conducted under the same Constitution of 1973. The party in power is still UNIP and the infrastructure as well as institutions of government remain the same. Essentially, no change in the conduct of the affairs of government has been effected.

⁶ See generally J. CRAMER, *THE WORLD'S POLICE* 221 (1964). Traditional forms of police are found in well-established institutions of kingships and chieftainships such as the Lozi of western Zambia. Reportedly, they operated under a hierarchy of police powers from the village headman to the paramount chief. In this system, police arrangements appear to have been based on tribal customs and practices, effected largely by personalities of local potentates. These policing traditions were designed for both internal and external protection as well as to maintain law and order.

⁷ 18 HERTSLET'S *COMM. TREATIES* 134 (1907).

⁸ See generally RUBIN, TARANTINO AND LARKIN, *CONSTITUTIONS OF THE COUNTRIES OF THE WORLD* 1 (A.P. Blaustein & G.H. Flanz eds. Supp. 1985).

⁹ *STAT. L.N.W. RHOD. 1899-1901*, 1 (1905). Under this law, although a majority of the constabulary constituted an infantry unit, other members performed civil police duties.

¹⁰ *STAT. L.N.W. RHOD. 1899-1909*, 7 (1910); see also High Commissioner's Proclamations Nos. 15 & 19 (1901) on discipline and other provisions on the Barotse Native Police. *Id.* at 15.

Council, No.1 (1911).¹¹ It was also in 1911 that the two Rhodesias in the East and West were fused.¹² Consequently, the Northern Rhodesia Proclamation No. 17 (1912)¹³ was issued to form a combined civil police, designated as the Northern Rhodesia Police.

British South African Company rule lasted from 1889 to 1924.¹⁴ To reflect the change in government and administration from the B.S.A. Company to direct British rule, the Northern Rhodesia Police Ordinance, No. 16 (1926),¹⁵ was issued to regulate matters regarding police in the territory. In 1937, the Northern Rhodesia Police Force was overhauled, evidenced in a new Northern Rhodesia Police Ordinance, No. 15 (1937).¹⁶

A federation uniting Northern Rhodesia (Zambia) with Southern Rhodesia (Zimbabwe) and Nyasaland (Malawi) to form the Federation of Rhodesia and Nyasaland was established in 1953 to last until 1963.¹⁷ As on previous occasions of administration change, a police

¹¹ STAT. L.N.E. RHOD. 101 (1917).

¹² No. 438 STAT. R. & O. 85 (1911).

¹³ STAT. L.N.E. RHOD. 253 (1912). It was amended by Proclamation No. 16 (1915) and effected by Proclamation No. 14 (1914) and Amendment Order in Council (1916), which revoked section 20. The Law of 1912 superseded Proclamations Nos. 15 and 19 of 1901. Peculiarly, however, it was not mandatory under this law for police to consent to the merger and be amenable to the Law of 1912. Where officers opted to remain separate, they continued to be governed by the previously existing police instruments in Barotseland or North-Eastern Rhodesia. As a result, initial numbers of the Northern Rhodesia Police Force were very small. In 1912, for example, this force consisted of 19 British officers and 750 enlisted Africans. For details on the background of the Northern Rhodesia Police Force, see CRAMER, *supra* note 6, at 221-226.

¹⁴ Northern Rhodesia Order in Council, No. 324 STAT. R. & O. 395 (1924); *see also* Northern Rhodesia Order in Council, No. 325, STAT. R. & O. 407 (1924).

¹⁵ ORD. PROC. & O. IN COUNCIL N. RHOD. 35 (1927). Under this law, police functioned as a military force during times of war and other public emergencies. Supreme authority was vested in the Governor-General of Northern Rhodesia. However, command, superintendence and control of the force was vested in a Commandant under section 5 of the Police Ordinance (1926). The Commandant was an appointee of the Governor General as approved by the Secretary of the Colonies in England. This law was partial to Europeans, who readily qualified to command ranks under section 6 of the Ordinance of 1926. In 1933, the military portion of the Northern Rhodesia Police Force was detached from the regular police force and designated as the Northern Rhodesia Regiment. The Civil Police Force showed an increase in European police at 80 persons and a decrease in the African enrollment at 447 persons. For details, *see* CRAMER, *supra* note 6, at 221-226. The Law of 1926 was consolidated in the Northern Rhodesia Police Ordinance, 1 L.N. RHOD. Ch. 46, 393 (1930).

¹⁶ SUPP. L.N. RHOD. 126 (1946).

¹⁷ No. 1199 STAT. INST. 1804 (1953); *see also* Rhodesia and Nyasaland Order in Council, No. 1635 STAT. INST. 3090 (1963). The Federation dissolved under Order in Council, No. 2088 STAT. INST. 4477 (1963).

ordinance followed: the Northern Rhodesia Police Ordinance, No. 5 (1953),¹⁸ was issued to cater to federal law enforcement needs in the Northern Rhodesian territory. At independence in 1964,¹⁹ the Northern Rhodesia Police Force became the Zambia Police Force (the Force) under the same law of 1953.²⁰

The Independence Constitution of 1964 in Part IX, articles 48 and 49, provided for the Zambia Police Force as an integral part of the public service.²¹ Colonial statutory regimes were modified in 1965 by the Police Act, No. 46 (1965).²² This law forms the basis of policing institutions in the country today.²³

The organization and administrative structures of the Zambia police force are largely predicated on the Zambia Police Act.²⁴ This Act

¹⁸ 2 L.N. RHOD. Ch. 44, 1 (1965 ed.). In this pre-independence era, native authorities operated largely unarmed rural police forces to maintain law and order. Limited fiscal resources and the lack of a clearly articulated statutory authority hampered their enforcement functions. In a large number of cases, local police operated as messengers enforcing native authority edicts and summons. CRAMER, *supra* note 6, at 221-226. The Northern Rhodesia Police Reserve, consisting of 1400 Europeans and 750 Africans, was formed in 1950 under ordinance No. 45, 2 L.N. RHOD. Ch. 39, 1 (1964 ed.).

¹⁹ Zambia Independence Order in Council, No. 1652 STAT. INST. 3643 (1964).

²⁰ 2 L.N. RHOD. Ch. 44, 1 (1965 ed.). Under this enactment, police strength is estimated at approximately 6000, catering to a population of about four million people. Most expatriate officers remained on the force for a few years to ensure continuity and the orderly transfer of police functions to Zambian forces. See generally Z. POLICE ANN. REP. FOR THE YEAR 1964 1-39 (1964).

²¹ 1 L.Z. arts. 48-9 (rev. ed. 1972). Articles 48 and 49 of the Constitution vested powers of appointment and disciplinary control of police in the President. As part of his executive functions, command of the armed forces (including the Zambia Police Force) was vested in the President alone. However, the Commissioner of Police was in charge of day-to-day operations of the force coincident with the Police Ordinance of 1953, still deemed applicable. See *supra* note 20, 2 L.N. RHOD. Ch. 44, 1-72. Furthermore, under articles 48 and 49 of the Independence Constitution of 1964, in conjunction with article 114 (9) and (10), powers of appointment and disciplinary control over police officers below the rank of superintendent were vested in the Commissioner of Police.

²² Z. GOV'T GAZETTE 273-309 (Acts Supp. 1965); consolidated in 3 L.Z. Ch. 133, 1 (rev. ed. 1972); see also Amendment Act, No. 40 Z. GOV'T GAZETTE 209 (Acts Supp. 1974). The Police Reserve still functions under Act 4, 1950, 3 L.Z. Ch. 130, 1 (rev. ed. 1972).

²³ Under the One Party Constitution of 1973, articles 130 (1) and (c) established a Police and Prison Service Commission to supersede the Public Service Commission as the controlling authority of police. However, even under the One Party Constitution of 1973, power to appoint the Inspector-General of Police, who replaced the Commissioner as the most superior police officer, was vested in the President. The President also enjoys powers of disciplinary control and removal of the Inspector-General and his second in command, according to article 132 (1) and (c) of the Constitution of 1973.

²⁴ 3 L.Z. Ch. 133, 1-81 (rev. ed. 1972).

also controls the structure, functions, and discipline of the force.²⁵ Hierarchy of command of the Force runs through a Constable, Corporal, Sergeant, Sergeant Major, Sub-Inspector, Assistant Superintendent, Superintendent, Chief Superintendent, Assistant Commissioner, Senior Assistant Commissioner, Deputy Commissioner, Commissioner, Inspector General of Police, and the President.²⁶ Three departments hold the structural organization together; namely, the Administration, Technical, and Operations departments.²⁷

The Zambia Security Intelligence Service (ZSIS) was established in 1973.²⁸ The ZSIS deals with matters of intelligence and other activities pertaining to the security interests of the country pursuant to the State Security Act of 1969 as amended,²⁹ together with the Preservation of Public Security Act of 1960 as amended,³⁰ and the Regulations of 1964.³¹ It consists of a director and officers as determined by the President under section 3 of this law. Rule-making powers

²⁵ According to section 5 of the Act, the term "security forces of Zambia" refers to the three components of the Zambian armed forces, namely, the Army, which may also include the National Service and Home Guards, the Air Force, and the Zambia Police Force. A small marine force operates on lakes bordering other countries such as Mweru with Zaire, Kariba bordering Zimbabwe, and Lake Tanganyika sharing borders with Tanzania. Cooperation for purposes of law enforcement with other sections of the armed forces is regulated through the Ministry of Home Affairs, which is responsible for the preservation of peace, prevention and detection of crime and apprehension of offenders.

²⁶ Z. POLICE ANN. REP. FOR THE YEAR 1981, 1-33 (1981).

²⁷ See generally *supra* notes 28 and 29. Command of the force rests with the Inspector-General of Police assisted by the Commissioner of Police and three Deputy Commissioners. Each department in turn is under the command of a Senior Assistant Commissioner of Police. The force is jurisdictionally apportioned into 13 divisions, corresponding to the provinces of the country, which are Central, Copperbelt, Eastern, Luapula, Lusaka, North-Western, Southern and Western Provinces. The remaining units are organized according to function, such as the Mobile Police Unit, Training Schools, Para-Military, State House and Tazara Police for the security and patrol of the Chinese-built Zambia-Tanzania Railway. The Police Act was amended in 1985 by No. 23 Z. GOV'T GAZETTE 101 (Acts Supp. 1985), to establish Vigilante Groups in the country. See also Vigilante Regulations, No. 122 Z. GOV'T GAZETTE 323-334 (S.I. Supp. 1986). The Zambia Police Force is assisted by the Zambia National Defense Forces, the Anti-Corruption Commission, the Special Investigation Team for Economy and Trade (SITET), Flying Anti-Robbery and Anti-Drug Squads, the Office of the President, Zambia Police Force Reserve, Mine Police, and private and security guard operations. For details, see Z. POLICE ANN. REP. FOR THE YEAR 1979, 1-45 (1979); see also Z. POLICE ANN. REP. FOR THE YEAR 1976, 1-49 (1976); Z. POLICE ANN. REP. FOR THE YEAR 1974, 1-47 (1974).

²⁸ Act No. 43 Z. GOV'T GAZETTE 369 (Acts Supp. 1973).

²⁹ 2 L.Z. Ch. 110, 1 (rev. ed. 1972).

³⁰ 2 L.Z. Ch. 106, 1 (rev. ed. 1972).

³¹ 2 L.Z. Ch. 106, 8 [Subsidiary] (rev. ed. 1972).

are vested in the President.³² A Staff Board subject to the instructions of the Director-General appoints, promotes, and disciplines officers in the ZSIS below the rank of Director.³³ The Board advises the Director-General on incidental matters affecting the general welfare of the ZSIS.³⁴

It should be emphasized that a close relationship is revealed between the actions of police and the performance of a government.³⁵ From the public point of view, police performance mirrors the functions and actions of the government. No other agency of the government influences the development of sound constitutionalism more than the police.³⁶

In Zambia, due to the strict nature of the one-party system, an independent and impartial law enforcement system must exist.³⁷ With this in mind, police independence comes only from its integrity and desire to ensure the preservation of individual rights.³⁸

The mandate for a police force to enforce law and order requires a reasonable exercise of control to ensure peaceful enjoyment of fundamental human rights. Colonial and post-colonial policing in Zambia was and is hierarchical in nature, reflecting the British influences. State security forces are also a part of this hierarchical system. Since Zambia has been under some form of national emer-

³² Z. GOV'T GAZETTE 191 (Acts Supp. 1973).

³³ *Id.*

³⁴ See generally State Security (Amendment) Act, No. 27 Z. GOV'T GAZETTE 153 (Acts Supp. 1985).

³⁵ See, e.g., Carter & Marenin, *Police in the Community: Perception of a Government Agency in Action in Nigeria*, 15 AFRICAN L. STUD. 9-28 (1977).

³⁶ See, e.g., Carter & Marenin, *The Political Role of the Police and the Nigerian Draft Constitution*, 1 NIGERIA BEHAV. SCI. J. 93-103 (1978).

³⁷ Mwalimu, *supra* note 4, at 157.

³⁸ The social milieu of police operation in Zambia is characterized by an overwhelming increase in crime rates and other acts of anti-social behavior. See generally *Foreign Broadcasting Information Service (FBIS): Daily Rep. Sub-Saharan Africa* [hereinafter FBIS: D.R.S.S.A.], Tuesday May 30, 1989, at 29-31. This atmosphere of lawlessness coupled with the general economic hardships affecting the whole country exposes police to tendencies unpalatable to consonant law enforcement. For examples of reported instances see Z. POLICE ANN. REP. FOR THE YEAR 1964, 1-39 (1964); see also Z. POLICE ANN. REP. FOR THE YEAR 1974, 1-47 (1974); Z. POLICE ANN. REP. FOR THE YEAR 1976, 1-49 (1976); Z. POLICE ANN. REP. FOR THE YEAR 1979: GEN. REP. AND SURVEY OF THE YEAR 1979, 1-45 (1979); Z. POLICE ANN. REP. FOR THE YEAR 1981, 1-33 (1981); POLICE AND PRISON SERVICE COMMISSION ANN. REP. FOR THE YEAR 1979, 1-4 (1980); POLICE AND PRISON SERVICE COMMISSION ANN. REP. FOR THE YEAR 1980, 1-5 (1981); ANN. REP. OF THE POLICE AND PRISON SERVICE COMMISSION FOR THE YEAR 1981, 1-5 (1982); ANN. REP. OF THE POLICE AND PRISON SERVICE COMMISSION FOR THE YEAR 1982, 1-5 (1983).

gency continuously since just prior to 1964, the President, police, and state security forces enjoy extraordinary powers, including the right to detain persons. Use of these powers in certain instances results in abuse and infringement of individual rights.

Accountability of police and state security forces is constitutional in nature. Case law has developed within the Zambian constitutional framework that restricts the expansive modalities of police power and state security forces. Administrative accountability has also developed, as reflected in disciplinary sanctions imposed against rogue law enforcement agents.

The law of human rights in Zambia typifies similar regimes in other Commonwealth African countries that limit complete enjoyment of fundamental human rights in the interests of national security, public order, safety, general welfare of the state, and other policy considerations. This "misapplication" of human rights law can be traced to colonial formulation of human rights norms as part of a "second-tier" of states' rights, ordinarily reflected in the "public order" laws (such as criminal law). Contemporary formulation of human rights in Zambia and other sub-Saharan African states constitutes an usurpation of individual rights by the state because these two levels differ from one another in a basic sense—namely, fundamental human rights are regarded as the basis upon which all other constitutional norms rest, while second tier norms are the basis for government rights. To ensure that Zambia and other sub-Saharan nations recognize the full enjoyment of basic rights, the police and state security forces must function independently and focus on law enforcement rather than regime protection.

C. Theoretical Antecedents of Police

A police force represents the government department established primarily to maintain law and order.³⁹ The caveat in the exercise of police authority is that reasonable control must always accompany its practical utility. However the police force itself, following the traditional concept of this government department, is granted discretion to determine the manner in which it safeguards both individual rights and government security.

Applying a test of reasonableness, the police exceed their mandated authority with actions considered arbitrary, capricious, or influenced

³⁹ See generally WEBSTER'S COLLEGIATE DICTIONARY 910 (1984); see also BLACK'S LAW DICTIONARY 1041 (5th ed. 1979).

by improper motivation. Where these actions adversely affect liberties and freedoms of individuals, they must be deemed a breach of fundamental human rights. Furthermore, if police action is not for the common good or the welfare of society at large, it must be declared a violation of fundamental human rights. Finally, police violations of laws restricting their powers are an abridgment of basic human rights.

This article employs a standard of "reasonable control" to examine police and state security forces in Zambia and follows a philosophy of unrestricted enjoyment of fundamental human rights as aspects of Zambian constitutionalism.⁴⁰

II: ACCOUNTABILITY OF POLICE AND STATE SECURITY FORCES IN LAW AND PRACTICE

Police accountability exists in the constitutional context through administrative regulations and through the judicial process. The courts act as sentinels of individual liberties, ensuring that police powers (including those of state security forces) are utilized in accordance with the Constitution.⁴¹ Therefore, the legal accountability of any police force is constitutional in nature.⁴²

⁴⁰ The test of "reasonable control" regarding police powers can conceptually be manipulated in a variety of ways to predicate other aspects of police powers. For example, secret police and other state security forces are founded on expansive modalities of state sovereignty in the philosophical tensions between fundamental human rights and rights of the state. The design of these forces, though not illegal by any means, is founded on a circumvention of the restrictive nature of the traditional authority of police as a unit of government. This article postulates that policy justifications emanating under notions of public security, public order and the general welfare of the state which are otherwise impermissible from the traditional outlook of police mandate, namely the exercise of "reasonable control" over persons, illustrate the extension in scope of powers enjoyed by state security and other secret police. Any unit of government established for the execution of secret police goals requires a tighter process of oversight in order to monitor possible erosion of basic individual rights. Contemporary national states invariably have blurred the requisite distinction between the regular political functions of the executive branch of a government and the authority of police as sentinels of law in public or civil service. The obliteration of this necessary demarcation invites undue political interference in the law enforcement function of police. As a result, the police force, as an organ of the law to safeguard society, acquires an identity as an instrument of the executive branch of government to warrant political interference. It must function as an independent entity of the state, primarily to follow the law and not the executive branch.

⁴¹ ZAMBIA CONST. art. 26.

⁴² *Id.*

Constitutional underpinnings of this accountability give rise to actions under tort law, administrative law, criminal law, and other legal branches. These actions arise only to the extent that police action has been subjected to its mandate to exercise reasonable control over persons and property for the common good and not to protect dominant classes. Since fundamental human rights constitute organic norms of the Constitution, all other norms, whether issued in the Constitution itself or purporting to follow it, must be conscionable under the spirit of fundamental human rights provisions. Thus, the test is a constitutional one which ascribes legality and liability to police and state security force actions.

In Zambia, the parameters of the police mandate are contoured under article 26 of the Constitution,⁴³ balancing between individual rights and the domain of a sovereign state. Article 26, in addition to other articles limiting individual rights, stipulates that, notwithstanding guaranteed rights in other articles,⁴⁴ a law or action under it is consistent with these provisions insofar as it is shown that this particular law permits preemption of these rights because the country is under a declaration of war or a state of emergency sustainable under article 30 of the Constitution.⁴⁵ Any such law or action can only be held invalid if it is adjudged excessive, taking into account the test of reasonableness in view of prevailing circumstances.⁴⁶

Article 30 of the Constitution stipulates when the President may preempt the exercise of fundamental human rights. The President may declare that a state of emergency exists under the Emergency Powers Act of 1964. Alternatively, the President may declare that a situation exists which may develop into a state emergency under the Preservation of Public Security Act.⁴⁷

Under these measures, the President, police, and state security forces enjoy extraordinary powers. Since the exercise of executive

⁴³ *Id.*

⁴⁴ *Id.* Article 15 relates to the protection of the right to personal liberty; article 18 protects from deprivation of property; article 19 protects from deprivation of privacy of home and other property; article 21 relates to the protection of freedom of conscience; article 22 addresses protection of freedom of expression; article 23 covers protection of freedom of assembly and associations; article 24 protects freedom of movement; and article 25 protects from discrimination on the grounds of race.

⁴⁵ *Id.* art. 30.

⁴⁶ *Id.*

⁴⁷ See generally ZAMBIA: A COUNTRY STUDY (I. Kaplan 3d ed. 1987); see also Parker, *Control of Executive Discretion Under Preventive Detention Law in Zambia*, 13 COMP. & INT'L. L. J. SOUTHERN AFRICA 159 (July 1980).

power must conform to the Constitution's boundaries, notwithstanding the necessary draconian nature of such actions, a process must be established to review executive action and police powers.

An accord between these two sets of values, basic individual rights and government authority embodied in emergency executive and police powers, has been reached in article 27 of the 1973 Constitution.⁴⁸ Under this article, where a person's liberties to freely move about are curtailed or limited in any way as a result of executive action, the following conditions must be complied with by the detaining authority.

First, as soon as reasonably feasible, but not in excess of fourteen days from the date the detention commenced, the victim must be provided with a written statement in a language he or she understands, articulating in detail the specific grounds of detention.⁴⁹

Second, not more than thirty days from the time the detention or restriction began, a notice must be published in the *Government Gazette* stipulating that the individual concerned is in detention. Detaining authorities also must provide the specific provisions of a law which permits such restriction or detention.⁵⁰

Third, only after a year in confinement or detention and upon a request from the detainee during the term of the detention, the victim's case must be reviewed by an autonomous tribunal constituted under law.⁵¹ Legal representation must also be provided either in the tribunal or in the court of adjudication according to article 27 of the Constitution.⁵²

Case law has emerged under these provisions to challenge the liberal exercise of presidential and police powers of detention. The cases are primarily founded on notions of constitutional accountability, but give rise to such torts as false imprisonment and malicious prosecution. In *Banda v. Attorney General*,⁵³ for example, petitioner, a suspect in a murder trial, was detained by police under powers

⁴⁸ ZAMBIA CONST. art. 27.

⁴⁹ *Id.* art. 27(a).

⁵⁰ *Id.* art. 27(b).

⁵¹ *Id.* art. 27(c). See also RUBIN, TARANTINO & LARKIN, CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 52 (A.P. Blastein & G.H. Flanz eds. Supp. 1985).

⁵² ZAMBIA CONST. arts. 27(d)-(e). These provisions require that the detainee consult a legal representative of her choice. The attorney appears with the victim before the tribunal adjudicating her case. Facilities for legal representation under articles 27(d) and (e) of the Constitution are in respect to both the court and the review tribunal.

⁵³ 1978 Z.L.R. 233 (1978).

contained in Regulation 33(6) of the Preservation of Public Security Regulations of 1964⁵⁴ for nine days and then released without being provided grounds of detention as required by article 27 of the Constitution. The petitioner successfully maintained an action against the government for false imprisonment.⁵⁵ In *Mulwanda v. The People*,⁵⁶ petitioner, a Permanent Secretary in the Ministry of Home Affairs, was detained by police under the same Regulation 33(6) of the Regulations of 1964 for corrupt practices. The police officer who detained him believed that the case was a peculiar one which demanded similar unusual methods of investigation. The Court denounced the officer's detention of the petitioner.⁵⁷

⁵⁴ 2 L.Z. Ch. 106, at 8 [Subsidiary] (rev. ed. 1972).

⁵⁵ The Court criticized abuse of police powers under this Regulation stating: A person may be arrested and detained under Regulation 33(6) if, and only if, the police officer in question has reason to believe that there are grounds which would justify the making of a Presidential order under Regulation 33(1). It is unlawful to use Regulation 33(6) for the purpose of investigating a criminal offense unrelated to public security. It is incorrect to say that in the case of a detention order under Regulation 33(6), the police act only on suspicion and do not have any grounds as envisaged by article 27 and which therefore applies only when grounds are established. As a matter of construction of the language used, there must be grounds for the police detention itself, and if that were not the proper construction, Regulation 33 (6) would be *ultra-vires*.

1978 Z.L.R. at 238.

In *Mwaba v. Attorney General*, 1975 Z.L.R. 218 (1975), which disapproved *Chimba & Others v. Attorney-General*, 1972 Z.L.R. 165 (1972) on the same subject, the court held that a person detained under the Preservation of Public Security Regulations of 1964 does not surrender all her rights as a citizen of Zambia except those which are vitiated by virtue of the detention. But this detention under these Regulations is a mere preventive act, and no stipulations can be imposed except those which reasonably can be adjudged to facilitate the process of detention. In *Mwangala v. Attorney-General*, 1974 Z.L.R. 97 (1974), where the plaintiff was arrested by police, kept in a prison cell for twenty-four hours, released on a police bond, and never prosecuted, such police action was held to be an illegal act.

⁵⁶ 1976 Z.L.R. 133 (1976).

⁵⁷ The High Court in *Mulwanda's* case disagreed with the police officer and his use of police powers, warning:

This is a thoroughly reprehensive attitude which must be unreservedly condemned. We share the deep anxiety which every right thinking member of society must feel at the prevalence of corruption in high places, but if the law enforcement agencies of the state knowingly resort to illegal methods to combat this type of social evil, they simply replace it with an even greater evil, namely an arm of the executive which regards itself as being above and beyond the law. Far from protecting society, these methods will inevitably lead to its destruction.

Id. at 136.

There are also cases decided within the parameters of criminal law and criminal procedure. For example, in *Mbandangoma v. Attorney General*,⁵⁸ the plaintiff successfully made a case against the police for misuse of detention powers in a police bond. The courts strongly reprimanded the police, cautioning that they must show justifications to arrest the plaintiff and at the time of arrest, reasonable grounds must exist linking the plaintiff with the offense.⁵⁹

Other than judicial accountability, the police force is subject to administrative control under the Constitution and the Police Act.⁶⁰

⁵⁸ 1979 Z.L.R. 45 (1979).

⁵⁹ *Id.* at 49; see also *In the Matter of the Criminal Procedure Code and In the Matter of R.S. Siuluta & 3 Others*, 1979 Z.L.R. 14 (1979). In this case, the state admitted to the detention of the applicants while further inquiries were being made against them. The police intended to charge them with an offense in the distant future. Judge Hadden of the High Court found this conduct of the state improper and a gross violation of law. *Id.* at 16.

⁶⁰ 3 L.Z. Ch. 133, 1 (rev. ed. 1972). Recall that article 27 of the Constitution of Zambia provides caveats in the exercise of police powers which affect fundamental human rights enumerated in articles 13 to 26. These caveats pertain to rights to life, personal liberty, protection from slavery and forced labor, inhuman treatment, deprivation of property, privacy of home and other property, provisions to secure protection of law, protection of freedom of conscience, freedom of expression, freedom of movement, freedom of assembly and association, and freedom from discrimination on the basis of race, gender or other grounds. Under article 27, where a person's freedom of movement is restricted or detained, the detaining authority, which includes police and state security forces above the rank of superintendent, must comply with a number of conditions.

In any case, article 29 of the Constitution requires that if any person alleges that fundamental human rights provisions in articles 13 to 27 have been, are being, or are likely to be infringed in relation to him, then such a person must apply to the High Court for redress. Article 27 ensures compliance with the letter and spirit of constitutional mechanisms in respect to tenets of fundamental human rights. Article 29 is the culmination of the process and practice of the arena of basic rights under Part III of the Constitution. Should abuse by police or other authorities occur, notwithstanding the conditions stipulated in article 27, then the person is at liberty to seek court action.

In regard to administrative controls under the Constitution, these are mainly reflected in the work of the Police and Prison Service Commission established under articles 130-134 of the Constitution. Its membership is determined by the President and therefore, members may be removed by him for inability to discharge respective functions including misconduct in office. However, the Commission's powers are limited to enable the President to direct the Police and Prison Service Commission under article 131(9) and (10) of the Constitution. The President could further order the Commission to refer any matter under its consideration to him for a determination according to article 131 (10) of the Constitution. However, the courts have held that once a Commission has decided that the case merits no further inquiry or adjudication, then the matter ceases to be under consideration by the particular Commission. Once the matter is no longer being considered by the Commission, the President cannot exercise his constitutional powers to require the matter to be referred to him. *Kangombe v. Attorney-General*, 1973 Z.L.R. 114 (1973).

Administrative control under the above-cited Police Act by and large constitutes internal acts of discipline.⁶¹

Methods of administrative accountability exist in the form of superior officers in the police force taking disciplinary measures against rogue police officers under a recognized mechanism of internal discipline in conjunction with an independent commission. For example, in 1980, 124 incidents of misconduct by police were reported, including theft by public servants, careless driving, and others.⁶² Such action enhances the poor image of police in the minds of the public and affects public respect for the law and government.⁶³ Thus far, the work of the Police and Prison Service Commission is commendable.⁶⁴ It is true, however, that conditions under which the police operate in Zambia and other countries in sub-Saharan Africa are not commensurate with an effective policing system.⁶⁵

⁶¹ See Z. POLICE ANN. REP. FOR THE YEAR 1964, 1-39 (1964); see also, Z. POLICE ANN. REP. FOR THE YEAR 1974, 1-47 (1974); Z. POLICE ANN. REP. FOR THE YEAR 1976, 1-49 (1976); Z. POLICE ANN. REP. 1979: GENERAL REP. AND SURVEY FOR THE YEAR 1979, 1-45 (1979); Z. POLICE ANN. REP. 1980, 1-39 (1980); Z. POLICE ANN. REP. 1981, 1-33 (1981). The 1981 report indicates on page three that 628 members of the force were punished in police tribunals established under section 30(1) of the Police Act of 1965 as amended.

⁶² Z. POLICE ANN. REP. FOR THE YEAR 1980, at 5 (1980). In 1981, criminal and other court cases involving police numbered 112. Z. POLICE ANN. REP. FOR THE YEAR 1981, at 4 (1982).

⁶³ See generally Carter & Marenin, *Police in the Community: Perception of a Government Agency in Nigeria*, 15 AFRICAN L. STUD. 9 (1977).

⁶⁴ For evidence of this positive performance, see POLICE AND PRISON SERVICE COMMISSION ANN. REP. FOR THE YEAR 1979, 1 (1980); POLICE AND PRISON SERVICE COMMISSION ANN. REP. FOR THE YEAR 1980, 1 (1981); POLICE AND PRISON SERVICE ANN. REP. FOR THE YEAR 1981, 1 (1982); and POLICE AND PRISON SERVICE COMMISSION ANN. REP. FOR THE YEAR 1982, 1 (1983).

⁶⁵ These poor conditions include low wages, inadequate or unsavory working conditions, inadequate transportation, and poor communications equipment. These are acknowledged by the Police and Prison Service Commission Annual Reports for the Years 1974-82. To improve their service to the public, the security and welfare of the police must correspondingly improve. Such improvements should reduce the tendencies to engage in corrupt practices. The issue of corruption, not only in the police force but also in the public service, generally is a major concern of the government and has culminated in the Corrupt Practices Act of 1980. Z. GOV'T GAZETTE 63 (Acts Supp. 1980). Under this Act, an Anti-Corruption Commission controlled and supervised by the President was created. The Commission investigates complaints and alleged conduct of any public officer suspected of engaging in corrupt practices and initiates prosecutions in the courts. A report of such an officer is made to the President under section 10 (1) of the Act. The Corrupt Practices Act, supersedes the English Prevention of Corruption Act of 1916, extended to Zambia under the English Law (Extent of Application) Act, 1963, 1 L.Z. Ch. 4, 1 (rev. ed. 1972).

III: HUMAN RIGHTS PRACTICES AND THE INFLUENCE OF POLICE AND STATE SECURITY FORCES IN ZAMBIA

A. *The Law of Human Rights in Zambia*

The law of human rights in Zambia is recognized, preserved, and secured in Part III, articles 13 to 27 of the Constitution, with supplementary provisions in articles 28-31.⁶⁶ For the purposes of this discussion, Part III of the Constitution of Zambia has been subdivided into four sections, as indicated below. Zambia was instrumental in the formulation of the Charter on Human and Peoples Rights adopted by the Heads of State of the Organization of African Unity (OAU) on June 27, 1981.⁶⁷ Commitment to fundamental human rights in Zambia is also evident in serial prescription of these rights⁶⁸ in the Constitution immediately subsequent to the formulations of principles of sovereignty and citizenship.

As in other countries of sub-Saharan Africa, these fundamental human rights are abridged. For example, article 13, which declares fundamental freedoms of life, liberty, security of the person in law, and protection of privacy of the home and other property, is sustainable only if these freedoms do not transgress on the rights and interests of the state as contained in article 4 of the Constitution prohibiting the formation of political parties outside the framework of the United National Independence Party. Also, rights of any individual must not prejudice the rights and freedoms of others or the public interest.

Although the government guarantees extensive fundamental human rights and observes basic freedoms, due process, and individual rights, the government nevertheless restricted political rights as a one party state.⁶⁹ These restrictions are manifested in a variety of ways, such as, the large concentration of power in the hands of the President.

⁶⁶ ZAMBIA CONST. arts. 28-31.

⁶⁷ 21 I.L.M. 58 (1982). The scheme of basic human rights espoused in this piece calls for re-appraisal in the formulation of fundamental human rights initially, followed by principles of sovereignty and citizenship. This view consonantly applies to prescription of norms of basic rights in the Zambia Constitution. As societies increasingly move away from regional or state identity, the suggested scheme is appreciably more in tune with the commonality of human rights as a global tradition. This schema is reflected in the Constitution of the Federal Republic of Brazil, 1988.

⁶⁸ ZAMBIA CONST. arts. 13-27.

⁶⁹ See generally U.S. DEP'T. ST. COUNTRY REP. HUM. RTS. PRAC. 1979-1988.

Under the president's broad emergency and presidential powers, he is at liberty to suspend "observance of human rights in the interests of state security."⁷⁰ Through the emergency legislation "the president has broad discretion to detain or restrict the movement of people, and law enforcement personnel have extra-ordinary powers to detain suspects and search homes."⁷¹

As a result of the ongoing state of emergency in Zambia since 1964, the President has wide powers of detention, which are readily available to his police and state security forces.⁷² In 1988, roughly twenty people were still in detention, including eight people detained in late 1988 for an alleged plot to overthrow the government. Although detainees do have recourse to the courts, the legal process is generally not expeditious.⁷³ Between 1979 and 1988, the reports recorded no denials of a free and public trial because the right to such a trial is constitutionally guaranteed (except in the case of presidential detainees).⁷⁴

Section Three of this part of the Zambian Constitution deals with the governmental attitude and record concerning national, international and non-governmental investigations of alleged human rights violations. The government does not encourage, discourage, or impede human rights inquiries by activists and organizations. Committed to the principles of human rights, President Kaunda was instrumental in seeking a mechanism in the Organization of African Unity for the protection and preservation of human rights in Africa. Although there are no local human rights groups in Zambia, the Law Association of Zambia and the University's law school cooperate in monitoring human rights protection in the country.⁷⁵ In the period of 1979 to 1988,⁷⁶ there is no public record of the Zambian government

⁷⁰ See State Security Act, 2 L.Z. Ch. 110, 1 (rev. ed. 1973); The Preservation of Public Security Act, 2 L.Z. Ch. 106, 1 (rev. ed. 1972); Regulations of 1964, 2 L.Z. Ch. 106, 8 [Subsidiary] (rev. ed. 1972); Emergency Powers Act, 2 L.Z. Ch. 108, 1 (rev. ed. 1972); U.S. DEP'T. ST. COUNTRY REP. HUM. RTS. PRAC. 1983, 421 (1984).

⁷¹ U.S. DEP'T. ST. COUNTRY REP. HUM. RTS. PRAC. 1988, 412 (1989). Because of this continuous state of emergency, it is recognized generally that the gap between rights accorded in the Constitution and those actually enjoyed by Zambians remains to be narrowed.

⁷² U.S. DEP'T ST. COUNTRY REP. HUM. RTS. PROC. 1988, 413 (1989).

⁷³ See *infra* note 96.

⁷⁴ U.S. DEP'T ST. COUNTRY REP. HUM. RTS PROC. 1988, 413 (1989).

⁷⁵ *Id.*

⁷⁶ See *infra* note 96.

being subject to an international, national or regional investigation for the violation of human rights.

In 1982, however, Amnesty International reported concern regarding detentions without trial and mistreatment of prisoners in Zambia.⁷⁷ Similar concerns were expressed by Amnesty International in 1983 and 1985. Because of these concerns, Amnesty International urged the government in 1986 to investigate allegations of the torture of imprisoned South-African security persons. President Kaunda replied that no torture or ill treatment had been inflicted on the South Africans and that their cases would be reviewed by the courts in accordance with the law.⁷⁸

In regard to cruel and inhuman or degrading treatment or punishment, Zambian practice between 1979 to 1988 is aptly summarized by the Country Reports of 1988 which state:

The Constitution outlaws torture, but there are credible reports that police and military personnel have resorted to excessive force when interrogating detainees or prisoners. In September, 1988, a High Court judge criticized 'overzealous' police officers and said that innocent people were treated brutally to obtain statements of confessions. Alleged abuses reported . . . include beatings, the withholding of food, pain inflicted on various parts of the body and long periods of solitary confinement. The courts have ordered investigations to ascertain if confessions or statements were made after torture or mistreatment. All the Reports⁷⁹ indicate that Zambian prisons are over populated, critically understaffed, unsanitary, and affected by the general lack of medical facilities throughout the whole country.⁸⁰

The right of privacy in the family, in the home, and in correspondence is guaranteed by the Constitution. Therefore, the police and state security forces must have search warrants to enter homes, except in cases involving a state of emergency or the deportation of an illegal alien.⁸¹ A magistrate or police officer above the rank of

⁷⁷ U.S. DEP'T ST. COUNTRY REP. HUM. RTS. PROC. 1982, 366-67.

⁷⁸ *Id.* at 354. There is no public record of the Zambian Government having been investigated during the course of 1988. Amnesty International maintains a chapter in Lusaka according to the U.S. DEP'T. ST. COUNTRY REP. HUM. RTS. PRAC. 1988, 418 (1989).

⁷⁹ See *infra* note 96.

⁸⁰ U.S. DEP'T ST. COUNTRY REP. HUM. RT. PROC. 1988, 418.

⁸¹ U.S. DEP'T ST. COUNTRY REP. HUM. RTS PROC. 1988, 414 (1989). Consistent detention of persons is revealed in practically all the Country Reports covered between 1979 and 1988.

Sub-Inspector may issue a search warrant. To obtain a search warrant, constructive probable cause must be demonstrated, just as in the American system. This requirement is typically met in Zambia.⁸²

Section Two of this portion of the Consitution deals with human rights practices involving the respect for civil and political liberties.⁸³ Freedom of speech and the freedom of the press are respected as long as they do not involve derogatory commentary about the Head of State, the philosophy of humanism, or the one-party State.⁸⁴

Exercising freedom of association and the right to peaceful assembly is similar to exercising the right to free speech and press. In principle, these rights were adversely affected by the nature of the political system. Therefore, all political activism outside the ambit of the one-party state was prohibited.⁸⁵ As a result, permits to hold public association meetings, processions, rallies, assemblies, and other fraternal gatherings must be obtained from the police as a matter of course.⁸⁶ These permits are easily secured unless the government believes that such assemblies will be disruptive and that they will destabilize the local authorities.⁸⁷ The country possesses a multitude of associations and other professional bodies. These associations function as unofficial lobbying groups to exert pressure on the party and government regarding numerous economic, political and social issues.⁸⁸

In Zambia, the freedom of religion is constitutionally guaranteed and supported by President Kaunda. A wide variety of Christian denominations operate freely in the country. Even though the government specifically prohibits the Watchtower Sect (the Jehovah's Witnesses) from conducting open air meetings and door to door campaigns seeking converts, the Sect functions openly with other religions. Zambia has a large population of Muslims and Hindus with their own mosques and temples. Legal associations and religious groups operate independently of party control or influence. President

⁸² See *infra* note 96. Safeguards of fair and public trial as they exist at common law also apply to Zambia in non-detention cases. When these issues are tried, the trials are generally held in public. The Zambian judiciary is by and large known for its independence. However, the President appoints and transfers judges.

⁸³ *Id.*

⁸⁴ See e.g., U.S. DEP'T ST. COUNTRY REP. HUM. RTS. PROC. 1988, 414; note 178.

⁸⁵ See *infra* note 96.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

Kaunda encourages independent community action by religious groups.⁸⁹

Another area of civil and political liberties involves the right of unrestricted internal and external movement, which includes foreign travel, emigration, and repatriation.⁹⁰ In Zambia, the President may restrict the movement of individuals within the country according to his emergency powers. For example, the government consistently prohibits foreign diplomats from traveling outside of a forty to fifty mile radius from Lusaka without the written permission of the Ministry of Home Affairs. Concerning internal travel, the government routinely uses police road blocks to conduct vehicle and passenger search and seizures. Although the government permits emigration, strict currency regulations, a result of adverse economic conditions, renders it difficult. Despite the government's travel restrictions, Zambia has served as a haven for refugees in the region, thereby earning the country high praise by the United Nations High Commission for Refugees (UNHCR). During the war in Rhodesia, Zambia provided refuge to more than 60,000 Rhodesian refugees. In 1980, Zambia served as host to an estimated 17,500 refugees, including 11,000 Angolans and 4000 Namibians. Regarding foreign travel, the government reserves the right to refuse or withdraw a passport when an individual's activities abroad seem to be inimical to the "interests of the state."

The final and most important section of the Constitution involving civil and political liberties relates to the rights of citizens to change the government.⁹¹ Approximately 10% of Zambia's adult population are currently members of the ruling United National Independence Party.⁹² As the leader of the party and head of state, the President possesses overwhelming powers that enable him to determine the members of the Central Committee and the Cabinet, which are the two premier organs of formal government. Political loyalty in both of these institutions is exacted by a mixture of merit and tribal balancing. All political and governmental offices at any level must be filled by members of UNIP. In practice, however, the political system was open to persons of divergent opinions as long as they operate within the one party structure.⁹³

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ U.S. DEP'T. ST. COUNTRY REP. HUM. RTS. PRAC. 1988, 419 (1989).

⁹² See *infra* note 96.

⁹³ See REPUBLIC OF ZAMBIA NATIONAL ASSEMBLY. THE REP. OF THE SPECIAL PAR-

In section four of this part of the Zambian Constitution, discrimination on the grounds of race, gender, religion, language or social status is dealt with. To appreciate the nature of these rights, it should be noted that Zambia consists of seven million people with more than seventy-two Bantu speaking ethnic groups.⁹⁴ The pursuit of equality is generally made to meet social and economic needs. However, between February and April of 1988, 203 trading licenses were withdrawn from business persons, most of them Asians, in order to stem black marketeering. This revocation was considered a discriminatory act by most observers.⁹⁵

Thus, an interesting paradox exists within Zambia. Zambia is a vocal supporter and strong proponent of human rights at the regional and international levels.⁹⁶ Consequently, Zambia is in the forefront of human rights and provides tangible support for self determination in Zimbabwe, Angola, Namibia, Mozambique and South Africa. In addition, Zambia serves as a country of first refuge for stateless and other displaced persons in the region. Simultaneously, the Zambian government continues to abridge fundamental human rights of its citizens. The solution to the problem lies in a fresh and renewal commitment to preserve the rights of Zambia's constituents.

C. *A New Approach to Human Rights Law in Zambia*

As stated earlier, the primary function of any police force is to facilitate the peaceful and unbridled enjoyment of individual rights and freedoms in the state. In the execution of these functions, police

LIAMENTARY SELECT COMMITTEE APPOINTED MONDAY JULY 9, 1990, 1 (1990). Though it focused on the democratization of the ruling party to make it responsive to the needs of the people, the committee practically endorsed the reintroduction of the multi-party system of government by eliminating provisions in the Party Constitution which make it supreme over other institutions in the country. It did not, however, call for the abolition of the one-party state, but rather indicated that UNIP should be revamped to face challenges of the movement on multi-party democracy and the impending referendum on the multi-party system which was scheduled for October 17, 1990.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ See generally U.S. DEP'T ST. COUNTRY REP. HUM. RTS. PRAC. 1979, at 233; U.S. DEP'T ST. COUNTRY REP. HUM. RTS. PRAC. 1980, at 313; U.S. DEP'T ST. COUNTRY REP. HUM. RTS. PRAC. 1982, at 360; U.S. DEP'T ST. COUNTRY REP. HUM. RTS. PRAC. 1983, at 421; U.S. DEP'T ST. COUNTRY REP. HUM. RTS. PRAC. 1984, at 381; U.S. DEP'T ST. COUNTRY REP. HUM. RTS. PRAC. 1985, at 381; U.S. DEP'T ST. COUNTRY REP. HUM. RTS. PRAC. 1987, at 349; U.S. DEP'T ST. COUNTRY REP. HUM. RTS. PRAC. 1988, at 412.

must balance the competing interests of individual rights with the derivative rights and interests of the state. Balancing the two sets of values is the subject of the restrictions on human rights in article 26 of the Constitution.⁹⁷ Under this article, fundamental human rights are subjected to powers of police and state security forces in the event of war or national emergency under article 30 of the Constitution.⁹⁸ Typically, article 30 is applied in regard to detention.⁹⁹

Therefore, the security and peaceful enjoyment of fundamental rights are subordinated to the mandate of police and state security forces under the Zambian regimes. Since the mandate of police power is constitutional, both the police and state security forces must strictly comply with the law in exercising their authority. Case law in which Zambian courts have succinctly elucidated on this principle has been alluded to above.¹⁰⁰

From the perspective of human rights law in Zambia, vis-a-vis the specific mandate of police power and also the general attributes of rights and powers of a sovereign state, the complete and unabridged enjoyment of rights must be protected, even where purposes of national security, public order, defense, public safety, public morality, or any such actions or laws are involved.

The issue of laws restrictive of fundamental human rights, yet not unreasonable, is a conceptual misnomer in a democratic society. First, from a regulatory point of view, this formulation shifts the burden from the state to the victim, whose rights have been infringed, to

⁹⁷ ZAMBIA CONST. art. 26.

⁹⁸ *Id.* art. 30.

⁹⁹ Legislative history of the law on emergencies and preservation of public security goes back to the period immediately before the independence of Zambia. On the attainment of independence, the President assumed full executive powers similar to those enjoyed by his predecessor. These powers included detention powers which are delegable to appropriate police officers and state security forces. These powers had been invoked by the colonial governor three months before independence to deal with the Lumpa-Lenshina Mulenga uprisings in the eastern and northern portions of the country. Pursuant to section 5(3) of the Preservation of Public Security Act, Parliament is empowered to extend declarations of the colonial governor now vested in the President. Under this authority, the Governor's declaration on the Lumpa-Lenshina Mulenga uprisings continued into the present. It can be revoked by the President or the National Assembly, or it lapses within seven days of a new President assuming power other than the incumbent in power according to the Constitution (Amendment) Act, No. 5 Z. GOV'T GAZETTE 189 (Supp. 1969). Detention powers contained in the Preservation of Public Security Act have been used to respond to various situations ranging from conditions of liberation wars, political instability, and purely criminal activities.

¹⁰⁰ See *supra* footnotes 53-59 and accompanying text.

show cause why the state should not violate his rights. This burden supports the postulation that the state usurps rights that are properly vested in the individual.

Second, the only state action reasonably justifiable in a democratic society is a valid and legitimate one under fundamental human rights provisions. If such action or law contradicts these provisions, it must inherently offend notions of democracy.

Third, democracy symbolizes a government by the people, essentially a government whereby primordial authority is vested in the people to be exercised by them directly or indirectly through a system of representation reflected in a free electoral process. This concept differs markedly from democratic centrism, a feature of any one-party state in which party members participate in policy discussions at all levels.¹⁰¹ The one-party system is more closely related to principles of oligarchy than to the traditional concept of democracy. As such, two contradictory principles cannot form the basis for diminishing rights and freedoms in specific cases.

Fourth, a postulation that the "participatory" disposition of the Zambian one-party state rendered it more in line with attributes of democracy and therefore justifies restrictions of basic rights if state action is necessary in a democratic society, is neutralized by the essence of the concept of democracy itself, namely the unrestricted freedom of people to self govern. Their representatives in government constitute their agents. Since the people have declared their basic rights and freedom under articles 13 through 26 of the Constitution to be fundamental, the state lacks authority to vest in itself the right to serve purported interests of the state by limiting democracy.

The commitment to complete enjoyment of fundamental human rights as expressed under articles 13 through 26 of the Constitution, as long as they do not impinge on the rights of others, stems from the proposition that policy justifications limiting complete enjoyment of basic rights and freedoms constitute second-tier¹⁰² prescriptive norms already addressed by laws, rules, and regulations of public order. The legitimacy and authority of these limitations are from constitutional norms. However, these norms were not designed to supersede

¹⁰¹ Members of the party and the nation as a whole are, by the nature of the system itself, required to follow decisions ultimately made by the Central Committee of the Party and the Office of the President.

¹⁰² "Second-tier" means the secondary level of formulating norms of laws governing societal conduct, distinguished from the primary or organic levels upon which norms of fundamental human rights are created.

or override the inherent enjoyment of basic rights contained in the Constitution.

There should be a commitment to full enjoyment of basic rights and freedoms formulated and recognized in the Constitution, except where they transgress the rights of others. Therefore, fundamental human rights are not about torture, inhuman treatment, or detention by state sanction, but instead represent an affirmation of the sanctity of life through law. Any articulation by the state to justify their preemption in specified cases under the guise of state sovereignty inherently undermines these fundamental principles.

If these basic rights and freedoms are considered derogable or revocable at the whim of the state, then it would follow that death, torture, and other forms of cruel and inhuman treatment or punishment would be conscionable in those state-justified circumstances. This view is erroneous and not constitutionally sound. The goal is just the opposite, namely to formulate and enshrine these natural rights recognized as safeguards against any abuse, erosion or abridgement. Abuse of human rights is the same whether it occurs overtly through a tangible display of force by individuals, or by instruments of the state to carry out prohibited actions in the name of national security, defense, public order or other policy considerations. If it is illegal for individuals to derogate fundamental human rights, it is also wrong for state instruments of power to do so. The Constitution represents an independent power base to govern the diversity of Zambia's citizens and promote the uniqueness of individuality.¹⁰³ The Constitution is based on fundamental human rights, as reposed in the individual. Since constitutional foundation represents the collective will of the people, humanity at this level cannot be diminished in any way. Any such attempt conceptually leaves the entire constitutional mechanism in disarray because the power base upon which it was founded has been eroded. Constitutional preemption of basic individual rights treads on this delicate and most fundamental tenet of organized society. Therefore, legal circumstances do not exist where it is proper to reduce, restrict, or take away fundamental human rights. Moreover, preemption may not be inserted in the organic law to strip such rights. The Constitution cannot sanction the demise of life in deference to expansive modalities of state rights.¹⁰⁴ There are

¹⁰³ See generally Mwalimu, *supra* note 4, at 157.

¹⁰⁴ As of 1988, 28 countries objected to the death penalty, 18 others allowed it for very exceptional criminal activities only, and 128 countries permitted it for

no state rights without fundamental human rights, including rights of those who have been delegated to govern or direct the state's course.

The process and practice of punishment in the case of wrongdoing is justified. In practice, these functions must necessarily be secondary under the wide umbrella of policy justifications. The bond of humanity is cemented by this consent to be bound by societal norms. Those who do not consent *prima-facie* are not bound and by implication must find a different level of consent or face expulsion from one society to another. Incidents of dissent in various societies and the courage of "dissidents" testify to this proposition. Until they have found an association or polity with whom they can forge a new compact, they may as well remain stateless. Therefore, no criminal act or civil wrong should be committed against anyone protected by this compact as generally manifested in the constitution, custom, or tradition holding a particular society together. Anyone in contravention of this compact is subject to the domain of state sovereignty as the only agent permitted by the collective will of the people to enforce and oversee the sanctity of individual rights expressed in the constitution. Under the second-tier permitting state or governmental action, sanctions against those engaging in recalcitrant behavior are properly within the ambit of rights and interests of a state. However, the state can only carry out and execute these functions to the extent that the Constitution of Zambia permits. Fundamental human rights, or the Bill of Rights as the case may be, are the only portion of the Constitution fundamentally prohibited from being infringed upon by anyone, including the state itself. The converse must be considered sound—that the state, being the preeminent agent of the collective will of the people, must ensure that recognition of these fundamental rights and freedoms are respected at all times by both the state and the individual. Such is the solemnity of fundamental human rights.

Government is established for the preservation of rights of citizens and other inhabitants in society. From the preservation of their rights, state rights and interests are founded and secured. A government established for purposes other than the security of citizens' rights lacks the mandate to rule. Therefore, violation of fundamental human rights by state instruments directly and immediately ruptures gov-

ordinary and exceptional crimes. Practically all of Africa falls in the last category allowing capital punishment. For details, see LAW LIBRARY OF CONGRESS, FOREIGN LAW SURVEYS, CAPITAL PUNISHMENT 1 (August 1988).

ernmental authority and legitimacy. Concurrently, any government which does not realize the essence of fundamental human rights as its base of authority is similarly culpable and negligent in the duty of a government to secure and safeguard the fundamentality of basic rights of the individual.

Basic or fundamental human rights of the individual are traced to natural and inalienable rights common to all, preserved and collected in the most fundamental form. The Constitution upon its creation finds them already in full bloom, original and fundamental. Pre-existence of a conglomerate of these rights prior to societal organization demands that the role of the Constitution be confined to recognition, preservation, respect and enforcement of these rights. This is necessary to recognize the imperfections in any structural edifice of humanity.

Therefore, the Constitution, representative of the collective will of the people, can do no more than ensure that the commonality of power in each and every individual is embodied in this instrument to ensure the complete exercise of rights. This equality must preserve the sanctity of the human person rather than an imposition of the will of the state over and above individual rights. State rights and interests must remain cognizant of their original source and be derivative of individual rights collected in an instrument representative of their collective will. Individual rights must be sanctified. Only in preservation, recognition and enforcement of human rights can the Constitution truly be the organic and fundamental law of the land.

It is also unsound for a basic law to secure and guarantee rights on one hand and essentially deny them on the other. These rights must be balanced in a court of law under a process requisite for a determination of breach.

The government cannot justify derogation of fundamental rights due to extraordinary circumstances contained in the Constitution. The government may take action through powers properly issued under the Constitution. Fundamental rights are not bargainable or negotiated in the Constitution, otherwise there would be no need for subordinate laws upon which policy finds expression. Rights are bargained and negotiated outside the Constitution, as legislators look into this instrument for guidance. Alternatively, they may be bargained while looking to the Constitution for direction. Therefore, any government and its operatives functioning under the rule of law must be subjected to this proposition. Those who violate the law tread on this delicate and important protective shield of the individual against state incursions into his or her private life and also against

transgressions of others in society. Breach of norms occurs at various levels in the interaction of society giving rise to functional constitutionalism. These include breaches by organized polities themselves. Whether breach occurs due to individual or state transgressions, the transgressors must be ascertained and sanctioned. As such, the government cannot, as a privilege of the state, constitutionally deprive another person of their natural rights. This premise stems from the fact that fundamental human rights contained in the Constitution of Zambia, as in other sub-Saharan African countries, are superimposed over and above all other constitutional norms and subordinate laws issued under them.¹⁰⁵ Law is for order and peace and not for violence and destruction.

Consequently, no phrase better signifies the unity of individuals than "we the people." The fact that the people themselves have united to create an organization, association or entity to be governed under the rule of law signifies the supremacy of the organic law of the land, namely the Constitution, custom or practice upon which society is founded. In essence, the source of fundamentality of human

¹⁰⁵ See, e.g., articles 3 to 19 on fundamental human rights of the Constitution of Mauritius, 1968 as amended, 1 REV. L. MAURITIUS 5 (1981); articles 11-26 of the Constitution of Liberia on fundamental human rights, BLAUSTEIN & KITTY, *Liberia in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD* 1, 18 (A.P. Blaustein & G.H. Flanz eds. Supp. September 1985); the preamble to the Constitution of Seychelles, 1979 as amended, OLSON & PRICE, *Republic of Seychelles in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD* i-xii & 1, 14 (A.P. Blaustein & G.H. Flanz eds. Supp. July 1983). The Seychelles preamble enumerates fundamental rights in the Constitution. Although this is a good example of commencement of basic rights provisions in the first part of the constitutional document, they are declaratory rather than justiciable. Fundamental human rights are not a declaration of intention as the Seychelles Constitution indicates, but rather the very basis of the constitutional mechanism of the state. For examples on limitations of fundamental human rights by constitutions of sub-Saharan Africa, see generally EWENZUKWA, LESSICK & KEENER, *Nigeria in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD* 1 (eds. A.P. Blaustein & G.H. Flanz eds. Supp. June 1987); JONES, SAWYERR & FERRIS, *Sierra Leone in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD*, 1 (eds. A.P. Blaustein & G.H. Flanz eds. Supp. June 1989); LARKIN & KUKUBO, *Botswana in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD* 1 (eds. A.P. Blaustein & G.H. Flanz eds. Supp. June 1985); BLAUSTEIN & HOLT, *Gambia in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD* 1 (A.P. Blaustein & G.H. Flanz eds. Supp. 1983); BLAUSTEIN, MENEZES & RUSH, *Kenya in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD*, 1 (A.P. Blaustein & G.H. Flanz eds. September 1988); RUSH & HACKWILL, *Zimbabwe in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD*, 1 (A.P. Blaustein & G.H. Flanz eds. Supp. September 1987); KAKOOZA, KIAPI, HOLT & KEENER, *Uganda in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD*, 1 (A.P. Blaustein & G.H. Flanz eds. Supp. September 1986).

rights in the constitution stems from the recognition of "we the people." This phrase is not synonymous exclusively with group rights but is also a fundamental predication of the human aspect of the individual as the basis of state creation.

Conceptually, even the proposition that these constitutions set against themselves is inherently flawed, because there is only one source to predicate enjoyment, namely the organic norms of fundamental human rights. Since fundamental organic norms cannot be used against themselves to prescribe and formulate liability, they must be tested against something else in the Constitution more superior than fundamental human rights. However, there is nothing more fundamental than basic human rights through which the state's rights and interests are founded; therefore, fundamental human rights must serve as the unrestricted source for all other norms.

The current state of emergency leads to excessive use of detention powers. The use of emergency powers must be constrained and narrowly restricted to legitimate applications of national security. However, judicial review of these powers ensures redress for wrongful application. This practice must be vigilantly pursued. It is vital that police and state security forces be made fully cognizant of the value of respect for the human rights tradition. Prisoners' fundamental human rights must be preserved at all times. Police and state security forces constitute societal agents, and in their dealings with the anti-social elements they must articulate and reflect the highest sense of honor and values of the law-abiding elements of society. Therefore, one of the primary reflections of the law enforcement function is to accentuate the positive attributes of compliance to norms of a civil society. As much as penal sanctions are necessary, they must be subordinate to the principles of rehabilitation and the need to prepare a perpetrator for reentry into society.

IV. CONCLUSION

In short, an examination of human rights practices indicates a general respect for human rights in Zambia, but also reveals a consistent disregard of the rights of prisoners and detainees during the course of arrest or interrogations, especially in cases pertaining to national security. Reports of the use of brutal force and other inhuman treatment of prisoners and detainees have been documented.¹⁰⁶ Fur-

¹⁰⁶ See *supra* note 96.

thermore, documented reports of unsanitary conditions, understaffing, and overpopulation in prisons constitute potential or actual grounds of abuse of inmate rights. These must be remedied through citizen awareness programs and the disciplining of offending officers through administration and criminal sanctions, including dismissal from public service and prison terms.

However, no government program concerning the proper interaction between law enforcement agents and the general public can succeed without the respective understanding and appreciation of individual human rights. Since law enforcement agents and the general public can only respect and protect that which they can understand, an educated and aware citizen is a valuable asset. If the level of understanding is minimal, respect will be correspondingly low. Thus, absent public awareness and understanding of the fundamentality of the rights enshrined in the Constitution, no amount of government representation will solve the problem of human rights abuse.

Coincident with public and police awareness of basic human rights is the issue of accessibility and contact between the public institutions and the people for whom they are designed to serve. This accessibility ensures familiarity between the ordinary citizen and government institutions, especially those units in continuous contact with the public. Law abiding members of the community must be free to interact with institutions of state power such as the police and state security forces. The pride of law enforcement must be reflected in the proper balance between the security of public institutions and public accessibility to the same. Only a citizen, unintimidated by the functions of the state, aware of his rights, and free to interact with all the instruments of state power, can informatively and effectively contribute to the development of the national state. Above all, there is no greater challenge to the success of a government than the need to ensure the general education of all segments of society regarding fundamental human rights of the individual.

