

ZAMBIA LAW JOURNAL

Volume 29, 1997

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and Supremacy *C. Anyangwe*

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Published by the University of Zambia Press
P.O. Box 32379
Lusaka, Zambia

ISSN 1027 - 7862

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THE ZAMBIAN CONSTITUTION AND THE PRINCIPLES OF CONSTITUTIONAL AUTOCHTHONY AND SUPREMACY

By
Carlson Anyangwe*

Summary

This article discusses, in relation to the Constitution of the Republic of Zambia, the principles of constitutional autochthony and the supremacy of the constitution. The article contends that the Zambian Constitution is substantively, but probably not procedurally autochthonous. It also argues that the concept of parliamentary sovereignty in the sense of Parliament being 'sovereign' and legislation by it being inviolable has no place under Zambia's Constitution. It further argues that the Constitution, being the supreme law of the land, towers above all norms, persons, authorities and institutions in the State and is unsufferable of any legislation inconsistent with it.

The article opens with an introduction which notes the fact of constitutional instability in the African continent and gives a synopsis of the genesis and drafting style of Zambia's fourth Constitution in thirty-two years. The main body of the article focuses on the following matters: legal continuity; autochthony; legitimacy; the subordination of all persons, institutions and legislation to the Constitution; the juridical status of the preamble and the justiciability of its provisions. By way of conclusion, the article briefly refers to three topical matters that recent African constitutions now appear to be paying closer attention to, namely, chieftaincy, the opposition and alteration of the Constitution.

I

INTRODUCTION

With the next millenium just around the corner, governance in Africa is basically still by trial-and-error methods; accession to political power is still very much by bullet rather than by ballot; single-party hegemony is by no means dead and buried; and governments continue to be unstable, political systems precarious and constitutions transient.

A. Constitutional instability in Africa

Since the 1960s when most countries in Africa achieved independence there has been a remarkable output of national constitutions in almost every state in the continent. The tragedy, though, is that most of these

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constitutions tend to be seriously deficient in quality and in meeting the legitimate expectations of the people for which they are drafted. More often than not, they correspond to the particular taste of succeeding political regimes. Introduced and adopted at fairly short intervals, they are always short-lived. The result is chronic constitutional instability in the continent.

Generally drafted by a political coterie, in a hurry, upon a calculation of exigencies, without meaningful public participation and without even consultation with other major stakeholders, many of these so-called constitutions are often a mere collection of rules of convenience administered by each ephemeral regime. They never really constitute the legal basis of the states themselves. Aware of the precarity of his own power and the fleeting nature of his own regime, each succeeding head of state never bothers to produce a durable constitution. Consequently, the basic law of many an African state has become a precarious document that inevitably perishes with the particular regime which introduced it.

B. Zambia's fourth Constitution in thirty-two years

I. Genesis

In 1991, Zambia reverted to political pluralism, thereby ending a 17-year one-party interregnum that began in 1972. Multiparty democratic elections organised in the country in October 1991 were won by the newly formed Movement for Multiparty Democracy (MMD) political party. The MMD Government came to power pledging, *inter alia*, to put in place a constitution which would be above partisan considerations and reflect high goals of national interest.

On 22 November 1993, in exercise of the powers under the Inquiries Act, Chapter 181 of the Laws of Zambia, the Zambian President, Mr FTJ Chiluba, appointed a commission to review the Constitution of Zambia. The commission, which became known as the Mwanakatwe Constitutional Review Commission, was gazetted under Statutory Instrument No. 151 of 1993 as amended by Statutory Instrument No. 173 of 1993. The technique of a constitutional review commission is not new. Zambia had had constitutional review commissions before: the Chona Commission in 1972 and the Mvunga Commission only as recently as 1990. However, the innovation in the Mwanakatwe Commission lay in the wide scope of its terms of reference. These were sufficiently broad and generous to accommodate all shades of opinion aimed at securing individual liberty and advancing the cause of an open, free and democratic society.

The Commission was granted power to make reference to the constitutions of other countries, that is, to borrow therefrom. The Commission was also granted liberty to make recommendations on the

substance and mode of adoption of the Constitution. These terms of reference were clearly wider than those that had been given by the ousted UNIP Government to either the Chona or Mvunga Commissions. The Mwanakatwe Commission was given this broad mandate to enable it to consider provisions which would help the country create an open, transparent and democratic society and a constitution that would 'stand the test of time.' The Commission travelled extensively throughout Zambia between March and September 1994 and conducted forty-six public sittings in all the nine provinces of the country, attracting a total of roughly 1 000 petitioners.¹

In June 1995, the Commission submitted its Report to Government,² which studied it and published its reaction thereto a few months later³. Then there followed another period of heated public debate on the Report and Government's White Paper on it. Eventually, in February 1996 those of the Commission's recommendations which were pleasing and acceptable to the Government were incorporated in a Bill 'to amend the Constitution of Zambia.' The Bill sailed through the National Assembly without a hitch. It was enacted as the 'Constitution of Zambia (Amendment) Act No.18 of 1996' and was promulgated by the Republican President.

In legal theory, therefore, the Government did not abrogate but merely amended the 1991 Constitution. In reality, only Part III of the 1991 Constitution survived repeal. Every other part, including the Preamble, was repealed and then replaced. In fact, the last four parts of the 1991 Constitution (Parts VI, VII, VIII and IX) were repealed and nine parts (Part VI to XIV) substituted therefor. Thus, whereas the original 1991 Constitution had nine parts, its amended version has fourteen. So why the fiction that the 1991 Constitution is still alive and well? Article 79(3) required and still requires a bill for the alteration of Part III of the Constitution, or of Article 79 itself, to be put to a national referendum. Had the Government touched Part III, the entire newly drafted constitution would have mandatorily been submitted to a nation-wide referendum as indeed the Mwanakatwe Commission had strongly recommended it should. The Government was, however, very averse to the idea of a referendum, pleading 'parliamentary sovereignty' as well as 'legal, logistical, financial and material imperatives' as legal and practical barriers to putting the Constitution to a referendum.⁴ It would, therefore, appear that the 'saving' of Part III was an astute ploy by Government to avoid a

¹ SUMMARY OF THE RECOMMENDATIONS OF THE MWANAKATWE CONSTITUTIONAL REVIEW COMMISSION AND GOVERNMENT REACTION TO THE REPORT, GOVERNMENT PAPER No.1 of 1995, Government Printer, Lusaka, 1995, p. 4.

² REPORT OF THE CONSTITUTIONAL REVIEW COMMISSION, Government Printer, Lusaka, 1995.

³ GOVERNMENT PAPER No.1 of 1995, *supra* note 1.

⁴ *Ibid.*, at 104-106.

referendum.

The promulgation of the Constitution of Zambia (Amendment) Act No.18 of 1996 made that document Zambia's fourth constitution in only thirty-two years of political independence. Of course, this is not a record in Africa as constitutional inflation is typical rather than atypical in the continent. Most African states are on their third or fourth constitution in thirty years or so of political independence; that is, an average of one constitution every ten years. Constitutional instability creates legal and economic uncertainties and partly accounts for the neglect of the rule of law and the low economic investment in many African states.

2. Drafting style

The Constitution of the Republic of Zambia is in English for obvious reasons. Historically, Britain was the parent state of Zambia and so introduced English as the language of public administration, the courts and legislation. Politically, in a country with no common native tongue, English is recognised as playing a positive role as a unifying factor in national integration and consciousness, and in promoting a sense of common belonging and destiny. Legally, Article 1(5) of the Constitution proclaims and establishes English as the official language in the country. One effect of this language provision is that even if the constitution were to be popularised through its translation into local languages so as to promote civic awareness, as many non-governmental organisations are advocating, the authoritative version of the Constitution will remain the one in English issued by the Government Printer.

In terms of draftsmanship, the Constitution faithfully adopts the prolix style of legal drafting for which the common law system is so noted. The document is detailed, long and wordy. It has 139 articles divided into fourteen parts, some parts having just one, two or three articles and some having as many as twenty-nine. One bewildering aspect of the draftsmanship is that here and there one finds details crammed into one long involved sentence or article.⁵ For a document intended 'to stand the test of time' and to be within the reach and comprehension of the ordinary man, its technicality, verbosity and prolixity can be bewildering. The document is essentially a lawyer's document. A tested technique of 'codification' that ensures long life to a constitution is that of conceptualising the ideas sought to be expressed therein at a high level of abstraction and generality. A good example is the 210-year old American Constitution. In 1789 the Americans were a founding democracy and, while drafting their founding constitution, eschewed prolixity as much as they

⁵ For example, articles 11, 16, 18, 23, 27, 65, 71, 75 (2), 77, 78 (4), 88(9), 97(2), and 139.

could and entrusted in their Supreme Court the responsibility of purposefully interpreting the constitution. In other words, constitutional provisions were enunciated in general and clear terms, the solution of particular cases being left to the intelligence of those administering the law.

A constitution is not just law. It is also a *res* and a political document. It is for this reason that constitutional law is the confluence of law and politics. Simple, straightforward and elegant drafting and presentation is desirable. It is the justified common complaint of the common man that the law is too technical, verbose and obscure. There is, therefore, a felt need to simplify the language of the law and to adopt a style of formulation that is briefer and easier to read and understand. The Ethiopian Constitution, for example, uses a drafting technique that is reader-friendly. It studiously avoids cumbersome and tortuous drafting, preferring instead shorter straightforward sentences that are easier to read. Such a constitution is both reader-friendly and user-friendly.

II CONSTITUTIONAL AUTOCHTHONY

In one of its terms of reference, the Constitutional Review Commission was mandated to recommend the best method of adopting the Constitution. After addressing itself to the need for legitimacy and durability of the Constitution and the views of the people, the Commission found it 'unavoidable and compelling to recommend unanimously adoption by a constituent assembly and a national referendum.'⁶ The Government vehemently rejected this recommendation and stood firm by its decision to have the Constitution adopted instead by Parliament, which is heavily dominated by the ruling party. This, at once, triggered a heated and sustained (and at times acrimonious) debate between those who favoured adoption by Parliament and those who favoured adoption by a constituent assembly and a national referendum. The sentiments and emotions ventilated by either side were so strong that it looked as though the Constitution would stand or fall depending on its mode of adoption. Whatever hidden political agendas and calculations may have informed either side, for the jurispudent and constitutionalist the issue was of paramount importance because of the self-evident need to invest the Constitution with popular legitimacy and the character of autochthony.

⁶REPORT OF THE CONSTITUTIONAL REVIEW COMMISSION, 204.

A. Legal continuity in Zambia and the demands of autochthony

1. Legal continuity

At independence in 1964, Zambia's Constitution was of the Westminster model bequeathed by Britain to all her former colonies on the attainment of independence.⁷ It contained the basic human rights provisions, the ancestry of which can be traced through the Universal Declaration of Human Rights back to the American Declaration of Independence and the French Declaration of the Rights of Man and the Citizen, themselves inspired in part by Magna Carta and natural law doctrines. Zambia's 1964 Constitution was also fashioned around the usual governmental trinity, namely, the executive, the legislature and the judicature. It contained the classic parliamentary system with a vice-president responsible before Parliament. The parliamentary system was retained even though Zambia opted, at independence, for an executive President. The 1964 independence Constitution, the 1973 one-party Constitution⁸ and the 1991 multi-party Constitution (including the amendments effected in 1996) are basically the same (except that Zambia is no longer a one-party state) and deviate only on matters which may be considered as *de minimis*.

Thus, in its main features, the 1991 Constitution (even as amended) is structured along the lines of that of 1964 and, in some respects, even reproduces many of its provisions.⁹ It provides for an executive president with wide, though greatly reduced and more circumscribed, powers. The President of the Republic of Zambia is the Head of State and of the Government and the Commander-in-Chief of the Defence Forces.¹⁰ He is a member of the Cabinet and is to that extent, collectively with the rest of the Cabinet, accountable to the National Assembly.¹¹ However, since Zambia's Parliament consists of the President and the National Assembly,¹² the President and his Cabinet, though accountable to the National Assembly, are not responsible before it. The current Constitution, like previous ones, provides for a unicameral legislature, and for fundamental human rights and freedoms which, in general terms, correspond with those contained in both the 1964 and 1973 constitutions.

⁷ D.G. Morgan, *Zambia's One-Party State Constitution*, PUBLIC LAW 42 (1976).

⁸ Simbi Mubako, *Zambia's Single Party Constitution-A Search for Unity and Development*, ZAMBIA LAW JOURNAL 67 [1973]; Morgan, *supra* note 7.

⁹ R.C. Zerem, *A Fresh Start: Zambia's Third Republican Constitution*, 18 COMMONWEALTH LAW BULLETIN 1188 (No. 3, 1992).

¹⁰ Article 33(1).

¹¹ Articles 49(1) and 51.

¹² Cf. the British Parliament which consists of the Commons, Lords and Crown.

Like its predecessors, the current Constitution also contains provisions generally found in the constitutions of other Commonwealth countries: the constitution as supreme law; human rights protection; emergency powers; independence of the judiciary; citizenship; code of conduct; Attorney-General and Director of Public Prosecutions; oaths of office; Auditor-General; Electoral Commission; finance and service commissions; and the Investigator-General (i.e., the ombudsman or, as he is known in South Africa, the Public Protector). Innovations, however, include the declaration of Zambia as a Christian nation,¹³ the provision for a Human Rights Commission,¹⁴ the provision of Directive Principles of State Policy and the Duties of a Citizen,¹⁵ and the constitutionalisation of the Local Government System,¹⁶ and of the Zambia Defence Force and Security Intelligence Service.¹⁷

The provision in the 1973 Constitution for a House of Chiefs was removed in 1991, and provision was instead made for a House of Representatives, the establishment of which was not mandatory but depended on a resolution passed by two-thirds majority of the members of the National Assembly. Neither the House of Chiefs nor the House of Representatives was ever established. This default did not affect the legislative process as neither of these Houses was assigned any legislative functions since they were not considered part of the legislature. The amended 1991 Constitution has resuscitated the ineffective a House of Chiefs of 1973, again, not as a second legislative chamber, but merely as 'an advisory body to the Government on traditional, customary and any other matters referred to it by the President.'¹⁸

It is, therefore, clear that there has been no legal discontinuity in independent Zambia, which is a Republic and continues operating a 'parliamentary' system. No succeeding constitution in a state can be a creation *ex nihilo*. Conceptual continuity and a certain amount of 'carry over' from earlier constitutions is inevitable.

Even in the case of a founding constitution, there can be no question of making *tabula rasa* because it is not possible to make a clean and complete break with past human experience. A constitution is a charter. It sets out the limits of the powers conceded by the ruled to the rulers. It sets out the manner in which a people expects to be governed. So the purpose of any government operating under a proper constitution is to satisfy such core human needs and expectations as the guarantees of life, liberty and pursuit

¹³ Fifth preambular paragraph.

¹⁴ Part XII.

¹⁵ Part IX.

¹⁶ Part VIII.

¹⁷ Part VII.

¹⁸ Article 130. In this, Zambia has followed the example of the Namibian Constitution.

of happiness. Again, since all contemporary, sovereign human communities are organised along the Westphalian-states system, national constitutions tend to be structured around certain basic ideals, concepts and government organs or institutions. This is so because constitution makers have always tapped on the experiences of the people for whom the constitution is meant and the experiences of peoples from other lands similarly circumstanced.

2. *Autochthony*

A country's constitution is autochthonous if it is constitutionally rooted in that country's own native soil and not imported from a foreign power or authorised by a foreign legislature.¹⁹ Strictly speaking, no constitution of any state is or can be substantively autochthonous or home-grown if we take the principle of constitutional autochthony or autarky to mean that the constitutional provisions are wholly rooted in a country's own native soil. The fact is that in constitutionalism the tools of legal science are used. These tools are legal techniques, concepts, ideas, categories and institutions. These are not country-specific. Besides, the very idea of a constitution is universal. So too, the practice and methodology of constitution-making. Therefore, cross-border translocation of constitutional concepts, institutions and structures is inevitable in a world made small by the possibility of fast travel, communication and exchange of information, thanks to advanced technology.

What, however, makes a constitution home-grown is not that its provisions are completely novel and spring from the country's own soil but the fact that it derives its authority, its legitimacy, from the natives, reflects their aspirations and responds to their ethos. It is submitted that a constitution is autochthonous if it is a people's constitution in the sense that the people fully participated in its making and adoption and can identify themselves with it as reflective of their common wish.

B. Legitimacy and the *Zambian Constitution*

Whether a constitution is legitimate or illegitimate (as distinct from the question of legality and illegality) may well depend on the mode of its adoption. This explains why the mode of adoption of the Constitution of the Republic of Zambia 1996, occupied such a central position during the drawn out public debate on the constitution. The informed *Zambian public* was polarised between those in favour of adoption by Parliament and those in favour of adoption by a constituent assembly and a national referendum. At the forefront of the former group was the Government itself, while the latter group was spearheaded by opposition political parties and civic organisations.

¹⁹ K.C. WHEARE, *THE CONSTITUTIONAL STRUCTURE OF THE COMMONWEALTH* 89 (1960).

1. Case for the proponents of adoption by Parliament

In support of the view that Parliament is entitled to adopt the constitution, five arguments were advanced. First, a constitution is law. The legislative power of the Republic vests in Parliament. So Parliament's job is to enact laws, including the law of the constitution. 'The concept of parliamentary sovereignty and its legitimacy in a democracy makes it a betrayal of confidence of the electorate for Parliament to abdicate its authority to legislate.'²⁰

Second, the Parliament of the day enjoys popular legitimacy, having been democratically elected in free and fair competitive elections. Therefore, it verily represents the people of Zambia by whose authority and for whom it acts.

Third, Parliament represents the sovereign will of the people. Any lawful act by Parliament is an expression of the will of the people.

Fourth, a constituent assembly as recommended by the Constitutional Review Commission, would be costly, time-consuming and likely to end with inconclusive results. Legislative power is constitutionally vested in Parliament. It would be irresponsible and inconsistent for Parliament to abdicate this power 'in favour of any subordinate body such as the constituent assembly.'²¹ Moreover, examples of constituent assemblies elsewhere have not been particularly inspiring. For example, it took the constituent assembly of India two years, and the constituent assembly of Pakistan nine years, to complete the process of producing a constitution. In some other cases, the constituent assembly squanders so much time and energy debating various amendments only to return, at the end of several days or weeks, to the original draft by the constitutional drafting committee, with perhaps minor variations. In any event, 'a constituent assembly is a transitional measure to be used where a Parliament is not universally constituted by the majority of citizens as was the case in Namibia and South Africa. The issue of a constituent assembly does not therefore arise in the Zambian situation where a Parliament is constituted through universal adult suffrage.'²²

Fifth, there are 'legal, logistical, financial and material imperatives'²³ that would have to be met before conducting any national referendum as required by Article 79 of the Constitution. The possibility of failure to meet the stringent requirements of Article 79 far outweigh the possibility of success.

These are compelling arguments and the case is indeed a strong one. However, it is perhaps not true, as the fourth argument avers, that a

²⁰ GOVERNMENT PAPER No. 1 of 1995, *supra* note 1 at 104.

²¹ *Ibid.*

²² *Ibid.*, at 106.

²³ *Ibid.*, at 105.

constituent assembly ('national convention' or 'constitutional convention' or 'sovereign national conference' as it is sometimes called) is to be resorted to only when there is constitutional discontinuity or breakdown or where an existing parliament is not universally elected. This may well have been the case in France in 1879. It may well have been the case also in those African states in which the military had taken over, and had subsequently decided to return the country to civilian rule and a new constitutional order.

But that was not the case in America in 1787. America's Constitutional Convention met in Philadelphia for four months, from May to July 1787. The Confederation Congress still existed and in fact was in session in New York the very time the Convention was sitting. In South Africa, there was an unrepresentative Parliament which lacked legitimacy but was legal and it legislated for the whole country even though Blacks were denied the vote. That Parliament continued to function until it was replaced by a legitimate one under a legitimate constitution and government.

The reason for this is simple. Where change is evolutionary rather than revolutionary the state does not tolerate a vacuum in legislative functions. Even in a revolutionary situation the revolutionaries who seize power find they have to resort to legislation by decree or proclamation until the new constitutional order (whatever it may be) is put in place. Otherwise, there will be total breakdown of law and order and the state will collapse.

The point is that there is no legal incompatibility between a constituent assembly (which, by definition, is of limited duration and has limited functions) existing alongside a Parliament. All power resides in the people and so they are free to do what they wish at any given time, subject, of course, to international law. Members of Parliament are not the people but only the representatives or agents of the people. As principal, the sovereign people do not become *functus officio* when they mandate their agents to act on their behalf. A principal can recall an agent, terminate his mandate, enlarge or curtail his mandate, or appoint yet another agent and invest him with authority to carry out a specific duty which will correspondingly diminish the authority of the earlier agent but without necessarily rendering the said earlier agent redundant. In the same way, having elected a Parliament the people are free, if they so wish, to constitute a constituent assembly and charge it with a specific task without thereby rendering Parliament otiose. To deny that the people have a right to do so is to deny that the people are sovereign.

2. Case for the proponents of adoption by a constituent assembly and a national referendum

The case here centred around two basic ideas: the need for a national consensus on the constitution, and the *desideratum* of investing the

constitution with the character of autochthony and popular legitimacy.

Firstly, it was argued, the Government was trying to take unconscionable advantage of its crushing majority in Parliament to rubber-stamp constitutional provisions which were generally unacceptable to the people as a whole. The only way to test the acceptability of the provisions of the draft constitution was to put the document to a national referendum. If the constitution were adopted by Parliament, nothing would prevent another parliamentary majority in the future from tearing the said constitution and rewriting and imposing its own. So constitution-making and the life expectancy of any constitution in Zambia would dangerously hinge on the ebb and flow of uncertain political fortune and of fleeting parliamentary majorities.

Secondly, there is need to have a break in Zambia's legal or constitutional continuity, which stretches back to the Zambia Independence Act 1964, a British statute. Zambia needed a constitution sanctioned by, and deriving its legitimacy, directly from the people of Zambia. The ringing phrase 'we the people of Zambia' must be given concrete meaning. The people of Zambia, whose lawful authority comes from God, needed to meet in a constituent assembly, as a sovereign body, and adopt²⁴ and give to themselves the constitution they have fashioned for themselves. In this way, the constitution would be in truth home-grown, having force of supreme law within Zambia through its own native authority. If the constitution were to be adopted and enacted by the present Parliament, it would have obtained force of law, not through the direct authority of the people, but through that of the said Parliament which derived its authority from the 1991 Constitution, itself adopted by a Parliament which in turn derived its authority from the 1973 Constitution, itself likewise having derived its authority from the 1964 Constitution, a British statute legalised and given its hallmark in Westminster.

This thesis is founded upon principles of enduring importance in constitutionalism and the case is a very persuasive one. But there is room for argument. In the first place, one Parliament cannot bind its successor. A later Parliament would always be at liberty to repeal what its predecessor might have declared or promised. So, the argument about a subsequent parliamentary majority repealing the constitution is not decisive.

In the second place, throughout the whole debate it was not very clear what the office of the perceived constituent assembly would be: to simply deliberate upon the constitution? to take its name literally and adopt and enact the constitution after deliberating upon it? to adopt the constitution (without deliberation) merely for the purpose of legitimising it? to merely review the constitution and pass it over to Parliament for enactment? or to exercise complete power regarding the constitution, including the power to

²⁴ Their approval would constitute enactment of the document.

reject the document and select a drafting subcommittee to proceed to a new draft?

Arguably, a constituent assembly would be more representative of the Zambian people than the National Assembly is. To begin with, in terms of its composition it would be a larger, more inclusive and broad-based body. Furthermore, in terms of legitimacy, participation at elections of members of the constituent assembly was more likely to be massive than the low voter turn out often seen at parliamentary elections. So, what this means is that the constituent assembly was more likely to have a stronger popular mandate to perform its appointed task than the National Assembly would.

In fact the Mwanakatwane Commission recommended that the Constituent Assembly should be composed of the following:

1. One representative elected from each district.
2. All members of Parliament.
3. One representative from each registered political party not represented in Parliament.
4. Two representatives from the Law Association of Zambia.
5. Two representatives from the Economic Association of Zambia.
6. Two representatives from the Local Government Association of Zambia.
7. Three representatives from the Zambia Congress of Trade Unions.
8. Three representatives from the Zambia Federation of Employers.
9. Three representatives from the Zambia Chambers of Commerce and Industry.
10. Five representatives from the Farmers Union.
11. Two chiefs from each province elected from the Chiefs Council.
12. Eight representatives elected from the Trade Unions.
13. Five elected representative from Women's Organisations.
14. Ten eminent persons appointed by the President.
15. Six representatives from religious organisations (two from Christian Council of Zambia, two from Zambia Episcopal Conference, two from Evangelical Fellowship of Zambia).
16. Two representatives from the Press Association of Zambia.
17. One representative elected from each University.
18. Two representatives elected from the Students Unions.
19. Two representatives elected from the Zambia Council of the Blind and Handicapped.
20. One representative from the Hindu Association of Zambia.
21. One representative from the Islamic Association of Zambia.
22. Two representatives from non-governmental organisations.
23. Nine representatives from the provinces (one representative elected from each province).²⁵

²⁵ Constitutional Review Commission: Mwanakatwe Commission Report, Chapter 27.

A constituent assembly conceived as a sovereign body would have complete authority to deliberate upon and enact the constitution, for it would be sovereign in its own right. It would be dependent on no outside body to authorise its actions, either before or after its labours are concluded. The Head of State's signature to the enacted or adopted constitution would not be regarded as assent to complete the process of enactment, because the process would be the monopoly of the constituent assembly. Rather, the signature would be considered as a mere authentication or certification that the document he signs is that which in fact the constituent assembly had passed. The certification could indeed be made by the chairperson of the constituent assembly, rather than the Republican President. This happened in those Francophonic states in Africa which convened a 'Sovereign National Conference' to soft-cushion their transition from authoritarianism to democratisation.

In the third place, although the genealogy of Zambian constitutions may be traced to the seed-bed at Westminster, each constitution obtained force of law through consent, acceptance or acquiescence by the people of Zambia, each took root in Zambian soil and owed its life to Zambia. Thus, Parliament's enactment of the constitution merely deprived the document of the character of procedural and not substantive autochthony.

Even so, the nationalistic legalist would reply that national sovereignty and pride dictate that the constitution be both procedurally and substantively autochthonous. He would even refuse to concede the point about substantive autochthony by rightly pointing to the 'enacting formula' used by the constitution itself in the preamble. He would submit that, had there been a desire to make a clean break with past constitutions of the country, the current Constitution would have been adopted directly by the people themselves.

But clearly, the Government never intended to cause a break in Zambia's constitutional history. The Constitutional Review Commission was enjoined in one of its terms of reference to 'take into account the 1964 Republican Constitution and other previous constitutions.' The preamble of the Constitution states, 'We, the people of Zambia by our representatives, assembled in our Parliament, ... Do hereby enact and give to ourselves this Constitution.' This is a fantastic claim that the Constitution was enacted by the people. The fact is that the people were never asked to pronounce themselves on the final draft of the Constitution. They did not actually enact it, though under constitutional law theory they are deemed to have done so through their representatives in their Parliament assembled. In spite of the emphatic 'our' in the quoted sentence, it is a fiction, of course, that the people of Zambia enacted the Constitution. It follows that the fact that the Constitution itself declares at the outset that the people of Zambia did enact the document, is in law, a

mere flourish, for the Constitution was enacted when the final vote was taken in Parliament and not in any nation-wide referendum. The process of enactment was completed by the Presidential assent.

III THE CONSTITUTION AS SUPREME LAW

The Constitution of the Republic of Zambia is the supreme law of Zambia and binds all persons and all organs of the State at all levels. It is so expressly declared in clauses (3) and (4) of Article 1 of the Constitution. This concept of the Constitution as the supreme law of the land entails the subordination of all persons, organs and legislation in the country to the constitution of the State. The principle of constitutional supremacy also implies the existence of some independent and impartial organ that ensures respect of the Constitution and the Constitutional order.

A. Subordination of all persons and organs to the constitution

Constitutions express the 'positivisation' of higher values, the mythical social contract between the ruled and the rulers. They contain a selection of the most important legal rules that govern the government and usually have some priority over other legal rules. They create, define and confine the various organs or institutions of the state. It follows that every individual, be he so high, and every organ of government, whether legislative, executive or judicial, is subordinate to the Constitution. But what about the people as a whole, are they subordinate to the constitution? To what extent, if any, is Parliament or the Republican President subordinate to the Constitution?

1. The People

The Zambian Constitution declares that 'all power resides in the people.'²⁶ This means the source of all legal authority is the people of Zambia who, moreover, are '[d]etermined to uphold and exercise [their] inherent and inviolable right as a people to decide, appoint and proclaim the means and style to govern [themselves].'²⁷ Acting through their representatives assembled in their Parliament, they enacted the Constitution and gave it to themselves. The Constitution is, therefore, their creation, their 'baby'. They can, therefore, be expected to respect and follow the letter and the spirit of the basic law, their own craft.

But it does not follow that they thereby become a slave to the Constitution and cannot alter it. Since the people are sovereign, they do not stand in a subordinate position in relation to the Constitution. Their

²⁶ Article 1(2).

²⁷ Second preambular paragraph.

hands are not in any way fettered. When it is said that the people are sovereign, it means they recognise no higher earthly authority above them. The supreme authority in the state is the people and not the Constitution. For, be it noted, the people are not a creation of the Constitution. It is rather the Constitution which is a creation of the people. Accordingly, the people are free to alter or overthrow the Constitution at any time they wish and put a new one in its place. Now, the questions why the people are sovereign and who made them so properly belong to history, political philosophy, or ethics, not law and so need not detain us.

2. Parliament

Parliament is a creature of the Constitution, at least the founding constitution of a state. It is the Constitution that says there shall be a Parliament, and legislative power shall vest in it. It is the Constitution that establishes Parliament and delineates the scope and manner of its law-making powers. Parliament's primary task is to make law for peace, order and good government. But it may not pass any Act purporting to derogate from constitutional provisions. It may not alter the Constitution otherwise than in accordance with the stringent amendment procedure laid down in it for doing so.²⁸ The principle of separation of powers which permeates the Constitution forbids one arm of government to trespass on the sphere of another. Parliament may not, therefore, usurp executive or judicial powers. The powers exercisable by Parliament are not self-vested, and such limitations as are imposed upon it are not self-imposed.

The constitutional supremacy clause asserts the logical priority of the Constitution over the institutions which it has created and whose nature and power it describes and determines. If, in addition to being legal, the Constitution is invested with the quality of popular legitimacy through its adoption directly by the people in a referendum, its supremacy becomes additionally based upon its origin or source, which is the sovereign people.

A nagging question, in view of the passionate debate on the mode of adoption of the Constitution, is whether Zambia's Parliament is a representative assembly or the supreme law-making body. If it is the former, then it has no monopoly over legislation. In particular, it cannot adopt the country's grundnorm but must refer to the people who, being sovereign, have the 'inherent and inviolable right as a people to decide, appoint and proclaim the means and style to govern themselves.'²⁹ The matter is, however, obfuscated by the claim in preambular paragraph 1 of the

²⁸ Article 79.

²⁹ Second preambular paragraph.

Constitution that the people of Zambia enacted the Constitution by their representatives assembled in their Parliament. Furthermore, Members of Parliament see and describe themselves as the people's representatives though a number of them are in Parliament not through the ballot box but by Presidential appointment.³⁰ Is this evidence that Zambia's Parliament is a representative assembly? A parliament may function either bicamerally or unicamerally in accordance with the requirements of the country's constitution. Zambia has a unicameral Parliament, which consists of the President of the Republic and the National Assembly. It is suggested that it is only the National Assembly that may be viewed as a representative body. Separately, neither the President nor the Assembly has the plenitude of legislative power as that power is vested in both as Parliament.

Indeed, pursuant to Article 62 of the Constitution, 'the legislative power of the Republic of Zambia shall vest in Parliament which shall consist of the President and the National Assembly.' Parliament is deemed to have passed an Act when the consent of both two of these elements is obtained. If the proper procedure³¹ is not followed, or if the President withholds his assent and returns the Bill to the National Assembly for reconsideration,³² no Act of Parliament has been passed. Legislative power in Zambia is, therefore, exercised by the National Assembly and the Republican President.³³ The National Assembly passes bills and the President assents to them.³⁴ By assenting to a bill passed by the National Assembly, the President participates in and completes the process of enactment of the Bill.

The President may, of course, withhold his assent to a Bill by sending it back to the Assembly for reconsideration. But the Assembly may override this power of disallowance by passing the Bill, with or without amendment, on a vote of not less than two-thirds of all the members of the National Assembly,³⁵ in which case the President must either assent to the Bill or else dissolve 'Parliament' and go to the country.³⁶ It is not clear why it is Parliament that is dissolved rather than the National Assembly. If the reference to Parliament in Article 78(4) is by deliberate intention rather than by inadvertence it means that a dissolution under this clause automatically

³⁰ Article 63(1)(b) of the Constitution empowers the President to nominate eight MPs.

³¹ Article 78(2)(4).

³² Article 78(3)(4).

³³ Moreover, the President may, at any time, attend and address the National Assembly and may also send messages to it to be read by the Vice-President or a Minister designated by the President: Article 82(1)(2). He may at any time summon a meeting of the National Assembly, prorogue Parliament or dissolve the National Assembly: Article 88(3)(5)(6).

³⁴ Article 78(1).

³⁵ Article 78(4).

³⁶ *Ibid.*

entails the calling of Presidential elections as well since the President is one element of Parliament. Yet, Article 88(6)(c) talks of the dissolution of the National Assembly rather than of Parliament, such dissolution entailing fresh presidential and general elections under clause (7) of that Article. Articles 78(4) and 88(7) are designed as a constraint in dissolving the National Assembly since, on dissolution, a new presidential election must also be held, the President's term depending directly on the life of the Assembly.

It is clear from the express words or necessary intent of Article 62 that the Zambian Parliament is conceived as the supreme law-making body of the land, recognising no higher legislative organ. When it is said that the legislative power of the Republic vests in Parliament, it means Parliament monopolises the power to make all laws; it has the exclusive competence to do so; and, therefore, no subject-matter may be reserved for legislation by any other organ of the state to the exclusion of Parliament. In other words, Parliament is king in the law-making sphere of governmental function. It is in this sense that we speak of parliamentary sovereignty.

Parliamentary sovereignty does not, however, mean a negation or denial of popular sovereignty which, in any event, is analytically superordinate to the former type of sovereignty. All power lies with the people. All state organs are theirs, created by themselves in the Fundamental Law enacted by and given to themselves. They alone have the sovereign right to effect a fundamental or radical change in the Constitution. They can do so peacefully by referendum as provided in the Constitution itself. Or they can do so by a revolutionary overthrow of the existing Constitutional order as dictated by the law of nature.

Parliamentary sovereignty does not mean that it is Parliament alone that must enact each and every single piece of legislation in the country. Parliament has neither the time nor the resources to occupy itself with *minutiae*. Experience and learning have taught that it makes for good government for Parliament to delegate some amount of its legislative power to certain persons and authorities to make subordinate legislation by way of statutory instruments. Thus, in spite of its express terms, Article 62 does not prevent Parliament from conferring on any person or authority power to make statutory instruments.³⁷ Evidently, the expediency, scope and duration of such delegation of legislative power is determined by Parliament itself as the primary law-making organ of the state. Discretionary delegation by Parliament of some of its legislative competence does not do violence to, but, in fact, underscores and emphasises, Parliament's legislative supremacy. What is inconsistent with Parliamentary supremacy is the total abdication by Parliament of its legislative powers or the essence thereof.

³⁷ Article 88(1).

3. *The President of the Republic*

It had long been recognised that the concentration of all State powers in one person or organ is dangerous for the health of the nation and the liberty of the individual. The constitutional theory of separation of powers which Baron de Montesquieu expounded was, therefore, designed to separate the different functions of government so as to promote efficiency in the State and avoid the tyranny that would inexorably result in the concentration of all the three principal governmental functions in the hands of one organ or person. The legislative, executive and judicial functions of government are functionally separated and vested in different organs. Zambia's Constitution has no explicit statement on separation of powers. This 'omission' is of no legal significance because the principle is considered axiomatic and is subsumed in the structure of the Constitution and the constitutional order of the country.

The principle of separation of powers notwithstanding, the reality of the pre-eminent position and role of the Republican President as the moving force in the State must be acknowledged. After all, equality of the three arms of government only means equality of status (that is, no subordination of any one arm to another) and not equality of stature, for each branch of government differs in power and potential. Elected directly by the people as a whole, the President is Head of State, personifies the nation and is answerable for the conduct of all State affairs. He is the national manager or overseer under whose control and direction, more or less, the public affairs of the State are carried out. He exercises supervisory oversight over all the departments of government. He is 'the father of the nation,' to use a common expression, beloved by those who crave for a father figure image.

Constitutionally, the powers of the African President are so tremendous that the office of President has the appearance of a fourth governmental organ. He is head of Government, head of State, head of the political party in power, and commander-in-chief of the defence forces; he has war powers, emergency powers, and treaty-making powers; he has power to initiate laws, to appoint and terminate appointments to major public offices, to constitute and abolish offices, to nominate a limited number of legislators, to assent to and promulgate laws, to appoint when each session of Parliament shall commence, to prorogue the National Assembly, and to dissolve it; he presides at Cabinet meetings; confers honours and exercises the prerogative of mercy.³⁸ Thus, the African President enjoys 'the strengths of the British Prime Minister and the United States President without the weaknesses of either.'³⁹

³⁸ See for example, *Zambian Constitution*, Articles 33(1), 29(1), 30, 31, 44, 46, 47, 49, 50, 59, 60, 61, 68, 78 and 88.

³⁹ Morgan, *supra* note 7 at 42.

With such enormous powers, checked only by the process of judicial review timidly undertaken by a timid judiciary, by the rare political control device of impeachment and by the uncertain adherence to the democratic value of periodical free and fair elections, it comes as no surprise that some presidents tend to see themselves as the source of all authority in the state and as standing above the constitution which, in any event, they regard as their personal product to be used only when it suits them to do so. This is the sort of executive that has been described as 'caesaristic, plebiscitarian,' that is to say, an executive once elected, sees itself as empowered to govern the country as it deems fit.

But that is politics. If we forget politics and remember only legalisms we realise that the President is necessarily subordinate to the constitution. It is the constitution that creates the office of President, makes the occupant of that office President and vests him with presidential powers. In theory of law the subjection of the President to the basic law is without doubt, and he is expected to govern according to the letter and spirit of the constitution.

B. Subordination of all legislation to the Constitution

The other limb of the concept of constitutional supremacy is that the constitution is the initial, omnipotent and paramount norm from which all other internal norms derive their validity. The constitution is the highest law in the hierarchy of domestic norms and prevails in the event of a clash with any domestic legislation.⁴⁰ In fact the actions and activities of all state institutions and authorities and of all individuals must conform to the constitution or else be nullified by the courts on the ground of

⁴⁰ Zambia's Constitution is conspicuously silent on the place of international law in Zambia's municipal law. The President of course has treaty-making powers. But does an international instrument to which Zambia is a State Party bind Zambia both internationally and domestically or only internationally? Zambia is a common law jurisdiction. It seems, therefore, reasonable to hypothesise that its practice follows that of most common law countries, which is that customary international law forms part of municipal law and that an Act of Parliament is necessary to transform a treaty into municipal law. This is the dualist approach according to which an Act of Parliament is required to integrate a binding international treaty into the domestic legal system if it is intended that the said treaty should also have domestic application. In the absence of such integration, the treaty, though binding on Zambia at the international level, it has no internal applicability. When a treaty has thus been integrated in the domestic legal system, how does it stand in regard to other municipal norms? Given that Zambia's Constitution is the supreme law of the land, a treaty having internal force stands in a position subordinate to the constitution but coordinates with legislation by Parliament. However, although treaty and statute stand on a footing of equality, a new treaty prevails over an earlier statute and a new statute prevails over an earlier treaty. This result is simply the application of the legal maxim, '*lex posterior derogat priori*', that is, a later law prevails over an earlier law.

unconstitutionality. Since a constitution creates, defines and confines the institutions of a State, its provisions rank higher than those of any (other) internal legislation. In order to make the principle of constitutional supremacy meaningful in practice, guardianship of the constitution and constitutional order is entrusted to the judiciary.

1. Supremacy of the constitution or of legislation by Parliament?

The doctrine of the supremacy of legislation by or under the authority of Parliament is likely to be encountered especially in a country without a codified constitution and operating a parliamentary system of government. There, legislation by parliament is considered the highest norm in the land because Parliament itself is considered the highest authority in the country, the recognised 'sovereign'. If the country has a written constitution, it certainly would have been adopted and enacted by Parliament and would have been published as a schedule to an Act of Parliament providing for the said constitution. The constitution is therefore conceived as a mere Act of Parliament which, like all other such Acts, is alterable by ordinary legislative process when it pleases the legislature to alter it.

In this connection, Britain comes to mind as a country which operates a constitutional system based on the doctrine of parliamentary sovereignty. The British Parliament is sovereign; it has no rival; its legal competence is unlimited.⁴¹ Any law that has been enacted by it and has received the routine approval⁴² of the Crown becomes the law of the land and is *ipso facto* beyond overturning by the British courts which, though revered and esteemed, are not cast in the role of ultimate guardians of the constitution. The courts will never question the authority of an Act of Parliament. But they will, if called upon to do so, question the competence of any other person or body and will ascertain the limits of his or its powers. They possess the authority to interpret legislation, particularly administrative action based upon it. But they may not strike down legislation by Parliament itself. The greatest of all constitutional conventions in Britain is that Parliament must be obeyed. It is of course fallible. But it can be trusted to rectify and cure its own mistakes.

So, the British continue to have faith and confidence in their representatives assembled in their Parliament. Historically, Britain's adherence to the idea of the inviolability of an Act of Parliament took root only when the Revolution of 1688 established the supremacy of Parliament and it, therefore, became possible for it to alter the common law. Up to then the notion of the ultimate supremacy of the common law persisted and the redoubtable Sir Edward Coke was able to hold in one case⁴³ that the courts could declare an Act of Parliament null and void if it violated the common

⁴¹ P.S. JAMES, *INTRODUCTION TO ENGLISH LAW* 156 and 163 (1962); H. ABRAHAM, *THE JUDICIAL PROCESS* 294-95 (1968).

⁴² The royal assent to an Act of Parliament is, by convention, never refused.

⁴³ *Dr Bonham's Case* (1610), 8 Co. 188.

law of England.

Now, in most countries with a written constitution, the provisions of the constitution are superior to and higher than all other domestic legal norms. The courts or some tribunal specially constituted for that purpose will, if called upon to do so, pronounce on the constitutionality of any law by the legislature or the executive, and will declare it invalid if it is not in conformity with the constitution. Thus, in the United States of America, for example, the Supreme Court will hold as unconstitutional and as of no effect, any statute passed by a legislature (even by Congress) which violates the US Constitution.

Where, as in Zambia, there is a written constitution and it is declared to be the supreme law of the land there is no scope at all for argument that the constitution is not superior to and higher than legislation by Parliament. Enactments by Parliament, and, *a fortiori*, measures passed pursuant to an enabling Act, must stand or fall according as they are in conformity with the constitution or not. For one thing, Parliament owes its existence and powers to the constitution and the authority of the law it makes, is derived from the Constitution, itself traceable to the people in whom all power resides. Clauses (3) and (4) of Article 1 of the Constitution clearly state that if any other law is inconsistent with the Constitution that other law shall, to the extent of the inconsistency, be void; and that the Constitution binds all persons in the Republic and all legislative, executive and judicial organs of the state at all levels.

In Zambia's constitutional system therefore, the concept of parliamentary sovereignty, (as this term is understood in British constitutional law), and its concomitant doctrine of the inviolability of legislation by Parliament, have no place. All power in Zambia resides in the people. This means that all public institutions and all officials charged with the conduct of public affairs derive their power and authority ultimately from the people. The people of Zambia have given to themselves an omnipotent and omnipresent supreme norm against which the validity of all other domestic norms is determined.

The legal competence of Zambia's Parliament is not unlimited. As a constitution is a device for limiting government, it necessarily contains prescriptions restrictive of the powers of the legislature as well. So there are certain things Zambia's Parliament cannot do. Being the supreme law of the land, the Constitution is unalterable by normal legislative process. Any intended alteration must be effected in the manner laid down in the Constitution itself. Besides, it is doubtful that Parliament has the constituent power of reworking and rewriting the provision of the Constitution.⁴⁴ Parliament cannot usurp the powers of another governmental organ. It cannot remove a single word from Part III of the

⁴⁴ Except, of course, if it is transformed into, or made part of, a constituent assembly.

Constitution⁴⁵ without the sanction of the people obtained through a nation-wide referendum as prescribed by the Constitution. Because the Constitution does not suffer laws inconsistent with it, legislation by Zambia's Parliament may be questioned and invalidated by the courts if it is violative of the Constitution.⁴⁶

2. Judicial review: the imperium of judges?

Judicial review is the power of the court to invalidate acts of legislators and executives which, in the court's view, violate the constitution. It may be 'curative' or 'preventive'. It is 'curative' if the court is invited to intervene after the event, as when the court is called upon to invalidate a piece of legislation already in force. It is 'preventive' if the court is invited to act pre-emptively and stop suggested legislation of dubious constitutionality, as when the court is invited to pronounce on the legality or constitutionality of an inchoate piece of legislation. 'Curative judicial review' is more prevalent and is well established in many jurisdictions. But 'preventive judicial review' is still new and is only slowly and grudgingly being accepted.

The principle of constitutional supremacy presupposes judicial control of the constitutionality of laws; a peace-maker in matters of constitutional checks. In other words, the principle by necessary implication enjoins the courts to ensure that all other laws are in conformity with the Constitution. Of course, the court is not self-activating and will only act when 'moved'; but once seised it will not be loathe to exercise this jurisdiction. There is no express constitutional vesting of the power to review the constitutionality of legislation in the Zambian courts. But that power is reasonably deducible from the following constitutional provisions: Articles 1(3), 27(1)(a)(2)(3), 28 and 94(1).

Article 1(3) provides that any other law that is inconsistent with the Constitution shall be void to the extent of the inconsistency. This assumes the existence of some organ with power to decide whether the impugned law is inconsistent with the Constitution or not and, if it is, to invalidate it entirely or only the inconsistent parts. The organs eminently and traditionally qualified for this task are the courts.

Under Article 28(1), the High Court has jurisdiction to hear and determine any application by any person alleging that any of the constitutional provisions relating to the protection of human rights 'has been, is being or is likely to be contravened in relation to him.' In this connection, the Court has power to make such orders, issue such writs and

⁴⁵ Part III deals with the protection of the fundamental rights and freedoms of the individual.

⁴⁶ Article 94(1).

give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the human rights provisions. Since the envisaged protected human rights are entrenched in the Constitution, it follows that human rights litigation is part of constitutional adjudication.

Besides, Article 94(1) vests in the High Court 'unlimited and original jurisdiction to hear and determine any civil or criminal proceedings under any law.' The only proceedings accepted from the jurisdiction of the High Court are those in which the Industrial Relations Court has exclusive jurisdiction under the Industrial and Labour Relations Act. Constitutional adjudication falls within the term 'civil proceedings' and the Constitution is evidently envisaged in the expression 'any law'. This interpretation is consistent with what exists in many common law jurisdictions: judicial review of the constitutionality of laws is by the ordinary courts and under the forms of ordinary litigation.

Article 27 deals with what may be called preventive judicial review of the constitutionality of legislation. Access to this form of judicial review is however confined to members of the National Assembly. Any group of at least thirty members of the Assembly may make a request for a report on a bill⁴⁷ or statutory instrument.⁴⁸ The Chief Justice will then appoint a tribunal consisting of two judges to report to the President and to the Speaker on the constitutionality of the impugned bill or statutory instrument. A report by the tribunal that any provision would be or is inconsistent with the Constitution must state the grounds upon which the tribunal has reached that conclusion. Unfortunately, the tribunal is not empowered to invalidate the inchoate Act of Parliament or the published statutory instrument. It is up to the authorities concerned to withdraw the constitutionally inconsistent instrument, maintain it, or recast it.

The Zambian constitution-giver was perhaps faced with one dilemma that continues to haunt a democracy: should the power to veto legislation, an expression of the sovereign will, be given to people who are not themselves responsible to the electorate? The court, as the final interpreter of the constitution, wields immense political power. When interpreting ordinary legislation the court sets out on a voyage to discover the intention of Parliament. But Constitutional litigation involves issues in which the constitution-giver's point of view is only one aspect of the judgment. The court's interpretation of the Constitution prevails over the presumed intention of the constitution-giver and over the expectations of

⁴⁷ The request is made to the Speaker and must be within three days after the final reading of the bill in the Assembly.

⁴⁸ The request in this case is made to the authority having power to make the instrument. The request must be made within fourteen days of the publication of the instrument in the *Gazette*.

any given Parliament. It was the venerable Justice Oliver Wendell Holmes who aptly remarked that whoever has absolute authority to interpret any written or spoken law, is the law-giver, for all intents and purposes, and not the person who first wrote or spoke them.

Judicial review is the most important and continuing relationship that a court can have with other political institutions in the state. It remains an enigmatic institution. It presents an exciting and perplexing encounter between legislator and judge, between statute and judgment. While it can only operate in a democratic society, it sometimes frustrates the will of the majority. Because of this apparent contradiction between representative democracy and judicial review, most civil law countries tend to regard judicial review, as an imperium of judges⁴⁹ and as a distortion of their 'proper' role. Hence, although all civil law countries have a written constitution, not all recognise judicial review and not all have an institution for bona fide judicial review. Instead, they have some special constitutional tribunal. But this so-called constitutional court is usually found outside or along side the ordinary court structure; access to it is not open to private individuals or groups, and, in some countries, can only pronounce on an act prior to its promulgation as law.

C. Juridical status of the preamble and the justiciability of its provisions

A constitutional preamble⁵⁰ is a covenant of trust between the government and the citizens prefacing the body of the constitution. It records the vision which the constitution framers have of the Republic. It sets out the basis and purpose of government. It holds out critical promises expressed in terms of pledges, declarations, convictions and resolutions.

A seven-paragraph preamble prefaces Zambia's Constitution. Among the promises of the Preamble are the declaration of Zambia as 'a Christian nation,' the solemn resolve 'to maintain Zambia as a Sovereign Democratic Republic,' the further resolve that Zambia 'shall forever remain a unitary, indivisible, multi-party and democratic sovereign state' and the still further resolve 'to uphold the values of democracy, transparency, accountability and good governance.' The preamble, like the body of the Constitution, is expressed as made by the People of Zambia.

What is the legal effect of these preambular statements? Are they legally binding or merely hortatory declarations? In short, do they confer

⁴⁹ For example, the French perception of judicial review is that it is a system of 'gouvernement des juges', that is, government by judges.

⁵⁰ The preamble to an Act of Parliament consists of recitals or statements set out in the beginning of the Act showing the reason for the statute.

any legal rights and are they justiciable? The answer to this question depends on whether one considers the constitution as just law or as just a political charter.

1. The constitution as law

The declaration that the Constitution is the supreme law of the land should logically lead to the inescapable conclusion that all its provisions, including the preambular ones, are justiciable since the document itself is law, unless judicial intervention is validly excluded by the Constitution itself.

2. The constitution as a political charter

However, an arguable case may be made for the view that a constitution ought not to be considered as law. After all, it is only a mode of organising a state and its government; a body of fundamental principles according to which a state is structured. It is, therefore, a document which is essentially political in character. Its promises, authority and sanction sound in the realm of politics. Indeed, this was the original meaning and effect of a constitution. Today, there are some states which still consider the appropriate function of a constitution to be a political charter of government, consisting largely of declarations of objectives or directive principles and a description of the organs in terms that import no enforceable legal restraints.⁵¹ Such a constitution is said to have the character of maxims of political morality, and for that reason is said to have no more than a political existence. Its provisions are political not legal, serving merely to exhort, to direct and inspire governmental action, and to bestow upon it the stamp of legitimacy.

3. The constitution as a politico-legal document

It is evidently desirable that a constitution should have the force of law. But that should not be its sole character. While having the force of law a constitution should be flexible enough to accommodate needed political commands, which are legal and yet non-justiciable. 'There is no inconsistency in a command being legal and yet not judicially enforceable. Judicial enforcement is not an inexorable criterion of lawness. A provision in a constitution or statute is not less legal because it is not judicially enforceable.'⁵²

A common feature of contemporary constitutions is that they invariably contain an admixture of justiciable and non-justiciable provisions. Like the French say, preambular provisions are matters '*aux confins du politique et du juridique*.' In some cases the preamble contains only non-justiciable provisions while the

⁵¹ B.O. NWABUEZE, 'JUDICIALISM IN COMMONWEALTH AFRICA 30 (1977).

⁵² *Ibid.*, at 25.

body of the constitution consists entirely of justiciable provisions. In other cases, there is no such clear cut demarcation: justiciable and non-justiciable provisions can be found in both the body of the constitution and in the preamble. For example, in the *Zambian Constitution*, the directive principles of state policy and the duties of a citizen are expressly declared to be non-justiciable even though they are in the main body of the Constitution.⁵³

So, not all the relations created by, or arising from, the Constitution are of such a nature as to be enforceable by the courts. Some are of a purely political nature, and, therefore, unsuitable for judicial enforcement; their violation is non-justiciable. They are known in the United States as 'political questions'. They are so called because, though legal, the duty they impose is basically political in nature, and their observance depends upon the fidelity of the executive, and legislative action, and ultimately on the vigilance of the people in exercising their political rights.⁵⁴ A constitution that is just law would be a boring, dreary and technical document. To avoid this result, modern constitutions while having the force of law, invariably enunciate political objectives which are either affirmed in the body of the document itself or in a preamble outside the enacted portion of the constitution or in both portions.

4. Utility of a preamble

Traditionally, the device of a preamble has always been used to state general principles of law and to affirm fundamental political objectives which fall within the realm of 'political questions' and, consequently, not justiciable. But this does not mean that everything stated in the preamble automatically falls outside judicial enforcement. The preamble is part and parcel of the constitution which is itself law and therefore enforceable. So, the preamble is tainted with the character of lawness. But it may, and often does, contain provisions which are too general, imprecise and vague to be capable of legal enforcement. Such provisions, easy to identify, are in truth nothing but a piece of political manifesto. Even so, they often serve as a guide to all citizens, authorities and organs of the state in applying or interpreting the constitution or any other legislation.

The preamble may also contain provisions that are sufficiently precise and have the character of legal prescriptions or ascertainable rights. Their justiciability is readily admitted and presents no difficulty. The juridical status of the preamble, therefore, is that it has force of law like the constitution itself. Preambular provisions are binding and may legitimately be invoked in an appropriate case as the basis for deciding a case. Some preambular provisions are justiciable; others serve as a guide to the interpretation or application of the constitution and other laws. The

⁵³ Article 111.

⁵⁴ M. Finkelstein, *Judicial Self-limitation*, 37 HARV. L. REV. 338 at 344-345 (1923).

preamble is, therefore, not an unenforceable part of the constitution. In invalidating segregation in American public schools the US Supreme Court founded its decision in *Brown v. Board of Education of Topeka*⁵⁵ partly on the preamble to the Constitution of the United States. The court said: '[T]here was a problem of inequality in our midst and ... we the people had to remedy it if the nation was to live up to the preamble's promise of equal justice for all ... If the preamble's compact with the people was to be honoured, that practice had to end.'

There are two fundamental political affirmations made in the preamble to the Zambian Constitution. They deserve at least a passing comment. There is, first, the declaration that Zambia is 'a Christian nation' and secondly, the resolve that Zambia 'shall forever remain a unitary state'. For reasons which are not altogether clear, except perhaps for unnecessary emphasis, the second pronouncement is textually repeated in Article 1(1). This appears to be Government's reply to autonomist ripples especially in Barotseland. If it is, it is unnecessary and absurd to cast it in terms of a form of state that must endure until the end of time. First, one Parliament cannot fetter the hands of its successor. Secondly, sovereign people are always free, at any given time in the country's history, to provide for themselves a form of state that meets the exigencies of the times. Consequently, this generation's claim to bind future generations forever to a particular form of state is a vaulting ambition, unrealistic and ineffective. The power of a sovereign people is in its own nature illimitable and it is absurd to attempt to do so. The fear of centrifugal forces in the country may be legitimate. But unitarism, with the fallacious equation of unitary to unity which that system implies, is not a panacea. The examples of Cameroon, Somalia, Sudan and Congo Kinshasa show that unitarism does not necessarily produce a united and strong state, but may instead bring about a fragmented, weak, wasteful, lethargic and impoverished state with centrifugal forces actively at work.

The 'Christian nation' clause is undoubtedly the most controversial provision in the preamble. It appears to be antinomical to Articles 19 and 20 which guarantee freedom of conscience and expression. A Christian nation must necessarily be unsufferable of any practice, teaching or philosophy that runs counter to Christian doctrines. Therein lies the danger. History instructs us that whenever there has been a combination of state and religion, there has always been intolerance in matters religious and philosophical. Admittedly, the Christian nation clause does not explicitly establish a state religion and does not expressly merge religion with politics. Religion is seemingly still subject to politics. Caesar and God will still continue to be given what is respectively theirs. But a Christian nation or republic is one that identifies itself with, seeks to conduct itself

⁵⁵ [1954] 347 US 483.

according to, and sets itself as a defender of the Christian faith, just as an Islamic nation or republic identifies itself with, strives to follow the tenets of, and defends, Islam. A country that identifies itself so closely with a particular religion may well permit other faiths to co-exist with the chosen one but then not on a footing of equality of status. Such other religions are merely tolerated and then only to the extent that their preachings do not run counter to, or subvert those of the elected faith.

So, at a time when Islamic theocracies are at last facing the inescapable challenges of secularisation, here in Zambia secularisation, which predates independence, has in effect been enervated. Christianity has been put on a pedestal. Arguably, the Holy Bible will become, willy-nilly, the implicit constitution of the land, that is to say, the main frame of reference for the Constitution and laws of Zambia. This will undoubtedly involve the canonical moralisation of public affairs, and of political and social relationships. Already, the declaration of Zambia as a Christian nation was quickly followed by the creation at State House of a 'religious desk,' no doubt an incipient Ministry of Christian Religious Affairs, headed by a gentleman under holy orders. The 'Christian nation' clause certainly goes far beyond the ordinary invocation of God found in the preambular provisions of the constitutions of many states. It may well not constitute the establishment of Christianity as the business of the state. But it does constitute the establishment of that religion as the concern of the state.⁵⁶ The bottom line is that the nature and extent of this doctrine of Christian nation is obscure and open to serious controversy.

IV

BY WAY OF CONCLUSION

There are three matters which recent African constitutions now appear to be paying closer attention to. These are the chieftaincy institution, the parliamentary opposition and the method of altering the constitution.

A. Chieftaincy

The monarchical form of government is native to Africa. All precolonial African societies were kingdoms. The colonialists acknowledged the centrality and ubiquity of the chieftaincy institution by integrating chiefs in the governance of the colonial territory. The British used chiefs as a critical link in their system of indirect rule, while the French and Portuguese used them as 'auxiliaries of administration' in their system of direct rule. During the period of self-government, preparatory to full independence, chiefs were brought in to participate in the legislative process of the

⁵⁶ The concept of a secular state appears to hold no appeal to the 'born again' Christians at the head of the leadership of the MMD Government. They apparently believe it is necessary to take Zambia to God through the political process.

country either as members of a unicameral legislative council or assembly or as members of an upper house in a bicameral assembly.

But upon achieving independence, many African states drafted constitutions that simply ignored the chieftaincy institution, being content to politicise and manipulate it for purposes of political patronage or vendetta, as the case may be. Others have at one time or the other toyed with the idea of legislating it out of existence. However, without being able to muster the political will to do so, they have often succeeded in marginalising the institution by using chiefs as mere collectors of government taxes within their respective chiefdoms. One time radical states, like Sekou Toure's Guinea, Milton Obote's Uganda and Julius Nyerere's Tanzania, purported to have abolished chieftaincy, claiming that it is a conservative reactionary institution that had collaborated with the coloniser and that in any event it is inconsistent with republicanism and democracy.

However, since the wave of democratisation and constitution-making that began in the continent in 1990, the chieftaincy institution is making its dramatic entry in the constitutions of most African states in spite of its apparent incongruity with republicanism. This is an interesting and intriguing phenomenon and it is something of a surprise that African constitutional lawyers appear so far not to have adverted their minds to it. The state in Africa is an amalgam of diverse nation-chiefdoms and a situation now exists where the controversial and conservative, but very important traditional chieftaincy institution exists within an overarching republican system, albeit both systems appear to be antithetical.

The African chief remains a powerful figure despite various attempts by the central government to clip his wings by gnawing into the chieftaincy institution. He still commands much authority and respect among his subjects. In some cases, he is even feared and revered. The rural population is very much attached to the chieftaincy institution and any attempt by government to abolish it will be tantamount to committing political suicide or even courting civil strife. The African politician is very much aware of this. In this age of political pluralism the chief and what he says cannot be ignored. Chiefs are now calling for proper rehabilitation of the chieftaincy institution, and for empowerment of chiefs by giving them greater participation and say in national affairs. These calls are louder by the day and the rural population is restive. Any politician who hopes to win the huge votes in the rural areas must give ear and curry favour with the chiefs, or else forget about his political career.

The chief has such a powerful grip over his subjects that he can sway the vote one way or the other depending on where he stands on any public issue. It is for this reason that some constitutions forbid a chief from taking part in partisan politics or running for elective office if he has not abdicated his chieftaincy.⁵⁷

⁵⁷ For example, *Zambian Constitution*, Articles 65(3) (4), and 129.

Constitution drafters do not see this limitation as a clog on the enjoyment by the chief of his political right to participate in the government of his country. They see it rather as a way of avoiding conflict of interest and of preventing the chief from having an undue advantage over his potential adversaries for elective office. However, this does not mean that a chief may not harbour political sympathies or vote at elections. Nor should it preclude the appointment of a chief to any non-elective public office for which he is otherwise qualified.

One reason for the widespread demand for the rehabilitation of the chieftaincy institution is the popular desire for autonomy at subnational level. People want to manage and control for themselves local matters that touch them immediately and directly, such as customary land tenure, the resolution of certain civil and criminal controversies, and so on. Such a demand is legitimate when it is borne in mind that in many African states the centre is generally insensitive to local concerns. For people in the periphery, the centre is too remote, 'foreign' and chilly. This is particularly the case in unitary states of the Jacobin model, where there is hardly any devolution of power to subnational territorial collectivities. In such circumstances, the people romanticise over 'the good old days' when their concerns were attended to, by and within their own communities.

The *Zambian Constitution* seeks to address these issues, but only in a timid manner. In response to calls for devolution of powers to subnational entities, the Government has constitutionalised the local government system by cryptically providing that the system shall be based on democratically elected councils and that the details of the system shall be prescribed by an Act of Parliament.⁵⁸ The Government has also embarked on a programme to reintroduce the old Native Authority system, which was the linchpin of the British colonial system of indirect rule. Part XIII of the Constitution deals with Chiefs and the House of Chiefs. But contrary to the demands and the expectations of chiefs, the House is not part of Parliament but merely 'an advisory body to the Government on traditional, customary and any other matters referred to it by the President.'⁵⁹

B. Constitutionalising the Opposition

In a fledgling democracy, such as Zambia is at the moment, the constitution drafters omitted to address in the Constitution the status of the opposition. This is of importance for at least two compelling reasons. First, it is necessary to build a democratic political culture of debate, give-and-take, tolerance, and peaceful alternation of power. Second, it is necessary to change a certain perception observable in all African states,

⁵⁸ Article 109.

⁵⁹ Article 130.

according to which the opposition is the sworn enemy of the government in power. A large section of the population, some government ministers, government functionaries and law enforcement officers in African states tend to see the opposition in this light. Indeed, in politics in Africa the word 'opposition' appears to have been taken literally and seems to have acquired the connotation of antagonism and conflict between those who are in power and those who are not. And yet the opposition in any democracy performs a key state function in proposing credible alternatives to government policies, in raising the quality and level of debate in Parliament, and in constantly challenging the government to deliver on its election promises. The opposition is necessary for any vibrant democracy. Without it, the government will just take the people for granted and simply go to sleep. It is in recognition of this signalled role of the opposition in a democracy that the older democracies of the West have constitutionalised the Parliamentary opposition and given its leader privileges, and a status similar to those of the leader of the party in power.

C. Alteration of the Constitution

Zambia's Constitution is a superior paramount law. It is, therefore, not on a level with ordinary legislation. That being the case, it is not alterable by ordinary means. A bill on any subject other than on the alteration of the constitution requires no more than a simple majority vote by Parliament. But before the President assents to a bill presented to him he may return it to the National Assembly with a message requesting it to reconsider the said bill.⁶⁰ This Presidential power of disallowance of the bill may be overridden by the National Assembly passing the bill on a vote of not less than two-thirds of all the members of the Assembly. When this happens, the President may bow to the wisdom of the Assembly by assenting to the bill within twenty-one days of its presentation to him. Alternatively, he may hold his ground and bring the issue at the bar of the sovereign people by dissolving Parliament⁶¹ and calling fresh Parliamentary and Presidential elections.⁶²

Now, when a bill bears on the alteration of the Constitution its passage in Parliament is advisedly made difficult.⁶³ This is to ensure that the power of alteration is resorted to only when compelling reasons dictate such a course, rather than for transient, whimsical and self-serving interests. The Constitution envisages two modes of alteration. First, when there is a bill for the alteration of the Constitution or the Constitution of Zambia Act. In this case, in order for the alteration to be effective the text of the bill has to

⁶⁰ Article 78(4).

⁶¹ *Ibid.*

⁶² Article 88(7).

⁶³ Article 79.

be published in the *Gazette* not less than thirty days before the first reading of the bill in the National Assembly, and the bill must be supported on second and third readings by the votes of not less than two-thirds of all members of the Assembly.⁶⁴

The second hypothesis is when there is a bill for the alteration either of Article 79 of the Constitution (that is, a bill to alter the alteration provision of the Constitution) or of Part III of the Constitution (that is, Articles 11 to 32, which deal with the protection of the fundamental rights and freedoms of the individual). In either case, the prescribed manner of effecting a valid alteration is as follows. The bill first has to be put to a national referendum (with or without amendment), at which the voters must not be less than 50 per cent of persons entitled to be registered as voters for the purposes of Presidential and parliamentary elections. Thereafter, the bill has to go through the first reading (and obviously the second and third readings) in the National Assembly.

It is submitted that the people's verdict on the bill binds the National Assembly and the President. Once the bill has been adopted by referendum it cannot be rejected by either, or both of them. Parliament's role is simply to formally enact it and the Presidential 'assent' that later follows is a mere act of authentication rather than an act that completes the enactment process. On the other hand, if the people pronounce themselves negatively on the bill, Parliament cannot enact it over their heads. A timid form of preventive testing of the constitutionality of legislation exists in clauses (1)(2) and (3) of Article 27. But in clause (8) of the same Article even this timorous procedure is ousted in the case of 'a bill for the appropriation of the general revenue of the Republic or a bill containing only proposals for expressly altering this Constitution or the Constitution of Zambia Act.'

⁶⁴ Article 79(2).

THE STATE SECURITY ACT Vs OPEN SOCIETY: DOES A DEMOCRACY NEED SECRETS?

By
Alfred W. Chanda**

I **INTRODUCTION**

In this article, I examine the State Security Act in light of the requirements of an open society. I argue that although some of the provisions embodied in the Act serve legitimate security purposes, there are nevertheless other provisions which seriously undermine some of the pillars of democracy, particularly freedom of expression, transparency and accountability of government. All these pillars are essential for an open society. I begin by looking at the intrinsic elements of an open society, particularly the importance of freedom of expression and access to information. I then consider the salient provisions of the State Security Act in light of Zambian constitutional provisions and international standards. I argue that sections 4 and 5 of the Act, in particular, are unconstitutional and do not meet acceptable international standards. Finally, I suggest possible reforms which can facilitate the creation of an open society, particularly the need to enact a Freedom of Information Act.

What is an Open Society?

The preamble to the Zambian Constitution declares that Zambia will 'uphold the values of democracy, transparency, accountability and good governance.'¹ An open society is, doubtless, one that upholds these values. Transparency, accountability and good governance are only possible where there is freedom of expression and the right of the public to know is assured. In this connection, Article 20(1) of the Constitution provides that:

Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to impart and communicate ideas and information without interference, whether the communication be to the public generally or to any person or class of persons, and freedom from interference with his correspondence.

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¹ Constitution of Zambia, CAP 1, Laws of Zambia (1995 edition).

Clause 2 of Article 20 goes on to provide that:

Subject to the provisions of this Constitution no law shall make any provision that derogates from freedom of the press.

Article 20(1) is, in material respects, identical to Article 19 of the Universal Declaration of Human Rights, 1948² and the International Covenant on Civil and Political Rights, 1966.³

Freedom of expression thus includes not only freedom to hold opinions without interference, but also freedom to receive ideas and information, and to impart and communicate ideas and information without interference. Freedom of expression is the life-blood of a democracy. It serves four broad purposes: (1) it helps an individual to attain self fulfillment; (2) it assists in the discovery of truth; (3) it strengthens the capacity of an individual to participate in a democratic society; and (4) it provides a mechanism by which to establish a reasonable balance between stability and social change. In a nutshell, what is at stake is the fundamental principle of the people's right to know.⁴

It is incontrovertible that the public essentially obtains information about matters of public interest from the press. It follows, therefore, that the press should have freedom to gather information and communicate such information and ideas to the public. A free press helps create an informed citizenry, which is necessary for sustaining a viable democratic society. In *Castells v. Spain*,⁵ the European Court of Human Rights stated that the press not only has the task of imparting information and ideas on matters of public interest but the public also has a right to receive them. Moreover, the public's right to know is an intrinsic aspect of informed political debate crucial to genuine democracy. The Court stated that:

Freedom of the press affords the public one of the best means of discovery and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society.⁶

² COUNCIL OF EUROPE, HUMAN RIGHTS IN INTERNATIONAL LAW: BASIC TEXTS 9 (1992). Article 19 of the Universal Declaration provides:

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.'

³ *Ibid.*, at 31. Article 19 of the ICCPR provides: '2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other medium of his choice.'

⁴ *Indian Express Newspapers (Bombay) vs. Union of India*, AIR (1986) SC 515.

⁵ Judgment of 23 April 1992, Series A, No. 236-B.

⁶ *Ibid.*, para. 43.

Access by the public and the press to information held by public authorities is of crucial importance in a genuine democracy. The European Court of Human Rights has stated that the right to receive information 'basically prohibits a government from restricting a person from receiving information that others may wish or may be willing to impart to him.'⁷

One of the authors of the US Constitution, James Madison, in emphasising the importance of an informed citizenry to democratic governance, stated:

A popular Government, without popular information, or the means of acquiring it, is but a prologue to a Farce or Tragedy; or, perhaps both. Knowledge will forever govern ignorance. And a people who mean to be their own governors must arm themselves with the power which knowledge gives.⁸

Access to government held information helps enhance the individual's understanding of, and his ability to discuss freely political, social, economic and cultural matters.

In India, the Supreme Court has held that the right to know is an integral part of the Constitutional right to freedom of speech and expression. In the case of *SP Gupta v. Union of India*,⁹ the government sought to withhold correspondence between the Union Law Minister, the Federal Chief Justice, and the chief justices of some high courts regarding the government's controversial policy of transferring high court judges from one state to another. In holding that the government had to disclose the correspondence, the Indian Supreme Court noted that 'the concept of an open government is the direct emanation from the right to know which seems implicit in the right of free speech and expression...'¹⁰

In another case, *State of Uttar Pradesh v. Raj Narain*¹¹, in which the Indian government sought to withhold certain documents issued to the police regarding security arrangements for the Prime Minister's travels within the country, the Supreme Court ruled that the government had to make public all documents that would not endanger public order or the Prime Minister's security. It stated.

In a government of responsibility like ours, where all the agents of the public must be responsible for their conduct, there can be but few secrets. The people of this country have a right to know every public act, everything that is

⁷ *Leander v. Sweden*, Judgment of 26 March 1987, Series A, No. 116, para. 74.

⁸ ARTICLE 19, FREEDOM OF EXPRESSION HANDBOOK: INTERNATIONAL AND COMPARATIVE LAW, STANDARDS AND PROCEDURES 91 (1993).

⁹ AIR [1982] SC 149.

¹⁰ *Ibid.*

¹¹ AIR [1975] SC 865.

done in a public way, by their public functionaries. They are entitled to know the particulars of every private transaction in all its bearing. The right to know, which is derived from the concept of freedom of speech, though not absolute, is a factor which should make one wary when secrecy is claimed for transactions which can, at any rate, have no repercussion on public security.¹²

II

THE STATE SECURITY ACT, CAP 111

The State Security Act (hereinafter the Act, which was enacted on 23 October 1969, replaced the Official Secrets Act of 1967. The Act is based on the Official Secrets Acts of 1911,¹³ 1920¹⁴ and 1939¹⁵ of UK. The Act was passed at the time of heightened security concerns. In 1969, Zambia was surrounded mostly by hostile minority regimes, with the Portuguese in control of Angola and Mozambique and the white minority being in control of Rhodesia, South West Africa and South Africa. Zambia's hosting of liberation movements and refugees from these countries invited military reprisals.¹⁶

The Government considered the existing Official Secrets Act 1967 inadequate for a number of reasons. First, that the definition of 'classified matter' in the said Act took out of the hands of the Government, and placed in the hands of the court, the decision as to whether any particular information may or may not be disclosed to the public. Second, the only effective way of dealing with suspected spies was to detain them without trial under emergency regulations, as the penalties stipulated in the Act were too weak. Third, under the Act the State was compelled to disclose information in court or detainee tribunal proceedings, even if that information was highly prejudicial to the interests of the State to disclose.¹⁷

The objects of the State Security Act are: to make better provision relating to State security; to deal with espionage, sabotage and other activities prejudicial to the interests of the State; and to provide for purposes incidental to or connected therewith.¹⁸ The Act covers a number of activities. Section 3, which covers espionage, makes it an offence punishable with not less than twenty-years imprisonment for any person, 'for any purpose

¹² *Ibid.*, at 884.

¹³ 1 & 2 Geo 5 c 28.

¹⁴ 10 & 11 Geo 5 c 28.

¹⁵ 2 § 3 Geo 6 c 121.

¹⁶ The Attorney-General, Mr F. Chuula, when introducing the State Security Bill in the National Assembly alluded to this:

... Hon. Members are only too aware that Zambia is in the front-line of the struggle to free Africa. We have been in the front-line for some years now. But far from the pressures easing with the passage of time, experience has shown, and logic confirms, that the struggle will increase in intensity. It was against this background that Government was obliged to examine the existing legislation and to decide whether that legislation was adequate to protect Zambia and its people.

See ZAMBIA NATIONAL ASSEMBLY HANSARD VOL. 18-20, 1969, col. 416.

¹⁷ *Ibid.*

¹⁸ Preamble, State Security Act, CAP. 111, Laws of Zambia (1995 edition).

prejudicial to the safety or interests of the State,' not only to engage in specified conduct calculated to be useful to an enemy but also to approach, inspect or enter a 'protected place'¹⁹ within the meaning of the Act. It catches all standard activities normally associated with espionage.

Under Section 4 of the Act, it is an offence punishable with up to between fifteen years and twenty-five years imprisonment to retain without permission, or fail to take reasonable care of, information obtained as a result of one's present or former employment under the government or a government contract; or to communicate information so obtained, or entrusted to one in confidence by a person holding office under the government, or obtained in contravention of the Act, to anybody other than a person to whom one is authorised to convey it or to whom it is one's duty to impart it in the interests of the State; or to receive such information knowing or having reasonable cause to believe it has been given in contravention of the Act.²⁰

¹⁹ Sections 5 and 6 of the Protected Places and Areas Act, CAP. 107, Laws of Zambia, provide as follows:

5. (1) If, in regard to any premises, it appears to the President to be necessary or expedient that special precautions should be taken to prevent the entry of unauthorised persons he may, by statutory order, declare those premises to be a protected place for the purposes of this Act; and so long as the order is in force no person, other than a person who is, or who belongs to a class of persons which is, specifically exempted in such order, shall be in those premises unless he is in possession of a pass card or permit issued by such authority or person as may be specified in the order, or has received the permission of an authorised officer on duty at those premises to enter them. '6.(1) If, in regard to any area, it appears to the President to be necessary or expedient that special measures should be taken to control the movements and conduct of persons, he may, by statutory order, declare such area to be a protected area.'...

²⁰ Section 4 provides:

1. Any person who has in his possession or under his control any code, password, sketch, plan, model, note or other document, article or information, which relates to or is used in a protected place or anything in such a place, or which has been made or obtained in contravention of this Act, or which has been entrusted in confidence to him by any person holding office under the Government, or which he has obtained or to which he has had access owing to his position as a person who holds or has held such office or as a person who is or was a party to a contract with the Government or a contract the performance of which in whole or in part is carried out in a protected place, or as a person who is or has been employed by or under a person who holds or has held such an office or is or was party to such a contract, and who:

- (a) uses the same in any manner or for any purpose prejudicial to the safety or interests of the Republic; or
- (b) communicates the same to any person other than a person to whom he is authorised to communicate it or to whom it is in the interest of the Republic his duty to communicate it; or
- (c) fails to take proper care of, or so conducts himself as to endanger the safety of, the same; or
- (d) retains the sketch, plan, model, note, document or article in his possession or under his control when he has no right or when it is contrary to his duty so to do, or fails to

There is no doubt that these are wide ranging prohibitions. For instance, it may be an offence under section 4 for a civil servant to pass on, or for a researcher to acquire from him, information about loans obtained by the Government from another government or international financial institution notwithstanding that the material has no bearing on security and is not even classified as confidential. This 'catch-all' section is indeed convoluted and abstruse. It is not clear from section 4 whether guilty knowledge (or *mens rea*) has to be proved for unauthorised communication to be an offence. The deterrent effect of the Act on junior and middle-grade civil servants in particular is considerable.

Section 5(1) of the Act provides that any person who communicates any classified matter to any person other than a person to whom he is authorised to communicate it or to whom it is in the interests of the Republic his duty to communicate it, shall be guilty of an offence and liable on conviction to imprisonment for a term of not less than fifteen years and not exceeding twenty years. Under subsection 2 of this section, it shall be no defence for the accused person to prove that when he communicated the matter he did not know and could not reasonably have known that it was classified matter. Thus, under this section, 'the Government,' in the words of the Attorney-General, 'and the Government alone, will decide what is to be classified matter.'²¹

Section 5 has serious defects. First, it does not provide any criterion upon which documents are to be classified. Under section 2, 'classified

comply with any lawful directions with regard to the return or disposal thereof: shall be guilty of an offence and liable on conviction to imprisonment for a term not exceeding twenty years.

- (2) Any person who has in his possession or under his control any sketch, plan, model, note or other document, article or information, relating to munitions of war and who communicates it directly or indirectly to any person in any manner for any purpose prejudicial to the safety or interests of the Republic shall be guilty of an offence and liable on conviction to imprisonment for a term not exceeding twenty years.
- (3) Any person who receives any code, password, sketch, plan, model, note or other document, article or information, knowing or having reasonable grounds to believe at the time when he receives it that the same is communicated to him in contravention of the provisions of this Act, shall, unless he proves that the communication thereof to him was against his wish, be guilty of an offence and liable on conviction to the penalty prescribed in subsection (1).
- (4) Any person who communicates to any person, other than a person to whom he is authorised by an authorised officer to communicate it or to whom it is in the interests of the Republic his duty to communicate it, any information relating to the defence or security of the Republic shall be guilty of an offence and liable on conviction to imprisonment for a term not exceeding twenty years.
- (5) For the purpose of subsection (4), 'information relating to the defence or security of the Republic' includes (but without derogating from the generality or the ordinary meaning of that expression) information relating to the movements or locations of the defence force or the police force, the steps taken to protect any vital installations or protected places, and the acquisition or disposal of munitions of war.

²¹ ZAMBIA NATIONAL ASSEMBLY HANSARD VOL. 18-20, col. 418 (1969).

matter' is merely defined as 'any information or thing declared to be classified by an authorised officer.'

Second, section 5 does not stipulate who is to do the classification. Section 2 defines an 'authorised officer' as 'a person authorised by the person responsible for the administration of this Act to exercise the powers or perform the duties conferred or imposed by such provision.' Since there are no guidelines given, any document could presumably be classified confidential even if it has not the remotest connection with public security. Moreover, any official working for the Government could be appointed as an 'authorised officer' to do the classification. These vague provisions are a serious danger to freedom of expression, and undermine the right of the public to know. The public cannot access almost all Government documents.

The penalties for infringement of the two sections are excessive by any standards. Similar provisions under the UK Official Secrets Acts create only misdemeanours and attract imprisonment of no more than two years.²² The Attorney-General, when presenting the State Security Bill for second reading in the National Assembly on 17 October 1969, stated that:

(The) Bill generally provides for heavy penalties; the Government wants everyone to know that a very serious view is taken of activities aimed at the destruction or weakening of the State. I might mention also that in a certain neighbouring country some of the activities dealt with in this Bill carry a mandatory death sentence.²³

Moreover, section 10 of the Act creates a number of presumptions which in effect shift the onus of proof of certain matters to an accused person. An accused person shall be deemed to have acted for a purpose prejudicial to the safety or interests of the Republic, unless the contrary is proved.²⁴

²² Official Secrets Act, 1989. *supra* note 15, Sec. 10 (a) see also S.D.E SMITH & BRAZIER, CONSTITUTION AND ADMINISTRATIVE LAW 494 (6th ed., 1986).

²³ ZAMBIA NATIONAL ASSEMBLY HANSARD, VOL. 18-20, col. 416 (1969).

²⁴ Section 10 provides:

- (4) If in a prosecution under this Act it is alleged that the accused acted for a purpose prejudicial to the safety or interests of the Republic he shall, unless the contrary is proved, be deemed so to have acted if, from the circumstances of the case or his character or general conduct as proved, it appears that he acted for such a purpose.
- (5) If in a prosecution under this Act it is alleged that the accused made, obtained, collected, recorded, published or communicated anything for a purpose prejudicial to the safety or interests of the Republic and it is proved that the making, obtaining, collecting, recording, publishing or communicating was by any person other than a person acting under lawful authority it shall, unless the contrary is proved, be presumed that the purpose of the act or conduct in question was a purpose prejudicial to the safety or interests of the Republic.
- (6) Where the lack of lawful authority or excuse is an ingredient of an offence under this Act, the burden of proving such authority or excuse shall lie on the accused and the burden shall not be on the prosecution to prove such lack.

These provisions, doubtless, make it very difficult to access publicly held information. The effect of lack of access is that the public is ignorant of the operations of Government and there is very little informed debate of matters of public interest taking place. The little publicly held information that is published is as a result of leaks to the media by Government officials. The absence of guidelines in the Act has given rise to abuse of the said provisions. In one case, a Personal Secretary to a Deputy Minister was prosecuted under the Act for allegedly leaking a letter written by the Deputy Minister to the President, recommending the appointment of a tribesman as a Permanent Secretary for Local Government and Housing.²⁵ Fortunately, the accused was acquitted because the State failed to prove all the elements of the offence.²⁶

In another case, *The People v. Fred M'membe, Masautso Phiri and Bright Mwape*,²⁷ three Editors of *The Post*, the only independent daily newspaper in Zambia, were charged with receiving documents, article or information knowing or having reasonable grounds to believe at the time that the same documents, article or information were communicated or received in contravention of section 4(3) of the State Security Act. The said material, which related to Government's programme of work on *Constitutional Reform Activities and a Proposed Referendum on the Constitution*, appeared in *The Post*, Edition No. 401 of 5 February 1996, which was banned by the President under section 53 of the Penal Code.²⁸

The High Court held that the accused had no case to answer as the essential ingredient of knowledge or reasonable ground for belief that the information was covered by the State Security Act had not been proved. Moreover, it had not been proved that the contents of the documents in issue were in fact matters of public security. Justice Chitengi held that the subject matter of the document, a referendum, could not be said to be prejudicial to public security. He noted that:

Referenda are the known lawful ways of asking the general citizenry to decide by plebiscite certain contentious issues

²⁵ *The Post*, 24 March 1995 at 1: 'Kayope a Tribalist.' In his letter to the President the Deputy Minister wrote *inter alia*: "He was born in Kasama and is Bemba-speaking and if we believe in the Christian values that we preach so tenaciously this is the man for the job." See also *The Post*, 18 April 1995 at 1: 'Civil Servant Arrested Over 'Bemba' Secrets'.

²⁶ *The people v. Syatalimi* (unreported decision of Subordinate Court).

²⁷ HP/38/1996 (unreported).

²⁸ CAP. 146. Section 53 provides that,

(1) If the President is of the opinion that there is in any publication or series of publications published within or without Zambia by any person or association of persons matter which is contrary to the public interest, he may, in his absolute discretion, by order published in the *Gazette* and such local newspapers as he may consider necessary, declare that that particular publication or series of publications, or all publications or any class of publication specified in the order published by that person or association of persons, shall be a prohibited publication or prohibited publications, as the case may be.

which the Government does not want to decide on its own. The Zambian Constitution contains provisions for referendum. In any case a Referendum is nothing more than an election and there can be no secret about an election in these days of transparency, the revelation of which should invite the stiff penalties under the State Security Act. I think it would surprise many and even jar their instincts to hear that in Zambia three nosy journalists have been imprisoned for twenty years for prematurely announcing Government intentions to hold a Referendum to decide a thorny constitutional issue. In fact the announcement shorn of the political statements it contains, and which political statements are no concern of this court, would boost the image of the Government locally and abroad. Such announcement has nothing to do with the security of the state. I venture to say that while Ex P3 could bear some classification for the purposes of security of Cabinet documents it may not, by reason of its contents, be brought within the ambit of the State Security Act. The revelation of the contents of Ex P3 cannot subvert the interests of the State. In fact reading through Ex P3 one finds that it contains nothing new and secret but matters that were publicly discussed during the constitutional reform debates, which matters are common knowledge and which I take judicial notice. The document Ex P3 contains no matter which if it fell into the hands of the enemy or the general public would imperil or prejudice the interests of the State.²⁹

He also held that not everything classified by an authorised officer necessarily becomes a classified matter under the State Security Act. After examining the preamble³⁰ and other provisions of the Act in order to determine the mischief the legislature intended to stop by enacting the Act, Justice Chitengi added that,

Clearly the State Security Act is intended to deal with serious matters like espionage and sabotage, the activities that tend to subvert the interests of the State. And applying the *ejusdem generis* rule of interpretation the other activities referred to must be activities akin to espionage and sabotage. They must be activities that tend to subvert the interests of the State. The heavy penalties prescribed for these offences

²⁹ *Supra* note 27 at R8 & R9.

³⁰ The Preamble provides:

Act to make better provisions relating to State Security, to deal with espionage, sabotage and other activities prejudicial to the interests of the State; and to provide for purposes incidental to or connected therewith.

and the provision to deny accused bail indicate that the conduct aimed at must be very harmful to the interests of the State. Indeed in the *Nikuv Case* SCZ/8/75/96, the Supreme Court has held, for instance that it was wrong to classify a contract for registration of voters as secret because transparency required that it be not.³¹

It is doubtful whether sections 4 and 5 of the State Security Act are compatible with Article 20 of the Constitution as well as international standards. Article 20(3) of the Constitution of Zambia permits the State to impose restrictions on freedom of expression. However, to be valid, such restrictions must be prescribed by law and must be reasonably required in the interest of defence, public safety and public order, etc. Moreover, the law in question must be reasonably justifiable in a democratic society.³² These expressions have been subject to interpretation by various national courts and international tribunals.

Prescribed by Law

In order for a restriction to be Prescribed by Law:

- (a) the law must be accessible, unambiguous, drawn narrowly and with precision so as to enable individuals to foresee whether a particular action is unlawful; and
- (b) the law should provide for adequate safeguards against abuse, including prompt, full and effective judicial scrutiny of the restriction by an independent court or tribunal.³³

It is submitted that sections 4 and 5 of the State Security Act fail to satisfy the requirements of restrictions prescribed by law. As already noted, these sections are vague, overbroad and do not provide any safeguards against abuse. No procedure for making information available to the public is provided. In *Christine Mulundika and 7 Others v. The People*³⁴ the Supreme Court invalidated some provisions of the Public Order Act,³⁵

³¹ *Supra* note 19 at R5.

³² Constitution of Zambia, Art. 20 (3)(a) and (c).

³³ ARTICLE 19, THE JOHANNESBURG PRINCIPLES: NATIONAL SECURITY, FREEDOM OF EXPRESSION AND ACCESS TO INFORMATION 3-4 (No. 3, November 1996). The Johannesburg Principles were developed and adopted at an International Consultation of experts in International Law, National Security and Human Rights and were submitted to the 1996 session of the United Nations Commission on Human Rights in Geneva by Mr Abid Hussain, the UN Special Rapporteur on Freedom of Opinion and Expression. They were also recommended by the Commission in the Report of Dato Param Kumaraswamy, the UN Rapporteur on the Independence of Judges and Lawyers and referred to by the Commission in its 1996 Resolution on Freedom of Expression. The Principles are based on International and Regional Law and standards relating to the protection of Human Rights, evolving State practice (as reflected, *inter alia*, in judgments of national courts), and the general principles of law recognised by the community of nations.

³⁴ 1995/SCZ/25 (unreported).

³⁵ CAP. 104, LAWS OF ZAMBIA.

which gave the police broad discretionary powers to regulate public meetings and processions. Chief Justice Ngulube, delivering the judgment of the Court, said *inter alia*:

Fundamental rights should not be denied to a citizen by any law which permits arbitrariness and is couched in wide and broad terms. In the *State of Bihar v. K.K. Misra and Others*³⁶, the Supreme Court of India expressed the view on laws imposing restrictions on fundamental rights that: ‘..in order to be a reasonable restriction, the same must not be arbitrary or excessive and the procedure and the manner of imposition of the restriction must also be fair and just. Any restriction which is opposed to the fundamental principles of liberty and justice cannot be considered reasonable. One of the important tests to find out whether a restriction is reasonable is to see whether the aggrieved party has a right of representation against the restriction imposed or proposed to be imposed.’ We find the foregoing to be a sound exposition of the attitude to be adopted in these matters. The principles of fairness are principles in their own right and ought to be allowed to pervade all open and just societies.³⁷

III

PROTECTION OF A LEGITIMATE NATIONAL SECURITY INTEREST

A restriction on freedom of expression or information that a government seeks to justify on national security grounds must have the genuine purpose and demonstrable effect of protecting a legitimate national security interest. Such a restriction is only legitimate if it is for a genuine purpose and its demonstrable effect is to protect a country's existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force, whether from an external source, such as a military threat, or an internal source, such as incitement to violent overthrow of the government. In particular, a restriction is not legitimate if its genuine purpose or demonstrable effect is to protect interests unrelated to national security, including, for example, to protect a government from embarrassment or exposure of wrong-doing, or to conceal information about the functioning of its public institutions, or to entrench a particular ideology, or to suppress industrial unrest.³⁸

It is submitted that sections 4 and 5 of the State Security Act go beyond protecting a legitimate national interest since their effect is to

³⁶ AIR 1971 1667 at 1675.

³⁷ *Supra* note 32.

³⁸ JOHANNESBURG PRINCIPLES, *supra* note 33, at 4.

indiscriminately deny the public access to information in the hands of the State regardless of whether that information affects national security or not. Provisions dealing with espionage, unauthorised use of uniforms, passes, etc., do not appear to be as offensive.

Reasonably Justifiable in a Democratic Society

To establish that a restriction on freedom of expression or information is necessary to protect a legitimate national security interest, a government must demonstrate that:

- (i) the expression or information at issue poses a serious threat to a legitimate national security interest;
- (ii) the restriction imposed is the least restrictive means possible of protecting that interest; and
- (iii) the restriction is compatible with democratic principles.³⁹

The State Security Act, insofar as it does not distinguish between information or documents that have a bearing on national security and those that do not, goes too far in restricting the right of the public to know. It cannot plausibly be argued that the restrictions it imposes on access to information held by the State are the least restrictive means possible of protecting national security. The restrictions are incompatible with the democratic principles which require transparency and open government. In the *Christine Mulundika* case the Supreme Court held that there are certain minimum attributes of democracy including,

the availability of a Government which reflects the will of the majority of the people expressed at periodic and genuine elections; the power of the state should reside in the people and where this is exercised on their behalf, the mandatory is accountable. Apart from the free and informed consent and maximum participation of the governed, it is also common to expect that the people have and actually enjoy basic rights and freedoms and available to the majority as well as to any minority.⁴⁰

Need for reform

The State Security Act in its present form is anachronistic and is incompatible with the requirements of an Open Society. The geo-political situation in Southern Africa, which prompted the Government to enact this draconian legislation, has completely changed and Zambia is now at peace with all her neighbours. We are now in an era when democracy and human rights have taken centre stage throughout the world. Zambia is lagging

³⁹ *Ibid.*

⁴⁰ *Supra* note 32.

behind several democratic countries that have enacted legislation that promotes openness. It is suggested that the State Security Act should be reformed in the following ways.

First, the right to access to information held by both local and central government must be incorporated in the Constitution as one of the justiciable rights, as has been done in Malawi, South Africa, Sweden and other countries. Second, there is need for the Government to enact a Freedom of Information Act. Such a statute must designate only those specific and narrow categories of information that it is necessary to withhold in order to protect a legitimate national security interest.⁴¹ The public must have the right to access information held by public authorities except in the few instances already mentioned. The Act should provide the procedures to be followed by the public in accessing public information. Such procedures must facilitate, rather than hinder access. Moreover, the statute should require the authorities, if they deny a request for information, to specify their reasons for doing so in writing and as soon as reasonably possible. It should provide for a right of review of the merits and the validity of the denial by an independent authority, including some form of Judicial Review of the legality of the denial.⁴²

Several countries have either passed special legislation or included in their constitutions the right of everyone to have access to public documents. In France, for example, the Act of 17 July 1978, created the right of everyone to have access to public documents, subject to certain enumerated exceptions.⁴³ In New Zealand, the Official Information Act 1982 provides a qualified right of access to all information held by ministers of the crown, government departments and organisations (such as parastatals) and statutory bodies. This includes a right of access to information, which is directly enforceable by the courts and subject to a limited number of statutory reasons for withholding such information. As regards 'official information,' the operative principle is that information should be made available unless a good reason exists for withholding it. Personal and official information may be withheld to protect any of the following broad interests: to prevent prejudice to the security, defence and international relations of New Zealand; to preserve the confidentiality of information entrusted to the government; and to maintain the law, the safety of any person or the economy.⁴⁴

In the United Kingdom, under the Official Secrets Act, 1989, only the following classes of information are protected: security and intelligence;⁴⁵

⁴¹ *Ibid.*, Principle 12, at 7.

⁴² *Ibid.*, Principle 14, at 14.

⁴³ R. Errera, *Press Freedom in France*, in ARTICLE 19 (Ed.), *PRESS LAW AND PRACTICE: A COMPARATIVE STUDY OF PRESS FREEDOM IN EUROPEAN AND OTHER DEMOCRACIES* 60-70 (1993).

⁴⁴ Section 6 of the Act.

⁴⁵ *Supra* note 15, section 1.

defence;⁴⁶ international relations;⁴⁷ and criminal investigation.⁴⁸ In Sweden, Chapter 2 of the Freedom of the Press Act,⁴⁹ which forms one of the constitutional documents, is known as the Principle of Public Access to Official Records. The essence of the Principle is that all documents are public unless there is an explicit statute which regulates otherwise. Under the Act, any Swedish citizen may request to see any documents in the files of a state or municipal agency, regardless of whether the document concerns the requesting party. Authorities are obliged by law to comply.⁵⁰

The Secrecy Act of 1980 delineates the permissible exceptions, which include: information relating to national security, foreign policy and affairs, criminal investigations and the personal integrity (privacy) or financial circumstances of individuals. Refusal of a request for information may be appealed, ultimately to the Supreme Administrative Court.⁵¹

In Africa, some of the new democracies have incorporated the right to access to information in their constitutions. Section 37 of the Constitution of Malawi, for example, provides that:

Subject to any Act of Parliament every person shall have the right of access to all information held by the State or any of its organs at any level of Government in so far as such information is required for the exercise of his rights.

Equally, Section 32 of the Constitution of the Republic of South Africa, 1996 provides that:

- (1) Everyone has the right of access to-
 - (a) any information held by the State; and
 - (b) any information that is held by another person and that is required for the exercise or protection of any rights.

The legislature is required to enact legislation to give effect to this right, and such legislation may provide for reasonable measures to alleviate the administrative and financial burden on the State.⁵²

It may be noted that the Mwanakatwe Constitutional Review Commission recommended the inclusion of a justiciable right to access to information held by Government.⁵³

⁴⁶ *Ibid.*, sec. 2.

⁴⁷ *Ibid.*, sec. 3.

⁴⁸ *Ibid.*, sec. 4.

⁴⁹ *Freedom of the Press Act, 1994* in THE CONSTITUTION OF SWEDEN 1989 (Published by the Sweden Riksdag).

⁵⁰ Freedom of Information Act, sections 1, 2, 12, 13 and 14.

⁵¹ H.G Axberger, *Press Freedom in Sweden* in PRESS LAW AND PRACTICE, *supra* note 31 at 160.

⁵² Constitution of South Africa, section 32(2).

⁵³ REPORT OF THE MWANAKATWE CONSTITUTIONAL REVIEW COMMISSION (Lusaka: Government Printers, 1995). In par. 7.2.16. the Commission noted: 'Many petitioners were unhappy at the veil of secrecy that surrounded the workings of Government as well as legal prohibitions created by the State Security Act. The Commission observed that informed opinion was necessary in a democracy. It was also true that Government

Third, no person should be prosecuted on national security grounds for disclosing information that he/she learned by virtue of government service, if the public interest in knowing the information outweighs the harm from disclosure.⁵⁴

Fourth, no person should be punished on national security grounds for disclosure of information if: (1) the disclosure does not actually harm and is not likely to harm a legitimate national security interest; or (2) the public interest in knowing the information outweighs the harm from disclosure.

Lastly, the judiciary must be vigilant to ensure that freedom of expression and the right to access to information are upheld. A timid judiciary will render any protections afforded by the law ineffectual.

IV

CONCLUSION

In this article, I have demonstrated that the State Security Act places severe restrictions on access to information held by the Government. This is incompatible with an open society, where transparency and accountability should be the norm. Although a democracy is entitled to some secrets, the bulk of information held by Government must be accessible to the public as it does not affect the security of the state. Greater public access to information will create an informed citizenry and contribute to the good governance, transparency and accountability promised in the preamble to the Constitution.

There is, therefore, an urgent need for Parliament to reform the law by amending the obnoxious provisions of the Act, and enacting a Freedom of Information Act, if our nascent democracy is to grow stronger.

was a natural custodian of public documents. Yet, administrative measures as well as statutory prohibitions may effectively deny citizens access to vital information. Noting the crucial role informed opinion played in fostering good governance, the Commission recommends that the right of access to information be a justiciable right. The implication of this right is to make:- (a) all official documents public unless such documents have been classified 'secret'; the right available to every person whose right has or freedom is affected by the right of access to information held by the State. The Commission accepts the views that the right of access to information alongside the right of the press will enhance democracy, and thus recommends that every person should have the right of access to all information held by the State or any of its organs at any level of Government in so far as such information is required for the exercise or protection of any of his or her constitutional rights.'

⁵⁴ JOHANNESBURG PRINCIPLES, *supra* note 33, Principle 15 at 8.

REFASHIONING THE LEGAL GEOGRAPHY OF THE *QUISTCLOSE* TRUST

By
Kenneth Kaoma Mwenda*

'...When the purpose has been carried out (i.e., the debt paid) the lender has his remedy against the borrower in debt: if the primary purpose cannot be carried out, the question arises if a secondary purpose (i.e., repayment to the lender) has been agreed, expressly or by implication: if it has, the remedies of equity may be invoked to give effect to it, if it has not (and the money is intended to fall within the general fund of the debtor's assets) then there is an appropriate remedy for the recovery of the loan...'

Lord Wilberforce - *Barclays Bank Ltd v. Quistclose Investments Ltd* [1970] AC 567 at 581-2.

I INTRODUCTION

This article examines the efficacy of the law on *Quistclose* purpose trusts. In this article, I address the salient features of the law on *Quistclose* trusts and further highlight some of the pertinent shortcomings of the law. The underlying thesis advanced in this work is that the policy basis underpinning the law on *Quistclose* trusts raises a number of important issues affecting fair play in commercial transactions today. To what extent, for example, does the law provide incentives to recalcitrant insolvent companies to borrow money for the sole reason of advancing their purposes? If money lent for a particular purpose and placed in a designated account cannot be reached by the company's creditors, to what extent does the law provide incentives for directors of such insolvent debtor companies from desisting to engage in reckless and negligent trading, which creates a false impression of corporate creditworthiness?

The article is organised in three main parts. The first part looks at the law as it is set out in the *Quistclose* case, whilst the second part examines the extent to which the trust beneficiary principle can be applied to the *Quistclose* trust. In the third part, I look at the shift towards a remedial

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approach in the judicial interpretation of the *Quistclose* trust. Indeed, this paper looks at both the primary and secondary obligations arising under the *Quistclose* trust. These obligations are spelt out. The paper also raises important questions on the rationality, and policy bases of treating *Quistclose* trusts as valid trusts. Furthermore, the paper highlights the contemporary shift in English law from looking at *Quistclose* trusts as a conceptual device to viewing them as remedial devices. This shift is further reflected in the laws of several countries, such as Zambia, that have adopted the English common law system.¹ I conclude by integrating different views on the *Quistclose* trust and providing a wider interpretation of the law.

II

A REFLECTION ON THE LEGAL POSITION IN ZAMBIA

Under Zambia's legal system, as is the case with many other common law jurisdictions, English law principles of equity and trusts apply.² There are, however, a few legislative inroads in Zambia to qualify the extent to which English law principles of equity and trusts apply to Zambia. Section 3 of Zambia's Trust Restrictions Act 1970 provides as follows:

Save as hereinafter provided, after the commencement of this Act no person shall -

- (a) settle any property; or
- (b) limit any property in trust for another; or
- (c) make any disposition whereunder property vests in possession at a future date.'

This general prohibition is then followed by exceptions in section 4 of the same Act:

Nothing in this Act shall apply to - ...

- (f) a trust for the purpose of the administration of the property of a person adjudged bankrupt or a body corporate in liquidation or a person who has entered into a deed of arrangement for the benefit of his creditors; ...
- (i) a trust terminable at the will of the beneficiary.

The above exceptions, particularly that in paragraph (f), explain some of the instances when the law on *Quistclose* trusts can apply to Zambia. Other exceptions under section 4 of Zambia's Trust Restrictions Act 1970 include a disposition in favour of a charity, a trust in favour of or for the benefit of a person of unsound mind or a minor, a trust in favour of a widow as long as she does not remarry, with a gift over in favour of the children, a trust for the purpose of the administration of enemy property, a trust in favour of a

¹ See generally chapters 4 and 5 of the Laws of Zambia.

² *Ibid.*

minor with interest to vest upon his attaining a specified age not exceeding twenty-one years, and a trust for the purpose of the operation of a pension, superannuation or similar scheme. It must be pointed out, however, that although Zambian case law on the *Quistclose* purpose trust is relatively underdeveloped, no major case has been reported in Zambia as departing from the law in *Barclays Bank v. Quistclose*. Against this background, I now turn to look at the law in the *Quistclose* case.

The *Quistclose* Case

There is a long line of authority that supports the view that where a creditor, such as a bank, has advanced money to a debtor company on terms that the money should be used by the debtor company for a specific purpose, and the debtor company does not use the money for that purpose, the money is then held for the benefit of the creditor.³ In such a debt

³ For example in one of the cases decided before the *Quistclose* case, *Toovey v. Milne* [1819] 2 B & Ald. 683, A advanced to B £120 so that B could pay his creditors. B became insolvent and returned £95 (unexpended money) to A. The plaintiff, A's assignee in bankruptcy, sought to recover this money. The claim failed and Abbot C.J. stated that the money advanced was for a specific purpose and, therefore, was not part of the insolvent estate. Per Abbot C.J. at 684:

...this money was advanced for a specific purpose, and that being so clothed with a specific trust, no property in it passed to the assignee of the bankrupt...[if]...the purpose having failed, there is an implied stipulation that the money shall be repaid.

Thus, where the specific (primary) purpose fails there is an implied term that the money must be returned to the creditor who provided the loan. Lord Wilberforce, in *Barclays Bank Ltd v. Quistclose Investments*, [1970] AC 567 at 580 F-G, commented that, 'The basis for the decision was...that the money advanced for the specific purpose did not become part of the bankrupt's estate.' However, Millet, *The Quistclose Trust: Who can enforce it?* 101 *LQR* 269 at 271 (1985), contends that it was not clear that the primary trust had failed; if it did, then either the agreement generated a mere power to expend the money in favour of the plaintiff but not exercised by B, or the arrangement was to alleviate bankruptcy and not specific payment to the plaintiff. That said, it must be observed that *Toovey v. Milne* was upheld in *Edwards v. Glyn*, [1891] 8 Moor. 243 in similar circumstances. The plaintiff and assignees in bankruptcy, C, contested B's preference for repayment to A of money advanced by A for a specific purpose unperformed due to B's insolvency. Although the Court rejected C's claim on the grounds of a contractual guarantee of repayment by B to A in the event of bankruptcy, two judges promulgated the trust analysis. Crompton, J., held that the money advanced to B by A was conditional on the execution of the specific purpose. If this purpose could not be achieved, then there was a secondary resulting obligation to return the money to the lender, in this case A, or alternatively, the money advanced to B was not for the primary purpose of paying B's general creditors. In essence, the money lent to B by A was '...clothed with a specific trust, the bankrupts, though they might have a legal right, had not an equitable right to use the money for any other purpose; and equity would, I think, have interfered to prevent them from doing so,' at 50-51. One of the most persuasive cases decided before the case of *Quistclose* was the Court of Appeal's decision in *Re Rogers* [1959] 2 E & E 29. In an attempt to avoid bankruptcy, B borrowed £1,000 from A, to pay C of which £270 was immediately paid. B was declared bankrupt and the plaintiff (trustee-in-bankruptcy) sued C to recover the £270. The claim failed on the grounds that the specific purpose of the advance was intended to pay off creditors and not to be utilised in a general pool of the organisation's assets. The money did not beneficially belong to B, but was held by B on primary trust for him to perform the specific purpose for which the money was advanced. Kay, L.J., at 249, *Ibid.*, observed, 'The desire and intent of [A]...was to prevent the bankruptcy of [B]...that the advance by [A] was for this special purpose, and the money was impressed with a trust' (emphasis added). Furthermore, Lindley, L.J., *Ibid.*, at 243, ruled

financing arrangement, there co-exists a contract and a trust institutional structure.⁴ This view was acknowledged by Lord Wilberforce in the seminal case of *Barclays Bank v. Quistclose Investments Ltd.*⁵ In that case, Quistclose advanced money to B for the exclusive purpose of B paying a dividend to its shareholders.⁶ The cheque was deposited in a special account⁷ at B's bankers (Barclays). B's account was already substantially overdrawn and B became insolvent before the proposed dividend was paid. Both Barclays Bank Ltd and Quistclose Investment Ltd claimed the unexpended funds. The principal issue before the Court was to determine whether Barclays Bank Ltd could use the money in B's account to offset against B's indebtedness to Barclays Bank Ltd (as a

that '...never was the bankrupt's in any proper sense so as to vest in his trustee as part of his general assets.' Similarly, in *Re Drucker (No. 1)*, *Ex p. Basden* [1902] 2 KB 237, the case of *Re Rogers* was followed, where money lent on security to the bankrupt had not been applied in the manner intended. Romer L.J., stated that there '...never was a moment of time at which this money could have been used for any other purpose than that of paying the creditor in question,' at 238-239. Furthermore, in *Re Nanwawa Gold Mines Ltd* [1955] 1 WLR 1080, the company sought to raise share capital on the condition that 'all moneys will be refunded and meanwhile will be retained in a separate account.' The money would be returned if the project were to be discarded. Demand for shares was low and the enterprise was abandoned. Harman, J., upheld the shareholders claim on the basis of mutual intention; the wording of the application coupled with a promise to retain the money in a separate account, generated a trust in favour of the shareholders; '...the mere fact that money was placed in a separate account, so that one could point to it and say: 'There it is,' would not itself *ex post facto* create a trust...But here it is not the fact of the money being in the joint account which is relied on, but the promise made in the document on the faith of which the application was made,' at 1084.

⁴ Contract mainly creates personal claims enforceable by and against parties to the agreement who having intended to create a legal relationship, have undertaken a valid offer and acceptance and there has been consideration flowing from the promisee. By contrast, trust is 'an obligation creating an equitable proprietary interest in the beneficiaries, capable of binding third parties and enforceable by the beneficiaries though not party to the settlor-trustee arrangement...'; see Hayton (1992) at 55. Trust and contract may coexist in a debt arrangement. The loan device may initially be a primary trust to facilitate the purpose. If the purpose is fulfilled, then the agreement is purely contractual resulting in a simple debtor-creditor relationship. However, if the purpose of the loan fails a secondary trust operates in favour of the lender.

⁵ [1970] AC 567. Lord Wilberforce observed that:

...arrangements for the payment of a person's creditors by a third person, give rise to a relationship of a fiduciary character or trust, in favour, as a primary trust, of the creditors, and secondarily, if the primary trust fails, of the third person, and have been recognised in a series of cases over some 150 years...

⁶ A advanced £209,000 to B for the specific purpose of paying a dividend to B's shareholders. B went insolvent before the dividend was ever paid out. The payment of dividends was the primary purpose of the advance and, therefore, was held on primary trust by B.

⁷ Under the agreement that the account would 'only be used to meet the dividend due...'

result of the overdraft) or that the unexpended money in B's account was now held on resulting trust for Quistclose Ltd, the financier of B. The House of Lords unanimously held that Quistclose Ltd was entitled to recover the money since it was held by Barclays Bank Ltd on a resulting trust of which Barclays Bank Ltd had notice.⁸ It could be argued here that since the primary purpose of the loan from Quistclose Ltd to B was for B to pay dividends to its shareholders, the money was held by B (and any subsequent holder who had notice of that arrangement and had not provided value for the money) on trust to facilitate that purpose.⁹ However, the primary trust failed¹⁰ when B became insolvent and thus the unexpended money in B's account was automatically held on a secondary or a resulting trust to repay the lender.¹¹ It would create unjust enrichment for Barclays Bank Ltd.¹² if it were to be allowed to retain the money loaned to B by Quistclose Ltd. The money was loaned to B for a specific purpose and Barclays Bank Ltd had notice of that arrangement.¹³ Therefore, it was possible 'to give the lender security interest until the moneys have been spent on a specified purpose.'¹⁴

⁸ See the comments of Lord Wilberforce in *Barclays Bank Ltd v. Quistclose Investments Ltd* [1970] AC 567 at 581-582 at G-H. He observed further, at 580 C-D:

'arrangements of this character for the payment of a person's creditors by a third person gave rise to a relationship of a fiduciary character or trust in favour, as a primary trust, of the creditors, and, secondly, if the primary purpose failed, of the third person.'

⁹ '[I]n *Quistclose* case, the primary purpose was clear, simple and definitive both in its ambit and in its frustration. The purpose was to pay a particular debt due to a particular creditor upon a particular date...' per Megarry, V-C, commenting on the primary purpose in *Re Northern Developments (Holdings) Ltd*, Unreported 6, 1978, quoted in Rickett, *Different Views on the Scope Quistclose Analysis: English and Antipodean Insights*, 101 *LQR* 608 (1991).

¹⁰ *Ibid.*; '...once the company [B] had decided to go into liquidation, that primary purpose plainly could never be accomplished. Once the voluntary winding up had commenced, the dividend could not be paid in competition with other creditors...and so under the circumstances no payment of the dividend could be carried out.' Megarry, V-C, offering commentary on the failure of the primary trust in *Quistclose*.

¹¹ *Ibid.*; '...the intention to create secondary trust for the benefit of the lender, to arise if the primary trust, to pay the dividend, could not be carried out, is clear and I can see no reason why the law should not give effect to it.'

¹² The comments of Russell, L.J., in the Court of Appeal were approved by Lord Wilberforce, in *Quistclose*, *supra*, note at 582 F-G., namely, that the decision in favour of *Quistclose* 'imposes no hardship on the defendant bank, to whom the decision the other way would have given a complete windfall of £209,000 odd...the defendant bank officials can scarcely have believed their good fortune when that date arrived without money being withdrawn from the dividend account; but in my judgement it was not good fortune...' [1968]1 All ER at 626 B-F.

¹³ Barclays Bank accepted the money 'with the knowledge of the circumstances which made it in law, trust money, and could not retain it against the respondents,' per Lord Wilberforce *Ibid.*, at 568 A-B.

¹⁴ MOFFAT, *TRUST LAW: TEXT AND MATERIALS*, 526 (2nd Ed., 1994)

The *Quistclose* case illustrates the co-existence of a trust and a debt relationship in a series of related transactions.¹⁵ If the obligations in the *Quistclose* case had been carried out by B, the arrangement would have ended up like any other contract in which *Quistclose* Ltd, as lender, would have been owed money by B, as the debtor. In the present case, the issues involved are much more complex than simple contract rules.

Goodhart and Jones suggest that the ruling in *Quistclose* is 'just and commendable'.¹⁶ There are several criticisms, however, that can be made of the ruling in *Quistclose*. To start with, if we take the ruling at face value, without looking at the policy considerations that underpin the law on such trusts, we would find that some organisations would begin to rely fraudulently on *Quistclose* in their financing techniques. By this I mean companies that are insolvent may begin to undertake debt knowing very well that they are insolvent and that in the event of creditors demanding payment of debt interest, the insolvent company can easily fall back on the law in *Quistclose* to avoid further liability. If this were to happen, it would give the market a superficial impression of solvency of many companies and these companies would unfairly attract credit. Let us take the following example:

A advances money to B for the specific purpose of purchasing certain named property. B has no *bona fide* intention of purchasing that property. In such a case, A would be offering B the money mainly on the strength of B's ostensible state of solvency and credit worth. Again, it could be argued that since investors, such as A, might have no knowledge of the law on *Quistclose* trusts, there is, therefore, generally no need to enforce a resulting trust under *Quistclose* when the purpose fails. Furthermore, given the above arguments, it is submitted that it would be helpful if registration of such agreements (for purposes of public notice) were to be introduced and made mandatory.¹⁷

Secondly, it is not clear why the primary purpose in *Quistclose* should fail. Is it simply because B is insolvent or is it because the

¹⁵ In the *Quistclose* case, it was held at 567 G-H that, 'The fact that the transaction was one of loan giving rise to a legal action of debt did not exclude the implications of a trust enforceable in equity.'

¹⁶ See Goodhart and Jones, *The infiltration of Equitable Doctrine into English Commercial Law*, 43 MLR 435 at 494 (No. 5 1980): 'no creditor has been misled into making a further loan by the existence of the separate dividend account; and there was no doubt that the bank knew of the agreement between parties.'

¹⁷ Similarly, Bridge, *The Quistclose Trust in World of Secured Transactions*, 12 OJLS 333 at 353 (1992), observes that, 'If the *Quistclose* security interest could quickly and cheaply be registered and attract the ranking of a purchase money interest, its comradeship with other security interests should more readily be recognised.'

purpose has not been carried out? It is important to observe that when B declared dividends for its shareholders, that created an instant debt obligation in favour of the shareholders. But then, where do we place the shareholders in the ranking of claims in insolvency proceedings? Is it before the creditors or after, and if so which creditors are we talking about? What happens in a case where a trust fund has been identified and set aside? Does it follow that the money in the fund still belongs to the general pool of assets of the insolvent company? One view has been advanced, that since the declaration of dividends in *Quistclose* created an instant debt obligation in favour of the shareholders, it follows naturally that the shareholders had an immediate right in equity for the money held in that dividend account by Barclays Bank Ltd, irrespective of the liquidation of B.¹⁸ This point was not addressed by their Lordships in *Quistclose* and indeed the point presents an important, but unexplored element in the *Quistclose* case.

The third point that I would like to address is that of determining who is or who is not the beneficiary in the *Quistclose* case.¹⁹ In the *Quistclose* case, the indirect beneficiaries under the primary trust were the shareholders who were entitled to a dividend in B company.²⁰ However, their Lordships stated that it was the lender, Quistclose Ltd, who possessed the equitable right to see whether the money was disposed of in accordance with the primary purpose.²¹ Given the reasoning of their Lordships, who would we say then was the beneficiary? Was it Barclays Bank Ltd? If it was Barclays Bank Ltd, then Barclays would have had other equitable interests in the trust fund other than those of a trust beneficiary since once the primary purpose had been carried out, the lender (*Quistclose*) would have become a simple creditor to B and there would have been no resulting trust. Nonetheless, some commentators take the view that the lender, Quistclose Ltd, may have possessed an equitable

¹⁸ See Goodhart and Jones, *supra* note 16 at 494. See also Millet, *supra* note 3 at 274, who believes that there are two possible solutions; either the agreement engendered a power, not trust, for payment of the dividend, and B (or in this case Barclays Bank) chose not to exercise it; or the purpose of the agreement was not exclusively for the payment of the dividend, but for the recovery and preservation of B. Millet favours his latter conclusion.

¹⁹ This is an important theme being pursued throughout this essay. Cf. *Re Denley* [1969] 1 Ch. 373.

²¹ As per Lord Wilberforce in *Barclays Bank Ltd v. Quistclose Investments Ltd*, *supra* note 3. '...when the money is advanced, the lender acquires an equitable right to see that it is applied for the primary designated purpose.'

right capable of execution in a trust for the benefit of a class of which Quistclose Ltd was not directly related to.²² Furthermore, it is not clear when it is exactly that the primary trust obligations are fulfilled (or money expended) and hence, when it is exactly that the equitable right is extinguished.²³ There is also controversy over the beneficial interests of parties involved in the primary trust arrangement under *Quistclose*. It is not clear whether or not these parties are beneficiaries under a private express trust. If they are not, then the *Quistclose* trust may be providing an exception to the beneficiary principle that applies to express trusts.²⁴

The case of *Quistclose* is an acknowledgement of the principle that a resulting trust in favour of the provider of the money arises when money is advanced for a particular purpose and that purpose fails. However, the case has left many questions unanswered. Perhaps, as Moffat submits, the House of Lords aimed not to be excessively restrictive so as to enable the future development of the device.²⁵ In the sections that follow below, we will consider further the shortcomings of the law in *Quistclose*. It will be shown how the *Quistclose* trust represents a challenge to the orthodox concept of private express trusts regarding the beneficiary principle. Furthermore, the discussion will show how the *Quistclose* case has brought about difficulties in assessing the legal characteristics of a secondary resulting trust. Finally, the analysis will disclose the nature of the much more contemporary remedial *Quistclose* model. It will be argued that the use of the remedial device indeed hinges upon the judiciary's perception of what constitutes 'fairness.' We now turn to examine the beneficiary principle.

The Beneficiary Principle and the Primary Trust in *Quistclose*

Generally, trusts for non-charitable purposes are void on two main grounds. First, such trusts are unenforceable because there is no human beneficiary to enforce the trust. A court of law is not able to administer the execution of such trusts in the event of there being no trustee to replace a dysfunctional trustee(s). This explains what the beneficiary principle is all about. There must be ascertainable beneficiaries who have a correlative right to enforce the trust. A purpose trust will be invalid if it is unenforceable. Grant, M.R., in *Morice v. Bishop of Durham*²⁶ held that 'every other [non-charitable] trust must have a definite object. There must be somebody in

²² See Heydon, Gummow and Austin (1993), at 476:

It is unusual to say the least, for a party in a position comparable to that of a settlor to retain a right to supervise the administration of a trust for the benefit of a class of which it is not a member.

²³ See *Re EVTR* (1987) BCLC 646 post.

²⁴ Grant, M.R. in *Morice v. Bishop of Durham* [1804] 9 Ves. Jr. 399, quoted in HANBURY AND MARTIN, HANBURY AND MARTIN: MODERN EQUITY 357 (14th Ed., 1993), observed that, 'Every other [i.e., non-charitable] trust must have a definite object. There must be somebody in whose favour the court can decree performance.'

²⁵ MOFFAT, TRUSTS LAW: TEXT MATERIALS 526 (2nd Ed., 1994).

²⁶ [1804] 9 Ves. Jr. 309. This case concerned a gift upon trust for 'such objects of benevolence and liberality as the Bishop of Durham shall approve of.' The trust failed because there were no ascertainable beneficiaries. As Lord Eldon ruled, 'As it is a maxim, that the execution of a trust shall be under the control of the court, it must

whose favour the court can decree performance.²⁷ The principle was, however, relaxed in *Re Denley's Trust Deed*,²⁸ where Goff, J., made a distinction in his ruling between 'purpose or object trusts which are abstract or impersonal,' and, therefore, void, and a trust for objects which 'though expressed as a purpose, is directly or indirectly for the benefit of an individual or group of individuals.' In *Re Denley*, the clause in question actually pointed to legal characteristics of an express trust. The clause was, however, drafted as a purpose trust. Purpose trusts, such as the one in *Re Denley*, are exempt from the beneficiary principle. Hence, a non-charitable purpose trust may be valid where there exists 'factual beneficiaries' so long as the trust is administratively workable. The point made here suggests that the beneficiary principle in express trusts has now been relaxed when it comes to cases falling under *Re Denley*.²⁹

It is submitted that the rule in *Saunders v. Vautier*,³⁰ which gives primacy to the intention of the beneficiary³¹ and permits the beneficiaries, where they are all sane adults and are all entitled to benefit, to bring an express trust to an end, is not applicable to the *Re Denley* and *Quistclose* type of express trusts. The exception here frustrates the philosophy that underpins

be of such a nature, that it can be under such control, so that the administration of it can be reviewed by the court, or, if the trustee dies, the court itself can execute the trust: a trust therefore, which in case of maladministration could be reformed; and a due administration directed, and then, unless the subject and the objects can be ascertained, upon principles, familiar in other cases, it must be decided, that the court can neither reform maladministration, nor direct a due administration.'

²⁷ At 404. This was affirmed in *Re Astor's Settlement* [1952] Ch 534. In 1945 Lord Astor made an *inter vivos* settlement for a number of non-charitable objects including: (1) 'The maintenance...of good understanding, sympathy and co-operation between nations; (2) The preservation of the independence and integrity of newspapers...;(3) The protection of newspapers...from being absorbed or controlled by combines.' The trusts failed. The objects of the trust were void for uncertainty. Furthermore, they were not for the benefit of individuals and were, therefore, purpose trusts which failed.

²⁸ [1969] 1 Ch. 373. The trust instrument provided a trust for the provision of a sports or recreation ground, for a period within the perpetuity rule, for the benefit of, primarily, employees of a company, and secondarily, for the benefit of such other persons as the trustees allowed to use it. Goff, J., held that a distinction must be drawn between 'purpose or object trusts which are abstract or impersonal' and are void, and a trust for objects which 'though expressed as a purpose, is directly or indirectly for the benefit of an individual or group of individuals.' Such a trust is outside the ambit of the mischief which the beneficiary principle intends to address, that is, a trust generally must have a human *cestui que trust*. In this case, there were ascertainable beneficiaries and, therefore, the trust was valid.

²⁹ Moffat, *supra* note 25 at 192. Cf. *Northern Developments* case already cited.

³⁰ (1841) 4 Beav 115. Here the testator left stock on trust to accumulate the income until a sole beneficiary should reach the age of twenty-five, and then transfer to him stock and accumulated income. When the beneficiary was twenty-one he claimed to have the fund transferred. Lord Langdale MR held, 'I think that principle has been repeatedly acted upon; and where a legacy is directed to accumulate for a certain period, or where the payment is postponed, the legatee, if he has an absolute indefeasible interest in the legacy, is not bound to wait until the expiration of that period, but may require payment the moment he is competent to give a valid discharge.'

³¹ Beneficiaries must be *sui juris*, fully ascertained and absolutely entitled to the property.

the rule in *Saunders v. Vautier*. As pointed out, the rule in *Saunders v. Vautier* permits a beneficiary who is *suis juris* and absolutely entitled to benefit from the trust, to bring the trust to an end and realise his beneficial interest, irrespective of the intentions of the settlor.³² It must be observed that indeed a *Quistclose* trust is a trust for a specific purpose as long as the purpose is not void for uncertainty, illegality or public policy. On the other hand, if the purpose cannot be carried out, then the benefit is held on resulting trust for the lender.³³

One of the consequences of the beneficiary principle is that non-charitable trusts must have a human beneficiary.³⁴ It is interesting to note, however, that in the *Quistclose* case there seems to have been one other unresolved problem. The problem being that the indirect beneficiary in the *Quistclose* primary trust was the body of shareholders in B to which the money should have been paid as dividends by B so as to undertake the specific purpose for which the money had been advanced. The court did not consider this and whether there was any infringement of the beneficiary principle. An analogy to company law can be made here and it would seem that Lord Wilberforce, in *Quistclose*, had pierced the 'corporate veil' by holding a non-charitable purpose trust valid on the basis of the notion that individuals behind the separate legal personality of a corporation owe a fiduciary duty based on equitable considerations.³⁵

The first case to rely directly on *Quistclose* was *Re Northern Developments (Holdings) Ltd.*³⁶ In that case, a group of banks, A,

³² In *Re New* [1901] 2 Ch. 534 at 544, per Romer, L.J., observed that:

As a rule, the court has no jurisdiction to give, and will not give, its sanction to the performance by trustees of acts with reference to the trust estate which are not, on the face of the instrument creating a trust, authorised by its terms.

³³ HAYTON AND MARSHALL: *LAW OF TRUSTS* 75 (9th Ed., 1992).

³⁴ The beneficiary principle has been relaxed for the so called 'valid trusts for imperfect obligation' which provide for: (a) trusts for the erection or maintenance of monuments or graves, e.g., in the case of *Re Tyler* [1891] 3 Ch. 252, Lindley, Fry and Lopes L.J.J., held valid a trust for the purpose of maintenance of a school; (b) trusts for saying of masses if they are not, charitable, e.g., *Gilmour v. Coates* [1949] AC 426: Lord Morton and Lord Reid held that a trust fund for prayers and meditation of a cloistered community was not for the public benefit and the trust was, therefore, non-charitable. Also consider *Bourne v. Keane* [1919] AC 815, where Lord Atkinson held valid gifts for the saying of masses; (c) trusts for the maintenance of particular animals, e.g., *Re Dean* (1889) 41 Ch. D 552: North, J., held valid a trust for the maintenance of horses and hounds; (4) miscellaneous cases: e.g., *Pirbright v. Sawley* [1896] WN 86, where a gift of consols was left to maintain a burial enclosure 'for as long as the law permitted.' Stirling, J., held the gift valid which should endure for twenty-one years since the perpetuity rule was expressly accepted.

³⁵ '...the payment of a person's creditors by a third party [gives] rise to a relationship of fiduciary character or trust, in favour as a primary trust, of the creditors, and secondarily, if the primary trust fails, of the third person.' per Lord Wilberforce in *Quistclose* 280, *supra* note 5, at 280.

³⁶ Unreported, 6 October 1978, but referred to by Gibson, J., in *Carrera Rothmans Ltd v. Freeman Mathews Treasure Ltd* [1985] Ch. 207.

advanced money for the payment of the unsecured creditors, C. These creditors belonged to a subsidiary organisation of B.³⁷ Unlike the preceding authorities, where either the primary purpose was performed or could not be performed (e.g., due to the borrower's insolvency), in this case performance remained feasible. The following conclusions that were made by Megarry, V-C have been subject to criticism.³⁸ Firstly, Megarry, V-C ruled that there existed a purpose trust of the type recognised in *Re Denley* enforceable by the banks, A. Not only could B not use the money for an alternative purpose but A could also oblige B to carry out the primary purpose.³⁹ Secondly, the primary trust was enforceable by the subsidiary organisation since the creditors belonged to a subsidiary organisation of B.⁴⁰ Finally, the primary trust was also enforceable by the unsecured creditors, C.⁴¹ Here, the principle issue is whether the *Quistclose* primary trust is a valid purpose trust under *Re Denley*.⁴² Megarry V-C adopted a very liberal interpretation of *Re Denley* and used a test based on 'identifiable beneficiaries' to justify the ability of

³⁷ B was the parent company of a group that specialised in house construction. One subsidiary, 'Kelly,' was in serious financial difficulty such that the whole group was in danger (a secured creditor had further exercised its power of sale over all the sites charged to it). A number of banks advanced £500,000 to help save Kelly. The money was paid in a special account to B with the specific purpose of 'providing moneys for Kelly's unsecured creditors over the ensuing weeks.' However, Kelly failed to survive leaving £350,000 unexpended. It was the question of disposal of £350,000 that the court faced.

³⁸ Millett, *supra* note 44 at 269.

³⁹ See *supra* note 36:

If Kelly had weathered the storm and had become self-supporting, then the purpose of the primary trust would have been fulfilled and what remained would have been on resulting trust for the banks [i.e., A]...similarly if a disaster overtook Kelly but a surplus remained after Kelly's unsecured creditors had been paid in full, or if, as in *Quistclose* itself, it became impossible to carry out the primary trust. In each case I think the banks would be entitled to what remained in the fund. But before the secondary trust can take effect, the primary trust must either be carried out or else have been impossible: and if the execution of the primary trust exhausts the fund, then nothing remains on which the secondary trust can operate.

⁴⁰ Megarry, V-C, quoted in Rickett, *supra* note 9 at 10 held that:

The fund was established for the immediate benefit of Kelly [the subsidiary], and I can see no reason why Kelly should not be entitled to compel Northern [the parent, B] to carry out the purpose for which the trust was established.

⁴¹ The interest of the creditors was described in terms of the purpose of the fund: 'The fund was established not with the object of vesting the beneficial interest in them, but in order to confer a benefit on Kelly (and so, consequentially, on the rest of the group and the bankers) by ensuring that Kelly's creditors would be paid in an orderly manner. There is perhaps some parallel in the position of a beneficiary entitled to a share of residue under a will if what he has is not a beneficial interest in any asset forming part of the residue, but a right to compel the executor to administer the assets of the deceased properly. It seems to me that it is that sort of right which the creditors of Kelly had.' *Carreras*, *supra* note 36, at 223, D-E.

⁴² (1969) 1 Ch. 373.

the third party creditor to enforce the primary trust against B.⁴³ On the other hand, Millet argues that the expansive rationale of Megarry, V-C seems to have taken this to be another exception to the beneficiary principle, concluding that the existence of persons who, although, not *cestuis que trust* are in fact interested in the disposition.⁴⁴ However, Rickett supports Megarry, V-C's interpretation arguing that *Re Denley* is capable of allowing the creditors, C, to enforce the primary trust as 'factual beneficiaries' providing the existence of the requisite intention. It is submitted here that this debate reflects today's challenges to the traditional analysis of private express trusts.

Millet's traditional 'pure trust' analysis favours the existence of illusory (persons) trusts and thus it disapproves the use of a purpose trust to penetrate the corporate veil. He is critical of the manner in which Megarry, V-C in *Northern Developments* and Gibson, J., in *Carreras Rothmans*⁴⁵ extended the decision in *Quistclose*. In essence, Millet rejects the primary purpose/secondary resulting trust analysis and believes that the only logical reason why the lender, A, could get B to perform his/her obligations on the primary purpose is because A '... is the beneficiary.'⁴⁶ There are some illogical difficulties in Millet's submission which cannot go without comment. How, for example, does the settlor himself become the sole beneficiary? Can a person settle property on trust for his or her own sole benefit? Millet's submission is contrary to existing authority. Moreover, his thesis does not address the validity of the *Quistclose* decision itself. By comparison, in New Zealand the courts have often applied the orthodox analysis of trusts, although they have done so with varying degrees of

⁴³ '*Re Denley's Trust Deed* establishes that what at first blush appears to be invalid as being a mere purpose trust may, on examination, be found to be a trust for a purpose which is enforceable by identifiable individuals. As Goff, J., said '...the court can execute such a trust both negatively by restraining any improper disposition, and positively, by ordering trustees, to carry out the trust. The question, then, is whether there are identifiable persons who could enforce the trust in the present case.' Transcript of the case at 21 reproduced in Rickett, *supra* note 40 at 610.

⁴⁴ Millet, *supra* note 18 at 269, clearly supports the traditional narrow interpretation of the beneficiary principle and purpose trusts as exemplified by Simonds, V-C, in *Leahy v. A-G for New South Wales* [1959] AC 457 at 478:

A gift can be made to persons (including a corporation) but it cannot be made to a purpose or to an object: so, also a trust may be created for the persons as *cestui que trust* but not for a purpose or object unless the purpose or object be charitable. For a purpose or object cannot sue, but, if it be charitable, the Attorney-General can sue to enforce it.

⁴⁵ See below.

⁴⁶ Millet, *supra* note 44 at 228 observes that:

There is, in fact, only one explanation of A's undoubted right to enforce the primary trust which can be reconciled with the basic principles. A can enforce the primary trust because he is the beneficiary.

consistency.⁴⁷ The variation here illustrates some of the legal problems associated with *Quistclose trusts*. In one of the English cases, *Carreras Rothmans Ltd v. Freeman Mathews Treasure Ltd*,⁴⁸ already cited, the parties' common intention was crucial in ascertaining the primary purpose trust. In *Carreras*, the plaintiff, A, was the original lender and C was the beneficiary under the primary purpose trust. A employed FMT for advertising services. A was also concerned about FMT's financial difficulties and thus A agreed to pay a monthly payment into a special account at FMT's bank.⁴⁹ The arrangement was known to FMT's bank. FMT later went into liquidation and A brought proceedings against FMT and the liquidator, to recover the unexpended money. Gibson, J., followed the authority of *Megarry, V-C in Northern Developments* and ruled in favour

⁴⁷ Despite this clear anomaly, other jurisdictions have adopted this 'pure trusts' analysis. The New Zealand case of *General Communications Ltd v. DFC New Zealand Ltd* [1990] 3 NZLR 406 (High Court and Court of Appeal) is the most interesting as it illustrates the differences in approaches by the courts. DFC agreed to advance \$950,000 to Video Workshop Ltd (third defendant) on the condition that the money was spent to purchase 'scheduled plant.' As security, DFC (first defendant) would have a charge on the plant and a second debenture. The plaintiff company supplied approximately \$195,000 of 'scheduled plant.' The security offered to the plaintiff was that BP (Video Workshop's solicitor and second defendant) would hold money provided by DFC and assured the plaintiff that the payment would be made by those moneys. However, after delivery but before payment Video Workshop's financial position deteriorated. DFC instructed BP not to disburse any of the advanced moneys. BP refused to give DFC the money, holding that they had it on trust for Video Workshop. Shortly after, the first debenture holder appointed a receiver and DFC then revoked the loan offer. Video Workshop then agreed to repay DFC from funds held by BP. Therefore, the plaintiff was unpaid. Counsel for the plaintiff argued on the basis of *Quistclose*, *Carreras* and *Northern Developments*, that moneys transferred by DFC to BP were held on trust, i.e., the primary purpose was for the payment to the suppliers of the scheduled plant. Therefore, at no point was the money the property of Video Workshop. Furthermore, the arrangement was irrevocable; if the primary trust failed, a secondary trust was whereby the money would be repaid to DFC. In this case, the primary trust had not failed and therefore, the plaintiff could succeed. Tompkins, J., held for the plaintiff; at 418-19 he stated 'this conclusion accords with commercial reality. The payment was made at the express request of Video Workshop's solicitors to enable them, as they put it, to respond promptly to requests for payment by suppliers. DFC acceded to this request with clear knowledge of the reason for making the payment. It would make no commercial sense to hold that DFC having made the payment in accordance with that request and with that knowledge, could then at any later time prior to the disbursement of the money by BP, revoke the arrangement and require repayment of some or all of what it had already advanced.' DFC appealed and the Court of Appeal reversed the decision, expressly adopting Millet, J., 'illusory trust' doctrine. This, in essence, has narrowed down the scope of *Quistclose* in New Zealand, concluding that 'DFC created an equity against itself...sufficient to enable [the plaintiff] to enforce the trust, to the extent of the debt due to it for equipment supplied...Having put the fund beyond its power of recall, [DFC] must have intended the trust, binding as it was on BP, to be irrevocable, and hence to confer a beneficial interest on each supplier as he fulfilled his contract.' *Ibid.*, at 409.

⁴⁸ [1985] Ch. 207.

⁴⁹ 'for the purposes only of meeting the accounts of media and production agencies incurred on [the defendant's] behalf for *Carreras Rothmans*.'

of A.⁵⁰ A primary purpose trust existed on the common intention between A and FMT even if the word 'trust' was not used. The agreement confirmed that money was advanced on trust to FMT for the sole purpose of paying A's creditors, C. The formation of a special account to pay those creditors and the fact that A was not free to recover the advances without the consent of FMT, was an integral aspect of the parties' common intention. Therefore FMT held the money on trust and could, therefore, not use it to pay off other liabilities that were not agreed upon with A.

Further still, *Re Multi-Guarantee Ltd*⁵¹ illustrates how 'intention' and the existence of 'ascertainable beneficiaries' must be seen as important when addressing the law on *Quistclose* trusts. In *Re Multi-Guarantee Ltd*, Multi-Guarantee offered insurance after the guarantee of certain appliances expired. Valance, a retailer, collected premiums from its customers to pay to Multi-Guarantee. The parties later agreed to pay premiums into a joint deposit account accessed only through their respective solicitors. Multi Guarantee went into liquidation. Valance argued that Multi-Guarantee had constituted itself a trustee of the moneys placed in a joint account 'effectively divest[ing] itself of all beneficial interest therein.' The Court of Appeal held that the requisite intention required to create the trust obligation was missing. The joint account was a convenient way to pool funds used for a variety of purposes, i.e., there was no clear-cut destination or alternatively, specific purpose. Furthermore, the beneficiaries were not ascertainable. For example, was the fund for Multi-Guarantee or its insurers or its customers? This is consistent with the beneficial principle in *Re Denley*. A number of authorities under the *Quistclose* line of cases have been decided on the specific intention of the parties to the initial agreement giving rise to a trust relationship that coexists with a contractual agreement for the benefit of the ascertainable beneficiaries. In the *Multi-Guarantee* case it was held that there was no purpose trust and hence, no tenable argument by the customers of Vallance for the existence of a secondary resulting trust.

The *secondary* trust's impact on the beneficiary principle has also been the subject of much debate. In *Quistclose*, Lord Wilberforce clearly indicated that the failure to perform the primary purpose gave rise to a secondary resulting trust. Interestingly, however, the *Re Vanderwell's Trusts* (No. 2)⁵² case sets out clearly, *inter alia*, the general classes of resulting

⁵⁰ 'In the light of that authority I cannot accept the joint submission that the third party creditors for the payment of whose debts the plaintiff had paid the moneys into the special account had no enforceable rights. In any event I do not comprehend how a trust, which on no footing could the plaintiff [as lender] revoke unilaterally, and which was expressed as a trust to pay third parties and was still capable of performance, could nevertheless leave the beneficial interest in the plaintiff [as lender] which had parted with the moneys. On Sir Robert Megarry, V-C's analysis the beneficial interest is in suspense until the payment is made,' at 223 F-G.

⁵¹ [1987] BCLC 257.

⁵² [1974] 2 Ch. 269.

trusts. In *Re Vanderwell's Trusts* (No. 2),⁵³ Megarry, J., made the distinction between automatic and presumed resulting trusts. The *Quistclose* trust is analogous to the 'automatic resulting trust' operating whenever the beneficial interest is not disposed of.⁵⁴ Even if the primary purpose is partially performed, i.e., the beneficial interest to C is not fully disposed of, the unapplied or unexpected money is still subject to a secondary resulting trust in favour of the lender. In *Re EVTR*⁵⁵ unexpected insolvency made it not possible for the insolvent company to undertake the full performance of the purpose for which the money was advanced. Consequently, the unexpended moneys less expenses, had to be returned to the company on a resulting trust.⁵⁶ It is submitted here that only complete performance of the primary purpose would lead to a creditor-debtor relationship. If the primary purpose is not completed and C's beneficial interest is not disposed of, here is an automatic secondary resulting trust in favour of the lender.

The *EVTR* case seems to have extended the scope of *Quistclose*, where previously the primary trust was in the form of a loan advanced for a purpose pursuant to a specific financial agreement. In *EVTR*, the trust was for the

⁵³ [1974] 1 All ER 47 at 68.

⁵⁴ In *Re Vandervells Trusts* No. 2 [1974] Ch. 269 at 289 F-G, Megarry, J., observed that:

The distinction between the two categories of resulting trusts is important because they operate in different ways...the first category subject to any provisions in the instrument, the matter is one of intention, with the rebuttable presumption of a resulting trust applying if the intention is not manifest. For the second category, there is no mention of any presumption of a resulting trust: the resulting trust takes effect by the operating of the law and so appears to be automatic. What a man fails effectually to dispose of remains automatically vested in him, and no question of any mere presumption can arise. The two categories are thus of presumed resulting trusts and automatic resulting trusts.

On the other hand, the case of *Re Ames' Settlement* [1946] Ch. 217, illustrates the operation of an automatic resulting trust (for failure outside a *Quistclose* instrument). In that case, the father transferred £10,000 to be held on trust of a marriage settlement on the occasion of the marriage of his son in 1908. The marriage was annulled in 1926 and the father died in 1933. However, the son received the income of the marriage settlement up until his death in 1945. On his death, the trustees sought directions as to whom the fund should be paid; either the father's estate; or the son's next-of-kin. It was held that since the marriage was void *ab initio* the consideration for the marriage settlement failed and the £10,000 was consequently held on a resulting trust for the father's estate.

⁵⁵ [1987] BCLC 646. *EVTR* needed new equipment to increase turnover necessary for the survival of its business. The lender, A, advanced *EVTR* £60,000 'for the sole purpose of buying new equipment' and to pay a deposit for the new equipment. However, the company fell into receivership before the order was completed. Consequently, the supplier returned the £48,536 (less expenses). Under *Quistclose* principles the lender succeeded in arguing that the fund was held on resulting trust because the primary purpose was only partially performed, i.e., expenses contingent on that loan were accrued by the borrower to pursue the specified objective.

⁵⁶ As per Dillon, L.J., at 650-51:

On *Quistclose* principles, a resulting trust in favour of the provider of money arises when the money is provided for a particular purpose only, and that purpose fails.

sole purpose of buying new equipment. It is evident that Lord Wilberforce's lack of exposition of what is a 'specific' purpose in *Quistclose* does not provide us with a helpful understanding of the law here. If, as Megarry, V-C put it, in *Northern Developments*, a specific purpose is a purpose upon which 'factual beneficiaries' can be ascertained, then whether that emanates from the 'sole purpose of buying new equipment' or not is a debatable issue.⁵⁷ The uncertainty surrounding the meaning of the term 'specific purpose' is more visible in *Tropical Capital Investment Ltd v. Stanlake Holdings Ltd*.⁵⁸ In that case, the Court held that money advanced for the specific purpose of 'assisting with a deal in the Ivory Coast for tyres' gave rise to a valid *Quistclose* trust. Whether or not this purpose is for the factual benefit of identifiable individuals is somewhat not clear.⁵⁹ Thus, the question here is how specific must the purpose be so as to be a *Quistclose* trust? It is argued that because the courts have not critically addressed the basis and scope of the primary purpose trust this creates uncertainty and confusion. Gibson, J., in *Carreras* suggests that the *Quistclose* trust would not be limited to circumstances where the specific purpose was the payment of creditors. He suggests that the doctrine would also apply where the purpose of the loan is something other than the payment of debts. The example given here is where property is being transferred for a specified purpose.⁶⁰ At the very least, it is submitted that intention and conduct

⁵⁷ *Ibid.*

⁵⁸ Unreported, 24 May 1991. Here a lender had been induced to advance a sum of money by fraudulent representations as to the identity of the borrower. The stated purpose for the loan was to finance a deal for tyres in the Ivory Coast. Not all of the required funds reached the borrower. Most of it was discovered, in transit, by a solicitor in his safe. He interpleaded and there followed a priority contest between the lender and a judgement creditor of the borrower with a garnishee order. The Court of Appeal ruled in favour of the lender. The majority held, *inter alia*, that the money had been earmarked on a *Quistclose* trust for a purpose that had failed. As per Taylor, L.J., in Rickett, *Loans for Purposes: Implied Contract, Express Trust or Pure Unjust Enrichment* LMCLQ 3 at 9 (1992).

Here the loan from the plaintiffs was not simply a loan for general purposes. It was requested and made for the specific purpose of 'assisting with a deal in the Ivory Coast for tyres; that purpose was expressly spelt out...

⁵⁹ The argument can be illustrated by way of example. If a person borrows money from a leading institution it is usually conditional on some purpose, for example, buying a car. However, what is the relevance of *Quistclose* if a cash advance from the bank is obtained on credit facilities? The transaction is a loan without a specific purpose.

⁶⁰ In my judgement the principle in all these cases is that equity fastens on the conscience of the person who receives from another property transferred for a specific purpose only and not, therefore, for the recipient's own purposes, so that each person will not be permitted to treat the property as his own or to use it for other than the stated purpose....If the common intention is that property is transferred for a specific purpose and not so as to become the property of the transferee, the transferee cannot keep the property if for some reason that purpose cannot be fulfilled.

per Gibson, J., in *Carreras*.

must be expressed in a context where creditors can be ascertained as factual beneficiaries in the execution of the purpose.

Another shortcoming of the secondary resulting trust formulation in *Quistclose* is ascertaining when the trust comes into force. It could be argued, for example, that the resulting trust in favour of the lender comes into force once the primary purpose is impossible to perform. If that be the case, to what degree then can performance be deemed impossible before a resulting trust comes into force? That said, it is important to consider also the range of non-charitable purposes that courts will admit as trusts. It would appear as though one of the guiding principles to admit such purposes as trusts is the criteria of 'factual beneficiaries' that has already been discussed. The more general the purpose, such as 'purchasing new equipment' or 'assisting with a deal in the Ivory Coast'; the more blurred the distinction between performance and non-performance and hence the less likelihood of there being a secondary trust.

It is also arguable that although the conduct of the parties, weighed against their intention, may indicate that there would arise a secondary trust upon failure of the primary purpose, the trust device that might ensue could be an express trust. The argument being advanced here is that since the parties had expressly stated their intention, the idea that the equitable interest of the settlor results back to the settlor is simply a fulfilment of the default term in the original agreement. Such express trust could be seen where B is required to return money advanced on loan by A for B to carry out a designated purpose.⁶¹ Be that as it may, the intention of the parties is crucial in determining what it is exactly that the parties intended to do and what rights or interests were intended to pass from one party to the other.

⁶¹ An argument which Rickett and Hayton advance as well; see Rickett, *supra* note 9, at 613 and, HAYTON, *UNDERHILLS LAW OF TRUSTS* 254 (13th Ed., 1979). Although, not a true *Quistclose* analysis, the case of *Re Kayford* illustrates the tensions in the law regarding the judicial imposition of intention. A customer may send money to a company for the supply of goods under a contract. If the goods are not supplied (e.g., the producer becomes insolvent), the customer is an unsecured creditor unless a trust has been created. The customer may create a trust until he receives title to the goods. This can be achieved through the use of appropriate words in the agreement when money is sent or by the company creating a trust upon or before receiving the money. In such circumstances, the customer retains beneficial ownership of his money until the goods are supplied. This occurred in *Re Kayford Ltd*, [1975] 1 WLR 259. The case is not generally accepted as *Quistclose* authority although the judgement mentioned the latter incidentally: 'there was no purpose trust, nor was the recovery by the customers of moneys based on a resulting trust. It is clear therefore, that *Kayford*, and its direct derivatives, are not *Quistclose* cases.' Rickett, *supra* note 9 at 609. K was a mail order company, where customers paid a deposit or full price for goods ordered. Concerned about its financial difficulties K sought to protect customer deposits by opening a special account to administer such funds. K became insolvent shortly afterwards. The primary consideration is who owned the moneys at the moment the company declared itself as trustee. [Preistley and Goodhart and Jones, have criticised *Re Kayford* for not considering this issue; if money belonged to the company at the time of the declaration of trust it would contravene section 320 (1) of the Companies Act 1948, prohibiting fraudulent preference. Preistley, *The Rompala Clause and the Quistclose Trust*, in Finn (Ed.), *ESSAYS IN EQUITY* (1987) at 233. Also, Goodhart and Jones (1980), *supra*, at 495]. Megarry, J., held the money on an orthodox express trust for the customers and the deposits were not treated as part of the

The Shift Towards a Remedial Approach

There have been instances where a constructive trust has been imposed on a transaction relating to a non-charitable purpose bequest.⁶² To illustrate, equitable considerations gave rise to a constructive trust in *Neste Oy v. Lloyd's Bank Plc.*⁶³ In that case, the plaintiff made a series of payments into a joint account of itself and its agent. A sixth payment was made, but unknown to the plaintiff, the agent had just gone into receivership. Bingham, J., held that the first five advances were not held on trust. There is no general rule that payments by a principal to his agent to be used for a

general assets of the organisation. This authority has been questioned for holding the customers as beneficiaries under trust, thus protecting them from general trade creditors. The critical issue is again that of intention. The customers had no inclination that their advances were to be held in a special trust device and, therefore, could not retain automatic beneficial ownership. Indeed, as *Goodhart and Jones, supra* note 18 at 497, observe, 'Kayford was paying into its trust account money which it could lawfully have paid in its ordinary account, and it is hard to see any material difference between that and the payment into a trust account of money in a general account.' In this case, the beneficial ownership was transferred upon the administration of a new account. It is clear that Megarry, J., largely 'assumed' the requisite intention required to create the trust. For example, consider the comments of Preistley referring to Megarry, J.,'s proposition that the customers retained beneficial ownership of their deposits at all times; 'It may be that when the facts of the case and the circumstances of the argument are looked at, that is a doubtful authority for the proposition that on the facts reported the beneficial ownership of the money remained in the payers. That seems to be rather assumed than decided' *Ibid.*, at 234 (emphasis added). This legal uncertainty is perhaps a reflection of the Court's willingness to achieve the desired result of consumer protection by using the trust to circumvent the principle of *pari passu*. Bridge, *The Quistclose Trust in a World of Secured Transactions*, OJLS 357 (1992) observes:

The result may therefore express a priority judgement, though a somewhat unsystematic one, as regards to the various creditors of the company...this expresses the law's mute preference for one class of creditor.

⁶² In *Chase Manhattan Bank NA v. Israel-British Bank (London) Ltd* [1981] Ch. 105, CM, the plaintiff, paid \$2m to the I-B. Due to a clerical error, the same payment was repeated that same day. I-B subsequently went insolvent and into compulsory liquidation. Goulding, J., held that the recipient of money knew the second payment was under mistake and, therefore, held it on constructive trust. The second payment gave rise to a constructive trust allowing CM to trace the money on an equitable interest that emanated from the moment the second payment was transferred. The instrument is not a purpose trust because there was no intention to advance the second payment to I-B. This is analogous to a contract void of consideration and, therefore, invalid. The case goes beyond the scope of *Quistclose* analysis, where the claim of the lender was against funds segregated for a specific purpose, e.g., a special bank account similar to *Quistclose, Re Kayford and Carreras*. Although there was no intent or attempt by CM to earmark its payments in a sufficiently circumscribed way, commentators have commended the decision as just and proper: 'it is unreasonable that the general creditors of the defendants should get a windfall benefit from money which was never due to the defendants'; see *Goodhart and Jones* (1980) Vol. 43, at 500.

⁶³ [1983] 2 Lloyds Rep. 358. Here the plaintiff appointed a UK agent, PSL, to handle business in the UK. Often, payments were made by the plaintiffs to PSL to settle fees, etc. These payments were made into a special account at Lloyds Bank. Five large payments were made to settle dues between January and February 1980. On 22 February 1980, the parent company of PSL appointed a receiver for the whole group. Unaware of this the plaintiff made a sixth payment into the account.

specific purpose necessarily give rise to a trust. However, the last payment was effectively void because there was no consideration accompanying it. Therefore, PSL held it on constructive trust. Indeed, at the time of the sixth payment the directors had knowledge that the company would be going into receivership and hence, it would be unconscionable for them not to return the sixth payment to *Neste Oy*.⁶⁴ Compared with *Carreras*, this case raises a lot of interesting issues which help to explain away some of the salient features of the law on *Quistclose* trusts. In *Carreras*, funds were advanced for a purpose and there was indication from both parties that they had agreed to apply the funds for the purpose. However, in *Neste Oy v. Lloyd's Bank Plc*, *Neste Oy* was clearly not aware of the insolvency risk and had not set aside the trust moneys into a trust fund account so as to avoid priority problems in insolvency proceedings. Thus, unlike in *Carreras*, in *Neste Oy v. Lloyd's Bank Plc* there was no indication from the conduct, or express intention of the parties, that all the moneys were being set aside in a trust fund account. So, the court ruled that there was no purpose trust. However, the court relied on some form of 'fairness' to hold that there was a constructive trust.⁶⁵

The legal problems surrounding the *Quistclose* trust are most visible when we look at the flexibility with which courts are willing to hold that there is a *Quistclose* trust. Several English cases illustrate the more expansive interpretation of the *Quistclose* doctrine in commercial transactions. For example, the decision to apply a *Quistclose* remedy where the purpose 'was to buy tyres,' or where the purpose was 'purchase of new machinery' indicates that the courts are moving towards a remedial device.⁶⁶ In *Rowan v. Darr*⁶⁷ a *Quistclose* remedy was imposed to avoid tenancies because of

⁶⁴ *Ibid.*, as Bingham, J., observes (at 261):

It would have been sharp practice...to take any benefit from the payment, and it would have seemed contrary to any ordinary notion of fairness that the general body of creditors should profit from the accident of payment made at a time when there was bound to be a total failure of consideration.

⁶⁵ In essence, when lender A advances B money in a pure creditor-debtor relationship by mistake or circumstances where it would be inequitable for B (and its creditors) to receive a windfall, B will hold that advance on constructive trust for A.

⁶⁶ See *Re EVTR and Tropical Investments*.

⁶⁷ 64 P & CR 202. Here R granted two tenancies of farmland to D to engage in a joint business venture. No rent was ever paid as R retained shooting rights over the land. The joint venture collapsed (never got off the ground) and the trial judge held there was a resulting trust in favour of the farmer, R, to reclaim his land free of tenancies. Millet, J., holding 'I reject the defendant's claim that the tenancy was independent of the joint venture and capable of subsisting even if the joint venture never came into operation.' The Court of Appeal dismissed an appeal by D on the basis of a *Quistclose* trust in favour of R. Scott, L.J., ruled (at 209) that, 'There is a resulting trust in favour of Mr Rowan by reason of the failure of the joint venture project. This conclusion of a proprietary equitable interest in favour of a Mr Rowan is consistent with along line of authorities of which *Quistclose Investments v. Rolls Razor Ltd* is a well known example.'

a failure of a joint venture between the parties. Furthermore, in *Guardian Ocean Cargoes Ltd v. Banco do Brasil SA*⁶⁸ the plaintiff made three payments before the deal was concluded. The money was advanced on condition that the transaction should be fully agreed. A *Quistclose* remedy was imposed when the deal collapsed and the plaintiff recovered his payments. This appears to be a remedial application based mainly on 'equitable' considerations since the purpose is somewhat not clear.⁶⁹ Other jurisdictions have also adopted a remedial perspective. Rickett cites the New Zealand case of *Dines Construction Ltd v. Perry Dines Corporation Ltd*⁷⁰ as an example of 'an avowedly remedial trusts approach.'⁷¹ However, in this case one of the factors that made it 'just' to impose a *Quistclose* trust was the fact that money was advanced for a specific purpose.⁷²

The remedial approach is, however, not free of problems. It may be significant that in most cases in which remedial proprietary relief has been granted, the level of insolvency has been such that the unsecured creditors had no prospect of recovery; in these cases the imposition of the proprietary remedy was at the expense of secured creditors. In *Neste Oy*⁷³ the secured creditors were banks and the main argument was whether the claimants should have priority over the bank's security.⁷⁴ However, the court found that the bank knew about the circumstances and hence that gave rise to a constructive trust. As constructive trustee, the bank could not retain the

⁶⁸ [1991] 2 Lloyd's Rep. 68.

⁶⁹ The case is analogous to *Re Kayford* and although not strictly a *Quistclose* trust, Megarry, J., seems to have 'assumed' that customers paid deposits on trust and/or the mail order company intended the deposits to be held on trust.

⁷⁰ [1989] 4 NZCLC 65, 298 (HC), DCL a shareholder in PDLC, paid, *inter alia*, the sum of \$380,000 to that company for an impending share issue. PDLC went into receivership before the shares were actually issued and its bankers claimed that since DCL had authorised PDLC to use the money for its 'general purpose' it was only an unsecured creditor. The Court rejected the bank's argument, holding that the money was subject to a *Quistclose* trust. Ellis, J., referred to a passage in GOFF AND JONES, THE LAW OF RESTITUTION, 'Equity's traditional rules suggest that it is necessary to discover a fiduciary relationship before a plaintiff can trace his property. Now that the law and equity are fused this requirement makes little sense, and it has been recently accepted that the receiving of money which consistently with conscience cannot be retained is, in equity sufficient to raise a trust in favour of the party for whom or in whose account it was received.'

⁷¹ Rickett, *supra* note 40 at 632.

⁷² As Ellis, J., considered, PDLC 'would not have dreamt of paying...[the money]...if the share issue was not going to proceed.' In essence, through this money PDLC intended to increase its shareholding, not to become a general creditor.

⁷³ [1993] 2 Lloyds Rep. 358.

⁷⁴ In *Liggett v. Kensington* [1993] 1 NZLR 257, Gault, J., expressed his 'reluctance to impose a constructive trust in circumstances where it would give effective priority over the charge of the bank if its charge had been obtained for value and without notice of the circumstances giving rise to the purchaser's claims of interest in the bullion stocks.'

sixth payment.⁷⁵

Another fundamental weakness of the remedial approach is the judiciary's search 'for the solution that seems fair and just after balancing all the relevant considerations.'⁷⁶ Notions of fairness and justice mainly hinge on subjectivity and value judgements and these could adversely affect commerce and industry if judicial notions of fairness (under the guise of a remedial trust) were to be allowed.⁷⁷ It is submitted, thus, that excessive judicial intervention is likely to cause uncertainty and confusion.⁷⁸

II CONCLUSION

This paper has examined in detail some of the important problems of the law relating to *Quistclose* trusts. Indeed, analogies have been made between the law in the United Kingdom and in other jurisdictions. Also, proposals for law reform have been highlighted wherever necessary.

That said, it is important to observe that case law and academic commentary, have been used to argue that a loan arrangement may commence as a primary trust to carry out a specific purpose.⁷⁹ If the purpose is performed, there exists a pure contract relationship in which the debtor owes the creditor money. On the other hand, if the purpose is not carried out, a secondary resulting trust arises in favour of the lender. Indeed, what we are seeing here is that on the verge of insolvency an inchoate resulting trust in favour of the lender is born and the trust crystallises at the on-set of formal insolvency proceedings. It could, therefore, be argued that insolvency proceedings, such as liquidation, create situations where it can be said that contractual obligations (i.e., where there is executory consideration) between parties are transformed into trust obligations. On

⁷⁵ As Bingham, J., ruled at 667, the last payment '[could not] in all probability have been credited to PSL's main account before the bank had learned that the group companies should cease trading at once and seek appointment of a receiver. The bank did not then know all the facts but it did know that PSL would trade no more and I think it was at that point clearly put on enquiry.'

⁷⁶ See Cooke, *Fairness* 19 (1989) VUWLR 421 at 422 also in Scot, *The Remedial Constructive Trust in Commercial Transaction* MCLQ 330 (1993). Cooke observes that: it may be that once the facts of any given case have been elicited most people would agree on the fair result. If the law provides that answer, it satisfies proper expectations. To the extent that the law produces a result that is not fair in a particular case, the law has failed. Bad law makes hard cases.

⁷⁷ For example, in *Neste Oy* Bingham expressly considered the notion of fairness in imposing the constructive trust reference footnote.

⁷⁸ Similarly, Cooke, *Fairness* (1989) 19 VUWLR 421 at 422, *supra* note 76 observes: It is very easy to say that, if judges decide according to their view of what is fair, the law ceases to be certain. The Chancellor's foot is readily rejected as a criterion, but without, consideration of how far differences in the length of human feet are significant in relation to the object to be measured. In truth, however, the cases as regards which that kind of argument is raised are usually cases where the law is uncertain: the person appealing to certainty is really appealing for the more conservative solution.

⁷⁹ See above.

that basis, the lender of the money can still recover the principal sum advanced (and any interest) without relying on enforcement of the original contractual obligations. However, the words, conduct, communication and nature of transaction can be decisive in establishing whether or not the requisite intent to create a purpose trust is present.⁸⁰

The application of *Quistclose* to the modern complexities of commerce must be welcomed with caution. I have argued in this paper that the *Quistclose* trust is in conflict with the concept of beneficiary principle. Terms such as 'specific purpose' do not in themselves make the trust enforceable by a human *cestui que trust*. Of course, Millet has provided an unusual formula of determining the *cestui que trust*.⁸¹ But that is not without its difficulties. I have already shown that in article.

The fact that judges readily flout the beneficiary principle for the benefits of 'commercial morality' is testament to the argument that the debate must continue.⁸² Indeed, we are reminded that:

[equitable] doctrines are progressive, refined and improved; and if we want to know what the rules of equity are, we must look, of course, rather to the more modern, than the more ancient cases.⁸³

The current judicial trend of awarding relief to a lender who advances money to a company (that later goes into liquidation) for a specific purpose seems to be an indirect way of relaxing the all pervasive *pari passu* of insolvency law.⁸⁴ Lord Wilberforce left vague the terms for the 'flexible interplay of equity and law' so that the nature and form of *Quistclose* could develop in accordance with the shifting notions of commercial practice. However, it is our humble submission that *Quistclose* must not be interpreted too widely. If this were to be the case, the interpretation would bring about

⁸⁰ For example, in *Bank of Scotland v. Liquidators of Huchison Main & Co. Ltd* [1914] SC (HL) 1, a company, C, arranged with the bank that it would obtain from company X a secured debenture which would be assigned to the Bank *in lieu* of certain assets which the Bank held as security for a debt due to it. The bank surrendered the assets to C, and C obtained the debenture from X. Before the debenture was assigned to the Bank, C went into liquidation. The Bank claimed the debenture because C held it on trust for the Bank. The House of Lords held that the Bank's claim was purely contractual and, therefore, it was an unsecured creditor. No trust existed to make the debenture belong to X.

⁸¹ See above.

⁸² See SEALY, COMPANY LAW AND COMMERCIAL REALITY (1984) quoted in Austin, *Commerce Equity Fiduciary Duty and Constructive Trust* [1986] 6 OJLS 444 at 450:

...our chancery judges today are still very much concerned with trusts and settlements, with deeds and conveyances, with rights and interests in land; all of it a world away from the cut and thrust of commerce and the risks and rapid fluctuations of the market place.

⁸³ Per Jessel, M.R., in *Re Hallet's Estate* [1879] at 710.

⁸⁴ Austin, *supra* note 82 at 455, observes that:

It is arguable that in the economic interests of the community, the law should provide some simple mechanisms for encouraging suppliers to participate in corporate rescues without being thereby relegated to the lowest division of creditors if the rescue fails; and should do so by case law...without waiting for statutory reform.

uncertainty and confusion in the law and the market place as well.⁸⁵ On the hand, we are mindful of the fact that some degree of flexibility in applying equitable doctrines is important in that this leads to much more equitable solutions.⁸⁶ But then, the trouble with legal scholarship is that we often work on the basis of precedents.

⁸⁵ In the words of Dawson, J., in *Hospital Products* (1984) 55 ALR 417 at 494: To invoke equitable remedies excessively would distort the doctrine and weaken the principle upon which those remedies are based. It would introduce confusion and uncertainty into the commercial dealings of those who occupy an equal bargaining position in place of the clear obligations which the law imposes upon them.

⁸⁶ Indeed, Mason J., *Ibid.*, at 457, observes: The disadvantage of introducing equitable doctrine into the field of commerce, which may be less formidable than they were, now that the techniques of commerce are far more sophisticated, must be balanced against the need in appropriate cases to do justice by making relief *in specie* through constructive trust, the fiduciary relationship being a means to that end.

THE CRIMINAL PROCESS IN JUVENILE COURTS IN ZAMBIA

By
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I INTRODUCTION

Any logical effort to design and to implement policy for the promotion and protection of children's human rights in the juvenile justice system in Zambia should be based on a firm knowledge of the underlying principles pertaining to the juvenile courts and to the manner in which these courts handle juvenile offenders in the criminal process.

Other African countries have experienced the growth of juvenile crime in the same manner as Zambia, attributable to the growth of urban settlement. However, in absolute terms it is still very far from the volume of juvenile crime familiar in the more highly industrialised countries.¹

Urban growth, stimulated by the mining industry, continued after independence, with increased migration to urban areas. As the United Nations Conference on Human Settlement noted:

... after independence, with the abolition of the poll tax and the removal of restrictions on movement, the migration links established during the colonial period, between the rural areas and the towns were strengthened and urban growth rates since independence have been extremely high.²

This has led to squatter settlements springing up on the peripheries of many towns. In the mid-1970s, the Government embarked on the upgrading of these areas (Chawama, Old Kanyama, etc., in Lusaka), providing them with some sewage sanitary services, although in most cases water supplies remained on a communal basis.

To add to the problem of squatting, many of the juvenile migrant town dwellers have had no adequate training to make them suitable for employment. The majority of juveniles are elementary (primary) school drop-outs; many of them are either too young to be employed or have not yet acquired any useful skills.³ Juveniles in search of quick money join the

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¹ W. CLIFFORD, *THE INTRODUCTION OF AFRICAN CRIMINOLOGY* 149 (1974).

² *United Nations Conference on Human Settlement*, held on 22-26 April 1966, at Vancouver, p. 6.

³ J. Hatchard, *Policy and Perspective on Juvenile Justice*, in K. OSEI-HWEDIE AND M. NDULO, (Eds), *STUDIES IN YOUTH AND DEVELOPMENT* 213 (1989).

informal sector as a source of income. This sector consists of the food stalls in public markets or in the back streets, and they are generally labelled as 'Street Vendors.' It must be noted that the informal sector is associated with the notion of deviant behaviour, especially in relation to school drop-outs. However, it should not be supposed that all juveniles in the urban areas who search for employment and join the informal sector engage in criminal activities. Yet, there are some of them who, of necessity, become delinquents and engage in various crimes (theft, house-breaking, and other crimes). For example, the number of juveniles brought before courts has increased since independence; 1 864 juvenile offenders were prosecuted in 1964,⁴ and this rose to 3 000 in 1974⁵ and 5 500 in 1996.⁶ There is an urgent need to address the problem of youth crime, as Zambia has a chance to plan and implement meaningful preventive programmes, such as those now aimed at street kids. Law reform is one of the responses to these challenges.

It must be noted that the juvenile justice systems developed in western countries are aimed at protecting juveniles from stigmatisation, and maintaining family units. The Zambian juvenile justice system, being an English inherited system, is supposed to follow the western model.

Juveniles guilty of serious crimes are to be separated from adult criminals,⁷ tried in juvenile courts⁸ and, if found guilty, sent to reformatories or approved schools for training and rehabilitation; first offenders are to be separated from hard-core delinquents.⁹ Children are not to be removed from their homes unless that is essential in their own interests.¹⁰ This leads to the investigation of family problems to determine how the family and child could be assisted together. Juvenile courts in Zambia operate within the underlying principle of the Juveniles Act,¹¹ based on the English Children and Young Persons Act, 1933,¹² which provides for 'care, guidance and protection for juveniles.'¹³ The Zambian courts have failed to observe this principle due to lack of special training for magistrates sitting in juvenile courts.¹⁴ This has led to non-compliance with the provisions of the Juveniles Act and, consequently, ill-treatment of juvenile offenders.

This article describes and evaluates the operation of Juvenile courts in the context of the judicial system as a whole. A basic theme of this article is that reform of the juvenile justice system does not require elaborate legal amendments but a re-evaluation of the operational practices of agencies

⁴ *Zambia Police Annual Reports* (1964), p.16.

⁵ *Zambia Police Annual Reports* (1974), p. 20.

⁶ *Draft Zambia Police Annual Reports* (1996), p. 22 (Forthcoming publication by the Government Printers, Lusaka).

⁷ Juveniles Act, Cap. 53 of the Laws of Zambia, section 58.

⁸ *Ibid.*, section 63.

⁹ *Ibid.*, sections 82 and 98.

¹⁰ *Ibid.*, section 59(b).

¹¹ Cap. 53 of the Laws of Zambia.

¹² 23 & 24 Geo. Sc. 12.

¹³ The Preamble of the Juveniles Act, Cap. 53, Laws of Zambia.

¹⁴ E.M. Simaluwani, *The Juveniles Justice System in Zambia* (Unpublished PhD Dissertation, University of London, 1994), pp. 267-269.

involved in the handling of juveniles.

Jurisdiction and procedural issues in Juvenile courts and age of criminal responsibility will be examined; this article shows that the courts generally ignore the parental role in the criminal process, which is an important procedural issue. This article will first briefly discuss the origin of the concept of 'juvenile justice.' The article does not deal with the actual criminal trial and disposition.

II THE ORIGIN OF THE CONCEPT OF JUVENILE JUSTICE

The historical development of juvenile justice systems in western countries reflects the recognition of 'childhood' as a special phase in the human life cycle, set apart from adulthood. Earlier, some child misconduct was treated with no distinction between juvenile and adult criminal behaviour, and punitive sanctions were imposed on convicted juveniles.¹⁵ Thereafter arose a 'child-saving' movement advocating the reform of the criminal justice systems and this led to the concept of 'juvenile delinquency,' an umbrella term which covers various acts of misconduct by juveniles, including status offenses, and intended to protect deprived and neglected children.¹⁶ Mary Carpenter (1851) categorised juveniles into two groups:¹⁷ (a) the 'perishing' class, destitute yet not involved in criminal activities; and (b) the 'dangerous' class, who had already received a prison brand. This was based on contemporary perspectives about the nature of juvenile crime and ways of responding to it. She demanded reformation in juveniles through care, nursing and affection, rather than alienation by corporal punishment. Deterrence principles were not to be applied, but rather love, guidance and teaching.

The Court of Chancery in England played a leading role in developing the doctrine of *Parens Patriae*, which remained the guiding principle in juvenile justice: law enforcement agents are only to interfere with the natural parents' control over children when the need arises, in the interests of the children concerned. With those concerns, a separate juvenile court was established in 1908 with its own personnel, to deal with matters pertaining to juveniles, including juveniles in need of care.

However, the Juvenile court's power in relation to juveniles in the United

¹⁵ P. ARIES, *CENTURIES OF CHILDHOOD* 10 (1962). For more information, see, J. GILLIS, *YOUTH AND HISTORY* (1974), *AMERICAN DELINQUENCY: ITS MEANING AND CONSTRUCTION* (1982); and A. MORRIS AND H. GILLER, *UNDERSTANDING JUVENILE JUSTICE* (1987).

¹⁶ A.M. PLATT, *THE CHILDSAVERS* 138 (1969).

¹⁷ H.J. RICHARDSON, *ADOLESCENT GIRLS IN APPROVED SCHOOLS* (1969).

Kingdom had continually been amended, due to changing political, social and economic conditions.¹⁸ Hence, the juvenile courts impose sentences which must be proportionate to the gravity of offenses of which the offenders have been convicted.¹⁹ Therefore, the juvenile courts in England are guided by the 'just desserts' principle in sentencing juveniles and pay much attention to social inquiry reports.

Zambian ethnic groups differ from those of Europe, because since the pre-colonial era, children have been considered the central and validating elements of a family and the basis on which their parents attained the status of adulthood.²⁰ Nonetheless, the categorisation of juveniles into two classes (i.e., juveniles in need of care and juvenile offenders) has been adopted from English law in the Juveniles Act,²¹ and it is considered to be the basis of the Juvenile courts. However, it is one of the areas in which the Zambian juvenile justice system has failed, as neglected children are not in fact offered any legal protection, or are detained without due process of law.

III

THE JURISDICTION OF THE JUVENILE COURT

As shown, the Juveniles Act (hereinafter the Act) addresses two categories of juveniles: children in need of care and those who commit crimes. However, this article focuses on the second category (i.e., juvenile offenders) and considers whether they are treated in accordance with the provisions of the Act.

The second class of juveniles recognised by the Act are those who are alleged to have committed delinquent acts. Special procedures for the trial of juvenile offenders are prescribed by the Act; some of the dispositions relating to juveniles not dealt with in this article are spelt out.²²

The Juvenile courts have exclusive jurisdiction to try all criminal charges against juveniles, except where a juvenile is charged with a crime of homicide or attempted murder or is charged jointly with an adult.²³ Thus, whether a case is grave or trivial, it must be disposed of in a Juvenile court.²⁴ This

¹⁸ For example, the Children and Young Persons Act, 1933; the Children and Young Persons Act, 1969; the Criminal Justice Act, 1982; the Criminal Justice Act, 1988; the Children Act, 1989; the Criminal Justice Act, 1991.

¹⁹ As provided by sections 1 and 2 of the Criminal Justice Act, 1991.

²⁰ N.M.Z. NGULUBE, SOME ASPECTS OF GROWING UP IN ZAMBIA, 20 (1989); see for more information on other ethnic groups, J.P. Bruwer 'Kinship Terminology Among the Chewa of the Eastern Province of Northern Rhodesia,' (1948) AFRICAN STUDIES 186 (Dec. 1948) K. POEWE, RELIGION, KINSHIP, AND ECONOMY IN LUAPULA, ZAMBIA (1989); E. SKJONSBERG, CHANGE IN AN AFRICAN VILLAGE: KEFA SPEAKS 124 (1989). C.M.N. White Vol. 14 No. 3, *Factors in the Social Organisation of the Luvale*, African Studies.

²¹ Part II, particular sections 9-18, and Part III sections 63-74, respectively.

²² See Juveniles Act., section 73.

²³ *Ibid.*, s 64(1).

²⁴ *Siwale v. The People* (1973) ZR 218.

includes offenses normally specified (in the case of adults) to be tried by the High Court.²⁵ The Supreme Court has decided that if a person is being tried by the High Court and during the proceedings it comes to the notice of the court that the accused is a juvenile, the trial must be abandoned and the case referred to the Juvenile Court. Baron, D.C.J. (as he then was), stated:

In the present case the indication arose for the first time when the statements of the appellants were received in evidence. At this point the trial court should immediately have conducted an inquiry as to the appellants' age, and having found that they were both juveniles ... should have ordered that the matter be heard and disposed of in a Juvenile Court. The High Court had no jurisdiction to hear this matter...²⁶

The appeal in this case was allowed and a re-trial ordered. The decision of this case emphasises the exclusive jurisdiction of the Juvenile courts over criminal cases involving juveniles. But in some cases subordinate courts do not follow this simple procedure of inquiring into the age of an immature accused, which, if appropriate, would validate their status in juvenile courts.

As the age of the offender is the vital factor in founding the jurisdiction of a juvenile court, a court has a duty to ascertain the age of any accused juvenile appearing before it. This means that the court must inquire into, and determine the age of a 'juvenile'.²⁷ As Mr Skinner once stated:

... It appears to me that the magistrate did not appreciate that he was dealing with a charge against a juvenile, and this was an irregularity which arose from his failure to inquire as to the age of the appellant.²⁸

The Court must show, in the case record, that it has ascertained the age of the juvenile, and if it fails to comply with the provision of the Act, the whole proceedings that follow may be nullified on appeal. However, perusal of case records at Lusaka juvenile courts for the period 1991 and 1992 revealed that most magistrates did not endorse the ages of juveniles and never even inquired about it.

IV THE AGE OF CRIMINAL RESPONSIBILITY

As shown, age plays a critical role in juvenile justice. It is a determining factor for the court in exercising its jurisdiction, in deciding the criminal responsibility of the offender and in selecting the sentence imposed on

²⁵ Sections 10 and 11 of the High Court Act, Cap 27 of the Laws of Zambia.

²⁶ *Musonda and Others v. The People* (1976) ZR 218 at 220.

²⁷ Section 118 of the Juveniles Act.

²⁸ *Chipendeka v. The People* (1969) ZR82 at 83.

conviction, especially in deciding whether to impose a term of imprisonment or an approved school order.

The Penal Code of Zambia has retained the common law rule that eight years is the lower limit of the age of criminal responsibility from criminal liability. As section 14 of the Penal Code provides:

A person under the age of eight years is not criminally responsible for any act or omission.²⁹

In the study, one case was found where a juvenile was arrested and charged with causing malicious damage to property; his age was given as eight years. When the case came up for plea on 10 April 1991, the father informed the court that his son was born on 24 October 1984, and gave the offender's age as seven years. The court's order was that 'since the child is under or about seven years, he is *doli incapax*; case dismissed; there is no case against him.'³⁰ This case showed lack of police investigations into the social background of the juvenile offender because the information could have been supplied earlier by parents or guardians. This suggests that the police officers failed to contact the parents when the juvenile was taken into custody.

Other Commonwealth countries in Africa have retained similar provisions in their Penal Codes,³¹ while the Uganda Child Law Review Committee (1992) proposes to raise the lower limit of criminal responsibility to fourteen years.³² In China the Youth Court has jurisdiction over juveniles between the ages of fourteen and eighteen years; those under fourteen years are not criminally responsible.³³ A victim is supposed to take civil proceedings against the parents of the juvenile.

England has raised the age of criminal responsibility to ten years, although juvenile offenders between the ages of ten and fourteen years are very frequently dealt with under the police cautioning system without being brought to the Youth Court.³⁴ It is a system intended to divert young juveniles from the criminal justice system and reduce the number of juveniles labelled criminals. However, the system is being criticised as widening the door to bring in those who formerly would not have been taken to the police station in the same circumstances, but informally warned in the street

²⁹ Section 14(1) of the Penal Code, Cap. 87 of the Laws of Zambia.

³⁰ Case Record No. 2P/49/91.

³¹ Section 15 of the Penal Code, Cap. 08:01 of Laws of Botswana, provides eight years as the lower limit while section 14 of the Penal Code, Cap. 7:01 of the Laws of Malawi, provides an even lower age limit of seven years.

³² Uganda: Child Law Review Committee, 1992 (Department of Probation and Social Welfare: Ministry of Labour and Social Welfare), p. 60.

³³ Ms Zuo Yan, Deputy Chief, Criminal Division, Chug Ning District People's Court, Shanghai Municipality, Seminar Paper presented at the School of Oriental and African Studies, London, on 3 December 1993.

³⁴ Section 70 of the Criminal Justice Act, 1991 renames Juvenile courts as Youth courts to deal with juveniles aged between fourteen and seventeen years.

by an officer exercising his discretion.

It must be noted that no international instrument defines an age limit of criminal responsibility. Article II of the African Charter on the Rights and Welfare of Child defines a child as a person under the age of eighteen years; as regards the administration of juvenile justice, it provides 'there shall be a minimum age below which children shall be presumed not to have the capacity to infringe the penal law.'³⁵ The age limit of criminal responsibility is left for national governments to determine, as a recognition that social and cultural factors must be taken into consideration in each particular country.

A juvenile of eight years and above may be charged with any criminal offence. However, in Zambia, a juvenile aged between eight and twelve years may not be found guilty of an offence unless the prosecution adduces evidence to show that the juvenile had 'mischievous discretion': an ability to understand the act and to know or appreciate its consequences.³⁶ The juvenile's criminal responsibility, and his capacity to know that what he was doing was wrong can be proved only from all the circumstances of the case; for example, if he concocted an ingenious and perfectly untrue story to excuse himself.³⁷ This rebuttable presumption of innocence in favour of juveniles aged eight to eleven years, as in common law, does not apply to those of twelve years and above, although by statutory definition a person under fourteen years is a child.³⁸

However, it seems the presumption conforms to some traditional tribal practices. For example, among the Luvale, boys between the ages of nine and thirteen years undergo a Mukanda initiation ceremony, whereby they learn their social responsibilities in the society. Thereafter, they are expected to have the intellectual capacity to distinguish wrong from right. They have attained the status of manhood in the eyes of their community. For example, they are expected to distinguish consent from refusal by girls in sexual relationships.³⁹

The Penal Code prescribes an irrebuttable presumption that a boy under twelve years of age is incapable of having sexual intercourse.⁴⁰ But, as already noted, a boy of eleven years, through the initiation ceremony is taught sexual techniques, and after the ceremony, is considered to be fully capable, with knowledge of herbs believed to increase his sexual strength. Under traditional customary law, a boy of eleven years of age could be accused of rape, but not under the Penal Code. The statutory presumption was based on English law, but it is doubtful whether Zambia will follow the recent abolition of the presumption in England, where section 1 of the Sexual Offences Act, 1993 abolishes the presumption of criminal law that a

³⁵ Art. XVII of the African Charter on the Rights and Welfare of Child, 1990.

³⁶ Section 14(2) of the Penal Code.

³⁷ *R v. FC (A Juvenile)* 2 NRLR 185.

³⁸ Section 2 of Juveniles Act.

³⁹ C.M.N. White (1955), *supra* note 20 at 56.

⁴⁰ Section 14(3) of the Penal Code.

boy under the age of fourteen years is incapable of sexual intercourse. In any event, the presumption applies in Zambia only to the age of twelve (not as formerly in England, fourteen) years.

V FUNDAMENTAL RIGHTS AND LEGAL REPRESENTATION

A juvenile accused of a criminal offence is guaranteed the same rights as an adult by the Constitution. These include, the right to a 'timely' trial, the right to notice of the charges, the right to cross-examine witnesses and the right to remain silent.⁴¹ Juveniles also have the right to representation by counsel of their choice; furthermore, in cases of rape, murder, aggravated robbery, incest, and other 'specified offences,' legal counsel must, if necessary, be provided by the State. When a person is brought before a court charged with any of these specified offences, the court is under a legal obligation, before taking a plea, to issue a legal aid certificate, which requires the Director of Legal Aid to provide counsel to represent the juvenile in court.⁴²

The provisions of the Legal Aid Act do not apply specifically to juveniles, but to all accused persons. In the case of *Tembo v. The People*,⁴³ a juvenile pleaded guilty without the issuing of a certificate and there was no legal aid representative in attendance before the trial court. On appeal, Baron, D.C. J., stated:

... Once again we cannot overstress the importance of complying with clear statutory provisions, particularly when such provisions are designed for the protection of accused persons. Here we have a mandatory provision for the issue of a legal aid certificate and it would of course be absurd to imagine that all the legislature had in mind was simply the issue of such certificate; clearly the intention of the legislature was to ensure that the accused actually had legal representation at his trial.⁴⁴

This quotation shows that the Juvenile Court did not comply with even mandatory provisions, and as such, the Supreme Court could not overstress that mandatory provisions must be followed. Case records at Lusaka subordinate courts over two years (1991-92) show that out of 118 juveniles' cases, advocates appeared in only two cases. It is difficult to determine why advocates are not involved in juveniles' cases; it may be that the high

⁴¹ Art. 18(1) and (2) of the Constitution Act 1996, and also sections 205 and 207 of the Criminal Procedure Code and Section 64 of the Juveniles Act.

⁴² Sections 9(1) and 10 of the Legal Aid Act.

⁴³ (1974) ZR 286.

⁴⁴ *Ibid.*, at 288.

fees charged by lawyers discourage juveniles and their parents from seeking their services.

Criminal proceedings in a Juvenile Court follow the full adversarial process by which a criminal trial of an adult is normally conducted. The prosecution adduces evidence to establish the guilt of the juvenile offender beyond reasonable doubt.

The juvenile or his/her parent or guardian if present in court, can cross-examine the prosecution witnesses, 'at the close of evidence in chief of each witness'.⁴⁵ In most cases, juveniles fail to cross-examine witnesses and instead make statements. If this happens, the Juvenile Court is empowered to put questions to the witnesses on behalf of the juvenile, and thereafter the public prosecutor has the right to re-examine the witness on the answer given.⁴⁶ In this study, it was observed that Juvenile courts in many instances did not comply with this provision of the Act. They insisted that juveniles put questions to the witness and, if they failed to do so, they were ordered to be silent and sit down.

VI THE IMPORTANT PRELIMINARY PROCEDURAL ISSUES

Unfortunately, Juvenile courts do not comply with important provisions of the Juveniles Act, which pertain to separation of juveniles from adult criminals, and require proceedings of these courts not to be held in open court. The magistrates interviewed took the view that taking a plea or mentioning a juvenile case in open court was not a serious violation of the provisions of the Juveniles Act.⁴⁷ It is, therefore, necessary to ascertain how the courts handle juveniles in relation to preliminary procedural issues. This raises the question of whether there is effectively a separate system of juvenile justice in Zambia.

This question can only be answered by examining the provisions of the Juveniles Act and the operational practices of Juvenile courts, which are subordinate courts hearing charges against juveniles. As has already been noted, the nineteenth century 'child savers' (social reformers) in western countries advocated the separation of juveniles from adult criminals to avoid dangers of corruption and stigmatisation.

Criminal trials in Juvenile courts, although matters of public interest, differ from adult criminal proceedings in being closed to the general public, except for the relatives of the juvenile and of the victim, if he/she is a juvenile too.⁴⁸ Also, the juvenile accused does not stand in the dock but in

⁴⁵ Section 64(4) of the Juveniles Act.

⁴⁶ Section 64(5) of the Juveniles Act.

⁴⁷ Interviews held with magistrates in Lusaka in early 1997 whose names were withheld.

⁴⁸ Section 119(2) of the Juveniles Act.

a particular place at the front of the courtroom, where he/she can speak to the magistrate and be spoken to without any difficulty. In relation to the sittings of Juvenile courts, the Act provides:

A Juvenile Court shall sit in a room other than that in which any court other than juveniles courts ordinarily sits, unless no such other room is available or suitable, and if no such room is available, the Juvenile Court shall sit on different days or at different times from those on or at which ordinary sittings are held.⁴⁹

Despite the clear provision of the Act, in this study it was found that juveniles are tried by the same magistrates, on the same days, at the same times and in the same court rooms as adults. The juveniles are/were seen being conveyed together with adult criminals, in a troop carrier designated as a prisoners' van, from police cells or remand prisons to the court. They are then locked up together with adults in cells at the subordinate courts while waiting to be taken inside the court rooms. When the courts begin hearing cases, juveniles and adults are brought into the courtrooms and sit on the same bench waiting for their cases to be called.

The public prosecutor calls the name of the juvenile and the interpreter then hands the case records to the magistrate. The offender moves and stands in front of the bench, behind the Public Prosecutor, and does not enter the dock. The magistrate asks the offender preliminary questions, which are important, such as name, age, residential address and parents' names. It is at this stage that the magistrate declares the court to be a Juvenile Court and orders other persons not connected with the case to go outside when in fact the identity of the juvenile has already been revealed to the general public. Adult accused persons not jointly charged with the offender remain in court. At no stage are/were juvenile offenders separated from adults; nor do the courts concern themselves to arrange sittings at different times or in different rooms, as the Act requires. This fundamental procedural requirement is routinely ignored. Although the Juveniles Act establishes a separate juvenile justice system, the Juvenile courts themselves do not appreciate this fundamental factor distinguishing them from ordinary criminal courts for the trial of adults.

VII COURT ATTENDANCE BY PARENTS OR GUARDIANS

It must be pointed out that in Zambian traditional society, a child internalises basic beliefs, values, attitudes and general patterns of behaviour that give direction to his or her subsequent behaviour within the family.

⁴⁹ Section 119(1) of the Juveniles Act.

The family is the initial transmitter of the culture through the socialisation process and, therefore, the parental role in juvenile justice is vital. It must also be noted that in the traditional criminal process the juvenile's liability was understood in the context of the parent's role in the criminal process. It was the parent or guardian who was summoned before a chief's court or council of elders. Simaluwani's study⁵⁰ showed that the village committee courts in rural Zambia summon the parent unless the parent has brought the case before the court on behalf of his or her child. This is vital for the maintenance of the family unit and the recognition of the parental responsibility for determining the personality, characteristics and conduct of children. It assists the court in assessing whether the parents have contributed to the juvenile's misconduct through their negligence in instilling in him or her the necessary norms and cultural values.

In the Juvenile courts, the Juveniles Act provides for the attendance of a parent or guardian:

Where a juvenile is charged with an offence ... before a court, his parent or guardian ... shall if he can be found and resides within a reasonable distance, be required to attend at court before which case is heard ... during all stages of the proceedings, unless the court is satisfied that it would be unreasonable to require his attendance⁵¹

The terms of this provision have been held by the High Court and Supreme Court to be mandatory. In *Lumsden v. The People*, Ramsay, J., stated:

There is nothing in the record to show that the requirements of section 125 [as it then was] ... were complied with. In my judgment, this section is mandatory in its terms and a Juvenile Court must either ensure that a juvenile's parent or guardian attends or makes an order that, in the circumstances, it is unreasonable to require the attendance. This was not done in the instant case ... accordingly I quash the finding of guilt.⁵²

If such attendance is dispensed with, the Juvenile Court should make an order that, in the given circumstances, it was unreasonable to require such attendance. The attendance of parents is vital and the provision is designed for the protection of juveniles. As Gardner, J., has stated:

We cannot over-emphasise that provisions such as these, which are designed for the protection of juveniles, are there

⁵⁰ E.M. Simaluwani, *supra* note 14 at 180-184.

⁵¹ Section 127 of the Juveniles Act.

⁵² *Lumsden v. The People* (1967) ZR 145; see also *Tembo v. The People* ZR 286; *Chalimbana v. The People* (1977) ZR 283; *Mumba and Others v. The People* (1978) ZR 404.

to be complied with and not ignored ... The important consideration is that if these provisions are not complied with they may prejudice juveniles. In this case, having once indicated his wish to plead not guilty, the juvenile changed his plea. We do not know whether this was the fairest course for him to take without the advantage of advice from a parent or guardian. In the circumstances we are of the opinion that, because of the possibility of prejudice, it would be proper to allow this appeal which we do.⁵³

This case illustrates that, in the absence of a lawyer, a juvenile offender is expected to seek guidance from his parents and that every opportunity should be given to him to do so. This provision does not apply to a Juvenile Court only, but to any court where the juvenile appears, whether jointly charged with an adult or not.⁵⁴

As stated above, the completed case records of Lusaka Juvenile courts were examined for the period between January 1991 and December 1992, totaling 118 cases (sixty-one for 1991 and fifty-seven for 1992). Analysis of these cases demonstrates that the Juvenile courts routinely hear and determine cases in the absence of parents or guardians. It was found that in 57 per cent of cases handled in 1991, parents did not attend, while in 1992 the proportion rose to 70 per cent. Most of the magistrates interviewed stated that if this provision of the Act was complied with, juveniles cases would never be commenced, and if commenced, they would take a long time to be completed.

In cases where the court shows a concern over the attendance of a parent, the matter tends to drag on without a plea being taken. This means that offenders remain in custody unnecessarily long, and therefore, operates to their disadvantage. This is never in the interests of juvenile offenders, as can be seen from this representative extract from the proceedings in the case of *The People v. A.S. (a Juvenile)*.⁵⁵

- | | |
|------------------|--|
| 11 February 1992 | - For Plea; adjourned to 14 February. |
| 14 February 1992 | - Juvenile offender not present; adjourned to 17 February. |
| 17 February 1997 | - Public Prosecutor addresses Court, 'the Juvenile offender not present.' |
| | - Order of Court: case adjourned to 24 February. |
| 24 February 1992 | - Public Prosecutor addresses Court, 'the juvenile offender not present and is reported to be sick at Emmasdale Police Station.' |
| | - Order of Court: adjourned to 2 March for Plea. |
| 2 March 1992 | - Offender present; guardian absent. |

⁵³ *Chalimbana v. The People* (1977) ZR 284.

⁵⁴ *Mumba and Others v. The People* (1978) ZR 404.

⁵⁵ Case Record No. 3p/53/92.

- Order of Court: adjourned to 6 March, to allow Police to summon the father.
- 6 March 1992 - Offender present; Public Prosecutor, 'father absent; applying for more time to summon him.'
- Order of Court: adjourned to 13 March.
- 13 March 1992 - Offender present; Public Prosecutor, 'father absent, I intend to summon the Social Welfare Officer.'
- Order of Court: adjourned to 23 March.
- 23 March 1992 - Offender present, father and Social Welfare Officer absent. Public Prosecutor, 'I talked to the Social Welfare Officer who indicated that he would attend Court, but he is not here today.'
- Order of Court: adjourned to 30 March, Social Welfare Officer to be contacted.
- 30 March 1992 - Offender present; father and Social Welfare Officer absent. Public Prosecutor, 'I have tried to get hold of any Social Welfare Officer, but I have not been successful. I am applying for another adjournment.'
- Order of Court: adjourned to 2 April.
- 2 April 1992 - Offender present: Guardian absent. Public Prosecutor, 'the guardian is at the High Court, who is our hope. I am informed he will start work on 26 April.'
- Order of Court: adjourned to 21 April for mention and 29 April for plea.
- 21 April 1992 - Offender present; Guardian present. Public Prosecutor, 'the matter is for mention.'
- Order of Court: adjourned to 29 April for plea.
- 30 April 1992 - Offender not present. Public Prosecutor, 'the offender was not brought from the Remand Prison.'
- Order of Court: adjourned to 5 May, for plea.
- 4 May 1992 - Offender present; Father present. Public Prosecutor 'the matter is for plea.'
- Court reads out the charge, and Interpreter explains the charge to the offender in Nyanja language.
- Offender denies the charge. Plea of not guilty entered.
- Order of Court: adjourned to 18 May, for mention and 21 May for trial.

This case shows that the offender remained in detention for about four months before a plea could be taken, and it took three of those months to summon the father, who worked in the Judicial Department. Even when the juvenile was said to have been sick in police cells, the Court did not inquire why he was over detained or whether he had been taken to the hospital for treatment while he was incarcerated.

A person not charged with an offence punishable with death, if not released on bail, is supposed to be brought before a court within twenty-four hours of his or her arrest.⁵⁶ In this case, the juvenile offender was in custody for twenty-one days before seeing a magistrate, and even when his guardian attended, he was not released on bail or to the custody of the father, who was said to be employed. The case records perused showed that in over 70 per cent of those cases, offenders were not granted bail. This means that juveniles remain in custody throughout the criminal process, as they are denied bail by police on arrest. Let us see what happened on the date set for trial:

21 May 1992 - Offender present, guardian present.

- Public Prosecutor: 'it is supposed to be a trial, but the complainant has an application to make.'
- Complainant: 'I would like to withdraw the matter against the offender; my parents and those of the juvenile have stayed together for a long time. I pity him.'
- Ruling by the Court: Application granted. The charge against the juvenile is withdrawn. The juvenile offender is hereby acquitted in accordance with section 20 of the Criminal Procedure Code.'

It is surprising to note that it took three months to trace the offender's father, who was a neighbour to the complainant. This shows how inefficiently the Public Prosecutors prepare cases for trial, in that they do not take a keen interest in the whereabouts of parents of offenders; it also shows that investigating officers do not try to see the complainant together with the offenders in order to settle the matter out of court, especially for cases of assault, such as the one quoted. If they did this, they would find that more cases ended at police stations. This would be one way of diverting juveniles from the criminal justice system and reducing the caseloads of Juvenile courts.

VIII CONCLUSION

The establishment of Juvenile courts in 1953 was supported by a renewed belief in the 'rehabilitative ideal' and the 'treatment' of delinquents, and 'neglected children.' The provisions of the Act were in line with the English Children and Young Persons Act, 1933, based on the principle of *Parens Patriae*, and at that time this judicial approach was exercised in favour of juveniles, because the magistrates, social welfare officers and other personnel had theoretical and cultural understanding of the juvenile justice

⁵⁶ Section 33(1) of the Criminal Procedure Code.

system.

The assumption is that magistrates who sit in Juvenile courts have received special instruction in social work and probation services. Leniency and understanding are expected to be evident as the Juvenile courts were intended to help juveniles, rather than to punish them. In this study, it was found that the same magistrates hearing adult criminal cases also tried juveniles, and sat as an open court in so doing. This is contrary to the provisions of the Juveniles Act, which provides for separate court rooms or different times of sitting. Charges against juveniles are not heard first and given precedence as they should be. Over detention is common and parents are often not summoned to attend court sessions. The Juvenile Court exists in theory, but it does not operate as a separate court as required by the law.

The reform of the juvenile justice system cannot be achieved merely by codifying the laws relating to juveniles; it is important to re-evaluate the operations of each relevant institution to find out why it is not functioning well. As it has been shown in this article, mistakes so identified can be rectified. For example, the magistrates should have special courses on juvenile justice, especially on arrest and detention for officers working in Lusaka and the Copperbelt towns.

Juvenile courts are neither modern nor traditional courts in their operation, due to the absence of a proper theoretical and historical understanding of the juvenile justice system. The training of magistrates is not broad enough to cover criminological explanations of juvenile crime, and they misconceivedly apply provisions of the Act which embody the philosophy of the juvenile justice system. The role of parents in juvenile justice is recognised as vital in the Act and under customary law practices, but not by the police, public prosecutors or the courts. The traditional legal systems are still applicable to a significant extent: the infrastructure exists in the form of village committees, which settle many local disputes, including those arising from juvenile misbehaviour.⁵⁷ Many of the elders who sit on these village committees have retired from work in urban areas, where some of them, as police officers or magistrates, once enforced national laws. Even in the urban areas, local courts often resort to traditional law and procedures. The fundamental problem in this area since independence has been the failure of the Government to define and apply a policy to deal with juvenile offenders.

It is, therefore, argued that the juvenile justice system should be remodelled based on the contemporary criminological theory of 'just

⁵⁷ E.M. Simaluwani (1994), *supra* note 14 at 183-185; see also S. Coldham, *Customary Marriage and Urban Local Courts in Zambia*, JOURNAL OF AFRICAN LAW, 67-75 at 74 (1990); and R.S. CARTER, LAW AND LOCAL LEVEL AUTHORITY (1976).

desserts' which incorporates welfare principles, and should largely adopt and mobilise the values and institutions of customary law and its procedures. The emphasis should be on the communities and families that must play a vital role in controlling juvenile crime and must encourage appropriate preventive measures. This means that juveniles require proper socialisation to minimise tendencies for deviant behaviour. This is within the context of the *United Nations Guidelines for the Prevention of Juvenile Delinquency*,⁵⁸ which provide that pre-delinquency detention through child socialisation is vital.

The importance of the family in the prevention of delinquency is recognised in the *Riyadh Guidelines*, as some of the fundamental principles laid down are:

2. The successful prevention of juvenile delinquency requires efforts on the part of the entire society to ensure the harmonious development of adolescents, with respect for and promotion of their personality from early childhood.
3. For the purposes of the interpretation of these guidelines a child-centred orientation should be pursued. Young persons should have an active role and partnership within society and should not be considered as mere objects of socialisation or control.
4. In the implementation of these guidelines, in accordance with national legal systems, the well-being of young persons from their childhood should be the focus of any preventive programme.
11. Every society should place a high priority on the needs and well-being of the family and its members.

A workable and constructive social policy for juveniles must be based on these guidelines which, in brief, reinforce the aims of traditional child socialisation in Zambia.⁵⁹ In traditional ethnic groups, a child is taught throughout his/her life the essentials of the society and is prepared for the uncertainty of future life, in such a way that he or she becomes self-reliant. The socialisation process leads him or her to acquire religious, political, economical and legal techniques from imitation, experience and participation in relevant economic activities. Such activities reduce stress and tendencies to delinquency, as the child is under constant supervision. For example, in Southern Province where the people are traditional cattle-keepers, the boys

⁵⁸ 8th United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in 1990, of the General Assembly, adopted the draft resolution; *United Nations Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines)* A/Conf. 144/26 of 5 September 1990; for more information, see the *United Nations Convention on the Rights of the Child*, 1989; the *African Charter on the Rights and Welfare of the Child*, 1990; and the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules)* 1985 (General Assembly Resolution 40/33 of 29 November 1985).

⁵⁹ N.M.J. Ngulube, *supra* note 20 at 24.

spend most of their time on cattle herding, while girls are involved in domestic activities (cooking, collecting firewood, drawing water from streams or wells and looking after the young children).⁶⁰

However, the *Riyadh Guidelines* reinforced the *Beijing Rules*,⁶¹ which recognise the importance of the family and the community in dealing with juvenile offenders and discourage custodial sentence; any sentence imposed on the juvenile should take into account his or her well-being. This involves the improvement of the social environment for both the offender and the potential offender, and the application of penal sanctions. The improvement of the social environment may include giving encouragement to effective means of socialisation for children, to enable them acquire personality characteristics beneficial to their well-being.

Contemporary thinking is guided by the principle of proportionality, and penal sanctions are classified in order of severity: custodial sentences are on the upper levels, followed by community-based orders on the lower levels. The traditional legal systems were community-oriented, as the family was responsible for its children's misconduct. In short, a juvenile justice system for Zambia must be community-based. As it has been shown in this article, the rights of juvenile suspects are often abused by the police and the courts.

It is relevant to emphasise here that the dual character of the criminal justice system and the complex nature of child socialisation, which raises conflicts between traditional and modern social norms and values in contemporary Zambia, especially in urban areas, make it difficult to make recommendations that can be applicable to all individuals. Therefore, any recommendations made should take into account the economic and social factors of diversity between different sections of the population, as well as the variety of contemporary values that prevail in Zambia. Importantly, for the system of juvenile justice advocated here to function well, there must be, on the one hand, an explicit policy to combat juvenile delinquency on the part of the Government, and on the other hand, there must be a committed workforce on the part of law enforcement agencies, not restricted to performing official duties during office hours only.

Zambia is experiencing economic constraints and is not able adequately to fund the law enforcement agencies. But, it has an abundant vital asset on which to build its juvenile justice system: traditional cultural values. It is up to the Government to mobilise the people in this regard, to encourage traditional customs and socialisation practices which are not prejudicial to the healthier life of the child.⁶²

⁶⁰ The economic activities of children were observed in Chief Simatachela's area of Kalomo District of the Southern Province, where it was found that the child's basic role in a traditional society is to learn, acquire traditional skills and absorb basic norms for the continuity of the society.

⁶¹ Rule 1.3 of *Beijing Rules*, *supra* note 58.

⁶² As provided under Article XXI(1) of the *African Charter on the Rights and Welfare of the Child*, 1990.

The local courts, applying customary law, have remained popular in rural areas and even in urban areas among certain individuals. In rural areas people opt to take criminal cases before local courts, instead of reporting them to the police, as pointed out earlier, confirming earlier studies done among the Lenje.⁶³ Coldham found that decisions of local courts in Lusaka are infrequently appealed against.⁶⁴ It would be better to transfer the jurisdiction of the Juvenile Court to the local court for certain offences (e.g., assaults, theft, malicious damage to property, etc), where compensatory and reconciliatory remedies would be appropriate, and juveniles will not be frequently detained. These courts are widely spread throughout Zambia and would be able to deal with juvenile cases without delays, as evidenced in this article. The traditional courts should be re-evaluated and given a vital role to play, given the dual characteristic of the system of juvenile justice and of the society at large.⁶⁵

Alternatively, special separate juvenile courts should be instituted with their own trained personnel. If this cannot be done, at least one magistrate in each major town should be appointed to hear all juvenile cases.⁶⁶ Such magistrates would eventually develop understanding and effective approaches to juvenile offenders, as they gain insight into juvenile crimes.

Last, but not the least, the age of criminal responsibility must be raised from eight years. The detention of juvenile offenders must be the last resort, as they should be always in the custody of their parents or guardians.

⁶³ R.S. Carter, *supra* note 57.

⁶⁴ S. Coldham, *supra* note 57 at 70.

⁶⁵ Malawi had allowed 'Traditional Courts' to operate and hear serious crimes as burglary, rape, housebreaking and theft, etc., side by side with the imposed judicial system; for more information see, L.J. Chimango, *Traditional Criminal Law in Malawi*; THE SOCIETY OF MALAWI, 28, 28-36 (1975).

⁶⁶ This arrangement was done in 1974 and 1975 in Lusaka, where Mr M. Moodley (then Senior Resident Magistrate) assigned Mr M. F. Burgess, Magistrate Class II, to hear all juvenile cases and the present author was prosecuting before Mr Burgess. The system worked well and it did not cause problems to social welfare officers and the police, as they had to appear before one court for juvenile cases.

CASE COMMENT

Realising Inherited Assets of the Insolvent for the Creditors: Why *Badenhorst v. Bekker NO en andere* 1994 (2) SA 155 (N) is Correct.

By
D.A. Ailola*

I INTRODUCTION

The sequestration of a party's estate imposes a certain *capitis diminutio*¹ on the insolvent and divests him of his estate. For many insolvents, this usually entails quite pathetic circumstances. For this reason, it is not unusual for them to attract the sympathy of their friends and families. Such sympathies often turn into a form of material help, such as work or even capital, for the resurrection of the insolvent's business ventures. The question that begs an answer is whether such help, if it is substantial, should be ignored by the trustee and the creditors of the insolvent person. An even more pertinent question is whether assets which have come to the insolvent by way of a legacy or some other form of inheritance, should be allowed to be enjoyed by him adversely, to the claims of his creditors. In South Africa, these questions have raised a certain amount of academic and judicial debate.² To answer them, one obviously needs to examine closely the real extent and effect of a sequestration order on the estate of an insolvent person in general, and on his inheritance in particular. The nature, scope and extent of such effect lies within the four corners of the Insolvency Act³ itself and in the judgements of the courts.

II THE EFFECT OF SEQUESTRATION

According to section 20(1)(a) of the Insolvency Act, the effect of the sequestration of the estate of an insolvent is to divest him of his estate and to vest it in the master of the Supreme Court until a trustee has been appointed, and, upon the appointment of a trustee, to vest the estate in him. There are, however, certain exceptions to this rule. In the Act, these are

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¹ A diminishment of legal capacities.

² See R.H. HAHLO, *THE SOUTH AFRICAN LAW OF HUSBAND AND WIFE*, 165 (5th Ed., 1985); C. SMITH, *THE LAW OF INSOLVENCY* 82 (1988).

³ Act No 24 of 1936.

covered mostly by sections 23⁴ and 156.⁵ Others are spelt out by the Insurance Act⁶ in terms of sections 39⁷, 40⁸, 41⁹, 42¹⁰ and 43, 57 and 58,¹¹ plus numerous other Acts.¹² What needs to be established then is whether a legacy or inheritance received by an insolvent person, whether before or after sequestration, also constitutes an exception to section 20(1). It is also necessary to show whether it is within the power of the testator to exclude such property from the insolvent estate of the legatee.

III THE ESTATE OF THE INSOLVENT

It is generally agreed that the estate of an insolvent comprises all his property on the date of the sequestration order.¹³ It includes property or proceeds thereof which are in the hands of a sheriff or a messenger of the court under a writ of attachment. In this connection, it suffices to note that even immovable property which has been attached and sold in execution, falls within the insolvent estate if the estate of the judgement debtor is

⁴ These include the insolvent's right to enter into certain types of contracts, with or without the consent of his trustee, provided they do not have any effect on assets in his insolvent estate. Another exception is that an insolvent may, with the consent of his creditors, trustee or master of the Court, work or practice a profession other than in the areas of trading as a general dealer or manufacturer. He is also entitled to keep his pension, compensation for any loss or damage relating to the defamation of his character or personal injury suffered, as well as such portion of his earnings as are determined by the master to be necessary for his own support and that of his dependants. In addition, he can sue or be sued in his own name without reference to the trustee in matters relating to status or other right which does not affect his estate or claim against him. See generally section 23(1), (2), (3), (4), (4), (5), (6), (7), (8) and (9).

⁵ Which protects the the proceeds of insolvent's policy which are due to a third party in respect to loss, damage or injury effected by the insolvent.

⁶ Act 27 of 1943.

⁷ Which excludes from the insolvent estate an insured person's life policy or policies which have been insured for three years or more and whose value does not exceed R30, 000. Any monies or assets into which such a policy or policies have been converted is also protected for a period of up to five years.

⁸ Which gives precedence to the claims of the policyholder's heirs and successors over those of his creditors or trustee upon his death.

⁹ Which excludes life policies of a married woman, whose value does not exceed R30, 000, from her husband's insolvent estate.

¹⁰ Which protects against insolvency all life policies which have been effected by a man in favour of a woman whom he later marries whether or not in community of property.

¹¹ Giving protection to funeral policies of the insolvent.

¹² See the Railway and Harbours Act 28 of 1912 and s 37B of the Pension Funds Act 24 of 1956, substituted by s 13 of Act 94 of 1977 and s 12 of Act 80 of 1978. See also the Workmen's Compensation Act 30 of 1941, the Land Bank Act 13 of 1944, Unemployment Insurance Act 30 of 1966, the Aged Persons Act 81 of 1967, War Veteran's Pensions Act 25 of 1968, Occupational Diseases in Mines and Works Act 78 of 1973, the General Pensions Act 29 of 1979, and Attorneys Act 53 of 1979, etc.

¹³ C. SMITH, *THE LAW OF INSOLVENCY* 82 (1988).

sequestered before formal transfer by registration. It, therefore, falls to be dealt with in terms of section 20(1)(a) and 20(2)(a).¹⁴ The common law has now expanded this principle by providing that even property which accrues to the insolvent, or which he may acquire during the sequestration also falls under his insolvent estate. Such property may have come by way of his employment activities during insolvency or, with the consent of his trustee, from his business and contractual activities.¹⁵

Amongst the things that the insolvent may acquire during sequestration are assets that are bequeathed to him by way of inheritance. Thus, in *Brown v. Oosthuizen*¹⁶ it was concluded that, as section 23 of the Insolvency Act did not provide to the contrary, the right to inherit formed part, in terms of sections 20(2) and 23(1) of that Act, of the insolvent estate, which in terms of section 20(1)(a) vested in the trustee. Accordingly, the Court had no power to exclude such property from the insolvent estate. In that case an insolvent debtor was applying for rehabilitation. All creditors who had proved claims against his estate had been fully paid and a small surplus remained. In addition, he had inherited a significant amount of cash. In his application for rehabilitation he also sought an order declaring the inheritance to vest solely in himself. Notice of the application was given, *inter alia*, to his trustee, who made no claim to the inheritance, and to six creditors, who had not proved their claims against the insolvent estate. Two of these creditors opposed the order in connection with the inheritance. Taking advantage of the trustee's lack of interest in the inheritance, the applicant contended that the Court had an equitable discretion to grant the order and that section 127 (2) of the Insolvency Act was wide enough to authorise such an order. The court, however, did not accede to this request. It decided as stated above.

IV

BADENHORST V. BEKKER NO EN ANDERE

In this case, the facts and holding of which are reported in the Afrikaans language, the principle that a legacy accruing to a debtor during insolvency fell into his sequestered estate was taken to an even higher plane. It was held that property which accrues to the insolvent by way of inheritance belongs to the insolvent estate even if the testator has ordered that it should not.

(i) The Facts

The facts of this case were briefly that the applicant and her husband

¹⁴ See *Simpson v. Klein* 1987 (1) SA 405 (W).

¹⁵ See s 20(2)(b) and s 23(1).

¹⁶ 1980 (2) SA 155 (O).

were married in community of property. Their joint estate had been sequestered in 1985. In 1992 the applicant's father died, having bequeathed certain property to her in his will. In the will in question it was also provided that any person inheriting thereunder would receive his or her inheritance as his or her free and exclusive property, free from the claims of creditors. The testator also excluded such bequests from any community of property to which the heir or heiress might be a party as a spouse. In the case of a beneficiary who was a female, the will also stated that her inheritance was to be enjoyed by herself only, free from her husband's control and marital power.

At the time of the testator's death and testament, he knew about the sequestration of the joint estate and of the fact that his daughter was an insolvent person therefore. In essence, his aim was to circumvent the goals of the Insolvency Act and the judgment of the court in *Brown v. Oosthuizen*.¹⁷ The respondents, who were the trustees of the joint estate, laid a claim to bequeathed assets, upon which the applicant approached the court for a declaratory order that she was entitled to them. Accordingly, the issue the court had to address was whether it was able to give effect to the testator's wish to put the excluded assets beyond the reach of the creditors of the insolvent joint estate.

(ii) The Holding

In his judgment, McLaren, J., held that the testator was perfectly within his rights to bequeath assets in such a way that they would neither be part of the joint estate nor subject to the matrimonial power of the applicant's husband. However, irrespective of which estate they fell under as long as they ultimately vested in a party such as the applicant who had been declared insolvent by virtue of her marriage in community, they could not be said to be unavailable for hers and her husband's creditors. For this reason, the testator could not arrogate to himself the power to exclude legitimate creditors in insolvency from realising bequeathed assets. Those assets cannot, as such, be immune from seizure upon the insolvency of the beneficiary. It would not make any difference in law even if the inheritance had occurred after the sequestration had taken place. Accordingly, the assets in question were held to fall within the ambit of section 20(1)(a) and 20(2)(b) of the Insolvency Act.¹⁸

The court also cast aside the contention that as the testator had intended to exclude the assets in question from the joint estate they, therefore, fell to be administered under section 21 of the Act. Under that section the applicant must prove that the assets belong to her alone and to apply for their release. The court stated clearly that the section in question did not apply to a

¹⁷ *Supra* note 16.

¹⁸ At 1591, 160D and 160F.

spouse married in community of property. It applies to the assets of a spouse whose 'estate has not been sequestrated.'¹⁹ This could not be said to be true of the assets of a spouse who is married in community of property. This is because the effect of the sequestration of a joint estate is to render both spouses insolvent. Most significantly, the court stressed the point that a testator has no authority, by means of a will, to change the law of insolvency.

V

REFLECTIONS ON THE JUDGMENT

There is no doubt that most ordinary men and women will find this holding surprising at best, and harsh and unfair, at the most. The views of ordinary folk are, on most issues involving insolvency, normally prompted by and premised on the notion that the poor wife is suffering a double jeopardy. She is seen as an innocent victim who is unlikely to have participated in the events and transactions which might have precipitated the insolvency. Indeed, for many others, the judgment would be regarded as an arrogant affront to the individual wishes of an ordinary, honest and loving father whose sole aim was to leave something for his child, whom fate had placed in an evil pathway of insolvency. It would also be seen as a sign of disrespect for the dead, who in most communities are supposed to be accorded their last wishes and allowed to rest in peace.

The law, however, is not premised on emotions and sentiment. There is no doubt that this judgement is sound in law. As the main goal of sequestration is to protect and advance the interests of the creditors of the insolvent, it would make a mockery of this principle if a court could hold that an insolvent can nonetheless keep valuable assets for himself, for the simple reason that he did not earn them through his own effort, but acquired them from a benefactor by way of inheritance.

Indeed, the notion that inherited assets form part of an insolvent's estate is not unique to South Africa. In Zambia for instance, section 41 of the Bankruptcy Act²⁰ stipulates that the property of the bankrupt shall comprise, among other things, any property which may devolve on him before his discharge. Testamentary legacies clearly fall under this category. The same apparently is the case in England. Thus, according to section 38 of the Bankruptcy Act, upon bankruptcy of the debtor all his property at the date of his sequestration, including property acquired by him, from that date until his eventual discharge, vests in the trustee of his estate.²¹ What is

¹⁹ At 160G/H-1 and 160J-161B.

²⁰ Chapter 190 of the laws of Zambia.

²¹ 1914, as amended. See also I.F. FLETCHER, *LAW OF BANKRUPTCY* 178 (1978).

critical in all jurisdictions is undoubtedly the issue of who is an insolvent. In England and Zambia obviously, the principle of marriage in community of profit and loss is unfamiliar. It is nevertheless accepted that spouses, should they so wish, may hold their matrimonial assets jointly. Where this happens and if it is coupled with the incurring of joint debts, they may both be insolvents. If one of them should inherit property thereafter, that fact alone (the inheritance) will not be sufficient to preclude the joint creditors from seizing such property. Conversely, should one of the spouses alone be an insolvent, his inheritance cannot be immune from seizure by his creditors.

What may be of further interest to ordinary testators, beneficiaries and scholars is to know whether there are any possibilities, if at all, of inherited assets ever being immune from the reach of a trustee in insolvency. The answer to this question is affirmative. The first thing to note, as regards debtors who are married, is that the principles in both the *Brown* and the *Badenhorst* judgements only apply to them when they are joint debtors and when the community of their assets has not been disturbed. Where such community is no longer in existence it may be possible for a spouse to enjoy her assets, including inherited ones without interference from the other's trustee. In that case, she may have to satisfy the requirements set out in section 21 of the Insolvency Act. Her own creditors cannot be denied their rights in respect of her inherited assets.

A separation of a community estate as described above may be effected *stante matrimonio*²² if an order of *boedelscheiding*²³ or its statutory successor—the *separatio bonorum*²⁴ is made by the court under the Matrimonial Property Act.²⁵ Special reasons must, of course, exist before such an order can be made. The most often cited reason is mismanagement of the joint estate by the husband or his abuse of marital power.

In the specific case of the testator he can ensure that any legacies he wishes to leave to an heir do not reach such heir's creditors by stipulating that the property will devolve on another heir, if at the time of his death, the heir should either be insolvent or undergoing sequestration. The other two ways of avoiding distribution to creditors in insolvency could involve the use of a discretionary trust, with special instructions to the trustee not to benefit any heir whose estate becomes insolvent. On the other hand, the heir may benefit for himself where the creditors and the trustee, while aware of the inheritance, do not claim it for distribution. Under these circumstances the insolvent, when applying for his rehabilitation, may pray for a

²² While the marriage continues or during the subsistence of the marriage. See V. G. HEMSTRA AND H.L. GONIN, *TRILINGUAL LEGAL DICTIONARY* (1981).

²³ Division of the joint estate. See V.G. HEMSTRA AND H.L. GONIN, *Ibid*.

²⁴ Separation of goods. See V.G. HEMSTRA AND H.L. GONIN, *Ibid*.

²⁵ No. 88 of 1984, section 20. See also R.H. HAHLO, *supra* note 1 at 173.

declaratory order confirming his exclusive right to such property.

VI CONCLUSION

Under the law of insolvency any property belonging to the insolvent vests in the trustee of his insolvent estate for distribution to his creditors. Such property includes assets which devolve on the insolvent subsequent to the sequestration of his estate. Inherited assets fall into this category. It is not competent for the testator to try and circumvent the law by stipulating in his will that bequeathed assets will fall out of the insolvent estate. This is so whether the insolvent is married in community of property or not. Indeed, there is no point in doing so where the beneficiary is married in community of property as such exclusion from the joint estate, though legal, does not stop the inheritance from being the property of an insolvent and therefore, liable for realisation for the joint creditors.

The only way the harsh results of this law can be avoided is by division of the joint estate prior to the sequestration of the joint estate. This may be attained from an order of *boedelschieding* or *separatio bonorum*. It may also come from the use of a discretionary trust under which an insolvent heir may be disinherited or a declaration order of the court confirming an insolvent's entitlement to inherited assets which have neither been claimed nor realised by the trustee or creditors despite knowing about them.

RECENT JUDICIAL DECISIONS

CIVIL PROCEDURE

Hasting Obrian Gondwe v. BP Zambia Limited, SCZ Judgment No. 1 of 1997, SCZ Appeal No. 78 of 1996 (unreported).

This was an appeal against a ruling of the High Court refusing to grant the appellant an interim injunction pending the trial of the main action.

The appellant began employment with the respondent in 1968. In the course of his employment, the appellant was entitled to a company house and a personal-to-holder vehicle. In 1994, the appellant applied for early retirement effective on the date of the letter. In his application, the appellant requested to be sold the house he was occupying and the company car which was allocated to him. In reply, the respondent wrote the appellant informing him that his offer to go on early retirement had been accepted effective the date of his letter. In addition, the respondent wrote that an amount had been deducted from the appellant's terminal benefits as the purchase price of the vehicle. Subsequently, the appellant disputed the price deducted for the vehicle. This dispute was not resolved and the respondent advised the appellant to report for work. The appellant refused and never reported back to work but proceeded on early retirement. In May 1995, the respondent informed the appellant in writing that he had been summarily dismissed and was asked to vacate the house and return the car. The appellant commenced an action and applied for an interim injunction against the respondent.

The trial judge denied the appellant's request for an interlocutory injunction. The trial court held that the appellant could be adequately compensated for by damages and that it would be unfair to the respondent for the appellant to continue occupying the house and using the vehicle when he ceased working upon retirement.

At the hearing of the appeal in the Supreme Court, the parties had settled the issue of the house by consent. The Supreme Court found that the appeal raised the important issue of whether there is a distinction between perquisites. The Court found that the appellant's conditions of service entitled him to a personal-to-holder car with an option to purchase. Moreover, considering the respondent's offer to sell the car to the appellant, the Court stated that the vehicle was not only an incident of employment but a benefit to be enjoyed even after termination of employment. The Court stated this as the distinction between the perquisites enjoyed as an incident of employment and conditions and benefits enjoyed after a certain period while in employment or at the end of that employment.

The Court held that the issue of whether an employee could be summarily dismissed after his retirement had been accepted and it was a

question of vital importance to be tried at the hearing.

Finally, although the appellant did not seek reinstatement, the Court found a probability that the appellant may be entitled to the reliefs he was seeking. Therefore, the Court granted the interlocutory injunction in relation to the vehicle.

Development Bank of Zambia and KPMG Peat Marwick v. Sunvest Limited and Sun Pharmaceuticals Limited, SCZ Judgment No. 3 of 1997, SCZ Appeal No. 1 of 1996 (unreported).

This was an appeal concerning the grant of an injunction to restrain the appointment of a Receiver and Manager.

The appellant bank had commenced an action to recover certain monies loaned by the bank to the respondents. While this action was pending, the bank appointed a Manager and Receiver in exercise or purported exercise of powers claimed by the bank under the loan agreements and under statute. The respondents, that is, the borrowers, commenced another action seeking an injunction to restrain the bank from appointing the Receiver. The lower court granted this injunction.

The Supreme Court disapproved of the parties commencing a multiplicity of procedures and proceedings over the same subject matter, stating that various courts may end up making various conflicting and contradictory decisions. The Court held that justice demands that the parties must raise whatever issues desired with the court in the earlier action. Therefore, the Court quashed the injunction granted as well as the new action commenced by the respondents.

Trinity Engineering (Pvt) Limited v. Zambia National Commercial Bank Limited, SCZ Judgment No. 4 of 1997, SCZ Appeal No. 58 of 1996 (unreported).

This was an appeal against the order of stay of execution granted by the High Court of the Supreme Court's earlier decision.

In the original proceedings in the lower court, the parties signed and filed a consent judgment, which was approved by that court. The respondent bank applied to set aside the judgment on the ground of fraud. The lower court found no fraud in obtaining the respondent's consent but set aside the judgment on the ground that the contract leading to the consent judgment was illegal as a violation of the exchange control regulations. The appellant appealed. In the appeal, the Supreme Court restored the consent judgment.

Later, the respondent bank obtained an *ex-parte* order from a single judge of the Court staying execution of the judgment. On inter party hearings, the *ex-parte* order was discharged and the respondent applied to the High Court for a stay of execution, which was granted.

The Supreme Court held that its judgments are final and there can be no stay of execution of a final judgment. Therefore, the Supreme Court set aside the High Court's order of stay of execution.

Mpande Nchimunya v. Stephen Hibwani Michelo, SCZ Judgment No. 12 of 1997, SCZ Appeal No. 67 of 1997 (unreported).

This was an appeal against a High Court order for the return of property taken in execution of a judgment or its value.

The respondent entrusted some cattle to Ethoni Hibwani, who in turn entrusted them to Samson Munahimba. In an action unrelated to the present case, the appellant sued Mr Munahimba for damages for receiving stolen cattle and was ordered to give the appellant a specified number of cattle. On appeal, the compensation was reduced to a lower number of cattle. Subsequently, a writ of *fiery facias* was issued by the court to enforce the judgment and cattle were seized from Mr Munahimba.

The respondent brought an action in the High Court against the appellant claiming that the cattle seized belonged to him. The High Court ruled in the respondent's favour.

The Supreme Court held that the High Court erred in its decision on two grounds. Citing Order 18 Rule 15 Sub-rule 10 R.S.C. 1995 Edition, the Court stated the principle that a cause of action disclosed in the writ but not repeated in the statement of claim is deemed abandoned and cannot be relied upon. Counsel for the respondent conceded that the statement of claim did not disclose a cause of action which was partially disclosed in the writ. Therefore, the Court deemed the respondent's cause of action abandoned.

In addition, citing *William David Carlisle Wise v. E.F. Hervey Limited* (1985) ZR 179, the Court applied the rule that if a statement of claim discloses no cause of action, as was the case in this action, then the respondent is not entitled to judgment.

The Court then turned to the ground alleged by the appellant that since the cattle were seized in execution of a judgment, the respondent ought to have taken out interpleader summons in terms of Rule 53, Part V of the Subordinate Courts Act, Cap. 28. The Court agreed that Rule 53 was applicable and the respondent should have taken out interpleader summons.

On both grounds, the judgment of the court below was set aside.

Barclays Bank Zambia Limited v. Manda Chola and Ignatius Mubanga, SCZ Judgment No. 8 of 1997, SCZ Appeal No. 123 of 1996 (unreported).

This was an appeal against a judgment by the Industrial Relations Court holding the dismissals of the respondents as unfair, and awarding damages.

Bank employees belonging to the Zambia Union of Financial Institutions and Allied Workers went on an illegal strike. The two respondents were

among those dismissed by the appellant bank in connection with the illegal strike. The respondents brought their claims to the Industrial Relations Court and were granted redress. The appellant bank appealed the decision claiming that the amount of compensation awarded to the two respondents was excessive and also claiming the finding of liability as against the second respondent, Mr Mubanga, was incorrect. Concerning the question of liability in favour of Mr Mubanga, the appellant bank argued that the respondents' complaint alleged discrimination, not unfair dismissal. Therefore, the Industrial Relations Court erred in going outside the pleadings to findings for the respondent. In the alternative, the appellant bank argued that the allegation of unfair dismissal was not borne out by the facts.

Citing *Zambia Consolidated Copper Mines Limited v. Mutale*, SCZ Judgment No. 9 of 1996 (unreported), the Supreme Court rejected appellant's argument holding that the Industrial Relations Court was a court of substantial justice which can entertain a complaint however inadequately couched, and make a decision on the merits of the case. The Supreme Court responded to the alternative argument, again citing *Mutale*, holding that the finding of unfairness was not a point of law nor a point of mixed law and fact, which is necessary in an appeal before the Court. Therefore, the Court upheld the lower court's finding of liability in favour of the second respondent.

Finally, the Court held that the principle of mitigation and the principle in *Zambia Airways v. Gershom Mubanga*, SCZ Judgment No. 5 of 1992 (unreported) of taking a period within which the employee could reasonably be expected to have obtained other comparable employment should have guided the Industrial Relations Court in its awards. Thus, the Court set aside the lower court's awards and in their place, awarded a lower amount of salary and benefits as compensation.

CONSTITUTIONAL LAW

Akashambatwa Mbikusita Lewanika, Hicuunga Evaristo Kambaila, Sebastian Saizi Zulu (suing as Secretary General of UNIP), Jennifer Mwaba Phiri (suing as National Secretary of LPF) v. The Attorney-General, The Electoral Commission and Frederick Titus Chiluba SCZ/8/235/95 and SCZ/8/236/96

This was a consolidated petition by the petitioners against the respondents for declarations that provisions of Article 34(3) (a), (b) and (c) of the Constitution in respect of Frederick Titus Chiluba had not been satisfied and therefore that he was not qualified to be nominated as presidential candidate or to be elected President of the Republic of Zambia, and that Mr Chiluba had contravened section 9 of the Electoral Act 1991 as

amended by Act No. 23 of 1996 in falsely swearing as to his citizenship and that of his parents; that section 9(3) of the above mentioned Electoral Act is *ultra vires* Article 41(2) of the Constitution; that Mr Chiluba was not a Zambian; and for an Order that the 1996 Presidential Elections be stayed until these issues raised had been determined, and for the enforcement of Article 41.

Before the petition could be heard, the Court on its own motion, raised a preliminary issue as to whether or not a petition under Article 41 of the Constitution could be heard before the Presidential Elections are held, especially in view of the provisions of section 9(3) of the Amendment to the Electoral Act, 1991, which provides that any petition relating to the nomination or election of the President shall be referred to the returning officer or the full bench of the Supreme Court within fourteen days of the person elected as President being sworn in. It was this same section that the Petitioners sought to have severed from the rest of the Act, as being *ultra vires* the Constitution.

After considering the arguments, the Court held that section 9(3) was procedural and not a matter of substantive law, and as such did not take away rights conferred by Article 41(2) (a), and was therefore, *intra vires* the Constitution. That being so, the Court further held that the petition was premature, and ought not to have been brought at this stage. The petition was, therefore, dismissed.

CONTRACT LAW

Union Bank (Zambia) Limited v. Southern Province Cooperative Marketing Union Limited, SCZ Judgment No. 7 of 1997, SCZ Appeal No. 100 of 1996 (unreported).

This was an appeal by the bank against the disallowance of arrangement fee and penal interest, concerning a loan by the customer under a promissory note undertaking to pay interest on the customer's loan of 135 per cent per annum, on up to K400 million, which the bank had agreed to lend to the customer.

The customer had signed what was termed a letter of set-off, agreeing, among other things, that any money standing to the customer's credit on any account held with the bank shall be held by the bank as security for any indebtedness of the customer '... upon banking account or upon any discount or other account for any other matter or thing including the usual banking charges. ...'

The customer had further signed a 'Letter of Arrangement,' whereby the customer acknowledged the bank's right to cancel the loan facility at any time, in which event the customer undertook to pay the bank 'all dues together with all other charges due by' the customer.

The bank appealed against the disallowance of the arrangement fee of K14 million, as the amount was not in fact in dispute and appeared in both parties computations. The appeal on this ground was allowed.

The major issue in the appeal concerned the charging and awarding of interest. There was evidence on record that the bank debited the customer's account at regular intervals and this was reflected in the documents showing the bank's computation of the customer's indebtedness, as well as on the customer's document, showing that the customer equally added interest at regular intervals. The Court found that the principle of compounding the interest was clearly mutually accepted, and on this basis, refused to entertain the cross appeal against the non-disallowance of compound interest.

Further, with regard to the customer's rejection of the outright debiting of penal interest, the Court recalled that the general rule where there has been non-payment of money by due date, in breach of agreement, is to compensate the party owed with an award of interest, which serves the same purpose of general damages. The Court further stated that considerations of remoteness and the principle of penalties were also relevant in this appeal. The Court held that the learned trial Commissioner was on firm ground when he disallowed penal interest, and that he was fully justified by the evidence and documents on record when he concluded to the effect that there was an attempt by the bank to recoup from the customer penalties inflicted by the central bank as the regulatory authority.

The Court refused to disturb the findings in the court below to the extent that they had established the right of the bank to charge compound interest. However, the Court directed that recalculation be done by the bank of the proper compound interest due.

The Court further held that it would be unjust to increase the total sum of interest payable by a party, as regards the pretrial interest awarded on the refund.

In sum, the appeal succeeded on the question of the arrangement fee. The cross appeal succeeded on the question of recalculation of the proper compound interest due, and the penal interest was to be refunded forthwith.

CRIMINAL LAW

Dorothy Mutale and Richard Phiri v. The People, SCZ Judgment No. 11 of 1997, SCZ Appeal No. 150 of 1996 (unreported).

This was an appeal against the conviction of the appellants on a charge of manslaughter.

The facts of the case were that on 21 April 1994, the appellants and two other men approached the deceased, Charles Musonda and one, Ogily Sinyangwe, at Kansenshi Market in Ndola. The deceased and his companion

were accused earlier on of having tried to steal a car belonging to the first appellant. The appellants started beating up the deceased and Sinyangwe, whereupon an 'instant justice' mob ensued. When the appellants later came back to the market and began to beat up the suspects, some marketeers tried to stop the beatings. A fracas ensued, during the course of which the appellants put the suspects in the first appellant's car and drove away with them. It was the prosecution's case that the deceased died from further beatings meted out near the first appellant's residence.

A major issue at the trial was the identity of the deceased and the linkage between the assaults at the market and those on Bombesheni Road, and whether the deceased was in fact one of the two men who were beaten up at the market.

The trial judge found that although there was no evidence from any witness linking the appellants to the deceased, the first accused and her husband themselves connected the deceased with the first accused, by reporting that there had been an instant justice mob at the market in which the deceased had died.

The Court held that the linkage was not enough on which to base the conviction. In its judgment, it stated, 'Where two or more inferences are possible, it has always been a cardinal principle of the criminal law that the Court will adopt the one which is more favourable or less unfavourable to an accused if there is nothing in the case to exclude such inference. The circumstantial case in this appeal did not exclude the more favourable inference.'

On this basis, the appeal was allowed and the conviction and respective sentences were quashed.

ELECTION LAW

Josephat Mlewa v. Eric Wightman, SCZ Judgment No. 1 of 1996, SCZ Appeal No. 99 of 1995 (unreported).

This was an appeal against a judgment of three judges of the High Court sitting as a divisional court in an election petition holding that the appellant, Josephat Mlewa, was not duly elected and ordering a nullification of his election and making a further order that a fresh poll be held in accordance with the provisions of the Constitution.

Both parties were candidates in the Parliamentary general elections held on 31 October 1991, for Mkaika Constituency. The respondent stood on the ticket for the Movement for Multi-Party Democracy (MMD) while the appellant stood on the ticket of the United National Independence Party (UNIP). At the close of voting, the appellant was declared winner of the elections.

Both parties presented evidence that the elections had been

characterised by corruption, bribery and incidents of illegal practices amounting to: contravention of the electoral regulations; use of government facilities; corruption and bribery; undue influence; and threats and violence to life and property. The High Court found that there was evidence supporting the allegation that UNIP cadres had distributed materials and gifts to bribe voters. In addition, the High Court found that undue influence, and threats and violence to life and property existed during the campaign. Even though the High Court found that the appellant was not personally involved, it held that the election was a nullity and ordered a fresh poll.

Citing *Limbo v. Mutatwa*, 1974/HP/EP/Z (unreported), *Jere v. Ngoma*, (1979) ZR 106, *Lusaka v. Cheelo*, (1979) ZR 99 and *Wisamba v. Makai* (1979) ZR 295, the Court rejected the contention that section 18(2)(a) of the Electoral Act was dependent upon section 18(2)(c). Thus, the Court held that a violation of section 18(2)(a) does not require personal knowledge of the wrong-doing by a candidate. This section is designed to protect the electorate and the system itself by providing for nullification whenever there is wrong-doing which has adversely affected and probably affected the election. Therefore, the Supreme Court upheld the decision and order of the High Court stating that the election violated section 18(2)(a) of the Electoral Act No. 2 of 1991.

Sebastian Saizi Zulu and Dr Roger Masauso Alivas Chongwe, SC v. Attorney General and Nikuv Computers, SCZ/8/75/96 (unreported).

This was an appeal against the decision of the High Court refusing to grant relief by way of judicial review. The appellants sought *inter alia*, an order of *certiorari* quashing the decision of the Government to award the contract of the registration of voters to the second respondent; a declaration that the second respondent is not entitled to conduct the registration of voters in Zambia; and that the said contract be declared null and void.

The appellants further sought an order that the registration of voters exercise being conducted by the second respondent be halted, and that the registration be declared null and void; and an order of *mandamus* that the Electoral Commission be ordered to direct and supervise the registration of voters.

The appellants submitted that there had been massive anomalies and malpractices in the exercise of the registration of voters. and that there was a contractual nexus between the second respondent and the MMD Party. They further contended that there was the likelihood of many eligible voters being disenfranchised by the registration of voters exercise.

The Court held, *inter alia*: that the appellants' apprehension that many eligible voters may be disenfranchised was without foundation. Although there had been a cut-off point of four million cards, the fact that at the close of registration only about two million voters had registered showed that

there was no basis for the apprehension.

The Court further held that it could find no evidence to show that the MMD as a political party was involved in any of the alleged electoral malpractices, and noted that all the examples of alleged electoral malpractices or rigging given by the appellant took place during the by-elections that were held under the old roll.

The Court found that there was no evidence of a conspiracy between the respondents to rig the elections, and further, that the second respondent was incorporated outside Zambia.

With regard to the breach of the Electoral (Registration of Voters) Regulations, the Court found that what was done was done in accordance with the law and the Constitution, the object of the exercise having been the production of a credible voters register and that the non-compliance with the regulations was not fatal.

Finally, the Court held that it could find no reason to nullify the registration of voters exercise, nor could it find a reason to issue an order of *mandamus* for the Electoral Commission to direct and control the voters registration exercise.

In conclusion, the appeal by the appellant was, in all, not successful.

EMPLOYMENT LAW

Kafue District Council v. James Chipulu, SCZ Judgment No. 5 of 1997, SCZ Appeal No. 71 of 1996 (unreported)

This was an appeal against a decision of the District Registrar of the High Court at Chipata awarding damages for inconvenience, mental torture, transport and upkeep costs. The assessment was as a result of a judgment entered in favour of the respondent against the appellant in default of appearance.

The respondent, employed by the Chipata Municipal Council, applied to the appellant Council for employment as Chief Health Inspector. The appellant Council subsequently wrote to the Chipata Council informing it that the respondent's application had been approved. The Chipata Council wrote to the respondent informing him that no objection was made to his transfer to the appellant Council and that the respondent would be deleted from the Chipata Council payroll on a specified date.

The respondent made arrangements for his family and did travel to Kafue to begin his new position as Chief Health Inspector. Upon arrival, he was told that he could not take up his appointment. The respondent attempted unsuccessfully to convince certain public officials that he should be allowed to take up his appointment. He incurred transportation costs for his efforts. Finally, the respondent returned to Chipata, where he explained his predicament and was re-employed. The respondent

commenced an action against the appellant, who made no appearance. Consequently, the respondent obtained judgment in default and damages were assessed at a later date by the Deputy Registrar.

The appellant Council appealed this default judgment and assessment of damages claiming: (1) there was no basis for assessing and awarding damages for inconvenience and mental torture; (2) in the alternative, that this case was not a proper one to award such damages; and (3) that the award for transport costs was in error as it was made without documentary evidence.

The Supreme Court ruled that, in fact, the appellant Council's conduct injured the respondent. Thus, the Court held there was a basis for the assessment. Citing *Hayes and Another v. James and Charles Dodd (a firm)*, (1990) 2 ALL ER 815 and *Jarvis v. Swan Tours Limited* (1973) 1 QB 233, the Court went on to hold that a contract of employment is not a purely commercial contract for which damages for anguish and vexation arising from a breach are not recoverable, but a contract which provides peace of mind and freedom from distress. Moreover, citing *McCall v. Abelesz and Another*, (1976) 1 ALL ER 727 and *Attorney General v. Mpundu* (1994) ZR 6, the Court held that this was a proper case for an award of damages for inconvenience and mental torture.

Concerning the award for transport and upkeep costs, the Court upheld the principle in *Mhango v. Ngulube and Others*, (1993) ZR 61 stating that the lower court made 'an intelligent and inspired guess of the value of the special loss on the meagre evidence' presented. Therefore, the Court dismissed the appeal in its entirety.

Mike Musonda Kabwe v. BP Zambia Limited, SCZ Appeal No. 115 of 1996 (unreported).

This was an appeal against a High Court decision refusing to declare that the appellant was entitled to terminal benefits based on an increased salary and to purchase his personal-to-holder car at book value. There was also a cross-appeal against the award of BP Africa bonus or allowance and other allowances due and payable under the conditions of service applicable to the appellant.

The appellant was employed by the respondent as part of management. In 1994, there was a general increase in salaries for all employees of the respondent. By letter dated 13 May 1994, the appellant's salary was increased to a specified amount with effect from 1 April 1994. The increments were reversed on 9 June 1994. Then, on 26 August 1994, the appellant offered to retire early. He requested that his terminal package be worked on the basis of the Personnel Administration Manual. This was accepted and his last working day was 26 August 1994. His terminal benefits were then worked out on the basis of the old salary and was sold his personal-to-holder car

not at book value. The appellant commenced proceedings and lost in the lower court, hence the appeal.

Referring to the minutes of the management meetings concerning the salary increments, the Supreme Court found that management did not agree or resolve to reverse the salary increments. Therefore, the appellant did not consent to the reduction of his salary. The Court upheld the decision of *Marriott v. Oxford and District Co-operative Society Limited*, (No. 2) 1970 1 QB 186 that if an employer varies basic conditions of employment without the consent of the employee, then the contract of employment terminates. In addition, the employee is deemed redundant on the date of such variation and must get a redundancy payment if the conditions of service do so provide. The Court rejected the contention that the appellant had accepted the new condition since he continued working after his salary was reduced. Therefore, the Court held that the contract between the parties terminated on 9 June 1994. Although the conditions of service provide for redundancy and not early retirement, the parties agreed that the appellant be on early retirement. Since the contract of employment was terminated on 9 June 1994, the appellant's benefits should have been calculated on the increased salary.

Concerning the sale of the personal-to-holder car, the Supreme Court stated that it was common cause that the appellant's last working day was 26 August 1994 and that the car in question was acquired in August 1989. Citing the evidence of company policy found in the record of appeal, the Court held that the appellant was entitled to buy the car at book value.

Finally, the Supreme Court reviewed the evidence and held that the appellant was entitled to BP Africa bonus on a pro-rata basis, all other allowances were not claimed and, therefore, were not awardable.

Bank of Zambia v. Joseph Kasonde, SCZ Judgment No. 14 of 1997, SCZ Appeal No. 56 of 1996 (unreported).

This was an appeal by the Bank of Zambia against the judgment of the High Court in favour of Joseph Kasonde (the plaintiff), where it was adjudged that the plaintiff be reinstated in his former job with all his benefits following his dismissal.

The facts were that the Plaintiff had been accused by his employers of dishonest conduct, involving fraudulent invoices for fuel bills. The Plaintiff pleaded ignorance of such invoices, and despite repeated requests from the plaintiff for details, such as invoice numbers, dates, names of drivers and vehicle numbers, so that he could properly exculpate himself, such information was not forthcoming from his employers, and he was subsequently suspended on half salary. Thereafter, he was put on a disciplinary charge of dishonest conduct contrary to the Bank of Zambia disciplinary code. His exculpatory statement in which he still pleaded

ignorance, and made a further request for more details, was ignored, and after several disciplinary hearings in which all his questions were ignored, he received a summary dismissal letter.

After addressing all the issues, the court could not fault the finding of the learned trial judge that the allegations against the plaintiff had been proved. The court held that it is trite law that the remedy of reinstatement is granted sparingly, with great care and jealousy, and with extreme caution. The court agreed with the trial judge that in this case there were special circumstances: the insubstantial allegations against the plaintiff; the unknown fate of the players he should have worked with, if they were exonerated; the fact that the defendant is a public institution and that those running it must at all times adhere to the principles of fair play, and that dismissals based on misconduct must be on proven grounds, with all employees enjoying equal treatment under the ruling regulations.

It was held further that where the plaintiff had been dismissed for dishonest conduct, there is a serious stigma attached which could affect the plaintiff's chances for future employment. Such stigma cannot be atoned by damages. The defendant may only atone for its wrongful action by reinstatement of the plaintiff as this was the only equitable and reasonable remedy.

The appeal was duly dismissed. The arrears due to attract interest at 15 per cent per annum up to date of reinstatement, and thereafter 6 per cent.

Ridgeway Hotel v. Beauty Aquaye Malunga and Michael Musonda, SCZ Appeal No. 94 of 1995 (unreported)

This was an appeal against the decision of the Industrial Relations Court, which ordered the respondent's reinstatement, after they had both been dismissed by the appellant, their employer.

The facts of the case were that the respondents had been conducting an extra-marital affair, which had led to an unseemly confrontation on the appellant's premises, between the first respondent and the wife of the second respondent, who accused the first respondent of having an affair with her husband, and that she (first respondent) was suffering from AIDS. Disciplinary meetings had been held by the Management of the appellant, in which the respondents were given the option for either one of them to resign from their employment or for them to stop their affair. When neither exercised the options and the affair continued, the two were dismissed, with three months salary in lieu of notice, and other benefits. The Industrial Relations Court found that the two had been discriminated against on the grounds of sex and social status, which it termed 'unlawful discrimination', particularly in view of the fact that many members of staff at the hotel, including the General Manager, had had affairs which had ended up in marriage, but none of them had been dismissed for the affairs they had.

In its appeal, the appellant argued, *inter alia*, that the Industrial Relations Court had failed to follow the guidelines of the Supreme Court in the *Ngwira v. ZNIB* case in which social status had been defined.

The Court held that social status under the Industrial and Labour Relations Act is as stated in the *Ngwira* case, and that there was therefore no evidence proving discrimination on the grounds of social status. It was further held that despite the numerous other affairs at the Ridgeway, the effect of the relationship between the respondents took a wider and more serious dimension on the reputation of the hotel. There was no discrimination whatsoever based on sex. The appellant had acted as humanely as possible under the circumstances, and had terminated the respondents' services with benefits, when it could have dismissed them. The Court, therefore held that there was nothing unlawful in the actions taken by the appellant. The appeal was allowed.

Zambia Privatisation Agency v. James Mutale, SCZ Judgment No. 14 of 1996, SCZ Appeal No. 96 of 1995 (unreported).

This was an appeal against a judgment of the Industrial Relations Court, holding that the termination of the respondent's employment by the appellant was unlawful and unjustified and ordering that the respondent be deemed to have completed his three year contract and be paid his salary and all allowances he was entitled to for the remaining term of the contract.

Following an advertisement and interviews, the respondent was employed as the first Director of the appellant agency on a contract period of three years. The appellant informed the respondent of his appointment as Director by letter. In this letter, the appellant stated that a 'suitable draft contract of service' would be executed. Approximately two years later, with no formal suitable contract of service in place between the parties, the appellant wrote to the respondent that his employment was terminated with immediate effect. The respondent was paid three months salary in lieu of notice and a further three months payment as *ex gratia*.

The Supreme Court noted that the respondent's complaint stated a cause of action under section 108(2) of the Industrial and Labour Relations Act No. 27 of 1993 for discrimination. However, the Court also noted that the respondent's complaint cited four grounds which included a statement that the termination of employment was unlawful or contrary to the conditions of service and without reasons or merit. Therefore, it was proper for the Industrial Relations Court to consider grounds other than discrimination in making its decision.

Citing *Contract Haulage v. Kamayoyo*, (1982) ZR 13, *Maclelland v. Northern Ireland Health Services Board* (1957) 2 ALL ER 129 and *Mumpa v. Maamba Collieries Ltd*, SCZ Judgment No. 29 of 1989 (unreported), the Court held that the relationship between the parties was that of master and

servant; thus, payment in lieu of notice for terminating the contract of employment was lawful. Therefore, the respondent's termination of services was not unlawful.

The Court further determined that the measure of damages in the absence of any express terms in the contract of employment must be a reasonable notice period: *African Association Limited v. Allen* (1910) 1 KB 396. It was common cause that the three-year contract between the parties did not make provision for termination by notice. Based upon the facts of the case, the Court held that the respondent was entitled to six months salary and all allowances he was entitled in lieu of notice as a reasonable length of notice.

LAND LAW

Ndola City Council v. William Kasonso, SCZ Judgment No. 13 of 1997, SCZ Appeal No. 34 of 1997

This was an appeal against a judgment of the High Court entered in favour of the respondent, wherein the Court held that the appellant contravened By-law 67 of the Ndola Municipal Council By-laws, Cap. 480 by demolishing the respondent's building.

The facts of the case were that the respondent had applied for a building permit, in accordance with Ndola City Council By-laws, to commence building on his residential plot, on which he had duly paid the necessary service charges. There was no response to the application, and five months later the respondent commenced building on the stand in question. Two months later, he received a letter from the appellant, advising him to stop building as he had no building permit, and consequently, the appellant demolished the respondent's building.

By-law 67(2) stipulates that where a person begins to erect any building without the necessary permit, the Council is required to give written notice to such a person, to demolish or remove such building within a time to be specified in the said notice. The Council is further required to notify the person that in the event of failure to comply with the requirement within the specified time, the Council will itself carry out such demolition. The Court held that the appellant had demolished the building without following their own By-law 67, and that the letter received by the respondent did not amount to a notice as required by By-law 67; there was no written notice specifying a period within which the plaintiff had to demolish the building, nor was there written notice that if he did not comply, it would enter the premises and carry out the demolition; the Council had therefore breached its own By-laws.

The appeal was dismissed with costs.

TORT LAW

Industrial Gases Limited v. Waraf Transport Limited and Mussah Mogeheid, SCZ Judgment No. 2 of 1997, SCZ Appeal No. 77 of 1994 (unreported).

This was an appeal on the question of liability as well as on the amounts awarded as damages. Waraf Transport Limited had hired a truck and trailer belonging to Mussah Mogeheid to haul maize. The second respondent's truck and trailer were involved in a collision with a truck belonging to the appellant. The accident was found to have been caused wholly by the negligent driving of the appellant's driver. Damage was caused to the truck and trailer as well as to the maize being carried.

The Supreme Court rejected the appellant's first ground of appeal in which the appellant sought to disclaim any vicarious liability claiming the driver had falsely obtained employment as he did not have a valid driving licence. The Court stated that it would be an unforgivable fiction to hold that the driver did not commit this tort in the course of his employment. Citing *Rose v. Plenty* (1976) 1 WLR 141, the Court upheld the general rule that the employer is liable for the wrongs done by his employees in the course of their employment.

Turning to the amounts awarded as damages, the Court made the following decision. First, the Court corrected an error in fact concerning the amount of maize lost and reduced the respondents' award accordingly. Next, the Court referred to the general rule regarding sufficiency of proof to support an award in respect of special losses citing *Mhango v. Ngulube* (1983) ZR 61. However, the Court recognised the efforts made by trial judges to do justice when making decisions with meagre evidence and reaffirmed the principle of not interfering unless the amount awarded was so high as to be utterly unreasonable.

After review of the trial judge's decision, the Court refused to interfere with the following awards: for repairs to the trailer when the repairs were performed by the second respondent and the evidence exhibited amounted to two quotations; towing charges for which no evidence was led; and loss of profits for which no documentary evidence was tendered and no details of operational expenses were given. Finally, on the amount awarded as damages to the second respondent's truck, the Court upheld the trial judge's award of K20 million plus 30 per cent interest from the date of the writ to the date of judgment below on the total of all the awards. The Court noted that the period in question was characterised by very high interest rates and a figure of 30 per cent was not unreasonable. The Court also held that the K20 million awarded for the truck represented a compromise between the replacement values proffered by the appellant and respondent since the trial judge observed that the respondent's evidence in respect of the value

of the truck was deficient.

Ndola Central Hospital Board of Management v. Alfred Kaluba and Priscilla Kaluba, SCZ Judgment No. 9 of 1997, SCZ Appeal No. 140 of 1996 (unreported).

In October 1995, the second respondent gave birth to a baby boy in the appellant's hospital. Due to complications, the mother had to undergo an operation and was hospitalised. The baby was placed in a Special Baby Care Nursery Unit, to which access was restricted to mothers who had babies and the nursing staff specifically assigned to the Unit. Two days after the respondent had given birth, the baby was stolen and had never been recovered. The respondents sued the appellant for negligence. The trial court found that the defendant was wholly to blame, invoking the doctrine of *res ipsa loquitur* and awarded the respondents a sum of K40 million as damages.

The appellants appealed on two grounds. First, the appellants claimed that it was incorrect to invoke the doctrine of *res ipsa loquitur* when it was not pleaded by the respondents. The Supreme Court, citing Order 18, Rule 8 in the White Book, held that the doctrine need not be specifically pleaded. Therefore, the Court upheld the trial court's finding of liability.

The second ground of appeal was against the quantum awarded as damages, which was allegedly excessive. Noting that the respondents had based their claim on nervous shock, the Court agreed with the trial court's extending of this well established principle to include shock resulting from the negligent loss of a baby. However, the Court disagreed with the trial court's approach. The Court held that the respondents were incorrectly compensated or 'consolated' for the actual loss of the baby and not for the shock suffered. Therefore, the Court set aside the award of K40 million and awarded an amount of K10 million as appropriate compensation.

WILLS

In the Matter of: Wills and Administration of Testate Estates Act and In the Matter of: Section 20(1) of Act No. 6 of 1989 between Isaac Tantameni C. Chali (executor of the Will of the late Mwalla Mwalla) v. Liseli Mwala, SCZ Judgment No. 6 of 1997, SCZ Appeal No. 2 of 1997 (unreported).

This was an appeal by the executor of the Will of the late Mwalla Mwalla against a judgment of the High Court varying the deceased's Will.

The deceased died by way of suicide. At the time of his death, he had two children, a son and a daughter, the respondent. He was also survived by his mother and three surviving sisters. The deceased kept the respondent, from the age of eleven years, and the brother in his custody and care until his death. The respondent is unmarried and has three children

born out of wedlock. The Will stipulates the deceased's mother as sole beneficiary; thus, no provision was made for the respondent or her brother.

In the High Court, the respondent alleged that upon arrival at her father's home, the deceased had carnal knowledge of her, resulting in the birth of a boy who is deaf and dumb. The respondent was unable to finish school due to the pregnancy. The deceased forged a certificate in her name purporting to show that she had attained 'O' levels (which she did not). The respondent complained about her father's sexual abuse to her mother who then reported the matter to Mpatamatu Police Station. In the presence of the police who interviewed the deceased, the deceased agreed to pay the respondent K400,000 to set up a business.

The respondent testified that she is twenty-seven years old. She is now working as a cook where, according to her, her 'O' level certificate is treated with suspicion.

The Supreme Court stated that it was very mindful of the fact that the matter in the High Court was decided upon by a learned senior female judge and involving a female applicant. Moreover, the Court considered that the observations and findings made by the judge heavily influenced her decision.

In deciding this appeal, the Court accepted that there was some evidence but it was not conclusive and not corroborated. First, the Court held that according to the rule of practice governing joinder of parties and due to non-joinder of parties before trial of the action, other than the respondent, the High Court was legally and effectively precluded from considering the interest of non-parties. Therefore, the orders granting part of the deceased's estate to the respondent's child and brother were wrong in law and struck out. The Court also held that the order requiring the appellant to administer the estate in 'consultation with' respondent's advocate was not pleaded and not prayed for, and thus was struck out.

Concerning the order requiring costs to be borne by each of the parties, the Court reaffirmed the duty of any executor to institute or defend an action against the estate if the action is deemed reasonable. The Court held that costs were to be borne out of the estate.

Finally, the Court turned to the question of whether the Will should or should not be varied so as to provide for a dependent, that is, the respondent. The Court referred to the Wills and Administration of Testate Estates Act No. 6 of 1989 S20(1)3 and S21(1), as well as other statutory definitions of 'dependent' and 'child', holding that the respondent was, in law, not a dependent. Therefore, in addition to all the other orders, the order granting a portion of the deceased's estate to the respondent was set aside.

Larry N. McGill
Amelia Pio Young
UNZA

RECENT LEGISLATION

1996 LEGISLATION

A. PRINCIPAL LEGISLATION

THE PUBLIC ORDER (AMENDMENT) ACT, No. 36 of 1996

This Act amends section 5 of the Public Order Act, by requiring every person who intends to assemble or convene a public meeting, procession or demonstration, to give police at least seven days notice (as opposed to fourteen days in the Principal Act) before the event.

THE MINISTERIAL AND PARLIAMENTARY OFFICES (EMOLUMENTS) ACT (AMENDMENT) ACT, No. 22 of 1996

This Act repeals section 4 of the Principal Act by making provision for the payment of a gratuity to members of Parliament, as from 1 November 1991. The gratuity is calculated on the basis of the last gross annual emolument, payable for each year or part thereof served on a *pro rata* basis. Where a member of Parliament has held, as from 1 November 1991, a post senior to that which that member is currently holding, the member shall be entitled, at the time the gratuity is payable, to be paid gratuity based on the last gross annual emolument at the higher post held or the last annual emolument as Member of Parliament, whichever is the highest.

THE PENSION SCHEME REGULATION ACT, No. 28 of 1996

The objects of this Act are to: provide for the prudential regulation and supervision of pension schemes; to provide for the appointment of the Registrar of Pensions and Insurance; to provide for the Registrar's powers and functions; and to provide for matters connected with or incidental to the foregoing.

The Minister is empowered to appoint the Registrar, who shall be a public officer and who shall be head of the registry office for pension funds, and the supervisory authority for pension funds.

All pension schemes are required to be registered, and to be issued with certificates of registration by the Registrar. Each registered pension scheme shall have a fund established in a separate multi-employer trust, or alternatively be affiliated to such a trust into which shall be paid all contributions, investment earnings, surpluses from insurance and other moneys, as may be required under the relevant pension plan rules or under the Act. From this fund shall be paid: benefits; expenses incurred in the management of the fund, including the authority and actuarial fees; and

any other payments authorised to be made out of the fund under the Act or any other law.

The Act requires the Registrar to establish and maintain a register of pension schemes, which shall be made available for inspection by the public at the office of the Registrar. Each pension scheme must comply with the following conditions:

- (a) make adequate arrangements for the preservation of pension rights so as to protect the interest of its members;
- (b) lay down the rights and obligations of the members in writing in the pension plan rules, a copy of which shall be given to each member;
- (c) provide to every member a benefit statement showing the member's actual benefits and the member's accrued portable benefits each year;
- (d) carry out an actuarial valuation every two years during the first five years after registration, thereafter, at least every five years so as to review and determine the sound funding of the pension scheme;
- (e) in managing its assets, aim to maintain at any time to real value of its members' accrued portable benefits; and
- (f) grant to members leaving the scheme before a benefit has become payable full portability of the accrued retirement benefits at the time the member leaves the scheme.

Portable benefits are defined as the total of the retirement contributions paid by the employee and the employer on the leaving member's account, plus interest during his participation under the plan. Each pension scheme must have an investment policy so as to: achieve secure and portable investments; and maintain at any time the real value of its members' accrued portable benefits. The Registrar must approve all investments. Pension funds are forbidden to make unsecured loans to an affiliated employer or to invest their assets abroad. The Registrar has power to de-register a pension-scheme if it appears to him that the manager has contravened or failed to comply with any provision of, or requirement under, the Act or regulations made under the Act or the pension plan rules.

THE PERSONS WITH DISABILITIES ACT No. 33 of 1996

This Act establishes the Zambia Agency for Persons with Disabilities, defines its functions, establishes Management Boards, and establishes the National Trust Fund.

The Zambia Agency for Persons with Disabilities shall be a body corporate with perpetual succession and a common seal, capable of suing and of being sued in its corporate name. Section 4 of the Act exempts the property of the Agency from being seized or attached by way of execution of a judgment debt. The Agency shall be composed of: eight representatives of associations of, or for persons with disabilities; one representative each from the Ministry of Science and Technology, Ministry of Community

Development and Social Welfare, the Zambia Chambers of Commerce and Industry, the Ministry of Finance, the Ministry of Education and the Ministry of Health; the Attorney-General's representative; and two members appointed by the Minister. Among the functions of the Agency are to: plan, promote and administer services for all categories of persons with disabilities; keep statistical records relating to incidences and causes of disabilities, which may be used for the planning, promotion, administration and evaluation of services for persons with disabilities; keep a register of persons with disabilities; provide rehabilitation, training, and welfare services or persons with disabilities; promote research into general rehabilitation programmes for persons with disabilities, etc.

The Director-General, appointed by the Minister for a three year-term subject to re-appointment, shall be the Chief Executive Officer of the Agency and shall, subject to the control of the Agency, be responsible for the day to day administration of the Agency. Other employees shall be appointed by the Agency.

The Minister is empowered to establish, by statutory instrument, a management board for each institution, which shall have legal personality. The funds of the Agency shall be derived from: Parliament; fees, levies, grants or donations; or loans. The Agency may use the funds to establish a fund to: provide loans to persons with disabilities for commercial ventures; train persons with disabilities to uplift their skills; and support research into disabilities and welfare of persons with disabilities, etc.

THE ANTI-CORRUPTION COMMISSION ACT, No. 42 of 1996

This Act repeals and replaces the Corrupt Practices Act, No. 14 of 1980. It provides for the establishment of the Anti-Corruption Commission as an autonomous body, its powers and functions, as well as its composition. It also provides for the powers and functions, of the Director-General.

Section 4 establishes the Anti-Corruption Commission as a body corporate with perpetual succession and a common seal, capable of suing and being sued in its corporate name.

Section 5 provides that the Commission shall not, in the performance of its duties, be subject to the direction or control of any person or authority. The Commission comprises five commissioners appointed by the President, that is, the chairperson who must have qualifications for high judicial office, and four others. All the Commissioners must have their appointments ratified by the National Assembly. The Commissioners shall hold office for a term of three years, subject to removal for cause.

The functions of the Commissioner shall be, *inter alia*, to:

- (a) prevent and take necessary and effective measures for the prevention of corruption in public and private bodies;
- (b) receive and investigate complaints of alleged suspected corrupt

- practices, and, subject to the directions of the Director of Public Prosecutions, prosecute offences under the Act or under any other written law; and
- (c) investigate any conduct of any public officer which, in the opinion of the Commission, may be connected with or conducive to corrupt practices.

The Commission may refuse to conduct, or may decide to discontinue, an investigation where it is satisfied that the complaint or allegation is malicious, trivial, frivolous, vexatious or the particulars accompanying it are insufficient to allow a proper investigation to be conducted, and shall indicate accordingly in the report. In any inquiry, the Commission may make such orders and give such directions as it may consider necessary for the purpose of conducting any investigation.

The Commission may make such recommendations as it considers necessary to the appropriate authority, which must, within thirty days thereof, make a report to the Commission on any action it has taken.

The Commission is required to meet at least once every three months and a decision of the Commission on any question shall be by a majority of the Commissioners present and voting at the meeting, and in the event of an equality of votes, the chairperson shall have a casting vote, in addition to a deliberative vote. The Commission is empowered to establish committees for the purpose of performing its functions.

Section 15 grants immunity to the Commissioners from both civil and criminal liability for anything done in the exercise of their functions. Moreover, a Commissioner shall not be called to give evidence before any court or tribunal in respect of anything coming to his/her knowledge in the exercise of his/her functions under the Act.

Part III of the Act establishes the Directorate of the Commission. The Directorate is headed by a Director-General appointed by the President subject to ratification by the National Assembly. The Director-General, who must have the qualifications of a puisne judge, shall be: responsible for the management and administration of the Commission; a full-time officer; and responsible for the implementation of any matters referred to him by the Commission. The Director-General shall retire at the age of sixty-five years. He may be removed from office for inability to perform the functions of his office, whether arising from infirmity of body or mind or from any other cause; or for misbehaviour.

The Director-General and other staff of the Commission shall enjoy immunity from both civil and criminal liability for anything done in the exercise of their functions.

Section 27 makes it an offence for anyone to obstruct officers of the Commission, as well as to make false reports to the Commission.

Part IV lists offences and penalties. The offences cover: corrupt practices

by or with public officers; corrupt use of official powers and procuring corrupt use of official powers; corrupt transactions by or with private bodies; corrupt transactions by or with agents; corruption of members of public bodies in regard to meetings; gratification for giving assistance in regard to contracts; gratification for procuring withdrawal of tenders; gratification in regard to bidding at auction sales; possession of unexplained property; and attempts to commit offences and conspiracies.

Section 40 requires a public officer to whom any gratification is corruptly given, promised or offered, to make a full report of the circumstances of the case to a police officer or an officer of the Commission within twenty-four hours of the occurrence of the event. If he fails to do so without reasonable cause, he shall be guilty of an offence. Any police officer or officer of the Commission may arrest without warrant any person in respect of whom such a report is made. Furthermore, any police officer or officer of the Commission is empowered to search any person arrested for an offence and take possession of all articles found upon him which the police officer or officer of the Commission believes upon reasonable grounds to constitute evidence of the Commission of an offence by him.

Section 41 provides that any person convicted of an offence under the Act shall be liable: (a) upon conviction to imprisonment for a term not exceeding twelve years; (b) upon a second or subsequent conviction, to imprisonment for a term of not less than five years but not exceeding twelve years; and (c) in addition to any other penalty imposed under the Act, to forfeiture to the state of any pecuniary resource, property, advantage, profit or gratification received in the commission of an offence under the Act. The court shall, in addition to the sentence that it may impose, order the convicted person to pay the rightful owner the amount or value of any gratification actually received by him, and such order shall be deemed to form part of the sentence. Any fine imposed, and the amount or value of any gratification ordered to be paid, may be recovered by distress and sale of the movable and immovable property of the person convicted. The principal may recover gratification corruptly obtained by his agent.

Part V of the Act specifies the powers of the Director of Public Prosecutions. Section 46 stipulates that no prosecution for an offence under Part V shall be instituted except by or with the written consent of the Director of Public Prosecutions.

The DPP is empowered under section 47 to require, by notice, the Commissioner of Taxes to furnish all information in his possession relating to the affairs of any suspected person and to produce or furnish any document or a certified true copy of any document relating to such suspected person, which is in the possession or under the control of the Commissioner of Taxes. Part VI deals with evidence, presumptions and other matters. Where any public officer has corruptly solicited, accepted,

obtained, or agreed to accept or attempted to receive or obtain any gratification, it shall not be a defence in any trial in respect of an offence under Part IV that: (a) the appointment, nomination or election of such person or any other person as a public officer was invalid or void; or (b) such public officer or any other public servant did not have the power, authority or opportunity of doing or of forbearing from doing the act, favour or disfavour to which the gratification related; or (c) he did not actually do any act, favour or disfavour to induce the gratification, or never had the intention of doing so.

Section 54 empowers the Director of Public Prosecutors at any time, with a view to obtaining at a trial the evidence of any person directly or indirectly concerned with or privy to an offence under Part IV, to tender or by writing under his hand, to authorise any court named by him to tender, a pardon to such person on condition that he makes a full and true disclosure of all facts or circumstances within his knowledge relating to the offence and to every other person involved in the commission thereof, whether as principal or in any other capacity, together with the delivery of any document or thing constituting evidence or corroboration of the Commission by the person to be charged or the accused person, as the case may be. Any person who does not make a full disclosure may have his pardon revoked. Any person who, in the opinion of the court has made a false, frivolous or groundless complaint or allegation to the effect that any person has committed or attempted to commit, or aided, abetted or counselled the commission of, or conspired with any other person to commit, any offence under Part IV, shall be guilty of an offence and shall be liable, upon conviction, to imprisonment for a term not exceeding ten years or to a fine not exceeding ten thousand penalty units, or to both. It shall be a valid defence in any proceeding that the gratification offered or accepted is an entertainment or casual gift.

Section 59 provides that in relation to a public officer or a Zambian citizen, or a Zambian resident, the Act shall have effect within as well as outside Zambia, and notwithstanding where any offence is committed by such person, he may be dealt with in respect of such offence as if it has been committed within Zambia.

The Commission is under section 62, empowered to make rules to govern its operations. Section 63 empowers the President, by statutory instrument, and on the recommendations of the Commission, to make regulations for the better carrying out of the purposes of the Act.

THE HUMAN RIGHTS COMMISSION ACT, No. 39 of 1996

This Act, enacted in December 1996, provides for the functions and powers of the Human Rights Commission, its composition and other related matters. The Commission is composed of the chairperson, vice-chairperson

and not more than five commissioners. The chairperson and vice-chairperson must be persons who have held, or are qualified to hold, high judicial office. The commissioners are appointed by the President subject to ratification by the National Assembly. The Commission shall not, in the performance of its duties, be subject to the direction or control of any person or authority.

Commissioners are appointed for a term not exceeding three years, subject to renewal. A commissioner may be dismissed from office for inability to perform the functions of his/her office, whether arising from infirmity of body or mind, incompetence or for misbehaviour. The functions of the Commission are to:

- (a) investigate human rights violations;
- (b) investigate any maladministration of justice;
- (c) propose effective measures to prevent human rights abuse;
- (d) visit prisons and places of detention or related facilities with a view to assessing and inspecting conditions of the persons held in such places and make recommendations to redress existing problems;
- (e) establish a continuing programme of research, education, information and rehabilitation of victims of human rights abuse to enhance the respect for and protection of human rights; and
- (f) do all such things as are incidental or conducive to the attainment of the functions of the Commission

The Commission has powers to investigate any human rights abuses either on its own initiative or on receipt of a complaint or allegation under the Act by: (i) an aggrieved person acting in such person's own interest; (ii) an association acting in the interest of its members; (iii) a person acting on behalf of aggrieved person; or (iv) a person acting on behalf of or in the interest of a group or class of persons.

The Commission has powers to:

- (a) issue summons or orders requiring the attendance of any authority before the Commission and the production of any document or record relevant to any investigation it is undertaking;
- (b) question any person in respect of any subject-matter under investigation before the Commission;
- (c) require any person to disclose any information within such person's knowledge relevant to any investigation by the Commission; and
- (d) recommend the punishment of any officer found by the Commission to have perpetrated an abuse of human rights.

Except where a matter is pending before a court, the Commission may, where it considers it necessary, recommend: the release of a person from detention; the payment of compensation to a victim of human rights abuse, or to such victim's family; that an aggrieved person seek redress in a court

of law; or such other action as it considers necessary to remedy the infringement of a right.

Complaints, which must be signed or thumb-printed by the complainant, and also bear his/her name and address, must be addressed to the Secretary of the Commission, and must be lodged within a period of two years from the date on which the abuse of human rights occurred or became known to the complainant.

The Commission may refuse to conduct, or may decide to discontinue an investigation where it is satisfied that the complaint or allegation is malicious, frivolous, vexatious or the particulars accompanying it are insufficient to allow a proper investigation to be conducted and must inform the complainant in writing accordingly.

The Commission is required to conduct all its sittings in public and make all its reports in respect of such sittings public. However, the Commission may hold its sittings in camera when it considers it necessary to do so. The Commission must send written reports of its findings to the parties concerned and, depending on its findings, make such recommendations as it considers necessary to the appropriate authority. Within thirty days from the date of such recommendation, the appropriate authority must make a report to the Commission, on any action taken by such authority to redress any human rights violation. It is an offence for any person to contravene this requirement, which can cost a guilty party a fine not exceeding ten thousand penalty units, or imprisonment for a term of up to three years, or both.

The Commission has power to regulate its own procedure. It must meet for the transaction of business at least once every three months. Decisions of the Commission are by a majority of the Commissioners present and voting at the meeting, but the chairperson has a casting vote in the event of a tie, in addition to his/her deliberative vote.

The Commission is empowered to establish committees and delegate to any of those committees such of its functions as it considers fit. Such committees may consist of outsiders except that at least one member of a committee must be a Commissioner.

The Commission is empowered to appoint a Director and a Deputy Director. The Director shall be the Secretary to the Commission and responsible for the management and administration of the Commission. The Director must be a qualified advocate. The Commission may appoint such other staff as it may consider necessary for the performance of its functions under the Act.

Commissioners and the staff enjoy immunity from civil or criminal proceedings for anything done in the exercise of their functions. No Commissioner or a staff member shall be called to give evidence before any court or tribunal in respect of anything coming to such person's knowledge

in the exercise of his/her functions.

A person commits an offence attracting a penalty of up to ten thousand penalty units, or imprisonment for a term of up to three years, or both if: being a witness before the Commission and without lawful excuse, refuses to be sworn or affirmed or having been sworn or affirmed, refuses to answer fully and satisfactorily any question lawfully put to such person; gives false testimony in any material particular to any matter under investigation; insults, interrupts or otherwise obstructs any commissioner or any member of staff in the performance of his/her functions under the Act; or disobeys any order made under the Act.

The Commission's funds comprise such moneys as may: be appropriated by Parliament; be paid to the Commission by way of grants or donations; and vest in or accrue to the Commission.

Subject to the approval of the President, the Commission may: accept money by way of grants or donations from any source; and raise by way of loans or otherwise, such moneys as it may require for the discharge of its functions.

The Commission is required to send an annual report to the President concerning its activities during the year, who must table the report before Parliament. Lastly, the Commission is empowered, by statutory instrument, to make rules to facilitate its work.

1997 LEGISLATION

THE ROADS AND ROAD TRAFFIC (AMENDMENT)

ACT, No. 4 of 1997

This Act was enacted in order to enable the government to raise revenue from motorists in respect of car registration and driving licenses. The amendment requires any person who has been issued a registration book for a motor vehicle or trailer to surrender such registration book to the licensing officer who shall, upon payment by such person of a fee of five hundred and fifty-six fee units (about ZK100,000), re-register that motor-vehicle or trailer and issue that person with a new registration book. The amendment also provides that there shall be payable in respect of a driving license such fee as shall be prescribed by the Minister by statutory instrument.

THE CONTROL OF GOODS (AMENDMENT) ACT, No. 7 of 1997

This amends the principal Act, Cap. 421, by, *inter alia*, imposing a 5 per cent import declaration fee in respect of goods of a value in excess of US\$500, imported into Zambia. The value of the imported goods in question shall include the free on board value of the goods, the cost of transportation, the value of the insurance policy covering the goods, if any, and the cost of freight. The fee shall be computed and become payable upon completion

and submission of the prescribed import declaration form to a commercial bank, before the importation of the goods. Any person who: attempts to evade the fee; knowingly fails to collect the fee; knowingly fails to file an import declaration form, or to supply information; knowingly conceals or destroys any book, record, document, statement, or other information; knowingly fails to obey summons; makes or furnishes any fraudulent document, statement, or other information; attempts to interfere with the determination or collection of the fee; knowingly discloses any information in a manner not authorised by law or regulations; or in any way knowingly assists in, or contributes to, any of the foregoing; shall be guilty of an offence and liable, upon conviction to a fine of not less than twenty thousand penalty units and not exceeding one million penalty units or upon default of such payment, one month imprisonment for each twenty thousand penalty units or portion thereof.

THE MINES AND MINERALS (AMENDMENT) ACT, No. 8 of 1997

This amendment to the Principal Act, Cap. 213, makes the Zambia Revenue Authority responsible for collecting mineral royalties. The amendment also provides for the creation of an Environment Protection Fund, which shall be managed in such manner as the Minister (of Mines) may, by statutory instrument, prescribe.

THE SUPREME AND HIGH COURT (NUMBER OF JUDGES) (AMENDMENT) ACT, No. 10 of 1997

The number of High Court Judges is raised from twenty to thirty.

THE ZAMBIA INSTITUTE OF HUMAN RESOURCES MANAGEMENT ACT, No. 11 of 1997

This Act provides for the establishment of the Zambia Institute of Human Resources, its functions, its membership and organisation and for matters connected with or incidental to the foregoing.

THE RATING ACT, No. 12 of 1997

The Act provides for the declaration of ratable areas; the assessment of ratable property; and the levying of rates etc.

B. SUBSIDIARY LEGISLATION, 1997

THE TECHNICAL EDUCATION AND VOCATIONAL TRAINING (FEES) (AMENDMENT) REGULATIONS, SI No. 65 of 1997

These regulations provide for increased tuition, boarding and general purpose fund fees payable by full-time students enrolled at Government

maintained and aided institutions. The fees are in various categories: Zambians: Residential and Non-Residential students; Non-Zambians: Residential and Non-Residential students. The fees for full-time residential Zambian students range from K148,271 per annum (for a certificate in Business Studies, Applied Arts, Commercial, Academic) to K1,576,897 (for a commercial Pilot); fees for non-Zambians for the same courses range from US\$1,590 to US\$7,059.

**THE NATIONAL HEALTH SERVICES (TRANSFER AND
SECONDMENT OF PUBLIC OFFICERS) REGULATIONS,
No. 76 of 1997**

These regulations provide for the transfer of public officers from the civil service to Health Management Boards from 1 August 1997. An officer who is transferred to a management board shall sign an employment contract with that board, which shall include the duration of the contract, the application of the conditions of service of the management board to the officer, and a provision for gratuity.

THE LOCAL COURTS (AMENDMENT) RULES, No. 85 of 1997

These rules revise upwards the various fees charged by local courts for various services and forms.

THE SUPREME COURT (AMENDMENT) RULES, No. 86 of 1997

These rules revise upwards the various fees charged by the Supreme Court for various forms and services.

**THE SUBORDINATE COURTS (CIVIL JURISDICTION)
(AMENDMENT) RULES, No. 87 of 1997**

These rules prescribe increased court fees charged by Subordinate Courts for various forms and services.

THE HIGH COURT (AMENDMENT) (NO 2) RULES, No. 88 of 1997

These rules prescribe increased court fees charged by the High Court for various forms and services.

**THE ANTI-CORRUPTION COMMISSION ACT (COMMENCEMENT)
ORDER, No. 33 of 1997**

This order, made by the President, brings into operation the Anti-Corruption Act, 1996 with effect from 17 March 1997.

**THE HUMAN RIGHTS COMMISSION ACT
(COMMENCEMENT) ORDER, SI No. 34 of 1997**

This order, made by the President, brings into operation the Human Rights Commission Act, 1996 as from 17 March 1997.

**THE REVISED EDITION OF THE LAWS OF ZAMBIA (1995)
(EDITION) (COMMENCEMENT) ORDER, SI No. 35 of 1997**

This order, made by the President pursuant to section 13(2) of the Laws of Zambia (Revised Edition) Act, brings into force the Revised Laws of Zambia (1995 Edition) on 31 March 1997. This is the first major revision of the Laws of Zambia for twenty years.

THE HIGH COURT (AMENDMENT) RULES, 1997, SI No. 71

These Rules, which substantially amend the existing High Court Rules, are made by the High Court Rules Committee chaired by the Chief Justice. The Rules are to come into operation on the expiry of six months after their publication (i.e., six months from 6 June 1997, which is 6 December 1997). Among the major amendments are:

1. All fees payable on filing of any document shall be in cash. The fees shall be paid before the document is presented at the Registry and unless so paid the document shall not be accepted.
2. Order VI of the Principal Rules is revoked and replaced by a new order which, *inter alia*, provides that: (i) except for petitions under the Constitution and Matrimonial Causes Acts and applications for writs of habeas corpus, every action in court shall, notwithstanding the provisions of any other written law, be commenced by writ of summons endorsed with or accompanied by a full statement of claim. The court shall not issue any writ of summons which is not endorsed with or accompanied by a full statement of claim; and (ii) every action shall, upon being commenced, be assigned to a Judge who shall be responsible to monitor its pace and eventually hear the cause.
3. Order X of the Principal Rules is amended in Rule II by providing that service of a writ or other court process on a body corporate other than a company shall be effected on any office bearer.
4. Order XI of the Principal Rules is amended to provide that a defendant shall enter appearance to a writ of summons by delivering to the proper officer sufficient copies of memorandum of appearance in writing dated on the day of their delivery, and containing the name of the defendant's advocate, or stating that the defendant is defending in person. The defendant shall at the same time deliver to the proper officer sufficient copies of the defence and counterclaim, if any. A memorandum of appearance not accompanied by a defence shall not be accepted.

5. Order XIX of the Principal Rules is revoked. The new Order requires the court or trial judge, not later than fourteen days after appearance and defence have been filed, to give directions with respect to the following matters: reply and defence to counterclaim, if any; discovery of documents; inspection of documents; admissions; interrogatories; and place and mode of trial.
6. Order XX is revoked and replaced by a new order which provides that if the plaintiff fails to deliver a defence to the counterclaim within the time allowed for that purpose by the order of directions, the defendant may, at the expiration of such time, enter final judgment or interlocutory judgment, as the case may be.
7. A party may apply, on motion or summons, for judgment on admissions where admissions of facts or part of a case are made by a party to the cause or matter either by his pleadings or otherwise (Order XII, Rule 6).
8. Order XXII is revoked and substituted by a new Order which provides that the parties shall, on setting down the action for trial, settle the issues in writing by stating the questions in controversy between them and stating the questions of law on admitted facts and questions of disputed fact, or questions partly of law and partly of fact except that this Rule shall not apply where the parties appear in person. At any time before the decision of the case, if it shall appear to the court necessary for the purpose of determining the real question or controversy between the parties, the court may amend the issues or frame additional issues, on such terms as it shall deem fit.
9. Order XXVII of the principal Rules is amended by the addition of two new rules. Rule 6 provides that a judge may, on application or on his own motion pursuant to an undertaking as to damages, order an assessment of damages arising out of a discharged injunction found to have been unjustified, and that the damages shall be assessed by the Registrar. Rule 7 provides that the court on an application by a party to a marriage shall have jurisdiction to grant an injunction containing one or more of the following provisions, namely: (a) a provision restraining the other party to a marriage from molesting the applicant; or a provision restraining the other party from molesting a child living with the applicant whether or not any other relief is sought in the proceedings. This shall apply even if the parties are not married but are living together in the same household as husband and wife.
10. Order XXX of the Principal Rules is amended to provide that every application in chambers shall be made by summons and that every summons shall be served two clear days before return thereof, unless it shall be otherwise ordered. Furthermore, an appeal from the decision or order of the Registrar on assessment of damages shall be to the Supreme Court. This amendment does away with an originating summons as a way of commencing actions in chambers.

11. Order XXXI is revoked and replaced by a new order which, *inter alia*, provides that except for cases involving constitutional issues or the liberty of an individual or an injunction or where the trial Judge considers the case to be unsuitable for referral, every action may, upon being set down for trial, be referred by the trial Judge for mediation and where the mediation fails the trial Judge shall summon the parties to fix a hearing date. The mediation office shall be required to keep a list of mediators who have been trained and certified by the court to act in this capacity with the field or fields of bias or experience indicated against each of their names. The mediators shall be of not less than seven years working experience in their respective fields. The mediator shall complete the mediation process not more than sixty days from the date of collecting the record. No appeal shall lie against a registered mediated settlement.
12. Order XXXVI of the Principal Rules is amended by deleting Rule 6 which provided for interest at 6 per cent per annum on a judgment. The new provision provides that where a judgment is for a sum of money, interest shall be paid thereon at the average of the short term deposit rate per annum prevailing from the date of the cause of action or writ as the court or Judge may direct to the date of judgment.
13. Order XXVIII of the Principal Rules is revoked and replaced by a new order which provides for the procedure for registering maintenance orders in the High Court under the Affiliation and Maintenance of Children Act, CAP. 64.

Alfred W. Chanda
UNZA

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Cover designed by Nason Tembo

Printed by UNZA Printer