



# Constitutionality of Criminal Procedure and Prison Laws in Africa

# Zambia

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# Introduction

Zambia's Constitution contains an enforceable Bill of Rights, one which mainly lists civil and political rights that constrain state power. Having human rights enshrined in an enforceable manner in the Constitution is important, because the validity of other laws is measured by their conformity to the Constitution; other laws that offend its provisions are otiose.

As will be seen, the Bill of Rights itself has several shortcomings. Many rights are subject to numerous exceptions that put their enjoyment in doubt, given that almost any subsequent law that on the face of it may violate human rights easily passes the constitutionality test. In a number of cases, human rights provisions are broadly defined, leaving considerable interpretive discretion to the executive and judiciary and thus potentially endangering the enjoyment of these rights. The Bill of Rights is also notable for not providing certain criminal justice rights, such as bail, that are taken for granted in other jurisdictions.

This chapter discusses the constitutionality of the criminal justice statutes. As such, the Constitution is used as the yardstick of their validity; human rights standards not found in the Constitution are not discussed here (though this does not necessarily mean they do not exist in other legislation).

# 1. General information

## 1.1. Recent constitution-making history

Zambia has had five constitutional cycles. At independence in 1964 it inherited a constitution with a Bill of Rights modelled on the 1963 Nigerian Constitution.<sup>1</sup> Although the Bill of Rights was entrenched,<sup>2</sup> the entrenchment provision was removed by an amendment in 1969 achieved by the ‘referendum to end all referenda.’<sup>3</sup> This made it easy for the government to make a further amendment in 1973 that abolished multiparty-ism in favour of one-party rule. Then, in 1991, the constitution was revised in 1991 to reinstate multiparty politics. The 1991 constitution brought back the entrenchment clause to lock the Bill of Rights and, for the first time, expressly affirmed the principle of constitutional supremacy.<sup>4</sup> In January 2016, the Zambian Constitution, except for the Bill of Rights, was amended. The draft Bill of rights, which integrates social and economic rights, shall be subjected to a referendum on August 11, 2016. This report does not include reference to the new Bill of Rights.

## 1.2. General constitutional principles

The Constitution of Zambia is the supreme law of the nation and any other law inconsistent with it is void to the extent of the inconsistency.<sup>5</sup> Although it has a Bill of Rights, it lacks a clause directing how courts are to interpret the provisions relating to human rights. However, articles 8 and 9 of the 2016 Constitution require courts to have regard to human dignity, equality and non-discrimination and sustainable development in the interpretation of the laws and policies. All the rights in the Constitution are subject to the general limitation that ‘the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or public interest.’<sup>6</sup> Subject to these limitations, the underlying Constitutional values are non-discrimination and equality, whereby all individuals in the country are entitled to each of the listed rights regardless of their ‘race, place of origin, political opinions, colour, creed, sex, or marital status.’<sup>7</sup>

## 1.3. Overview of judicial system

The judiciary in Zambia consists of the Supreme Court, the Constitutional Court, the Court of Appeal, High Court, Subordinate (magistrates) Courts, Small Claims Courts and Local Courts.<sup>8</sup> Several other courts or quasi-judicial tribunals exist, set up under specialised legislation. These include the Lands

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<sup>1</sup> Alfred Chanda, *Human Rights Law in Zambia: Cases and Materials* (University of Zambia Press 2007) 4.

<sup>2</sup> Constitution of the Republic of Zambia 1964, art. 72(3).

<sup>3</sup> Muna Ndulo and Robert Kent, ‘Constitutionalism in Zambia: Past, Present and Future’ (1996) 40 *African Law Journal* 264.

<sup>4</sup> Constitution of the Republic of Zambia 1991, art. 1(2).

<sup>5</sup> Constitution 2016, art. 1(1).

<sup>6</sup> *ibid*, art. 11.

<sup>7</sup> *ibid*.

<sup>8</sup> *ibid*, arts. 120, 124, 127, 130 and 133.

Tribunal<sup>9</sup> and Small Claims Court.<sup>10</sup> The judiciary is established as an autonomous institution.<sup>11</sup> The judges of the courts are required to be independent and impartial, subject only to the Constitution and the law.<sup>12</sup>

Although the Supreme Court is the final court of appeal, it is equivalently ranked with the Constitutional Court (which has exclusive jurisdiction over constitutional matters).<sup>13</sup> It is an appellate judicial forum hearing appeal cases from the Court of Appeal, which in turn hears appeals from the High Court. The High Court has unlimited and original jurisdiction to hear and determine any civil or criminal proceedings under any law.<sup>14</sup> Except for serious crimes (such as homicides, robberies and treason) which are directly tried by the High Court, most crimes are tried by Subordinate Courts and appealed to the High Court.

Zambia has a vibrant legal profession, under the Law Association of Zambia (LAZ), which has often litigated matters of public interest. However, when their views are at variance with those of government the lawyers sometimes face harassment, intimidation and threats from government officials and political party supporters.

## 1.4. Overview of law enforcement structure

The Zambia Police Service (ZP) is the main law enforcement body created under the Constitution.<sup>15</sup> Other specialised law enforcement agencies exist, usually focusing on specialised crimes. These include the Anti-Corruption Commission (ACC), established under the Anti-Corruption Act,<sup>16</sup> and the Drug Enforcement Commission (DEC), established under the Narcotic Drugs and Psychotropic Substances Act.<sup>17</sup> The ACC has the primary mandate to combat cases of corruption, while the DEC has law enforcement jurisdiction over drug-related offences and money laundering.

The running of prisons is entrusted to the Zambia Correctional Service, a constitutionally established institution under the authority of the Ministry of Home Affairs.<sup>18</sup>

## 1.5. Overview of criminal procedure legislation, prison laws and other legislation regulating arrested and detained persons

The Constitution (2016) and the Criminal Procedure Code, adopted in 1934, are the main statutes regulating the conduct of criminal process. These are complemented by other statutes, including the Supreme Court Act 1973, the High Court Act 1960, Subordinate Courts Act 1934, the Penal Code Act

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<sup>9</sup> Lands Act 1995, s 20. See also The Lands Tribunal Act 2010, s 3.

<sup>10</sup> Small Claims Court Act 1992, s 3.

<sup>11</sup> Constitution 2016, art. 122.

<sup>12</sup> Ibid.art 121.

<sup>13</sup> Ibid, 91(1).

<sup>14</sup> Ibid, art. 134.

<sup>15</sup> Ibid, art. 193(1)(a).

<sup>16</sup> Anti-Corruption Act 2012, s 4.

<sup>17</sup> The Narcotic Drugs and Psychotropic Substances Act 1993, s 4.

<sup>18</sup> Constitution 2016, art. 193(1)(C).

1931, Juveniles Act 1956, Defence Act 1964, Inquests Act 1939, Mental Disorders Act 1949, the Probation of Offenders Act 1953, Anti-Gender Based Violence Act 2011, National Prosecution Authority Act 2010, and Plea Negotiations and Agreements Act 2010.

The police are governed by the Zambia Police Act 1966 (as amended).

The management and control of prisons is regulated by the Prisons Act enacted in 1966 and amended piecemeal over the years.

Zambia has ratified all major UN and AU human rights treaties, which have provisions relevant to criminal justice rights. But as a dualist state, international law treaties do not apply directly unless enacted into domestic statutes. However, in *Sara Longwe*,<sup>19</sup> the seminal case on the application of international law in the country, the High Court took the view that in deciding an issue not covered by domestic legislation, a court could take notice of binding international treaties. The Court further stated that ratification of such documents without reservations indicated clear willingness of the state to be bound by the treaties, willingness of which the courts should take notice.

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<sup>19</sup> *Sara Longwe v Intercontinental Hotels* 1992/HP/765 (1993) 4 LRC 221.



## 2. Constitutionality of provisions relating to arrest

### 2.1. Policies leading to arrest

An arrest consists in a police officer or any other person actually touching or confining the body of the person being arrested, unless such person submits to custody by word or action.<sup>20</sup> The arrest is in two parts: physical restraint and the suspect being informed of the reasons for his or her arrest.<sup>21</sup>

The Constitution prohibits trying and convicting a person for a criminal offence unless that crime is defined and the penalty prescribed in a written law.<sup>22</sup> For one to be arrested, tried and convicted, the act or omission must have constituted an offence at the time it took place.<sup>23</sup> Furthermore, convicting a person on a wrong or mistaken provision is generally treated in the same manner as convicting a person on the basis of a crime that does not exist in legislation.

The Constitution provides that no person, unless consenting thereto, 'shall be subject to the search of his person or his property or the entry of others on his premises.'<sup>24</sup> The provision, however, allows for several derogations or exceptions so broadly framed as to render it meaningless. These include acts done in the interest of defence, public safety, public order, public morality, public health, town and country planning, protection of the rights and freedoms of others, inspection of premises by those entitled by law, and for purposes of enforcing a judgment order of court.<sup>25</sup> As seen below, the courts have upheld arrests based on illegally obtained evidence in contravention of the constitutional provision.

Several other statutes have provisions either within the permitted exceptions or are potentially in conflict with the Constitution. The Criminal Procedure Code (CPC) allows for a police officer to search a person who has been arrested and to place in safe custody all articles, apart from clothing, found upon the suspect.<sup>26</sup> The CPC also allows for any police officer to 'stop, search and detain any vessel, aircraft or vehicle in or upon which there shall be reason to suspect that anything stolen or unlawfully obtained may be found and also any person who may be reasonably suspected of having in his possession or convey in any manner anything stolen or unlawfully obtained.'<sup>27</sup>

The Zambia Police Act allows a police officer of at least the rank of sub-inspector to carry out any search of premises for purposes of investigating a crime, provided the suspicion is based on

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<sup>20</sup> Criminal Procedure Code Act, s 18(1)

<sup>21</sup> *Silungwe v The People* (1974) ZR 130 (HC).

<sup>22</sup> Constitution 1996, arts. 18(4) and 18(8).

<sup>23</sup> *ibid*, art. 18(4).

<sup>24</sup> *ibid*, art. 17(1).

<sup>25</sup> *ibid*, arts. 17(2)(a), (b), (c), (d).

<sup>26</sup> CPC, s 22.

<sup>27</sup> *ibid*, s 23.

reasonable grounds.<sup>28</sup> Such search requires a warrant issued by a magistrate, except where an officer suspects a crime is being committed in his proximity or the matter is urgent. In *Liswaniso*,<sup>29</sup> however, the Supreme Court upheld the validity of an arrest and conviction that was based on an illegal police search. Section 11 of the state Security Act, relating to public security, gives the president powers to order any person by warrant who owns or controls any apparatus within the country used for the sending or receipt of telegrams to produce originals and transcripts of all telegrams of any specified class or description.<sup>30</sup>

## 2.2. Rights during arrest

### 2.2.1. Prohibition of arbitrary or unlawful arrest

The Constitution offers protection against arbitrary or unlawful arrest by requiring that ‘a person shall not be deprived of his personal liberty except as may be authorised by law ...’<sup>31</sup> The wording, though, is dangerous as it contains no safeguards to bar any law passed subsequent to the Constitution from taking away liberty, seeing as arbitrary arrests without trial would not infringe this provision as long as they were based on a written law (see section 6 of this chapter).

An arrest can be effected by a police officer or any other person or a magistrate. With regard to a police officer, the CPC entitles any police officer without an order from a magistrate and without a warrant, to arrest, inter alia, any person whom he suspects, upon reasonable grounds, of having committed a cognizable offence.<sup>32</sup>

A police officer in charge of a police station is further entitled to arrest individuals for petty offences, such as any person ‘who has no ostensible means of subsistence, or who cannot give a satisfactory account of himself’ or any person who, ‘by repute’, ‘[is] an habitual robber, housebreaker or thief, or an habitual receiver of stolen property, knowing it to be stolen, or ... habitually commits extortion, or, in order to commit extortion, habitually puts or attempts to put persons in fear of injury.’

These provisions seem to give the police arbitrary power of arrest solely on the basis of a person’s economic status and mere reputation. This potentially offends both the constitutional provision of personal liberty and the non-discrimination clause.

A few crimes empower police to make an arrest only with a warrant or order from a magistrate. Such offences include permitting a prisoner of war to escape, defamation of a foreign princess, acts of mutiny, official corruption, frauds and breaches of trust by police officers, desertion of children, common nuisance and common assaults.

Any private person, that is any person who is not a police officer, ‘may arrest any person who, in his presence, commits a cognizable offence, or whom he reasonably suspects of having committed a

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<sup>28</sup> Zambia Police Act (as amended by Act No 14 of 1999), s 15.

<sup>29</sup> *Liswaniso v The People* (1976) ZR 272 (SCZ Judgment No. 58 of 1976).

<sup>30</sup> State Security Act Chapter 111 of the Laws of Zambia, s 17(1).

<sup>31</sup> Constitution 1996, art. 13(1).

<sup>32</sup> CPC, s 26.

felony.<sup>33</sup> The owner of property may also arrest persons found committing any offence involving injury to that property without a warrant.<sup>34</sup> Where a private person has effected an arrest he or she shall without unnecessary delay hand over the arrested person to a police officer or the nearest police station.<sup>35</sup>

Finally, a magistrate is entitled, 'at any time, to arrest or direct the arrest, in his presence, within the local limits of his jurisdiction, of any person for whose arrest he is competent, at the time and in the circumstances, to issue a warrant'.<sup>36</sup>

## 2.2.2. Obligation of law enforcement to use reasonable force

Article 15 of the Constitution prohibits that any person be subjected to torture or inhumane treatment. This is the only provision in the Constitution without qualifications or exceptions. The Constitution further protects the right to life, but with several exceptions. In relation to the criminal justice system, it requires that 'a person shall not be deprived of his life intentionally except in execution of the sentence of court in respect of a criminal offence under the law in force in Zambia of which he has been convicted'.<sup>37</sup>

A person shall not be considered as having been deprived of life in violation of the Constitution where a person dies as a result of use of force that is reasonably justifiable in the circumstances of the case:

- for the defence of any person from violence or for the defence of property;
- in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
- for the purpose of suppressing a riot, insurrection, mutiny or if he or she dies as a result of a lawful act of war; and
- in order to prevent the commission by that person of a criminal offence.<sup>38</sup>

Both the Zambia Police Act and the Prisons Act, which allow their officers to use firearms on persons escaping from lawful custody, categorically state that the purpose is not to kill but to disable.<sup>39</sup>

In the past, several Zambian laws, including the CPC, provided for corporal punishment, but its constitutionality was challenged in the High Court in *John Banda v The People*.<sup>40</sup> The appellant had been convicted of malicious damage to property and sentenced to one month's imprisonment, suspended for 12 months, and ten strokes of the cane. The Court held that the sentence of corporal punishment and its underlying provisions breached article 15 of the Constitution and were null and void. The government later repealed provisions in statutes that allowed for corporal punishment.

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<sup>33</sup> *ibid*, s 31(1).

<sup>34</sup> *ibid*, s 31(2).

<sup>35</sup> *ibid*, s 32(1).

<sup>36</sup> *ibid*, s 36.

<sup>37</sup> Constitution 1996, art. 12(1).

<sup>38</sup> *ibid*, art. 12(3).

<sup>39</sup> Prisons Act Chapter 97 of the Laws of Zambia, s 29, and Zambia Police Act Chapter 107 of the Laws of Zambia, s 24.

<sup>40</sup> *John Banda v The People* HPA/6/1998.

### 2.2.3. Right to be promptly informed of the reasons for arrest

The Constitution requires that ‘any person who is arrested or detained shall be informed as soon as reasonably practicable, in a language he understands, of the reasons for his arrest or detention’.<sup>41</sup> The provision does not indicate who is responsible for informing the person arrested or detained, nor does it set strict timelines within which this is to be done. Presumably the duty to inform lies with the police or person making the arrest. This provision has not been incorporated in the CPC. However, as seen below, the CPC requires that a person who has been arrested without warrant must be brought before court within 24 hours of the arrest.

### 2.2.4. Right to conditional release before being brought into police custody

The Constitution has no specific provision for this right. Article 13 protects personal liberty and simply states that a person must be released if not tried within a reasonable time. The Constitution has no any other provisions relating to bail.

Subordinate legislation, however, allows for bail to be granted by police before the case moves to trial. Section 33 of the CPC entitles a police officer in charge of a police station to release an arrested person where, after due inquiry, there is insufficient evidence to proceed with the charge. Under the same provision, if a person who has been arrested for offences which are not serious and not punishable by death and cannot be brought to court within 24 hours of arrest, such person must be released on bail. This bail granted at the police station is usually referred to as police bond.

No fee is chargeable for bail granted by police.<sup>42</sup> However, the police may require that the person being admitted to bail must have sureties who make an undertaking that he or she shall appear before court as required.<sup>43</sup> In *Chitungu and Others*,<sup>44</sup> the High Court held that the police have power to cancel the bail granted by them if it appears to them that the accused is about to disappear, leave the country, interfere with witnesses or is likely to commit a similar offence. It stated, however, that the bail granted by police does not cease automatically when an accused appears before court.

The CPC also allows an arrested person to waive his or her right to trial by pleading guilty to specified offences without going to court and agreeing to pay a fine. This usually applies to traffic offences and other offences punishable by a fine.<sup>45</sup>

Even where a person has admitted guilt in this manner, the documents are still sent to court and a hearing date is set. Any person who has admitted guilt without being tried is still entitled to change his or her mind and withdraw the admission and proceed with trial.

Although there is no constitutional limitation to the right to bail, the law lists certain offences as non-bailable, at any stage of the criminal justice process. These include:

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<sup>41</sup> Constitution 1996, art. 13(2).

<sup>42</sup> Zambia Police Act Chapter 107 of the Laws of Zambia, s 19.

<sup>43</sup> See CPC, ss 123 and 16.

<sup>44</sup> *The People v Benjamin Sinkwinti Chitungu, Joseph Antonio Arthur and David Muzuma* (1992).

<sup>45</sup> CPC, s 221.

- murder, treason or any other offence carrying a possible or mandatory capital penalty;
- misprision of treason or treason felony;
- aggravated robbery;
- theft of a motor vehicle as a repeat offender of the same offence;<sup>46</sup>
- where a person is charged with an offence under the State Security Act and the Director of Public Prosecutions (DPP) issues a certificate that the safety or interest of the state would be prejudiced;<sup>47</sup> and
- anyone charged with some drug-related offences.<sup>48</sup>

### 2.2.5. Right to remain silent and privilege against self-incrimination

Article 18(7) of the Constitution states that ‘a person who is tried for a criminal offence shall not be compelled to give evidence at trial’. The effect is that the investigation and prosecution cannot have recourse to the accused person and force him or her to answer questions. As such, the provision includes the right to refuse to answer questions asked by police and prosecutors and also not to give evidence on oath or to make an unsworn statement which should not be subjected to cross-examination.<sup>49</sup>

In the case of *Thomas Mumba v the People*<sup>50</sup> the appellant was charged under the Corrupt Practices Act, section 53(1) of which states: ‘An accused person charged with an offence under part IV shall not, in his defence be allowed to make an unsworn statement, but may give evidence on oath or affirmation from the witness box.’ The High Court found the provision in breach of article 18(7) of the Constitution, since it had the effect of compelling the accused to give evidence only on oath and thus be liable to cross-examination.

### 2.2.6. Right to privacy

Apart from article 17, which prohibits a search on one’s person or premises without consent, the Constitution lays down no specific provisions relating to the protection of a person’s privacy during the criminal process.

### 2.2.7. Right to be informed of one’s rights

This right is not provided for in the Constitution.

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<sup>46</sup> *ibid*, s 126 as read with CPC (Amendment ) Act 1993, s 2 and CPC (Amendment) Act 2005, s 2.

<sup>47</sup> *ibid*, s 123(4).

<sup>48</sup> Narcotic Drugs and Psychotropic Substances Act 1993, s 43.

<sup>49</sup> Alfred Chanda, 242.

<sup>50</sup> *Thomas Mumba v The People* HNR/438/1984.

### 2.3. Right to redress following rights violations

The Constitution states that ‘any person who is unlawfully arrested or detained by any other person shall be entitled to compensation thereof from that other person.’<sup>51</sup> In the case of *Mbandangoma*,<sup>52</sup> the plaintiff was arrested by police and granted police bond. The police, however, required him to present himself to them periodically, which he did several times before being told they had stopped proceedings against him. In an action for compensation for false imprisonment, the High Court held that police had no power to arrest or detain a person for the purpose of conducting investigations, and awarded him compensation.

Apart from this specific provision entitling one to compensation for false imprisonment, the Constitution also has a general provision under which those with human rights violation grievances could seek redress. Under article 28, any person who alleges that his or her rights are being or are likely to be contravened may apply to the High Court, which shall hear the matter and do what it considers appropriate to enforce or secure the right in question. Article 28, however, is restrictive in terms of *locus standi* as it does not generally permit other persons to bring a case on behalf of a victim. This significantly weakens public interest litigation.

### 2.4. Regime applicable to children

The Constitution does not provide for children’s rights in the criminal justice system. The Juveniles Act, together with the Penal Code, forms the backbone of criminal laws handling children in conflict with the law. Section 2 of the Juveniles Act defines a juvenile as a person under the age of 19. The Penal Code sets eight years of age as the age of criminal responsibility, and vests those between eight and 12 with a rebuttable presumption.<sup>53</sup> A male child below the age of 12 years is presumed to be incapable of having carnal knowledge, that is, is incapable of committing sexual offences such as rape.<sup>54</sup> Fixing the age of criminal responsibility has been found to be too low by international standards. In 2007 the UN Human Rights Committee criticised the age of criminal responsibility and recommended that Zambia raise it to an acceptable international level.<sup>55</sup> The UN Committee on the Rights of the Child in General Comment No. 10 (2007) recommends the age of 12 years as the minimum lower age of criminal responsibility.

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<sup>51</sup> *ibid*, art. 13(4).

<sup>52</sup> *Daniel Chizoka Mbandangoma v The Attorney General* (1979) ZR 45 (HC).

<sup>53</sup> Penal Code Act Chapter 87 of the Laws of Zambia, s 14(1)(2).

<sup>54</sup> *ibid*, s 14(3).

<sup>55</sup> Concluding Observations of the Human Rights Committee UN DOC CCPR/C/ZMB/CO/3/CRP.1.

## 3. Constitutionality of provisions relating to custody prior to first court appearance

### 3.1. Outline of the different places of custody prior to first court appearance: police, secret services, special units, etc.

The Constitution has no provision indicating where a person who has been arrested ought to be detained prior to the court appearance. In practice, persons while awaiting trial are detained in police cells as well as Remand Prisons, managed by the Prisons Service. There are about 350 police posts and police stations across the country and 86 prisons.<sup>56</sup> However, see section 6 below for a discussion of places where a person can lawfully be detained.

### 3.2. Rights in custody prior to first court appearance

#### 3.2.1. Prohibition of arbitrary or unlawful detention

While the Constitution protects personal liberty, subordinate legislation does not expressly prohibit arbitrary unlawful detention, nor provide for procedures to be followed when someone has been the victim of unlawful detention.

#### 3.2.2. Right to be presumed innocent until proven guilty

Article 18(2)(a) of the Constitution indicates that every person who has been charged with a criminal offence 'shall be presumed innocent until he is proved or has pleaded guilty'. The presumption of innocence entails that a defendant 'shall not be subject to unnecessary pre-trial deprivation of freedom'.<sup>57</sup> This provision, read together with article 13(3) which entitles a person to conditional or unconditional release, seems to suggest that it overrides any statutory provisions prohibiting bail for certain offences. The Supreme Court acknowledged in *Chetankumar Shantkal Parekh*<sup>58</sup> that article 13(3) overrides any prohibitions on bail in lesser laws, but took the view that its application only kicks in when trial is unreasonably delayed through no fault of the accused. In this interpretation, it follows that there is nothing unconstitutional about statutory prohibitions of bail.

The presumption of innocence is, however, not expressly reflected in subordinate legislation.

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<sup>56</sup> Human Rights Watch, *Unjust and Unhealthy: HIV, TB, and Abuse in Zambian Prisons* (2010) 5.

<sup>57</sup> Alfred Chanda, 211.

<sup>58</sup> *Chetankumar Shantkal Parekh v The People* 1995/SCZ/11/a.

### 3.2.3. Right to be promptly charged or released

The Constitution provides that every person charged with a criminal offence is entitled to be informed as soon as reasonably practicable, in detail and in a language he or she understands, of the nature of the offence with which he or she is charged.<sup>59</sup>

Sections 134 to 137 of the CPC provide more detail on the drawing up and content of charges. Every charge should contain a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence he or she is charged with.<sup>60</sup>

### 3.2.4. Right to conditional release

See the discussion in section 3.2.4.

### 3.2.5. Right to be promptly brought before a judge

The Constitution sets no specific length of custody. It simply requires that an arrested or detained person, if not released on bail, shall be 'brought without undue delay before a court'.<sup>61</sup> Under another provision, it entitles any person charged with a criminal offence to be afforded a fair hearing 'within a reasonable time'.<sup>62</sup> Section 33 of the CPC requires that where a person is arrested without warrant, that person shall be presented before court within 24 hours. Since the Constitution simply requires one to be brought before court without undue delay or within reasonable time, the CPC provision does not seem to offend the provisions of the Constitution. However, other statutes allow for longer periods of detention without any requirement to produce the detained person before court. The Immigration and Deportation Act empowers an immigration officer to detain suspected prohibited immigrants for a period not exceeding 14 days while conducting inquiries of that person.<sup>63</sup> This is clearly arbitrary power as it does not even require reasonable suspicion at a minimum. As held in the *Mbandangoma*<sup>64</sup> case, no one has power to arrest a person in order to help with investigation.

### 3.2.6. Right to remain silent

This applies in the same manner as discussed in section 3.2.5.

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<sup>59</sup> Constitution 1996, art. 18(2)(b).

<sup>60</sup> CPC, s 134.

<sup>61</sup> Constitution 1996, art. 13(3).

<sup>62</sup> *ibid*, art. 18(1).

<sup>63</sup> Immigration and Deportation Act No. 18 of 2010, s 38(1).

<sup>64</sup> *Daniel Chizoka Mbandangoma v The Attorney General* (1979) ZR 45 (HC).



### 3.2.7. Privilege against self-incrimination

This applies in the same manner as discussed in section 3.2.5.

### 3.2.8. Right to communicate

This right is not provided for in the Constitution. Furthermore, the CPC is silent on the right of the suspect to communicate with a legal representative or with family members during police custody.

### 3.2.9. Right to legal representation

The Constitution states that every person charged with a criminal offence 'shall unless legal aid is granted to him in accordance with the law enacted by parliament for such purpose be permitted to defend himself before Court in person, or at his own expense, by a legal representative of his choice'.<sup>65</sup> However, the law does not expressly provide for access to a legal representative during police custody. Legal aid is constitutionally granted only at the trial stage (see below).

In practice, many civil society organisations employ paralegals, who provide legal advice and assistance in some police stations and prisons but do not appear in court.

There are obvious risks surrounding legal aid, which is granted at the stage of trial. At this point a person has already been interrogated by police and may have made damaging confessions or have had certain rights, such as the right against self-incrimination, violated while being interrogated. By the time a legal aid lawyer is given at trial stage, the damage is already done to the case of the accused and therefore the value of legal aid is significantly diminished.

### 3.2.10. Right to an interpreter

The Constitution has no provision entitling suspected persons to be provided with information in a language they understand. As outlined below, the constitutional right applies only at trial.

### 3.2.11. Right to be separated from different categories of arrested persons

This right is not provided for in the Constitution.

### 3.2.12. Right to safe custody

The Constitution does not have a specific provision covering this right, but it does recognise the right to be free from torture and other ill-treatment (article 15) as well as the right to security of the person (article 11(a)).

The Zambia Police Act places a duty on the custody officer at a police station to ensure that a person in police custody is treated in a decent and humane manner and that police cells or other places of detention are clean and in habitable condition.<sup>66</sup>

### 3.2.13. Right to humane conditions of detention

The Constitution recognises the right to be free from torture and other ill-treatment<sup>67</sup> as well as the right to security of the person.<sup>68</sup>

The Police Act requires the custody officer to, inter alia, ensure that a person in police custody who requires medical attention does have medical facilities and that all necessary provisions and other facilities used by a person in custody are in a hygienic condition.<sup>69</sup>

### 3.2.14. Right to be informed of one's rights

Beyond the constitutional right to be informed of the reasons for one's arrest or detention, which is furthermore not provided for in subordinate law, there is no constitutional or legal provision covering this provision.

## 3.3. Right to have one's case summarily decided upon before the first court appearance

This right is not provided for in the Constitution. However, section 221 of the CPC provides for the possibility to admit guilt before a police officer to offences mainly punishable by a fine and avoid trial. The concerned person can notify the court before the set date of trial that he or she wishes to withdraw the admission of guilt and proceed with trial.

## 3.4. Rights of foreigners

The Constitution has no provision on the rights of foreigners in the criminal process. However, the rights provided in the Constitution apply to all people in the country, including foreigners, except where there are express exceptions.

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<sup>66</sup> Zambia Police Act Chapter 107 of the Laws of Zambia, s 18B(1).

<sup>67</sup> Constitution 1996, art. 15.

<sup>68</sup> *ibid*, art. 11(a).

<sup>69</sup> Zambia Police Act Chapter 107 of the Laws of Zambia, s 18(1).

### **3.5. Right to redress following rights violations**

See section 3.

### **3.6. Complaints and oversight mechanisms**

Apart from the possibility of seeking redress as discussed above, there is no oversight or complaints mechanism created by the Constitution. Subordinate laws, however, provide for redress mechanisms (see section 6).

### **3.7. Regime applicable to children**

This right is not provided for in the Constitution. However, section 59 of the Juveniles Act states that juveniles can be detained only if they are suspected of having committed homicide (for which there is no bail) or a grave offence like aggravated robbery, or if it is believed their release would defeat the ends of justice.

The same provision states that juveniles should be released unless it is necessary to prevent their association with a reputed criminal or prostitute. This is open to the criticism that it has to nothing to do with criminal investigation and instead concerns itself with child care, which is the responsibility of parents.

Section 58 of the Act requires that, as far as possible, juveniles should be separated from adults.

## 4. Constitutionality of trial-related provisions

### 4.1. Universal trial-related rights

#### 4.1.1. Principle of legality

Under the Constitution, a person 'shall not be held to be guilty of a criminal offence on account of any act or omission that did not at the time it took place, constitute such an offence'.<sup>70</sup> A person hence cannot be prosecuted for an offence created retroactively.

The principle has not been translated into subordinate legislation.

#### 4.1.2. Right to be presumed innocent until proven guilty

See section 4.2.2. The Constitution recognises the right to be presumed innocent until proven guilty, but this is not expressly enshrined in subordinate legislation.

#### 4.1.3. Right to be promptly charged or released

See section 4.2.3. The Constitution and CPC recognise the right, at a minimum, to be informed of the reasons for one's detention and be formally charged at the first court appearance.

#### 4.1.4. Right to challenge custody

There is no general constitutional right to challenge custody or to apply for bail. However, article 13(3) of the Constitution recognises the right to be released where trial has been delayed through no fault of the defendant. In addition, articles 26(1)(c) and 26(2) authorise a detained person to request that his or her case be reviewed by a tribunal presided over by a High Court judge, at the earliest three months after the person was detained, the outcome of which may be release. The Constitution does not specify whether such release must be unconditional or may be accompanied with conditions.

Sections 123 to 133 of the CPC provide the legal regime on bail before the courts (during pre-trial detention and during trial). Bail may be granted by a subordinate court, the High Court or Supreme Court, which will determine the amount on a case-by-case basis. Bail may also be guaranteed by sureties, ie, persons who undertake that the accused will appear at trial. However, the CPC and other

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<sup>70</sup> Constitution 1996, s 18(4).

laws prohibit persons arrested for or charged with certain offences from being granted bail (see section 3.2.4. above for the list of such offences).

However, considering that the Constitution has no exception for which release can be granted under the provision protecting personal liberty, it means even these offences still fall within the ambit of the Constitution and therefore, where trial is delayed, conditional or unconditional release can still be granted.

Furthermore, the mechanism provided for under article 26(1)(c) of the Constitution does not appear to be reflected in subordinate legislation.

In the case of *Pate*<sup>71</sup> the Court listed factors it has to weigh in deciding to grant or deny bail as:

- the nature of the accusations against the applicant and the severity of the punishment which may be imposed;
- the nature of the evidence in support of the charge;
- the independence of the sureties if bail is granted;
- the prejudice to the applicant if he is not admitted to bail; and/or
- the prejudice to the state if bail is granted.

#### 4.1.5. Right to remain silent

This right is not expressly recognised in the Constitution, except as part of the right against self-incrimination. While it is not directly stated in the CPC, the CPC does contain provisions indicating that the accused cannot be compelled to give evidence. These are examined below.

#### 4.1.6. Privilege against self-incrimination

Article 18(7) of the Constitution enshrines the right of an accused not to be compelled to give evidence at his or her own trial. Section 157 of the CPC further states that an accused (and his wife) is a competent but not compellable witness.

For further discussion, see section 3.2.5. of this chapter.

#### 4.1.7. Right to equality before the courts

This right is not provided for in the Constitution. The principle of equality of arms is not prescribed either, and generally has not been translated into lesser legislation. As a result, defendants appearing in the Subordinate Courts have no entitlement to know in advance adverse evidence the state or prosecution may have against them. This is commonly referred as 'trial by ambush'.

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<sup>71</sup> *Anupbhai Munabhai Patel v the Attorney General* 1993/HC/366.

#### 4.1.8. Right to be declared not competent to stand trial

This right is not provided for in the Constitution.

#### 4.1.9. Right not to be tried in absentia

The Constitution entitles every accused person to be present at his or her own trial. Except with one's consent, 'the trial shall not take place in his absence unless he so conducts himself as to render the continuance of the proceedings in his presence impracticable and the court has ordered him to be removed and the trial to proceed in his absence'.<sup>72</sup>

This is reflected in section 191 of the CPC, which requires that an inquiry or trial shall be conducted in the presence of an accused, or if the accused's presence has been dispensed with, in the presence of his or her advocates, if any.<sup>73</sup> The provision does not indicate circumstances in which an accused person's presence can be dispensed with. However, sections 202 and 203 of the CPC authorise a court to continue a trial in the absence of an accused (except if charged with a felony) following an adjournment, which may be unconstitutional. The court, though, may set aside a conviction reached in absentia upon being satisfied that the cause of the absence was reasonable.<sup>74</sup> The CPC also allows the accused to choose not to be present at trial, which is in line with constitutional prescripts.

When it comes to the passing of judgment, the CPC requires that if the accused person is in custody, he or she 'shall be brought up, or if not in custody, be required by the court to attend, to hear judgment delivered ...'.<sup>75</sup> However, no judgment shall be deemed to be invalid simply because the accused was absent from court when judgment was delivered.

#### 4.1.10. Right to be tried *and* sentenced in a public and open court

The Constitution requires that both trial and 'the announcement of the decision of the court ... shall be held in public'.<sup>76</sup> However, this is subject to several exceptions, under which the court or any other authority may hold proceedings excluding the public. These include where public attendance would prejudice the interests of justice; in the interest of defence; public safety; public morality; welfare of persons under the age of 18 years; or the protection of the private lives of persons concerned.<sup>77</sup> The requirement to conduct trial and sentence in public is also reflected in the CPC and other laws. The CPC, in section 168, requires that judgment must be delivered in open court. However, it authorises that the trial be held *in camera* for the same reasons as those listed in the Constitution.<sup>78</sup>

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<sup>72</sup> Constitution 1996, art. 18(2).

<sup>73</sup> CPC, s 191.

<sup>74</sup> *ibid*, s 203(2).

<sup>75</sup> *ibid*, s 168(2).

<sup>76</sup> Constitution 1996, art. 18(10).

<sup>77</sup> *ibid*, art. 18(11).

<sup>78</sup> CPC, s 76(b).

In line with these exceptions in the Constitution, several statutes provide for exceptions to public hearings. The State Security Act prescribes that on application by the prosecution the court shall exclude from court the public or a portion of the public. However, judgment is still required to be passed in public or open court.<sup>79</sup> Section 119 of the Juveniles Act also allows for excluding members of the public from criminal cases involving a juvenile as an accused.

#### 4.1.11. Right to be informed of an upcoming hearing

This right is not provided for in the Constitution.

#### 4.1.12. Right to an individualised trial

This right is not provided for in the Constitution.

#### 4.1.13. Right to legal representation

The Constitution states that every person charged with a criminal offence 'shall unless legal aid is granted to him in accordance with the law enacted by parliament for such purpose be permitted to defend himself before Court in person, or at his own expense, by a legal representative of his choice'.<sup>80</sup> The Constitution, therefore, does not make the provision of legal aid mandatory but leaves its provision to be regulated by an act of parliament. Furthermore, the Constitution states that a detained person (hence not every person on trial) must be given adequate facilities to consult with a legal representative<sup>81</sup> and has the right to be represented by a legal representative before the courts.<sup>82</sup> What is clear is that people are entitled to defend themselves at their own expense by hiring a legal representative of their choice.

The Legal Aid Act regulates the granting of legal aid to indigent litigants. It largely construes legal aid as legal representation before a court. Defendants appearing before Subordinate Courts may apply to the magistrate for legal aid. If the magistrate considers that the person has insufficient means to hire a private practitioner and that it is desirable in the interests of justice, he or she issues such a person with a legal aid certificate. The Legal Aid Board is then required to provide the person with a legal representative.<sup>83</sup> The High Court, however, is mandated to grant legal aid to any accused person appearing before it where the 'court considers that there are insufficient reasons why the accused should not be granted legal aid'.<sup>84</sup>

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<sup>79</sup> State Security Act Chapter 111 of the Laws of Zambia, s 15(1).

<sup>80</sup> Constitution 1996, art. 18(2)(d).

<sup>81</sup> *ibid*, art. 26(1)(d).

<sup>82</sup> *ibid*, art. 26(1)(e).

<sup>83</sup> Legal Aid Act Chapter 34 of the Laws of Zambia, s 8(1).

<sup>84</sup> *ibid*, s 9(2).

The construction of who is considered as a legal representative was given by the Court in *Patel*.<sup>85</sup> The Court stated that a legal representative needed to meet two criteria: first, one must be a lawyer who is entitled to appear before the Court; and secondly, he or she must be a person not disabled under any law in Zambia from appearing before and actually exercising his or her right of audience. This means only lawyers admitted to the bar and not debarred for disciplinary reasons can represent another person as legal representatives. Invariably this leaves out paralegals and all those who have academic legal training but have not been called to the bar. Section 5 of the Legal Aid Act, however, allows legal assistants (ie, persons who have law degrees but not yet admitted to the bar) who are under the Legal Aid Board to appear for legally aided persons in Subordinate Courts and in chambers for superior courts.

The CPC does not put any unconstitutional limitations on the right to be represented by a legal representative of one's choice.

#### 4.1.14. Right to an interpreter

Article 18(2)(f) of the Constitution entitles an accused person to be permitted to have the assistance without payment of an interpreter if he or she cannot understand the language used at trial.

The CPC recognises the accused's right to have evidence interpreted if it is not in a language he or she understands.<sup>86</sup> Furthermore, an accused can request that the judgment be translated into his or her own language, at no cost and without delay. However, the limitation is that this will be done only 'when practicable'.<sup>87</sup> An order for community service also has to be explained in a language the accused understands.<sup>88</sup>

#### 4.1.15. Evidence-related rights

In relation to evidence-based rights, the Constitution provides for the following:

- adequate time and facilities for the preparation of one's defence;<sup>89</sup>
- facilities to examine in person or by his or her legal representative the witnesses called by the prosecution and to obtain the attendance and examination of witnesses testifying on his or her behalf;<sup>90</sup> and
- a copy of any record of the proceedings made by or on behalf of the court, subject to the payment of such reasonable fee as may be prescribed by law.<sup>91</sup>

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<sup>85</sup> *Patel v Attorney General* (High Court) 1969.

<sup>86</sup> CPC s 195. See also ss 223(4)(c) and 245(5)(c) in relation to certain depositions given by co-accused in High Court proceedings.

<sup>87</sup> CPC, s 170.

<sup>88</sup> *ibid*, s 306A.

<sup>89</sup> Constitution 1996, art. 18(2).

<sup>90</sup> *ibid*, art. 18(2)(e).

<sup>91</sup> *ibid*, art. 18(3).



The Constitution does not have a specific provision on the suppression of evidence collected in violation of constitutionally protected rights. However, arising from the provision on the supremacy of the Constitution in terms of which any other law in violation of its provisions is null and void, it should be obvious that any evidence collected in violation of the Constitution should not stand. The courts have taken a self-contradictory position that effectively undermines the supremacy of the Constitution. While they have readily suppressed evidence obtained as a result of confession induced by torture, they have equally readily admitted evidence produced as a result of illegal searches violating the right to privacy. In the view of the courts, such evidence is admissible as long as it is relevant to the matters and that it is not the duty of the court to be concerned with the methods by which evidence is obtained.<sup>92</sup> But this surely is a simplistic approach as it is the court's duty, if not its primary one, to uphold constitutional provisions. The CPC contains numerous evidence-related provisions but none that is blatantly contrary to the Constitution.

#### 4.1.16. Right to privacy

See section 3.6.2.

#### 4.1.17. Right to be informed of one's rights

The Constitution does not provide for this right, apart from the right to be informed of the charges brought against the accused.<sup>93</sup>

### 4.2. Rights of foreigners

The information provided in section 4.4. remains relevant here, with the exception of the provisions of the Constitution and CPC in relation to access to an interpreter, which were addressed in section 5.1.14. However, both would apply to Zambians and foreigners alike who do not understand English.

### 4.3. Rights specific to the trial

#### 4.3.1. Right to a speedy trial

The Constitution recognises the right to be tried within a reasonable time.<sup>94</sup>

There are no prescribed timelines in subordinate laws within which cases should be concluded. In practice many cases take several years to conclude, thus violating the rights of concerned people to

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<sup>92</sup> See the cases of *Liswaniso v The People* (1976) ZR 277 (SC); and *Liswaniso Sitali and Others v Mopani Copper Mines PLC* (2004) ZR 176 (SC).

<sup>93</sup> Constitution 1996, art. 18(2)(b).

<sup>94</sup> CPC, s 18(9).

speedy trial. In *Luboto*,<sup>95</sup> the Human Rights Committee held that the period of eight years it took to conclude the applicant's case was incompatible with the right to fair and speedy trial.

#### 4.3.2. Protection against double jeopardy (non bis in idem)

The right against double jeopardy is constitutionally protected. A person who has been tried and either convicted or acquitted cannot be tried for that offence or for any other criminal offence 'of which he could have been convicted at the trial for that offence'.<sup>96</sup> The Constitutional protection against double jeopardy is reflected in the CPC:

A person, who has been tried by a Court of competent jurisdiction for an offence, and convicted or acquitted of such offence, shall, while such conviction or acquittal remains in force, no be liable to be tried again on the same facts for the same offence.<sup>97</sup>

#### 4.3.3. Right to compensation for malicious prosecution

The Constitution does not have a separate provision relating to compensation for malicious prosecution. However, malicious prosecution would in most cases still fall within the provision covering compensation for false imprisonment discussed above.

### 4.4. Rights specific to sentencing proceedings

#### 4.4.1. Right to submit evidence in mitigation of sentence

This right is not provided for in the Constitution. Section 302 of the CPC establishes the possibility to submit evidence in mitigation by requiring that the court may, before passing sentence, receive such evidence as it thinks fit, in order to inform itself as to the proper sentence to be passed.

#### 4.4.2. Right to an individualised sentence

This right is not provided for in the Constitution.

#### 4.4.3. Right to life/Right not to impose unusual or degrading punishment as a sentence

The Constitution provides for the right to life but allows for it to be taken away 'in execution of sentence of Court in respect of a criminal offence under the law in force in Zambia'.<sup>98</sup> This means that

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<sup>95</sup> *Benard Lubuto v Zambia* (2001) AHKR 37 (HRC 1995).

<sup>96</sup> Constitution 1996, art. 18(5).

<sup>97</sup> CPC, s 138.

the death penalty can be imposed on crimes specified under any law in force. It is mandatory on conviction for aggravated robbery using a firearm,<sup>99</sup> treason<sup>100</sup> and murder (except where there are extenuating circumstances).

As mentioned, article 15 of the Constitution protects against torture, inhuman or degrading punishment or other like treatment, and, based on his provision, the High Court outlawed corporal punishment (*John Banda v the People*). However, a case challenging the constitutionality of the death penalty for being inhuman and degrading was dismissed by the Supreme Court on the ground that the Constitution expressly contemplates the imposition of the death penalty under article 12(1) (as an exception to the right to life).<sup>101</sup>

The conformity of the mandatory death penalty for some crimes in Zambia was challenged before the UN Human Rights Committee (HRC).<sup>102</sup> Zambia is a state party to the ICCPR. In the case of *Lubuto v Zambia*<sup>103</sup> the applicant was convicted of aggravated robbery using a firearm, which under Zambian law automatically earned him the death penalty; however, the Committee found the mandatory nature of the death penalty in Zambia incompatible with the ICCPR.<sup>104</sup>

#### 4.4.4. Right to be sentenced to an appropriate facility, including a psychiatric hospital

This right is not provided for in the Constitution.

#### 4.4.5. Right to review or appeal one's sentence

This right is not provided for in the Constitution. However, the CPC provides for the right of the sentenced person to appeal a judgment issued by a Subordinate Court before the High Court and a judgment issued by the High Court before the Supreme Court.

#### 4.4.6. Right to a non-custodial sentence

This right is not provided for in the Constitution. A court can issue a community court order in lieu of a prison sentence for misdemeanours.<sup>105</sup>

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<sup>98</sup> Constitution 1996, art. 12(1).

<sup>99</sup> Penal Code Act Chapter 87 of the Laws of Zambia, s 294.

<sup>100</sup> *ibid*, s 43.

<sup>101</sup> See the case of *Benjamin Banda and Cephas Kufa Miti v The Attorney General* (2007)(unreported).

<sup>102</sup> The treaty body responsible for monitoring the implementation of human rights obligations under the International Covenant on Civil and Political Rights 1966 (ICCPR).

<sup>103</sup> *Lubuto v Zambia Commission* No. 390/1990.UN. Doc. CCPR/C55/zd/390/Rev/1.(1995).

<sup>104</sup> *ibid*.

<sup>105</sup> CPC, s 306A.

## 4.5. Regime applicable to children

While the Constitution has no specific provision for the trial and sentencing of children, other statutes do. Section 63 of the Penal Code requires a Subordinate Court to sit as a Juvenile Court whenever trying a juvenile. The Subordinate Court does not have exclusive jurisdiction to try juvenile cases. It follows that juveniles may still be tried in non-juvenile courts if not appearing before a Subordinate Court. At the sentencing of a juvenile, the Court in *Dimeni*<sup>106</sup> has held that a parent, guardian or social welfare officer should be present during the trial of a juvenile.

Section 118 of the Juveniles Act requires that where a juvenile is brought before the court, the court must first ascertain the age of the juvenile. If it finds the person to be a juvenile then it must indicate that it is sitting as a Juvenile Court. In *Mwape*,<sup>107</sup> the Court held that the requirement to ascertain the age under section 118 can be satisfied solely on the basis of the ocular observation of the magistrate.

Section 68 of the Juveniles Act prohibits the court from using the words ‘conviction’ and ‘sentence’ in relation to the finding of guilty of juveniles. Section 70 requires that a no finding of guilty of a juvenile shall be regarded as a conviction of a felony for purposes of any disqualification attaching to a felony. Section 138(4) of the Penal Code (as amended in 2005) states that a child between 12 and 16 years old who commits the offence of defilement is liable to such community service or counselling as the court may determine is in the best interests of the child. Section 25 of the Penal Code prohibits the sentencing to death of persons below the age of 18 years.

## 4.6. Right to redress following rights violations

See section 3.3.

## 4.7. Impartiality and independence of the courts

The Constitution entitles every defendant to trial by ‘an independent and impartial court established by law’.<sup>108</sup> In *John Ezekiel Mumba v the People*<sup>109</sup> the Supreme Court quashed the conviction of the accused because a military officer who took part in investigating the case also sat as a member of the court-martial that convicted him,<sup>110</sup> thus calling that court’s impartiality into question.

## 4.8. Jurisdiction/competence of courts

See section 2.3.

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<sup>106</sup> *The People v Dimeni* (1979) ZR 234(HC).

<sup>107</sup> *Davies Mwape v The People* (1979) ZR 54 ( SCZ Judgment no. 8 of 1979).

<sup>108</sup> Constitution 1996, art. 18(1).

<sup>109</sup> *John Ezekial Mumba v The People* (2006) ZR 93.

<sup>110</sup> *ibid.*

# 5. Constitutionality of detention-related provisions

## 5.1. Universal detention-related rights

### 5.1.1. Right not to be arbitrarily or unlawfully detained

Article 13 of the Constitution lists strict exceptions to the right to liberty, exceptions that are authorised by law. Since this implies that detention that does not fall into one of these exceptions is unconstitutional, arbitrary and unlawful detention is hence prohibited. One notable exception is article 13(1)(h), which authorises the detention of persons reasonably suspected of being of ‘unsound mind, addicted to drugs or alcohol, or a vagrant’.

Subordinate legislation does not list places of detention directly and categorically. The CPC, as noted, allows the police to take into custody persons arrested without warrant but must produce them before court within 24 hours. The Zambia Police Act establishes the office of a custody officer who is responsible for the welfare of accused persons in police custody.<sup>111</sup> This entails that the police are legally entitled to take custody of accused persons prior to being presented to court. In practice, all major police stations have cells where accused persons who are not granted bail are detained.

With regard to prisons, the Prisons Act entitles the Minister of Home Affairs to designate any building, enclosure, or place as a prison.<sup>112</sup> A prison may, therefore, be a place which was not purposely built as such. In case of overcrowding or outbreak of an epidemic, the Commissioner of Prisons may establish a temporary prison in any building, enclosure or place.<sup>113</sup>

The Prisons Act further indicates categories of those who shall be admitted into prison custody, namely, those accompanied by remand warrants from courts, court-martials, immigration officers, and police.<sup>114</sup> As such, a person can be admitted to prison without having been presented before a judge.

This implies that prisons are legally entitled to keep in custody persons presented to them with the above documentation. The danger, however, is that without a direct and specific indication of an authorised place of detention, detention in places other than police stations and prisons may not necessarily be unlawful.

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<sup>111</sup> Zambia Police Act (as amended by Act No 14 of 1999), ss 18A and 18B.

<sup>112</sup> Prisons Act Chapter 97 of the Laws of Zambia, s 3(1).

<sup>113</sup> *ibid*, s 4(1).

<sup>114</sup> *ibid*, s 55(1).

### 5.1.2. Right to be informed of the reasons for one's detention

The Constitution entitles every person detained to be informed of reasons for his or her detention as soon as practicable and in a language one understands.<sup>115</sup> In article 26(1)(a), the Constitution further entitles those whose freedom of movement is lawfully restricted and those detained when the state is at war or during a state of emergency to be furnished as soon as is reasonably practicable, but not more than 14 days after commencement of detention, with a written statement specifying in detail grounds upon which their movement is restricted or they are being detained. This provision does not generally apply to criminal proceedings but is more of a safeguard for the rights of those restricted or detained under preventive detention measures pursuant to the president declaring a full or partial state of emergency, as provided for under articles 30 and 31 of the Constitution, respectively.<sup>116</sup>

Article 26(1)(a) has at least three key elements: the information must be furnished within 14 days; the state must give details of the reasons for the detention; and information must be in a language the detainee understands.

The constitutional requirements are not reflected in a specific manner in subordinate legislation. However, each of these elements has been subjected to adjudication and judicial pronouncements. In the case of *Chipango*<sup>117</sup> the applicant received his grounds of detention only after 16 days, a delay the Court held to have contravened the constitutional provision and thus rendered the detention order invalid.

With regard to what constitutes 'detailed' information, the Court stated in *Kapwepwe*<sup>118</sup> that the state is not required to furnish the detainee with all the evidence or information in its possession as it may be against the public interest. Specifically, the Court stated:

This is not, however, to say that the allegations must be particularised in the same way as criminal charges; the procedure of preventive detention is, a fortiori, different from criminal procedure, and there is no warrant for the position that the allegations must be made in similar manner.<sup>119</sup>

Detailed grounds are those enabling one to know what is alleged against one and to make representations accordingly to the detaining authorities. Grounds of detention crafted in vague manner would not meet the criterion. In *Mutale*<sup>120</sup> the Court held the following statement of grounds of detention as too vague to enable a detained person to make meaningful representations to the detaining authorities and thus ruled that his detention was unlawful:

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<sup>115</sup> Constitution 1996, art. 13(2).

<sup>116</sup> A declaration of emergency triggers into effect either the Emergency Powers Act or the Preservation of Public Security Act, both of which allow the president to restrict or detain people without trial.

<sup>117</sup> *Chipango v Attorney-General* (1970) SJZ 179.

<sup>118</sup> *Re Kapwepwe and Kaenga* (1972) ZR 248.

<sup>119</sup> *ibid.*

<sup>120</sup> *Mutale v Attorney-General* (1976) ZR 139.

That between 1<sup>st</sup> January 1971 and 11<sup>th</sup> December 1973 you conspired with other persons in Zambia to commit crimes that you organised and managed the commission of serious crimes in Zambia, which acts are prejudicial to the security of Zambia.<sup>121</sup>

Finally, detailed grounds of detention must be in a language the detainee understands. In *Chakota*<sup>122</sup> the High Court stated that this requirement is satisfied, in the case of someone illiterate in English, if the detaining authority, at the time of serving the written statement, explains the grounds and translates them in a language the detainee understands. An officer who made the explanation should attest to that, stating the language in which it was explained.<sup>123</sup>

### 5.1.3. Right to challenge one's detention

The 'right' of pre-trial detainees (and those detained during trial) to challenge their detention was discussed above in the context of bail. This section thus discusses only the grant of bail pending an appeal. Except for article 13, which protects personal liberty, the Constitution has no specific provision regulating the grant of bail while an appeal is pending or being pursued. However, specific provisions in subordinate legislation do provide for this. A person who has appealed against a decision of a Subordinate (Magistrate) Court may apply for bail pending appeal before the same Court.<sup>124</sup> In a similar way, a person who wishes to appeal or apply for leave to the Supreme Court (from the High Court), may be granted bail by the High Court.<sup>125</sup> Where an applicant is denied bail by the Subordinate Court, he or she may apply to the High Court, and an applicant denied bail by the High Court may apply for bail before the Supreme Court.<sup>126</sup> In the case of *Mayonde*,<sup>127</sup> the High Court held that bail pending an appeal cannot be granted unless there is a notice of intention to appeal. In the *Kambarange Kaunda* case<sup>128</sup> the court held that bail pending an appeal cannot be granted where one is charged with offences for which bail is prohibited.

The Constitution confers on the president power to pardon or reprieve offenders, either unconditionally or under conditions as the president may determine.<sup>129</sup> A person who receives an unconditional presidential pardon obtains a constitutional right not to be tried again for the same criminal offence of which he or she has been pardoned.<sup>130</sup> Under the Prisons Act the president may at any time release on licence a prisoner serving a term of life imprisonment subject to conditions the president may specify in the licence.<sup>131</sup> The president may, however, recall a prisoner released on

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<sup>121</sup> *ibid.*

<sup>122</sup> *Chakota and Three Others v Attorney-General* 1979/HP/D/1482.

<sup>123</sup> *ibid.*

<sup>124</sup> CPC, s 332.

<sup>125</sup> *ibid.*, s 336.

<sup>126</sup> Supreme Court Act, s 22.

<sup>127</sup> *Mayonde v The People* (1976) ZR 129 (HC).

<sup>128</sup> *Kambarange Kaunda v The People* 1990-1992 ZR 215.

<sup>129</sup> Constitution 1996, arts. 44(2)(c) and 59.

<sup>130</sup> *ibid.*, art. 18(6).

<sup>131</sup> Prisons Act Chapter 97 of the Laws of Zambia, s 116(1)

such licence to prison to serve the remainder of the sentence or may at any time vary or modify any such conditions or terms.<sup>132</sup>

There are at least two clear differences between the power granted to the president under the Constitution and under the Prisons Act. First, under the Constitution, the president can pardon any offence, while under the Prisons Act he or she can only give a licence to someone serving a term of life imprisonment. Secondly, one who is pardoned unconditionally under the Constitution cannot be re-arrested for the same offence or recalled to prison, whereas under the Prisons Act the president can recall the concerned prisoner to serve the remainder of the sentence.

Under the Prisons Act, a person convicted of a criminal offence and sentenced to imprisonment exceeding one month may be entitled to remission of one-third of the sentence. A person serving life imprisonment cannot receive a remission of his or her sentence.<sup>133</sup>

An amendment to the Prisons Act in 2004 created the National Parole Board to coordinate parole activities and recommend the release of prisoners on parole.<sup>134</sup> The Commissioner of Prisons may, on such terms and conditions as the Parole Board determines, allow a prisoner who is serving a term of imprisonment of at least two years to be released from prison on parole until the expiry of the remainder of the prison term. However, parole is of limited use as it can only be granted six months before the date of release.<sup>135</sup>

The Penal Code allows a court which has convicted a person of a criminal offence of which no minimum sentence is fixed by law to make an order discharging the person absolutely or subject to the condition that he or she shall not commit any offence during such a period not exceeding 12 months from the date of the order.<sup>136</sup> If the offender commits another offence during the period of conditional discharge, he or she will be liable to be sentenced for the original offence.<sup>137</sup>

The court is also entitled, under the Probation of Offenders Act, to make a probation order instead of giving a custodial sentence. Where a person is convicted of a crime the sentence of which is not fixed by law, and having regard to the prisoner's youth, character, antecedents, home surroundings, health or mental condition, or the nature of the offence or circumstances in which the offence was committed, the court may make a probation order placing the person under the supervision of a probation officer for a specified period.<sup>138</sup> The order shall not be for less than one year and not more than three years. A person who fails to comply with its requirements shall be liable to be sentenced for the original offence.<sup>139</sup>

What perhaps could be in conflict with the constitutional provision on personal liberty are provisions in the Prisons Act allowing the Commissioner of Prisons to retain some prisoners who have fully

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<sup>132</sup> *ibid*, s 116(1)(2).

<sup>133</sup> *ibid*, s 109(1).

<sup>134</sup> Prisons Act (as amended by section 32 Prisons (Amendment) Act No 16 of 2004), ss 113A and 113B

<sup>135</sup> *ibid*, s 114.

<sup>136</sup> Penal Code Act Chapter 87 of the Laws of Zambia, s 41(1).

<sup>137</sup> *ibid*, s 41(2).

<sup>138</sup> Probation of Offenders Act Chapter 93 of the Laws of Zambia, s 3(1).

<sup>139</sup> *ibid*, s 3(2).



served their sentences on ‘compulsory after care orders’. The Commissioner can make a compulsory after care order under two circumstances:

- where a prisoner has been sentenced to imprisonment at least twice before and is currently serving a sentence of three or more years; and or
- where the Commissioner considers it necessary or desirable, in the interest of the rehabilitation of that prisoner.<sup>140</sup>

A person under a compulsory after-care order commits an offence and is liable to three months imprisonment if he or she contravenes its terms or conditions or is convicted of any other offence.<sup>141</sup> The provisions allow for no consent of the person subject to the orders, nor is it subject to confirmation by the courts. This is in conflict with article 13 of the Constitution, which guarantees personal liberty and forbids taking away a person’s freedom except under the prescribed exceptions. The compulsory after-care orders are not within the exceptions contemplated by the constitutional provision.

#### 5.1.4. Right not to be detained for civil debt

There is no specific provision in the Constitution proscribing detention for civil debt. The Constitution prohibits trying and convicting a person for an act or omission that at the time did not constitute a criminal offence, which civil debt does not amount to.<sup>142</sup>

The Prisons Act, however, contemplates the imprisonment of what it terms ‘civil prisoners’, defined as any prisoners other than criminal prisoners and who may include individuals detained for civil debt.<sup>143</sup> The definition clearly indicates that such persons have not committed any criminal offence and thus it conflicts *prima facie* with article 13 of the Constitution which guarantees personal liberty.

#### 5.1.5. Right to family visits

The Constitution has no specific provision on family visits or the right to family life or to human dignity. Where article 26 applies, the Constitution only imposes that one’s detention be published in the official Gazette within 14 days of detention, which at a minimum would allow families to be informed of a person’s detention.<sup>144</sup>

The Prison Rules, passed pursuant to section 146 of the Prisons Act, entitles all prisoners to receive visitors, subject to restrictions necessary for discipline and order.<sup>145</sup> The officer in charge of a prison

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<sup>140</sup> Prisons Act Chapter 97, s 17(1)(1)(b).

<sup>141</sup> *ibid*, s 18(1)(a)(b).

<sup>142</sup> Constitution 1996, art. 18(4).

<sup>143</sup> Prisons Act Chapter 97 of the Laws of Zambia, s 2.

<sup>144</sup> Constitution 1996, art. 26(1)(b).

<sup>145</sup> Prison Rules, r 128.

may defer a prisoner's rights to receive visitors due to misconduct but the right shall not be forfeited.<sup>146</sup> The duration of the deferment is, however, not stated.

Where a prisoner has served at least three years of the sentence without being visited by relatives, the Commissioner of Prisons can authorise payment of total or partial costs of travel of indigent relatives of a concerned prisoner so that they may visit him or her.<sup>147</sup> A prisoner is also entitled to receive a special visit under the following three circumstances:

- at the death or sudden illness of a near relative;
- to attend to business or family affairs of an urgent nature; or
- to make arrangements for obtaining employment or assistance from friends when he or she is released.<sup>148</sup>

A prisoner is not allowed to entertain more than three visitors at a time.<sup>149</sup> All visits to a prisoner of family members or friends shall be in the sight and hearing of a prison officer.<sup>150</sup> Where a prisoner is dangerously sick and desires to be visited by a near relative or a friend, the officer in charge of a prison may at his or her discretion permit the visit.<sup>151</sup>

A prisoner sentenced to separate confinement is not entitled to family visits for the duration of the confinement.<sup>152</sup> Prisoners under the sentence of death have restrictions on receiving visitors and family members can visit only if, subject to the consent of the Commissioner, the concerned prisoner has made an express wish to be visited by certain relatives or friends.<sup>153</sup>

#### 5.1.6. Right to legal representation during detention (including post-sentence)

As noted in sections 4.2.9. and 5.1.13. above, the right to legal aid is not constitutionally guaranteed, though its provision is mandated in certain circumstances under the Legal Aid statute. The constitutional right to legal representation under article 18 is limited to those charged with criminal offences.<sup>154</sup> Arguably, this means that post-sentence prisoners who have exhausted or waived their right to appeal are not entitled to legal representation as contemplated under article 18(2)(e) of the Constitution. Equally, Prison Rules only provide for the visit of a legal advisor to a prisoner who is a party to legal proceedings.<sup>155</sup> It is not stated whether the legal proceedings should relate to what led the prisoner into custody or not. However, if it relates to new criminal proceedings, then the constitutional provision on legal representation would be triggered.

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<sup>146</sup> *ibid*, r 128(3).

<sup>147</sup> *ibid*, r 130(1).

<sup>148</sup> *ibid*, r 13(1).

<sup>149</sup> *ibid*, r 132(1).

<sup>150</sup> *ibid*.

<sup>151</sup> *ibid*, r 139.

<sup>152</sup> *ibid*, r 171(1)

<sup>153</sup> Prisons Act Chapter 97 of the Laws of Zambia, s 121.

<sup>154</sup> Constitution 1996, art. 18(2).

<sup>155</sup> The Prison Rules, r 135.

### 5.1.7. Evidence-related rights

As noted already, the Constitution provides any person charged with a criminal offence with the right to be given adequate time and facilities for the preparation of a defence.<sup>156</sup> This right is applicable both to pre-trial detention and during detention pending an appeal or during an appeal itself. Since it is a right intended to allow an accused to prepare his or her defence, it falls off once a person has exhausted or waived his or her right to appeal. The High Court has taken a very narrow interpretation of the provision. In the *Chiluba, Kabwe and Chungu* case (where the applicants sought disclosure of adverse information in the possession of the prosecution), it took the view that an opportunity to cross-examine witnesses in court, to look at documents produced in court, to produce documents in defence and to summon witnesses satisfied the right to adequate facilities to prepare one's defence.<sup>157</sup> This approach means a defendant tried by the Subordinate Court cannot ask for disclosure of adverse evidence in the possession of the prosecution.

The Prison Rules task the officer in charge of a prison with responsibility to keep proper records of all circumstances and correspondence relating to prisoners under his or her custody, including all the prisoners' warrants.<sup>158</sup> There is, however, no indication that a prisoner is entitled to access these documents. The Rules further require the officer in charge of a prison to give every prisoner an opportunity to:

- Prosecute an appeal against conviction and/or sentence; or
- Submit a written statement as may be required under any written law relating to the review of his or her case.<sup>159</sup>

Thus, under the Rules a person who has already exhausted or lost the right to appeal would still be entitled to an opportunity and time to prepare written statements relating to a review of his or her case. This is important as it could be used, for example, to prepare a plea for presidential clemency or pardon.

### 5.1.8. Right to be separated from different categories of detainees

The Constitution has no specific provision for this right. It could be argued that the constitutional provision guaranteeing the presumption of innocence would entitle those not yet convicted to be detained separately from those already convicted.

The Prisons Act, however, specifically provides for the separation of different categories of prisoners. Male and female prisoners are required to be kept apart and confined in separate prisons or in separate parts of the same prison but in a manner that as far as possible prevents their seeing or communicating with each other.<sup>160</sup> The Act further provides for separation of convicted and

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<sup>156</sup> Constitution 1996, art. 18(2)(c).

<sup>157</sup> *Chiluba, Kabwe and Chungu v The People* (2005) HPR/01/05.

<sup>158</sup> The Prison Rules, rr 11 and 12.

<sup>159</sup> *ibid*, r 14.

<sup>160</sup> Prisons Act Chapter 97 of the Laws of Zambia, s 60(1).

unconvicted prisoners, and within these categories, for the further separation of the following: young prisoners; adults; first offenders; prisoners with previous convictions; and prisoners suspected or certified as being of unsound mind.<sup>161</sup>

#### 5.1.9. Right to safe custody

The Constitutional right to be free of torture, inhuman or degrading punishment has been discussed above. The provision allows for no exceptions or derogations. Therefore, even persons under detention are guaranteed protection from torture, inhuman or degrading treatment or punishment.

The Prisons Act forbids punishing of prisoners by subordinate officers, unless operating under lawful orders from the Commissioner of Prisons or from the officer in charge of a prison.<sup>162</sup>

The Prisons Act, however, allows for practices on prisoners that may amount to torture, inhuman or degrading treatment. These practices include 'sentencing' prisoners who commit minor prison offences to:

- confinement in a separate cell for a period not exceeding 25 days;
- confinement in separate cell with a penal diet for a period not exceeding 25 days;
- reduced diet with or without confinement in a separate cell for a period of up to 25 days;
- forfeiture of remission of sentence not exceeding 25 days of the total remission earned; and
- extra work for a period not exceeding 25 days.<sup>163</sup>

Corporal punishment as a disciplinary measure in prison was abolished in 2004.

The Prison Rules charge subordinate prison officers with responsibility to ensure safe custody of all prisoners under their care.<sup>164</sup> What constitutes safe custody under the Rules is not stated.

The extent to which these are implemented may qualify them to be inhuman and degrading, and therefore in violation of the protection against inhuman and degrading treatment.

#### 5.1.10. Right to humane conditions of detention

The right to humane conditions of detention could be inferred from the constitutional guarantee against torture, inhuman or degrading treatment. In addition, the Prison Rules provide for the humane treatment of prisoners and entitle them to certain rights and amenities such as medical care, good quality meals, clothing and prison uniforms, vaccinations, exercise, and not working on Sundays and public holidays.<sup>165</sup>

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<sup>161</sup> *ibid*, s 60(2).

<sup>162</sup> Prisons Act Chapter 97 of the Laws of Zambia, s 28.

<sup>163</sup> *ibid*, ss 95, 96 and 97.

<sup>164</sup> Prison Rules, r 89.

<sup>165</sup> See The Prison Rules, rr 16, 17, 25, 65, 104, 107, 116, 156 and 166.

### 5.1.11. Right to be informed of one's rights

There is no constitutional provision for this right. The Prison Rules, however, provide for prisoners to be informed of some of their rights. Every prisoner shall be, on admission to prison, provided with full information about the Prison Rules regarding the treatment of prisoners of his or her category. The prisoner shall also be informed about the prisoners' earnings scheme and privileges, the appropriate method for submitting petitions and of making complaints about food, clothing, bedding and other necessities as well as the disciplinary requirements of the prison.<sup>166</sup> A printed abstract of the Prison Rules in English and a vernacular translation in four major local languages shall be posted in every prison in places easily accessible to all prisoners.<sup>167</sup>

## 5.2. Rights of foreigners

The Constitution has no specific provisions concerning rights of foreigners. The Prisons Act empowers the Minister of Home Affairs to remove, by warrant, any prisoner who has been sentenced to imprisonment, to any country in which the person was born or normally resided before coming into Zambia, in order for the person to serve the rest of the sentence in that country.<sup>168</sup> Removal of foreigners under this provision is not premised on there being an extradition treaty with the country to which the person is sent.

The Prison Rules entitle any foreign prisoner who has not been convicted to facilities to seeing his or her consular representatives.<sup>169</sup> The Penal Code requires the public prosecutor to inform the Minister of Home Affairs whenever a non-citizen is convicted and sentenced to imprisonment.<sup>170</sup> The provision does not state the purpose of the information, but it is presumably for informing consular or embassy officials of the country to which the prisoner is a national.

## 5.3. Right specific to pre-trial detention: Right not to be detained awaiting trial

See section 5.1.4.

## 5.4. Rights specific to detention while under appeal: Right not to be detained while the case is heard on appeal

The Constitution recognises that detention is an exception to the right to liberty.<sup>171</sup> The CPC recognises the right to apply for bail while the case is heard on appeal.<sup>172</sup>

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<sup>166</sup> *ibid*, r 110(1).

<sup>167</sup> *ibid*, r 110(2).

<sup>168</sup> Prisons Act Chapter 97 of the Laws of Zambia, s 141(1).

<sup>169</sup> The Prisons Rules, r 138.

<sup>170</sup> Penal Code Act Chapter 87 of the Laws of Zambia, s 33.

<sup>171</sup> Constitution 1996, art. 13 (1).

## 5.5. Specific rights of sentenced prisoners: Prohibition of unlawful detention

Constitutional and legal provisions relating to unlawful detention, as well as opportunities such as parole, discharge, remission or pardon which entitle a prisoner to a premature release from prison, were discussed above. It should be added that Prison Rules require keeping accurate records of prisoners, including details of their warrants.<sup>173</sup> The officer in charge of a prison is required to review release dates every month and note those who will be released the following month.<sup>174</sup>

## 5.6. Right to redress following rights violations

The Constitution recognises in article 13 the right to redress for false imprisonment, as well as, under article 28, a general right to seek redress in the High Court.

Article 28, as noted already, entitles any person who believes his or her rights are being or are likely to be violated to seek redress in the High Court. However, where detention has been ordered for security reasons following the president's declaration of a full or partial state of emergency under articles 30 and 31 respectively, the courts have constrained themselves from intervening. The case of *Mung'omba*<sup>175</sup> was concerned with the declaration of emergency following a failed coup attempt in 1997. The applicant, then the main opposition leader, was detained without trial. The Court held that it had no jurisdiction to review the president's powers without trial. It stated:

It is a matter for executive discretion and nothing else; if the president is satisfied he may detain. This court is not seized of the full facts, has no knowledge of what evidence there is to support those facts and is not in a position to judge or even to recommend (certainly not to substitute its discretion for that of the president).<sup>176</sup>

It goes without saying that such a narrow and timid approach the judiciary took in ousting its jurisdiction to review preventive detention orders (detention without trial) renders nugatory resort to article 28 in order to vindicate one's rights if arbitrarily detained by the president.

As already noted, these rights are not recognised in subordinate legislation.

## 5.7. Oversight and complaints mechanisms

Apart from these constitutional oversight mechanisms, mechanisms exist in other rules and pieces of legislation. The Prison Rules provide for a mechanism for all prisoners with complaints to address them directly to prison officials, including the officer in charge of a prison.<sup>177</sup> The Prisons Act further allows judges, magistrates, town clerks, council secretaries and members of the Human Rights

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<sup>172</sup> CPC, s 336(2).

<sup>173</sup> The Prison Rules, rr 11 and 12.

<sup>174</sup> *ibid*, r 112.

<sup>175</sup> *Dean Namulya Mung'omba vs Attorney-General 1997/HP/2617*.

<sup>176</sup> *ibid*.

<sup>177</sup> The Prison Rules, rr 15 and 63.

Commission to visit prisons and report their findings and recommendations to the Commissioner of Prisons.<sup>178</sup> The Act prescribes disciplinary measures for erring prison officers.<sup>179</sup>

The Zambia Police Act equally provides for disciplinary measures for erring officers,<sup>180</sup> but goes further to create an autonomous body, the Police Public Complaints Authority (PPCA), to look into complaints of police misconduct, which invariably include detention-related complaints.<sup>181</sup> The PPCA is mandated to receive all complaints against police actions and to investigate all complaints which result in injury or death.<sup>182</sup> It is mandated to submit its findings and recommendations to:

- the Director of Public Prosecutions for consideration of possible prosecution;
- the Inspector General of police for disciplinary action or any other administrative action; and/or
- the Anti-Corruption Commission or any other relevant body or authority.<sup>183</sup>

## 5.8. Regime applicable to children

The Constitution has no specific provision relating to the detention or sentencing of children to imprisonment. Section 72 of the Juveniles Act prohibits sentencing juveniles to imprisonment or sending them to detention camps. However, the Act creates Reformatories and Approved Schools to which juveniles in conflict with the law may be sent.

The Prisons Act allows for an infant child to be admitted into prison with its mother.<sup>184</sup> When the child attains the age of four years, the officer in charge is required to remove the child and give it over to willing relatives, or, if not available, to the care of a social welfare authority.<sup>185</sup>

## 5.9. Impact of detention on all other fundamental rights

Conviction of a criminal offence and consequential imprisonment have a bearing on the enjoyment of other rights. Imprisonment usually affects one's political participation in government, participation in civic roles such as voting, may lead to exclusion from certain categories of employment and could affect family relations. Although the Constitution does not have a provision that comprehensively lists all detrimental consequences accruing on imprisonment, it does have provisions limiting persons who are imprisoned from seeking presidential or parliamentary office. Article 65(1) disqualifies from being elected as a parliamentarian anyone under a sentence of death; under a custodial sentence; whose freedom of movement has been restricted or is detained under any law; and who within a period of five years has served a sentence of imprisonment. Since article 34(3)(3) requires a

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<sup>178</sup> See Prisons Act Chapter 97 of the Laws of Zambia, ss 39-41.

<sup>179</sup> *ibid*, s 46.

<sup>180</sup> See Zambia Police Act Chapter 107 of the Laws of Zambia, ss 30-41.

<sup>181</sup> Zambia Police Act (as amended by Act No. 14 of 1999), s 57B.

<sup>182</sup> *ibid*, s 57G(1)(a)(b).

<sup>183</sup> *ibid*, s 57G(1)(c).

<sup>184</sup> Prisons Act Chapter 97 of the Laws of Zambia, s 56.

<sup>185</sup> *ibid*.

presidential candidate to be qualified as a member of parliament (MP), it follows that these disqualifications apply equally to presidential candidates.

Under the Constitution, a serving MP who is sentenced to death or to imprisonment for a term exceeding six months ceases to hold office.<sup>186</sup> The same applies to a person whose freedom of movement has been restricted or is detained pursuant to articles 22 and 25 (preventive detention) of the Constitution.<sup>187</sup> An MP who appeals his or her conviction and/or sentence, or applies for presidential pardon, shall, while awaiting the final determination of the matter, not exercise his or her parliamentary functions or receive remuneration.<sup>188</sup>

However, where that MP's appeal is successful or the MP receives a pardon, he or she shall be entitled to resume his or her functions as a member and receive remuneration, including for the period in which he or she did not exercise those functions.<sup>189</sup>

The Electoral Act also prohibits prisoners from registering as voters or voting. A person sentenced to death or imprisonment is disqualified from registering as a voter.<sup>190</sup> Under the Electoral Act, however, reference to imprisonment excludes sentence of imprisonment which is suspended or one which is imposed in default of a fine.<sup>191</sup> When it comes to actual voting, the Electoral Act bars anyone under lawful custody or whose freedom of movement has been restricted under any law in Zambia from voting.<sup>192</sup> Considering that 'lawful custody' may include persons held on remand and not convicted of any offences, this provision is potentially in conflict with the presumption of innocence under the Constitution.

The Non-Governmental Organisations Act of 2009 makes it criminal for anyone to operate an NGO without registering it under its terms.<sup>193</sup> A person who offends this requirement may, on conviction, be fined or imprisoned for a term not exceeding three years.<sup>194</sup> A person convicted and sentenced under this provision is further prohibited from holding office in an NGO for a period of ten years from the date of conviction.<sup>195</sup> In addition, the NGO associated with the convicted person is liable to de-registration.<sup>196</sup>

While as a matter of policy many government agencies and private entities dismiss or do not recruit persons who have served prison terms, there are some express provisions to this effect in certain statutes. The Zambia Police Act<sup>197</sup> and Prisons Act<sup>198</sup> provide for the dismissal of officers who have been imprisoned for criminal offences. The Accountants Act prohibits registering as accountants

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<sup>186</sup> Constitution 1996, art. 71(2).

<sup>187</sup> *ibid*, art. 71(2)(g).

<sup>188</sup> *ibid*, art. 71(3)(i)(ii).

<sup>189</sup> *ibid*.

<sup>190</sup> Electoral Act No. 12 of 2006, s 7(1)(f).

<sup>191</sup> *ibid*, s 7(2).

<sup>192</sup> *ibid*, s 19(c).

<sup>193</sup> Non-Governmental Organisations Act No. 16 of 2009, s 10(1).

<sup>194</sup> *ibid*, s 10(3).

<sup>195</sup> *ibid*, s10(4).

<sup>196</sup> *ibid*, s 36(3).

<sup>197</sup> Zambia Police Act Chapter 107 of the Laws of Zambia, s 41.

<sup>198</sup> Prisons Act Chapter 97 of the Laws of Zambia, s 42.



persons convicted of any offence involving dishonesty.<sup>199</sup> Although the provision does not refer to imprisonment, it is clear that anyone imprisoned for crimes involving an element of dishonesty is disqualified from the accounting profession.

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<sup>199</sup> Accountants Act No. 13 of 2008, 14(1)(a).

## 6. Conclusion and recommendations

The constitutionality of criminal process statutes discussed above exposes at least three points. First, very few provisions in other statutes, such as the CPC, offend human rights provisions in the Constitution. This, however, is not due to the fact that subordinate laws have excellent human rights standards but that the Constitution has several broadly defined exceptions that almost every other law easily meets. Furthermore, various human rights provisions in the Constitution are expressed in language lacking in specificity and are hence liable to interpretations that may water them down.

Secondly, thanks to its drafting style the Bill of Rights has inherent weaknesses in how the rights are provided for, that is, primarily as constraints on state power and much less so as personal entitlements. Thirdly, the Constitution does not provide for many rights that are now associated with the criminal justice system or which are usually found in international normative frameworks and relatively new African constitutions such as those of Kenya and South Africa. The right to bail, for example, is taken for granted in many jurisdictions, but is not provided for in the Constitution.

To help address these challenges, the chapter makes three categories of recommendations. Some of the listed recommendations have been submitted by CSOs, the Human Rights Commission, LAZ and the Judiciary to the constitution-making process, and have been reflected in draft constitutions. These relate to:

1. unconstitutional provisions;
2. intrinsic weaknesses of the Constitution; and
3. rights not provided for in the Constitution.

### 1. Unconstitutional provisions

Several provisions in other laws are expressly or potentially in conflict with constitutional provisions on human rights. It is recommended that the government amends these pieces of legislation to bring them in harmony with the constitutional human rights standards. In particular:

- The government should consider amending section 27 of the CPC, which allows for the arrest of persons solely on the basis of economic status and mere reputation, as it violates the constitutional provisions on personal liberty and non-discrimination.
- The government should consider amending section 38(1) of the Immigration and Deportation Act, which allows for up to 14 days of detention of suspected illegal immigrants in order simply to conduct an inquiry. The power is arbitrary and violates the rights to personal liberty and to presumption of innocence, and is discriminatory against immigrants (or any person arbitrarily identified as such).
- The government should consider amending sections 123 and 126 of the CPC and section 43 of the Narcotic Drugs and Psychotropic Substances Act, which prohibit bail for certain offences. Although the Constitution does not specifically provide for bail as a matter of right, it does not prohibit it. The fact that a right is not provided for more explicitly in the

Constitution is not sufficient justification for constraining its enjoyment. It is recommended that the government amends the law on bail to allow for a presumption of bail in all cases.

- The government should consider amending section 17 of the Prisons Act, which allows for compulsory after-care orders to prisoners who have fully served their sentence, as the provision potentially offends the personal liberty provision guaranteed in the Constitution.
- The government should consider abolishing the practice of penal diet and prolonged separate confinement as provided for under the Prisons Act as these potentially violate the protection against inhuman and degrading treatment.

## **2. Intrinsic weaknesses of the Bill of Rights**

Most of the rights in the Bill of Rights, including personal liberty and the right to privacy, are not given as positive affirmations or entitlements but as a residue of constraining state power. The right to privacy is simply provided for by prohibiting searches on one's person or property, while the right to liberty is described in terms of constraints on unlawful arrest and detention. This, coupled with several broadly crafted exceptions, makes it difficult to know the actual content of a certain right.

As Zambia is in the process of elaborating a new constitution, it is recommended that:

- Zambia should revise the drafting style of the Bill of Rights so that rights are expressed as positive entitlements and not as some indeterminate constraint upon the state.
- The government should consider removing excessive exceptions to human rights provisions and in most cases simply subject these provisions to exceptions that are absolutely necessary as well as appropriate to a democratic state.
- The government should consider abolishing the constitutional provisions that allow for preventive detention or detention without trial.

## **3. Rights not provided for in the Constitution**

The Constitution does not provide for many criminal justice rights. Since the country is in the process of writing a new constitution, it is recommended that the government and the Zambian people take advantage of this process to review the Bill of Rights and provide for what is lacking. The following are recommended for inclusion:

- right to bail;
- right to privacy;
- right to be informed of one's rights;
- rights applicable to children in the criminal justice process;
- right to communicate;
- right to legal representation, including during post-sentence imprisonment;
- right to be separated from different categories of arrested and detained persons;
- right to safe custody;
- rights of foreigners such as the right to have their consular offices informed whenever they are arrested or detained;
- right to be informed of an upcoming hearing;
- right to submit evidence in mitigation of sentence;

- right to be sentenced to an appropriate facility (including a psychiatric hospital);
- right to appeal or review of verdict and sentence;
- right to non-custodial sentence;
- right not to be detained for civil debt;
- right to family visits; and
- right to humane conditions of detention.

# Bibliography

## ***International instruments***

African Charter on Human and Peoples' Rights

International Covenant on Civil and Political Rights

United Nations Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment

United Nations Convention on the Rights of the Child

## ***Legislation***

Constitution of the Republic of Zambia 2016

Penal Code Act 1931, Cap. 87

Criminal Procedure Code Act 1934

Subordinate Courts Act 1934

Inquests Act 1939

Mental Disorders Act 1949

Probation of Offenders Act 1953, Cap. 93

Juveniles Act 1956

High Court Act 1960

Defence Act 1964

Prisons Act 1966, Cap. 97

Zambia Police Act 1966, Cap. 107

Legal Aid Act 1967, Cap. 34

State Security Act 1969, Cap. 111

Supreme Court Act 1973

Small Claims Court Act 1992

Narcotic Drugs and Psychotropic Substances Act 1993

Lands Act 1995

Electoral Act 2006

Accountants Act 2008

Non-Governmental Organisations Act 2009

Lands Tribunal Act 2010

National Prosecution Authority Act 2010

Plea Negotiations and Agreements Act 2010

Immigration and Deportation Act 2010

Anti-Gender Based Violence Act 2011

Anti-Corruption Act 2012

***International and domestic case law***

*Lubuto v Zambia Commission* No. 390/1990.UN. Doc. CCPR/C55/zd/390/Rev/1.(1995)

*Anupbhai Munabhai Patel v the Attorney General* 1993/HC/366

*Benjamin Banda and Cephas Kufa Miti v The Attorney General* (2007)(unreported)

*Benard Lubuto v Zambia* (2001) AHKR 37 (HRC 1995)

*Chakota and Three Others v Attorney-General* 1979/HP/D/1482

*Chetankumar Shantkal Parekh v The People* 1995/SCZ/11/a.

*Chiluba, Kabwe and Chungu v The People* (2005) HPR/01/05

*Chipango v Attorney-General* (1970) SJZ 179

*Daniel Chizoka Mbandangoma v The Attorney General* (1979) ZR 45 (HC)

*Davies Mwape v The People* (1979) ZR 54 ( SCZ Judgment no. 8 of 1979)

*Dean Namulya Mungómba v Attorney-General* 1997/HP/2617

*John Banda v The People* HPA/6/1998

*John Ezekial Mumba v The People* (2006) ZR 93

*Liswaniso v The People* (1976) ZR 272 (SCZ Judgment No. 58 of 1976)

*Liswaniso Sitali and Others v Mopani Copper Mines PLC* (2004) ZR 176 (SC)

*Kambarange Kaunda v The People* 1990-1992 ZR 215

*Mayonde v The People* (1976) ZR 129 (HC)

*Mutale v Attorney-General* (1976) ZR 139

*Patel v Attorney General* (High Court) 1969

*Re Kapwepwe and Kaenga* (1972) ZR 248

*Sara Longwe v Intercontinental Hotels* 1992/HP/765 (1993) 4 LRC 221

*Silungwe v The People* (1974) ZR 130 (HC)

*The People v Benjamin Sinkwinti Chitungu, Joseph Antonio Arthur and David Muzuma* (1990 - 1992) Z.R. 190 (H.C.)

*The People v Dimeni* (1979) ZR 234(HC)

*Thomas Mumba v The People* HNR/438/1984

### **Literature**

Chanda, A. *Human Rights Law in Zambia: Cases and Materials* (University of Zambia Press 2007)

Human Rights Watch, *Unjust and Unhealthy: HIV, TB, and Abuse in Zambian Prisons* (2010)

Ndulo, M. and Kent, R. 'Constitutionalism in Zambia: Past, Present and Future' (1996) 40 *African Law Journal* 264