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Law, religion and human rights in Zambia: The past, present and the practice

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Summary

Zambia, a former British colony, is a unitary state with a population of about 10 million inhabitants. Zambia has a political system that embraces both the presidential and parliamentary systems of government. A member of parliament, once elected as such, may be appointed to cabinet. The religious demography is mostly Christian, with the other religions existing side by side. Zambia has a Bill of Rights enshrined in the Constitution, and amongst the rights guaranteed is the right to religion. The right to religion is therefore justiciable. Apart from the constitutionbal gaurantee, the right to religion is also enforced by the Human Rights Commission, the Police Complaints Authority, the Anti-Corruption Commssion, to mention but a few, as well as other institutions put in place by government for the enforcement of human rights. Under the Constitution, African traditional and customary law practices are only recognised to the extent that they do not conflict with written law. Despite this recognition, women and children have remained marginalised. Socio-economic rights are only directives of state principals which are not justiciable. The right to religion is justiciable. The right to religion, coupled with religious scruples and the regulation of the internal affairs of churches, mosques, religious schools and such by the government leaves little to be desired. Christianity is favoured. Zambia was declared a Christian nation by the second republican President, Dr Frederick Chiluba. Practice has shown that, in as much as the Constitution guarantees freeedom of religion, Zambian leaders have more often than not favoured those with an inclination towards Christianity.

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1 Introduction

Nearly all nations of the world profess to be democracies, or at least that they abide by the rule of law. One might say that law, religion and human rights are nowhere better defined than in a constitution. In Zambia, like many other countries, the Constitution is the *grundnorm* from which no law may divert.[1] The supremacy of the Constitution, the protection of fundamental human rights, one of which is the right to enjoy one's religion, are all provided for in the Constitution.[2]

This article takes a closer look at provisions in Zambian law as they relate to religion and human rights. The article considers law, religion and human rights as they relate to African traditional customs and practices obtaining in Zambia. It does not, however, delve into the historical origins of any religious group in Zambia; it would suffice to say that these origins are no different from those of neighbouring countries.

2 Religious demography

Zambia has a landmass of about 752 614 square kilometres and her population is estimated at 10 462 436.[3] Of this population, about 98,7% are Africans, 1,1% are Europeans, while about 0,2% are composed of other races.[4] Zambia is predominantly Christian. Of the population of Zambia, about 50% to 75% are Christian, while Muslims and Hindus account for 24% to 49% and indigenous beliefs account for about 1%.[5]

3 The governmental and legal system

Zambia is a unitary state divided into nine provinces established under the Constitution.[6] The provincial administrations are subject to the control of the central government and have no legislative or judicial powers. These provinces differ in area, population and economic

1 Art 1(3) provides that the Constitution is the supreme law of Zambia and if any other law is inconsistent with the Constitution, that other law shall, to the extent of the inconsistency, be void.

2 Part III of the Zambian Constitution constitutes the Bill of Rights and its enforcement provisions.

3 A Mwansa 'Zambia at a glance' in G Robbers (ed) *Encyclopedia of world constitutions* (2006) 1030.

4 As above.

5 As above.

6 Part VIII of the Constitution establishes the local government system pursuant to which the Local Government Act ch 281 of the Laws of Zambia was enacted. The Act defines the manners and instances upon which a district may be established.

strength. Local authorities or district councils are subject to the authority of provincial administrations.

Zambia has a written Constitution codified in a single document. The Constitution is the supreme law of the land. It takes precedence over all other laws. Other laws are applicable only to the extent that they are not in conflict with the Constitution. Therefore, Zambia ought to enjoy constitutional and not presidential or parliamentary supremacy.

The law-making function is a preserve of parliament. However, by way of delegation, local authorities may pass by-laws with the consent of the responsible Ministers. Most legislation is introduced by members of cabinet, the Ministers and some by the back-benchers.

Zambia is a party to various international and regional human rights instruments. Amongst these are the International Covenant on Civil and Political Rights (CCPR), the International Covenant on Economic, Social and Cultural Rights (CESCR), the United Nations (UN) Convention on the Rights of the Child (CRC), the African Charter on Human and Peoples' Rights (African Charter), as well as the African Charter on the Rights and Welfare of the Rights of the Child (African Children's Charter). These instruments only apply in Zambia upon enactment in domestic law.

3.1 Enforcement of human rights

The Zambian Constitution may be said to be a fountain of hope for the protection and enforcement of human rights in Zambia. Leaning heavily on the enforcement and protective provisions of the Constitution,[7] any person who alleges an actual or imminent violation of their rights may seek redress through the High Court. No person or authority is above the Constitution. The enforcement of human rights is, therefore, dependent on the sanctity of the Bill of Rights in the Constitution. Other institutions have been established specifically to help in the recognition, promotion, realisation and enforcement of fundamental human rights and freedoms.

3.2 The Human Rights Commission

The Human Rights Commission is an autonomous body established by the Constitution.[8] The Human Rights Commission Act, chapter 48 of the Laws of Zambia, governs the Human Rights Commission. Section 3 of the Act equally guarantees the autonomy of the Commission and states that the Commission shall not, in the performance of its duties, be subject to the direction or control of any person or authority.

The functions of the Commission are to:[9]

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7 Art 28 of the Constitution.

8 Art 125 establishes the Human Rights Commission and guarantees its autonomy.

9 Sec 9 of the Act.

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

The Commission's powers are defined under section 10 of the Act and these constitute the powers to investigate any human rights abuses:

(a) on its own initiative; or
(b) on receipt of a complaint or allegation under the Act by -
    (i) an aggrieved person acting in such person's own interest;
    (ii) an association acting in the interest of its members;
    (iii) a person acting on behalf of an aggrieved person; or
    (iv) a person acting on behalf of and in the interest of a group or class of persons.

The Commission also has powers to

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

Evident from the foregoing provisions is the fact that the Commission lacks judicial powers to realise its functions. The Commission is limited to making recommendations and nothing more.[10] The Commission also has no powers to entertain any matter which is pending before a court of law.[11]

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[10] Sec 10(4) of the Act provides that, subject to subsec 5, the Commission may, where it considers it necessary, recommend the release of a person from detention; the payment of compensation to a victim of human rights abuse, or to such victim's family; that an aggrieved person seek redress in a court of law; or such other action as it considers necessary to remedy the infringement of a right. This is quite at variance, eg, with what obtains in Uganda where the Human Rights Commission has quasi-judicial powers.

[11] Sec 10(5) of the Act.

Further, in as much as the Commission is said to be autonomous, by and large it exists just on paper. First, the President appoints the commissioners, subject to ratification by parliament.[12] Secondly, the funds of the Commission are made available by parliament and through grants and donations from whichever source, but with the approval of the President.[13] The Commission is equally mandated to submit its annual report to the President, who in turn presents the report to parliament.[14] According to the principle of autonomy, the Commission should sever ties with the appointing authority and the Chairperson of the Commission should be responsible for tabling the annual report before parliament. The receipt of grants and donations by the Commission should equally be governed by the existing law and not be the subject of presidential approval. That said, it is important to note that the Constitution guarantees fundamental human rights and freedoms, and a constitutional body in the name of the Human Rights Commission helps in the recognition, promotion, realisation and enforcement of these rights. It is hoped that the system may be perfected in the near future to make it meaningful.

3.3 Other institutions

Apart from the Human Rights Commission, other institutions have been established that assist in the enforcement of human rights. Such institutions include the Judicial Complaints Authority[15] and the Police Complaints Authority, as well as the Police Victims' Support Unit. These institutions deal with complaints against erring officers from the respective institutions and victims of abuses from the general public respectively. Of these institutions, the Police Victims' Support Unit has been more active.

4 Fundamental rights and freedoms

The Constitution defines and provides for the recognition and enforcement of fundamental human rights and freedoms. Specifically, article 11 of the Constitution provides as follows:

> It is recognised and declared that every person in Zambia has been and shall continue to be entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed, sex or marital status, but subject to the limitations contained in this part, to each and all of the following, namely:

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12 Sec 5(2) of the Act.

13 Sec 22 of the Act.

14 Sec 26 of the Act.

15 Established by sec 20(1) of the Judicial (Code of Conduct) (Amendment) Act 13 of 2006. There have been complaints, however, from various quarters of society that the authority is equally toothless and lacks the necessary authority to deal with matters presented to it, and therefore another entity to waste national resources.

(a) life, liberty, security of the person and the protection of the law;
(b) freedom of conscience, expression, assembly, movement and association;
(c) protection of young persons from exploitation;
(d) protection for the privacy of his home and other property and from deprivation of property without compensation;

and the provisions of this part shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in this part, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.

Apart from the provisions relating to the right to life, the protection from slavery and forced labour, the protection from inhuman treatment and the provisions to secure the protection of the law, the other fundamental provisions may be derogated from in accordance with the provisions of the law in order to deal with the situation at hand.[16] The enforcement of fundamental rights and freedoms is made possible by article 28 of the Constitution.[17]

[16] Art 25 of the Constitution provides that '[n]othing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of articles 13, 16, 17, 19, 20, 21, 22, 23 or 24 to the extent that it is shown that the law in question authorises the taking, during any period when the Republic is at war or when a declaration under article 30 is in force, of measures for the purpose of dealing with any situation existing or arising during that period; and nothing done by any person under the authority of any such law shall be held to be in contravention of any of the said provisions if it is shown that the measures taken were, having due regard to the circumstances prevailing at the time, reasonably required for the purpose of dealing with the situation in question'.

[17] Art 28 of the Constitution of Zambia provides: '(1) Subject to clause (5), if any person alleges that any of the provisions of articles 11 to 26 inclusive has been (protective provisions), is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply for redress to the High Court which shall: (a) hear and determine any such application; (b) determine any question arising in the case of any person which is referred to it in pursuance of clause (2); and which may make such order, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of articles 11 to 26 inclusive. (2)(a) If in any proceedings in any subordinate court any question arises as to the contravention of any of the provisions of Articles 11 to 26 inclusive, the person presiding in that court may, and shall if any party to the proceedings so requests, refer the question to the High Court unless, in his opinion the raising of the question is merely frivolous or vexatious. (b) Any person aggrieved by any determination of the High Court under this Article may appeal therefrom to the Supreme Court: Provided that an appeal shall not lie from a determination of the High Court dismissing an application on the ground that it is frivolous and vexatious. (3) An application shall not be brought under clause (1) on the grounds that the provisions of articles 11 to 26 (inclusive) are likely to be contravened by reason of proposals contained in any bill which, at the date of the application, has not become a law. (4) Parliament may confer upon the Supreme Court or High Court such jurisdiction or powers in addition to those conferred by this article as may appear to be necessary or desirable for the purpose of enabling that court more effectively to exercise the jurisdiction conferred upon it by this article or of enabling any application for redress to be more speedily determined.'

4.1 African traditional and customary law

African traditional and customary rights are also guaranteed under Part Three of the Constitution. The Constitution provides that no law shall make any provision that is discriminatory either in itself or in its application to members of a particular race, tribe, or system of customary law.[18] However, African tradition and customary law is only applicable to the extent that such law or tradition is not repugnant to natural justice or inconsistent with written law and the Constitution itself.

The Subordinate Court Act[19] has a much more expanded provision.[20] This is probably due to the fact that subordinate courts are more spread out across the country than the High Court and are easily accessible by many litigants. Subordinate courts also handle most cases that hinge on African tradition and customary practices, while the High Court intertains such matters mainly on appeal.

It is important to note here that the test applied to written law and African customary law is applied equally to African traditional beliefs as it is applied to religious practices. The bearing of the test discussed above, that is to say, customary law not being repugnant to justice, equity or good conscience, or incompatible, either in terms or by necessary implication, with any written law for the time being in force in Zambia on traditional beliefs and or religious practices, is discussed in the later part of this paper.

4.2 Women and children

Women and children are a special group deserving of particular mention where law, religion and human rights are concerned. They continue to be vulnerable and marginalised in the community. The vulnerability of women and children permeates a plethora of human rights, including the right to religion. Article 23 of the Zambian Constitution indirectly

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18 Art 23(4)(d) of the Constitution.

19 Ch 28 of the Laws of Zambia.

20 Sec 16 of the Subordinate Court Act provides: 'Subject as hereinafter in this section provided, nothing in this Act shall deprive a Subordinate Court of the right to observe and to enforce the observance of, or shall deprive any person of the benefit of, any African customary law, such African customary law not being repugnant to justice, equity or good conscience, or incompatible, either in terms or by necessary implication, with any written law for the time being in force in Zambia. Such African customary law shall, save where the circumstances, nature or justice of the case shall otherwise require, be deemed applicable in civil causes and matters where the parties thereto are Africans, and particularly, but without derogating from their application in other cases, in civil causes and matters relating to marriage under African customary law, and to the tenure and transfer of real and personal property, and to inheritance and testamentary dispositions, and also in civil causes and matters between Africans and non-Africans, where it shall appear to a Subordinate Court that substantial injustice would be done to any party by a strict adherence to the rules of any law or laws other than African customary law.'

provides for the protection of women's rights.[21] The provision relates to nondiscrimination on the basis of sex. The state has not enacted a deliberate policy to protect the rights of women and children, despite being a party to the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), CRC and its African counterpart. African customary law continues to disadvantage women and children in its application, especially in matters relating to succession and marriage.[22] Violence against women and children prevails in both private and public life.[23] Even though these matters may be reported

21 Art 23 of the Constitution provides: '(1) Subject to clauses (4), (5) and (7), a law shall not make any provision that is discriminatory either of itself or in its effect. (2) Subject to clauses (6), (7) and (8), a person shall not be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority. (3) In this article the expression "discriminatory" means affording different treatment to different persons attributable, wholly or mainly to their respective descriptions by race, tribe, sex, place of origin, marital status, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description. (4) Clause (1) shall not apply to any law so far as that law makes provision (a) for the appropriation of the general revenues of the Republic; (b) with respect to persons who are not citizens of Zambia; (c) with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law; (d) for the application, in the case of members of a particular race or tribe, of customary law with respect to any matter to the exclusion of any law with respect to that matter which is applicable in the case of other persons; or (e) whereby persons of any such description as is mentioned in clause (3) may be subjected to any disability or restriction or may be accorded any privilege or advantage which, having regard to its nature and to special circumstances pertaining to those persons or to persons of any other such description is reasonably justifiable in a democratic society. (5) Nothing contained in any law shall be held to be inconsistent with or in contravention of clause (1) to the exent that it is shown that it makes reasonable provision with respect to qualifications for service as a public officer or as a member of a disciplined force or for the service of a local government authority or a body corporate established directly by any law. (6) Clause (2) shall not apply to anything which is expressly or by necessary implication authorised to be done by any such provision or law as is referred to in clause (4) or (5). (7) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this article to the extent that it is shown that the law in question makes provision whereby persons of any such description as is mentioned in clause (3) may be subjected to any restriction on the rights and freedoms guaranteed by articles 17, 19, 20, 21 and 22, being such a restriction as is authorised by clause (2) of article 17, clause (5) of article 19, clause (2) of article 20, clause (2) of article 21 or clause (3) of article 22, as the case may be. (8) Nothing in clause (2) shall affect any discretion relating to the institution, conduct or discontinuance of civil or criminal proceedings in any court that is vested in any person by or under this Constitution or any other law.'

22 Local Courts Act, ch 36 and Intestate Succession Act ch 59 of the Laws of Zambia are not friendly in their provision and application against women and children. The practice has shown that men are favoured above women and children. Eg, long before the enactment of the Intestate Succession Act, and this remains the law, the High Court in the case of *Martha Mwiya v Alex Mwila* (1977) ZR 113 (HC) decided that there was no Lozi custom, one of the tribes in Zambia, which upon divorce compels a husband to share property acquired during the existence of the marriage.

23 The author's personal experience at Legal Resources Foundation, Zambia, where he served as Principal Advocate.

to the state, perpetrators are rarely prosecuted and law enforcers have encouraged out-of-court settlements.

Provisions relating to the protection of young persons, in particular, are insufficient. Children have become vulnerable, but there exists no proper legislation to protect their rights.[24] The number of sexual abuse cases have increased, and barely a week passes without media reports on the sexual abuse of children. Some sectors of society have called for the amendment of the Penal Code to provide for harsher punishment. Some women's groups have even advocated the castration of offenders.[25]

4.3 Sexual orientation

Sexual orientation is another issue relevant to law, religion and human rights which deserves mention in this paper. Sexual orientation is said to be more than a status, but rather an immutable personal characteristic that forms part of an individual's core identity and encompasses a range of human sexuality, from gay and lesbian to bisexual and heterosexual orientation.[26] The Zambian Constitution does not explicitly provide for sexual orientation rights, but these rights may be asserted under the provisions relating to equality and non-discrimination, privacy and assembly and association.[27] Despite these constitutional provisions, the rights of gays, lesbians and bisexuals have been denied in Zambia. Moreover, nothing has been done to uphold the supposed constitutional supremacy on the subject, nor has the government provided favourable policy directions.

In 1998 the government refused to recognise the right to a different sexual orientation when some gays and lesbians wanted to register their association.[28] The underlying reasoning for the refusal was that the right was un-Christian and also flew in the face of traditional customs and beliefs. The then Vice-President, Lieutenant-General Christon Tembo, told parliament that it was a matter of public knowledge that homosexuality goes against the order of human nature and morality as understood in Zambian society.[29] He said that Zambian people have, through parliament, criminalised acts that go against the order of nature, specifically quoting sections 155, 156 and 394 of the Penal Code.[30]

He observed that the Registrar of Societies is under an obligation to refuse registration of any society if it appears that the terms of the constitution or rules of such a society are in any respect repugnant to

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24 Art 26 of the Constitution is currently the only provision that provides for the protection of young persons against child labour.

25 This has mainly been the call by various NGOs, especially women's NGOs.

26 Ontario Human Rights Commission http://www.ohrc.on.ca/english/publications/ (accessed 15 February 2008).

27 Arts 11 & 21 of the Zambian Constitution.

28 The Lesbians, Gays, Bisexual and Transgender Association (LEGATRA).

29 See http://www.zamnet.zm/ or http://www.mask.org.za/sections/africapercountry.htm (accessed 21 September 2003).

30 These sections in the Penal Code deal with offences against morality.

or inconsistent with the provisions of any law in force at the time in Zambia. President Chiluba agreed. He said that '[h]omosexuality is the deepest level of depravity. It is unbiblical and abnormal. How do you expect my government to accept something that is abnormal?'[31] The present government led by Mr Mwanawasa has not made any change and no policy exists that favours homosexuals and lesbians.

In practice only heterosexuality, 'man to woman relationships', have been recognised, and any person who indulges in other forms of sexual orientation is penalised. Section 155 of the Penal Code[32] provides that

> any person who has carnal knowledge of any person against the order of nature or permits a male person to have carnal knowledge of him or her against the order of nature is guilty of a felony and is liable to imprisonment for 14 years.

An attempt or conspiracy to commit the above offence renders one liable, and a penalty of up to seven years' imprisonment is imposed upon conviction.[33]

It is therefore difficult to assert these rights based on the constitutional provision because homosexuality has been criminalised. This amounts to discrimination, and a denial of the right to equality of those who practise other forms of sexual orientation. This is despite the fact that Zambia is a party to international human rights instruments that prohibit discrimination on the basis of sexual orientation, such as CCPR[34] and the African Charter.[35]

4.4 Socio-economic rights

What obtains in many of the former British colonies also obtains in Zambia. Socio-economic rights are not part of the Bill of Rights. Therefore only civil and political rights are justiciable while economic, social and cultural rights have remained directives of state policy.[36] This flies in the face of the much-affirmed principle of progressive realisation of these rights.[37] In the case of *Soobramoney v Minister of Health, KwaZulu-Natal,*[38] the Constitutional Court held the following:[39]

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31 As above.

32 Ch 87 Laws of Zambia.

33 Secs 156 & 394 Penal Code.

34 In 1993, the United Nations Commission on Human Rights declared that the prohibition against sexual discrimination in CCPR includes discrimination on the basis of sexual preference. See http://www.pdhre.org/rights/sexualorientation/html (accessed 21 September 2003).

35 Afronet *Zambia Human Rights Report* (2002) 94.

36 Part IX of the Constitution provides for Directives of the State Policy and duties of a citizen and art 111 particularly states that Directives are not justiciable.

37 A government willing to enforce the socio-economic rights of its citizens has to undertake measures within its available resources to achieve the progressive realisation of the rights and not to postpone their realisation.

38 1998 1 SA 765 (CC).

39 As above. See also De Waal *et al The Bill of Rights handbook* (2001) 441.

> What is apparent from these provisions is that the obligations imposed by sections 26 and 27 in regard to access to housing, health care, food, water, and social security are dependent upon the resources available for such purposes, and that the corresponding rights themselves are limited by reason of the lack of resources. Given this lack of resources and the significant demands on them that have already been referred to, an unqualified obligation to meet these needs would not presently be capable of being fulfilled.

The principle of progressive realisation of socio-economic rights should be a factor even as Zambia struggles towards the attainment of the Millennium Development Goals. It is hoped that with the current constitutional debate by the National Constitutional Conference, socio-economic rights might find themselves amongst those guaranteed.[40] Socio-economic rights ought to be justiciable in order to give them the meaning they deserve in the Constitution and in the lives of the citizenry.

4.5 The right to religion

Having considered the various rights guaranteed under Part Three of the Zambian Constitution, we may now consider the right to religion. The right to religion or the protection of the freedom of conscience is enshrined in the Constitution under article 19.[41] The enforcement of the right to religion is the same as for any of the other rights guaranteed under the Bill of Rights. The enforcement provision, article 28 of the Constitution, applies even here.[42] The court that has jurisdiction to

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40 The Wila Mung'omba-led Constitutional Review Commission incorporates socio-economic rights under the Bill of Rights of the draft Constitution currently under debate.

41 Art 19 reads: '(1) Except with his own consent, a person shall not be hindered in the enjoyment of his freedom of conscience, and for the purposes of this article the said freedom includes freedom of thought and religion, freedom to change his religion or belief, and freedom, either alone or in community with others, and both in public and in private, to manifest and propagate his religion or belief in worship, teaching, practice and observance. (2) Except with his own consent, or, if he is a minor, the consent of his guardian, a person attending any place of education shall not be required to receive religious instruction or to take part in or attend any religious ceremony or observance if that instruction, ceremony or observance relates to a religion other than his own. (3) A religious community or denomination shall not be prevented from providing religious instruction for persons of that community or denomination in the course of any education provided by that community or denomination or from establishing and maintaining instructions to provide social services for such persons. (4) A person shall not be compelled to take any oath which is contrary to his religion or belief or to take any oath in a manner which is contrary to his religion or belief. (5) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this article to the extent that it is shown that the law in question makes provision which is reasonably required — (a) in the interests of defence, public safety, public order, public morality or public health; or (b) for the purpose of protecting the rights and freedoms of other persons, including the right to observe and practice any religion without the unsolicited intervention of members of any other religion; and except so far as that provision or, the thing done under the authority thereof as the case may be, is shown not to be reasonably justifiable in a democratic society.'

42 See n 17 above.

entertain an application for redress for an alleged violation of human rights is the High Court. Appeals are made to the Supreme Court.

Other provisions exist in other pieces of legislation which protect the right to religion. Under chapter XIV of the Penal Code, chapter 87 of the Laws of Zambia, which provides for offences against religion, offences include the following:[43]

(1) destroying, damaging or defiling any place of worship or any object which is held sacred by any class of persons with the intention of thereby insulting the religion of any class of persons or with the knowledge that any class of persons is likely to consider such destruction, damage or defilement as an insult to their religion;[44]
(2) voluntarily causing disturbance to any assembly lawfully engaged in the performance of religious worship or religious ceremony;[45]
(3) intentionally wounding the feelings of any person or insulting the religion of any person by trespassing on burial places;[46]
(4) uttering any word, or making any sound in the hearing of a person, or making any gesture in the sight of a person, or placing any object in the sight of a person with the deliberate intention of wounding the religious feelings of a person.

It is, however, worth noting that, despite the law creating such offences, these are misdemeanours for which the punishment is either negligible or difficult to enforce.

The Extradition Act, chapter 94 of the Laws of Zambia, also recognises the right to religion. The law provides that no extradition can be granted if there are substantial grounds for believing that a request for extradition has been made for the purposes of prosecuting or punishing the person claimed on account of his race, religion or nationality or that the position of the person claimed may be prejudiced for any of these reasons.[47] Therefore, if a person being extradited asserts their right to religion and that such a right would be violated, she may be protected from extradition. Prisoners, including those on death row, are also guaranteed religious rights, despite being denied many other rights, such as the right to vote.[48] If a prisoner sentenced to death asks to see a minister of religion, arrangements for her access to clergy can be made.[49]

43 Sec 131 Penal Code.
44 Sec 128 Penal Code.
45 Sec 129 Penal Code.
46 Sec 130 Penal Code.
47 Sec 32 Extradition Act.
48 See art 75(2) of the Constitution; sec 25 of the Electoral Commission. In the case of *Mailoni Mushala & Moses Rindai Chisamba v Electoral Commission of Zambia and the Attorney-General* SCJ 11 of 2008, the Supreme Court of Zambia decided that it was not unconstitutional for the prisoners to be denied the right to vote.
49 Sec 200 Prisons Act; ch 97 Laws of Zambia.

5 Preferential treatment of religion

5.1 The 'Christian nation' declaration and its impact

We have seen that the right to religion or freedom of conscience and its enjoyment are fundamental. It is enshrined in the Constitution of Zambia. We have equally seen how the right has made its way into acts of parliament. It cannot therefore be denied that this right is provided for adequately. However, the full enjoyment of the right is not the same as guaranteeing it in legislation.

Similarly, the preferential treatment of one religion may interfere with the rights of another. In Zambia, the Constitution begins with a statement preferring one religion. The Preamble reads: 'We the people of Zambia ... declare the Republic a Christian nation while upholding the right of every person to enjoy that person's freedom of conscience and religion.' The National Constitutional Conference has also repeated this Preamble provision in the draft Constitution.[50] The declaration of Zambia as a Christian nation has been discussed and debated at many gatherings. Many people have argued that the Preamble of the Constitution is not enforceable, and that therefore it does not matter whether the provision remains in the Constitution or not. The Supreme Court has ruled that the Preamble to the Constitution is not a protective provision and can therefore be amended by parliament without much ado.[51] One could argue that the Preamble defines the underlying features, desires and expressions contained in the document. It could further be argued that the contents of the Preamble have a bearing on the entire Constitution and its application. It is therefore not far-fetched to assume that persons subscribing to faiths other than Christianity might feel alienated by the continued presence of the declaration of Zambia as a Christian nation in the Preamble.

In as far as it appears that the right to religion may be enjoyed by all persons in Zambia, public leaders both in government and in the opposition visit congregations of the Christian faith more often than those of any other religion. With respect to media coverage, there is also a bias towards Christianity, both Catholic and Protestant. This trend was seen during the First Republic between 1964 and 1972, the Second Republic between 1972 and 1991, and during the Third Republic from 1991 to date,[52] but it has been more pronounced during Chiluba's reign.

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50 The phrasing of the declaration of Zambia as a Christian nation in the Preamble of the draft Constitution is not any different from the current one.

51 *Zambia Democratic Congress v Attorney* SCZ Judgment 37 of 1999.

52 From 1964, when Zambia attained independence, Zambia enjoyed multi-party politics until 1972 when a one-party state was assumed. This period is referred to as the First Republic. The one-party state period from 1972 to 1991, when Zambia reverted to multi-partism, is referred to as the Second Republic and the period from 1991 to date is referred to as the Third Republic.

Before addressing the situation of religious rights on the ground, it is necessary to take a critical look and examine the circumstances surrounding the declaration of Zambia as a Christian nation and what followed thereafter. Admittedly, the population of Zambia is largely Christian, and it would not be surprising to hear such a declaration, especially after a regime change from one-party rule to multi-party politics. One would therefore conclude that the declaration had a political advantage for the ruling party. It worked to woo the requisite support that the ruling party needed at the time from many Zambians. It may not have been expected that the first Republican President, Dr Kenneth Kaunda, would easily accept defeat — let alone his supporters. We have recently seen the difficulties in Kenya and Zimbabwe that have led to the now-popular concept of coalition governments in Africa when an election fails. This defeats the purpose of elections and the tenets of democracy.

However, it would appear that the declaration of Zambia as a Christian nation, coupled with the prayers of the Zambian people for a peaceful regime change across all religious denominations, at the time, constituted the key to avoid violence after regime change. It has been argued that President Chiluba's rationalisation of his declaration was not meant to undermine other religions.[53] Seshamani argues that, had Chiluba declared, for instance, that Zambia was a born-again Christian state, there could have been room for misgivings regarding its neutral character or freeness. He argues that the declaration only purports to remind Zambians of the primacy of man as a moral being and hence the imperative for Chiluba to try his best to follow the path prescribed by Jesus.[54] He states that any such declaration has obviously to be made in a language that the people would understand, and with over 72% of the Zambian population belonging to the Christian faith, at least in the nominal sense, it would readily strike a chord in most people's hearts when the President says that 'every inch of this land belongs to Jesus Christ'.

The greater danger, however, would be a feeling of religious superiority that might degenerate into a bigotry which perceives all non-Christians as lost souls that need to be saved. Soon after Chiluba made this declaration, Islamic programmes were banned on both television and radio. One can also not forget the Livingstone episode in which a Hindu temple and an Islamic mosque were destroyed. These events may not be linked directly to the declaration and may have been caused by other motives, but the danger that all non-Christian religious or spiritual practices may be branded as dangerous or as satanic cults cannot be ruled out.[55]

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53 V Seshamani 'A Hindu view of the declaration of Zambia as a Christian nation' http//www.christianitytoday.com/ct/2000/January (accessed 6 August 2008).

54 As above.

55 See n 53 above.

When Zambia was declared a Christian nation, the circumstances could definitely have been different from from the time when the declaration was included in the Constitution. The political climate had tilted, the people of Zambia knew who their leaders really were and those who had resigned from active politics, like the first President, Dr Kaunda, made it known that they would run for presidency come 1996. Those who were close allies to Chiluba, like Dean Namulya Mung'omba and Baldwin Nkumbula, left to form their own political parties. In the meantime, Chiluba grew popular amongst Christians, while attempting to amend the Constitution in such a way as to bar Kaunda from contesting the 1996 presidential elections. It would not strike anybody as strange if one were to suggest that the inclusion of the declaration in the Constitution may have been motivated by the incumbent President's desire to win votes from Christians in the name of uniting a nation whose population is largely Christian.

Many people have thus taken advantage of the declaration of Zambia as a Christian nation. As Professor Carlson Anyangwe of the Faculty of Law at the University of Zambia, observes:[56]

> Once we have declared Zambia a Christian nation then the government of Zambia also has to be Christian. You cannot have a non-Christian government running the affairs of a Christian nation, the declaration entails having Christian members of parliament, Christian ministers of government and Christian judges and all civil servants would have to be true Christians in order to manage, in Christian fashion, the affairs of the Christian nation.

At the same time, he also maintains: [57]

> You cannot favour one religion and at the same time honestly uphold the propagation and exercise of other religious beliefs that are doctrinally and in matters of faith opposed to the state-chosen religion. That is against the nature of any religion, which always seek to convert as many people as possible ... to allow such a situation the laws of Zambia would have to be consistent with Christian doctrines, dogmas and practices. In effect that would mean that the Bible, and not the Constitution, would be the supreme law of Zambia. The Bible will become the linchpin of Zambia's educational system, even as the Holy Koran is in Islamic states.

Since the time of the declaration, we have seen a shift in the behaviour of political leaders. When they visit Christian congregations, they make statements that are in line with the declaration.[58] They also encour-

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56 Manja Kamwi, Information Officer MS Zambia, quoting Prof Carlson Anyangwe: 'We should behave like Christians — not proclaim it' MS.dk/sw30785.asp (accessed 6 August 2008).

57 As above.

58 Speaking in Ndola at the occasion to commemorate the African Methodist Episcopal Church (AMEC) Founder's Day at Chipulukusu congregation, the then Copperbelt Province Minister George Mpombo, now Energy Minister, in a speech read for him by Ndola mayor Zinho Latife, urged the church in Zambia to cultivate a spirit of unity based on the teachings of Jesus Christ. He said that unity with people worshipping God together and asking for Christ's guidance was cardinal to the church holding together.

age people to do things the Christian way. Referring to the denial by the Registrar of Societies to register the Lesbians, Gays, Bisexual and Transgender Association (LEGATRA),[59] President Chiluba said that '[h]omosexuality is the deepest level of depravity. It is unbiblical and abnormal; how do you expect my government to accept something that is abnormal'.[60] Therefore, from the foregoing and in referring to the Bible, one would conclude that Chiluba made Christian faith the yardstick of social morality.

It must, however, be pointed out, as may be observed from religious demography, that most Zambian citizens, including those occupying public office, are Christians. In as much as it may be misleading to interpret all actions by leaders as Christian, the declaration has been taken advantage of and it has been used by leaders to gain political mileage. Taking advantage of the declaration is what might endanger the declaration and bring about unwarranted acrimony. Professor Anyangwe observes that the scenario might seem bizarre to someone who takes only a casual or superficial look at the Christian declaration, but it is a real possibility and posesses the potential for conflicts, not only between Christians and other religious groups, but also among the various Christian denominations who might get embroiled in a 'holy war' to ensure that their own brand of Christian teaching gains ascendancy in the state.[61]

Zambia's subscription to Christianity should be manifest in the way its citizens conduct themselves, not in a pharisaical Christian nation proclamation. Credible Christians, or countries that espouse Christian virtues, do not go around proclaiming it on rooftops. Their Christianity is immediately apparent in the way they carry and conduct themselves. It is said a tiger does not proclaim its 'tigertude'. When you see a tiger, you know it is a tiger.[62]

5.2 Particularisation of religious scruples

In light of religious demography, the particularisation of religious scruples may be likened to the preferential treatment of religions. For in as much as Zambia is a secular state and every individual is free to practise his or her religious beliefs, it is equally not hard to see how Christian scruples might be seen to be imposed, given the dominance of Christianity in the country. That is what the citizens are used to seeing and that is what most of them practise.

A good example would be marriage ceremonies. Whereas in customary marriages it is recognised that men are potentially polygamous,

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59 This was an association that was formed to promote the interests of lesbians, gays and bisexual individuals in Zambia.

60 See n 29 above.

61 See n 56 above.

62 As above.

Christian marriages and the Marriage Act recognise the union of one man and one wife, to the exclusion of all others. A Christian marriage cannot be dissolved in the same simple way that a marriage under African customary law may be dissolved. A Christian marriage can only be dissolved by the High Court, because its status is equivalent to that of a marriage under the Marriage Act. Such recognition has not been accorded other religions.

Another example is the designation of public holidays. Even though there is no compulsory imposition of a day of worship, the government practises favouristism toward some groups. For example, the Seventh Day Adventists, though a Christian group, observe and worship the sabbath on Saturdays, while most other Christian groups do so on Sundays. In the event that a public holiday falls on a Sunday, it has been the government's practice to make the Monday following that particular Sunday a public holiday.[63] This preferential treatment is not accorded to other religions or religious groupings. It is quite unusual for the government to declare a holiday when a religious group's 'holiday day' falls on a working day.

5.3 Regulation of internal affairs of churches, mosques, religious schools, and such

Churches, like other non-profit organisations and other religious groups, are regulated by the Societies Act.[64] Unless otherwise exempted, all church organisations are supposed to be registered with the Registrar of Societies. If the provisions of the Act are not adhered to, a church may be de-registered or its registration application denied. A society under the Act means any club, company, partnership or other association of ten or more persons, whatever its nature or object, that is formed or established in Zambia, has its headquarters or chief place of business within Zambia; or which is deemed to be an association established in Zambia under the provisions of section 5; and any branch of such club, company, partnership or association. There are a number of reasons for which the registrar can refuse to register or exempt a society from registration. Denial of registration may occur in cases where it it appears that the terms of the constitution or rules of such society are in any respect repugnant to or inconsistent with the provisions of any law in force in Zambia. It may also occur in cases where the Registrar is satisfied that the application does not comply with the provisions of this Act or of any rules made under the Act.[65] The Registrar has the discretion to cancel at any time the registration of any society, if he is satisfied that the society has among its objects, or is likely to pursue or

63 The Minister responsible has the power to declare any day a public holiday.

64 Ch 119 Laws of Zambia.

65 Sec 8 of the Act.

to be used for, any unlawful purpose or any purpose prejudicial to or incompatible with the peace, welfare or good order in Zambia.[66]

Equally, the Registrar may, in his discretion, cancel at any time the registration of any society on the ground that the terms of the constitution or rules of such society are in any respect repugnant to or inconsistent with the provisions of any law currently in force in Zambia. Registration may also be cancelled if the society concerned has, in contravention of the provisions of section 17, altered its objects or pursued objects other than its declared objects.[67] Finally, registration may be cancelled in cases in which the society concerned has failed to comply in a timely manner with an order made under the provisions of sections 19 or 20,[68] or where issues of repugnancy to or inconsistency with the provisions of any law currently in force in Zambia arise.[69]

The right to enjoy one's freedom of religion is not absolute, nor is any other fundamental right under the Bill of Rights — there are limitations. Under article 19(5) of the Constitution of Zambia it is provided that:

> Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of the Article to the extent that it is shown that the law in question makes provision which is reasonably required in the interests of defence, public safety, public order, public morality or public health; or for the purpose of protecting the rights and freedoms of other persons, including the right to observe and practice any religion without the unsolicited intervention of members of any other religion except so far as that provision or, the thing done under the authority thereof as the case may be, is shown not to be reasonably justifiable in a democratic society.

More often than not the government has used article 19 of the Constitution and other limitation clauses to control the internal affairs of churches. Many times, the government has interfered in the internal affairs of a religious community, citing the interests of defence, public safety, public order, public morality or public health or the purpose of protecting the rights and freedoms of other persons. This practice dates back to Zambia's early days of independence, when religious sects could be banned on grounds of public safety, public order and public morality. During the First Republic, Kenneth Kaunda's rule in the late 1960s, the Lumpa Church, headed by a woman named Mulenga Lenshina in the Northern District of Chinsali, was disbanded and its adherents sent into exile to the then Zaire, now the Democratic

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66 Sec 13(1) Societies Act.

67 Sec 17 of the Act falls under Part III of the Act that provides for duty of societies to furnish information to the Registrar.

68 Under secs 19 & 20 of the Act, the Registrar or an authorised officer may call for certain of the specified documents to be furinished by a society.

69 Sec 13(2) Societies Act.

Republic of Congo.[70] Members of this sect only started coming back to Zambia after the change of government in 1991, and some are still in the Democratic Republic of Congo.

In the case of *Feliya Kachasu v Attorney-General,*[71] the petitioner, who was a pupil at Buyantanshi School in Mufulira, was suspended from school for refusing to salute the Zambian national flag and to sing the Zambian national anthem, both of which were required under regulations made by the Minister of Education pursuant to the Education Act of 1966. It was argued on behalf of the applicant that the suspension from school of the applicant was unconstitutional on the ground that it constituted a hindrance in the enjoyment of her freedom of conscience, which includes freedom of thought and of religion as provided for under chapter III of the Constitution. It was further asserted that Regulation 25 of the Education (Primary and Secondary Schools) Regulations 1966 was invalid, null and void, because it was *ultra vires* section 12 of the Education Act 1966 and therefore in conflict with the guarantee of freedom of conscience in Section 21 of the Constitution. In deciding this case, the court stated first that, for the purposes of section 21 of the Constitution, the test as to what constitutes religious ceremony observance or instruction is a subjective test and not an objective one. The court relied on the judgment of Justice Frankfurter in the American case of *Minersville School District v Gobitis*,[72] which concerned the refusal of two Jehovah's Witness pupils to participate in the flag salute ceremony at their school. The court focused particularly on Justice Frankfurter's opening remarks that

> [a] grave responsibility confronts this court whenever in the course of litigation it must reconcile the conflicting claims of liberty and authority. But when the liberty invoked is liberty of conscience, and the authority is authority to safeguard the nation's fellowship, judicial conscience is put to its severest test ...

The court decided that, if a duty is imposed by a valid law and the breach of that duty is made subject to certain consequences, a person who is charged with such a breach cannot set up as a defence that he has a conscientious objection or religious scruple against performing that duty. The judge stated that, although a subjective test may be used in determining whether one holds a religious opinion, an objective test must be used in determining whether a ceremony or observance is religious in nature. The court thus held that, on the basis of an objective test, the singing of the national anthem and the saluting of the national flag are not religious ceremonies or observances.

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70 The Lenshina sect was disbanded by UNIP government in 1964 for unlawful religious acts. Mama Lenshina was their spiritual leader from the Chinsali district. The sect came back into the country during the second republican government of former President Chiluba. They have pledged to work with Mwanawasa's government.

71 (1967) ZR 145 (HC).

72 310 US 686 (1940).

In 2005, at the instigation of the masses, the government banned the Universal Church of the Kingdom of God and deported its two pastors of Brazilian origin on suspicion of practising satanism. Scores of Lusaka residents rioted and threatened to demolish the congregation's church if the government did not take action. It was not until police were deployed to quell the situation that the church was saved from being damaged. The church has remained operational only by virtue of an order of the High Court. At the time, one of the Protestant bishops retorted, in support of the government action to ban the Universal Church, that churches have different teachings but that if some teachings were not godly, they should be stopped with immediate effect. Quoting from the Bible, Bishop John Mambo of the Anglican Church said that many people were coming in the name of God, but that Christians should be careful which church they went to.[73]

Other controls that may impinge on the internal affairs of churches relate to the application of the State Securities Act and the Immigration and Deportation Act. When imposed, the two Acts would be read together with article 19 of the Constitution alluded to above. Section 22 of the Immigration and Deportation Act grants the Minister of Home Affairs blanket authority to issue a deportation warrant without giving any reasons whatsoever. Also burdensome for churches and religious groups is the requirement that to own land, a church has to satisfy the requirements of the Land Perpetual Succession Act. Trustees are supposed to be registered other than the church owning real property in its own name and right.

5.4 The right to self-determination

Zambia is a unitary state embracing a dual legal system. It recognises both written law and customary law and practices. The constitutional system recognises different practices by religious and cultural communities. These institutions are free to promote and to uphold their cultural heritage, and religious community or practices. Religions spread their religion without constraints imposed by political authorities. However, such practices must conform to written law, natural justice and equity. The practices should equally not jeopardise public safety, public defence, public morality, and public healthy and should not infringe upon other persons' rights.

5.5 Conflicts between religions

As observed earlier in this paper, Zambia is predominantly Christian. This being the case, there is little or no conflict between religions. In fact, it is probably safe to say that Zambia has never been involvd in a religious conflict. Since Zambia's independence there has been peace.

[73] June Zambia News Agency, Zambia 27 November 2007.

Leaders are therefore reminded not to take advantage of this peace, but to guard it jealously.

5.6 Spiritual values and practices of indigenous African peoples

African customary values and practices are recognised to the extent that they are not repugnant to natural justice and are in conformity with written law. To the extent that they do not endanger the defence of the nation, public safety, public morality, public health and the rights of other individuals and communities, these are allowed to prevail. However, certain of the practices, such as inheritance of widows and ritual cleansing, are slowly fading due to the prevalence of the HIV/AIDS pandemic. Under African customary law, men are potentially polygamous. Polygamous marriages are valid in Zambia and are still being practised. However, as observed, due to the HIV/AIDS pandemic, many people would prefer monogamous marriages and reduce the risk of getting infected by multiple sexual partners.

Traditional healers are free to practise and administer herbs, but only to the extent that such practices are not repugnant to natural justice and good conscience. Most of these have even formed associations such as the Traditional Healers Association of Zambia. Due to the dilapidated health infrastructure and the non-availability of conventional medicines, it is not surprising that a sizeable section of the population of Zambia still administers traditional herbs for most of their ailments. Currently, the government has hidden behind the guise of African or traditional culture not to talk about the illness of President Mwanawasa, who suffered a stroke in Egypt during the African Union Summit in early July 2008 and was flown to Percy Military Hospital in Paris, France, for medical treatment. The government has repeatedly said that, according to tradition, it is a taboo to speak about someone's illness. The question that confronts us is whether the illness involving a person that holds a constitutional office such as the office of President cannot be discussed. To what extent can constitutional provisions be relegated for the sake of customs or traditions or, indeed, culture?

6 Conclusion

Law, religion and human rights are three areas that may be said to be fused. It may even be difficult to attempt to draw a line between what is law, what is religion and what is human rights. Human rights are inalienable and inherent by virtue of one being human. Law and religion should leave room for human rights, which are universal and recognise no borders. In more instances than not, these three areas correlate.

The practices in Zambia should not be viewed in isolation from those which obtain in other countries, particularly in Central and Southern

Africa, and in those countries that are former British colonies. Even a historic perspective on how religion, especially Christianity, was brought to this region by European missionaries like David Livingstone, is almost the same. In all of these countries, law, religion and human rights depend on the supremacy of the constitutions and written law to thrive.

There is, one might say, a great deal of freedom of conscience in Zambia. Controls exist as would reasonably be expected in a democratic society. But, by and large, law, religion and human rights in Zambia exist side by side with a few marginal incidences of theviolation of the right to religion.