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Charles Mwalimu

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# POLICE, STATE SECURITY FORCES AND HUMAN RIGHTS IN NIGERIA AND ZAMBIA: DYNAMIC PERSPECTIVES IN COMPARATIVE CONSTITUTIONALISM

Charles Mwalimu\*

## I. Dynamics of Organization, Administration and Community Interaction of Police and State Security Forces

### A. Introduction: The Mandate of Police

The term "police" denotes an integral part of a government and its administration. As a unit, it represents a department of a government to maintain law and order among its other residual functions.<sup>1</sup> The mandate of police is to exercise *reasonable control* in the course of interplay of their extensive powers underlined by broad discretion. This is necessary for the requisite balance between peaceful enjoyment of individual rights and security of rights and interests of state for and on behalf of the People.<sup>2</sup> Consequently, an act by police or state security forces considered unreasonable, capricious, arbitrary or improperly motivated is beyond police mandate to exercise reasonable control, therefore *ultra-vires* their authority. An act beyond the confines of law adversely impacting individuals in contact with police and state security forces constitutes a violation of fundamental human rights. We have called on the establishment of police to serve and obey the law prior to their performance as state operatives.

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\* Senior Legal Specialist, Near Eastern and African Law Division, Law Library, Library of Congress.

1. See generally WEBSTER'S COLLEGIATE DICTIONARY 910 (1984).

2. See generally, Charles Mwalimu, *Police and Human Rights Practices in Nigeria: A Primer Case Study Toward Complete Enjoyment of Fundamental Human Rights in Sub-Saharan Africa*, 5 EMORY INT'L. L. REV. 515 (1991) [hereinafter *Police in Nigeria*]; see also Charles Mwalimu, *Police, State Security Forces and Constitutionalism of Human Rights in Zambia*, 21 GA. J. INT'L & COMP. L. 217 (1991) [hereinafter *Police in Zambia*].

The mandate of police demands that the constitutional edifice of police and state security forces must reflect their functionary disposition as primary tools of Law and not manipulative instruments of political elites and other dominant classes in the state. Mixed loyalties as to the proper repository of police powers essentially undermines the scope of compliance by law enforcement agents to norms of fundamental human rights. As long as police are primarily oriented to protect the regime in power, sustenance of rights unabridged is untenable to the detriment of people in the state. Police and security forces must be returned to their proper law enforcement function to ensure the sanctity of fundamental human rights of the individual.<sup>3</sup>

### ***B. History, Development and Organization of the Nigerian and Zambian Police***

Nigerian and Zambian pre-colonial policing arrangements are similar. They both functioned under unwritten norms of customary laws indigent to local people in these territories. They were designed to address multiple functions such as internal maintenance of law and order and external protection of kingships and chieftainships in modalities akin to military forces.

In Nigeria, indigenous society, by recourse to informal detail of messengers to facilitate judicial process also exercised social control by similar informal process including mystic powers of the supernatural.<sup>4</sup> In Zambia, on the other hand, the Lozi of western Zambia have been cited to utilize the modern hierarchical arrangement of police powers traced from the village headman to the paramount chief. Personalities of local potentates were crucial to the success of the policing systems enhanced by tribal customs.<sup>5</sup> Colonial policing systems for both countries were established primarily to protect settler interests in Nigeria traced to 1861<sup>6</sup> and in Zambia to 1889 when the British South African Company (B.S.A.C.)

3. *Id.* See further, Charles Mwalimu, *The Influence of Constitutions on the Development of a Nation's Law and Legal System: The Case of Zambia and Nigeria*, 8 ST. LOUIS U. PUB. L. REV. 157 (1989) [hereinafter *Influence of Constitutions*].

4. *Police in Nigeria*, *supra* note 2; see also TEKENA N. TAMUNO, *THE POLICE IN MODERN NIGERIA 1861-1965: ORIGINS, DEVELOPMENT, AND ROLE* (1970); T.N. TAMUNO, *Before British Police in Nigeria*, NIG. MAG. 102 (June 1966); and SUNDAY GABRIEL EHINDERO, *POLICE AND THE LAW IN NIGERIA* (1986).

5. JAMES CRAMER, *THE WORLD'S POLICE* 221-226 (1964); see also *ZAMBIA: A COUNTRY STUDY* 223-238 (Irving Kaplan ed. 1979, 3d printing 1987).

6. *Influence of Constitutions*, *supra* note 3.

of Cecil Rhodes was granted a Royal Charter. This instrument constituted official recognition of the Company as a British Corporation to acquire and exploit minerals and administer North-Eastern and North-Western Rhodesia while protecting traditional rulers from external threats by force of arms.<sup>7</sup>

The legal framework of the Nigerian police also goes back to 1863 when Hausa Police were formalized as "security forces" consolidated in 1879 and 1895.<sup>8</sup> Because of conflicts between local inhabitants and settlers, the Rivers Protectorate Police Force was established in 1890, and superseded the following year by the Hausa constabulary.<sup>9</sup> The Hausa Constabulary was later redesignated as the Niger Coast Protectorate Police with a strength of 500 police.<sup>10</sup> The Lagos Guard is also a manifestation of historical developments of the Nigeria Police Force organized as early as 1840 to 1860 to address socio-political disturbances between settlers and indigenous people.<sup>11</sup> Corresponding to the three political subdivisions of Lagos, Northern and Southern Nigeria, police also developed in support of these administrative structures evidenced in the Constabulary Proclamation of 1906.<sup>12</sup> The three classifications of Lagos Police Force, Northern Nigeria Police Constabulary and Southern Nigeria Police Force appears to have been maintained, even with the amalgamation of the northern and southern portions of the country in 1914.<sup>13</sup> Under Ordinance, No.2 of 1930,<sup>14</sup> however, the three systems of police in Lagos, Northern and Southern were united to form the Nigeria Police Force (N.P.F.). Pursuant to the federal Constitution of 1954,<sup>15</sup> both the federal capital territory at Lagos and the regions in the East, North and West jointly administered the police. Under the Constitution of 1963, coinciding with the creation of the Mid-Western Region of Nigeria, effective 1964, Nigeria Police were administered in five command areas.<sup>16</sup> Commissioners of Police in the

7. *Id.*

8. Ordinances of the Settlement of Lagos 1862-1870, 10 (1874); *see also* Ordinances of the colony of Lagos 1893, 18 (1894).

9. *Police in Nigeria supra* note 2; *see also* Constabulary Disciplinary Ordinance No. 4, 1892, Ordinances of the Colony of Lagos 1893, 643 (1894).

10. *See* Police ordinance, No. 14 of 1897 and Proclamation No. 4 of 1902 consolidated as Police Ordinance, 1 The Laws of the Colony of Southern Nigeria, ch. 34, 446 (1908).

11. S.G. EHINDERO, *supra* note 4.

12. 1906 Northern Nigeria Proclamations 59.

13. *Police in Nigeria, supra* note 2.

14. 1930 Nigeria Ordinances 25, repealed in 1942, effective 1943 consolidated in 5 The Laws of Nigeria, ch. 172, 254 (1948).

15. *Influence of Constitutions, supra* note 3.

16. Ann. Rep. of the Nigeria Police Force (1964).

Regions commanded the Forces subject to the overall command of the Inspector-General of Police at the center. In 1978, the Nigeria Police force was organized in five departments of "A" to "F" with a strength spanning 2,222 in 1926 to 84,955 in 1979.<sup>17</sup> Since its establishment, the Nigeria Police Force has functioned alongside Native or Local Authority police forces.<sup>18</sup> These forces were integrated into the Nigeria Police Force in 1969 and 1972.<sup>19</sup> Under the Constitution of 1979,<sup>20</sup> the Nigeria Police Force is recognized in articles 194-196 as a unitary force, to the exclusion of all other forces.<sup>21</sup> Therefore, current regimes of law providing the legal framework of the Nigeria police is the Constitution of Nigeria, 1979 complemented by legislation issued under it. The Constitution of 1979 is soon to be replaced in 1992 on the return of the country to civilian rule.<sup>22</sup> Police exercise their powers under the Police Act, 1943 as amended.<sup>23</sup> Under these measures, primary functions of the Nigeria Police Force include maintenance of law and order, prosecution of offenses, protection of property and other functions of general law enforcement. The present configuration of the Force corresponds to twenty-one territorial demarcations of states including the newly-created Katsina and Ikwa-Ibom states. The organizational structure is by and large hierarchical.<sup>24</sup>

In Zambia, the legal framework of police is traced to 1891, when a small constabulary was established to protect settler commercial interests and safeguard their welfare.<sup>25</sup> That unit was also created to provide a buffer against incursions of Arab slave traders, though it also carried out civil police duties. Two sections of this constabulary functioned in North-Eastern Rhodesia<sup>26</sup> and the Barotse Native Police operated in North

17. See generally Ann. Rep. of the Nigeria Police Force 1926-1979. The Force plans to expand to 200,000 by the 1990s, a ratio of 1:500 people per officer to cater to a population of 112 million people.

18. Native Police Ordinance, No. 17 of 1943, Ann. vol of the Laws Nigeria, ch. 140, 479 (1948); The Native Authority Law of Northern Nigeria, 1954, 2 The Laws Northern Nigeria, ch. 77, 1275 (1963); Local Government Law of Western Region of Nigeria, 1955, 4 The Laws of the Western Region of Nigeria, ch. 70, 19 (1959).

19. NIGERIA: A COUNTRY STUDY 275-276 (Harold D. Nelson ed., 4th ed. 1982).

20. Annual Volume of the Laws of Nigeria (Ann. Vol. L.N.). (appendix 119 p. 1979).

21. *Influence of Constitutions*, supra note 3.

22. Rep. of the Pol. Bureau 103 (Mar. 1987); see also Charles Mwalimu, *Trends in African Law (Nigeria)*, in A.B.A. SEC. INT'L L., AFR. L. COMM., NEWSL. (Spring 1990 and Jan. 1991).

23. 5 Laws of Nigeria, ch. 172, 257 (1948); see also 5 The Laws of the Fed. Rep. of Nig. and Lagos, ch. 154, 2928 (1959) reprinted under Decree, No. 41 of 1967, Ann. Vol. L.N. A189 (1967).

24. *Police in Nigeria*, supra note 2. The Police Act is reinforced by Police Regulations, Ann. Vol. L.N. B149 (1968).

25. The State Law of Northern Rhodesia 1889-1901, at 1 (1910).

26. *Police in Zambia*, supra note 2, at 218.

Western Rhodesia under the Barotseland North-Western Rhodesia Order in Council of 1899.<sup>27</sup> The North-Eastern Rhodesia Constabulary was also subject to article 20 of the Northeastern Rhodesia Order in Council No. 1 of 1911.<sup>28</sup> North-Eastern and North-Western Rhodesia were administratively fused in 1911 under an Order in Council of that year issued to create Northern Rhodesia.<sup>29</sup> The unity of these territories precipitated Northern Rhodesia Proclamation, No. 17 of 1912 to raise a Civil Police Force, better known as the Northern Rhodesia Police Force.<sup>30</sup> Initially, it comprised 19 British officers, 8 non-commissioned British officers and 740 enlisted Africans. Company rule lasted in Northern Rhodesia from 1899 to 1924, giving way to direct British control in 1924 under the Northern Rhodesia Order in Council of 1924.<sup>31</sup> To reflect requirements of the new regime, consolidating legislation was promulgated, contained in the Northern Rhodesia Police Ordinance, No. 16 of 1926.<sup>32</sup> The Force under the law of 1926 functioned also as a military force during wartime and other emergencies. In 1932, effective 1933, the military portion of the Force was detached to form the Northern Rhodesia Regiment.

In 1937, a new Northern Rhodesia Police Ordinance, No. 25 of 1937,<sup>33</sup> replaced the Law of 1926. A Federation uniting Northern Rhodesia (Zambia) with Southern Rhodesia (Zimbabwe) and Nyasaland (Malawi), known as the Federation of Rhodesia and Nyasaland, subsisted in the country between 1953 and 1963.<sup>34</sup> To cater to exigencies of law and order of a federal character in Northern Rhodesia, the Police Ordinance No. 5 of 1953 provided the basis of police administration.<sup>35</sup> As in Nigeria, Local or Native Authority Police also formed part of the law enforcement system in Northern Rhodesia during the colonial era. Such local authority police forces, largely unarmed operated predominantly in rural areas as messengers enforcing Native Authority edicts and summons. At independence in 1964, the Northern Rhodesia Police became the Zambia Police

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27. The State Law of Northern Rhodesia 1889-1901, at 7.

28. The Statute Law of North-Eastern Rhodesia 253 (1917).

29. No. 438, Statutory Rules and Orders, 85 (1911); see also *Influence of Constitutions*, *supra* note 3.

30. The Statute Law of North-Eastern Rhodesia 253 (1917).

31. No. 324, Statutory Rules and Orders 395 (1924). See also *Police in Zambia*, *supra* note 2, at 219, and *Influence of Constitutions*, *supra* note 3.

32. Ordinances, proclamations and orders in council of Northern Rhodesia 35 (1927).

33. 1 Supp. to the Laws of Northern Rhodesia 126 (1946).

34. *Influence of Constitutions*, *supra* note 3.

35. 2 Laws of Northern Rhodesia, ch. 44 (1965 ed); see also *Police in Zambia*, *supra* note 2, at 220.

Force under the same law of 1953 with an estimated force of 6,000 police.<sup>36</sup> Colonial regimes were swept away in 1965 by the Police Act, No. 43 of 1965.<sup>37</sup> This law forms the basis of police operations, organization and administration in support of the constitutional mechanism on police.

In 1973, Zambia entered one party rule under a single-party Constitution of the same year.<sup>38</sup> Articles 130 to 134 established a Police and Prison Service Commission sharing executive powers of police with the President. The President is overall commander of the Armed Forces with appointing authority to designate the Inspector-General of Police, Commissioner of Police and also members of the Commission. The Commission, however, appoints, removes and disciplines police officers other than the two most senior officers noted above.

By and large, organization and administration of the Zambia Police Force is based on the Police Act of 1965. Its command structure, as in Nigeria, is hierarchical. Structural patterns of the Force are held together by three main departments, namely, Administration, Technical and Operations.

In 1985, the Zambia Police Force (Amendment) Act, No. 23 of 1985<sup>39</sup> introduced another change in the organization and administration of the Zambia Police Force, at least on paper, by establishing and constituting a Vigilante Force to support police in their law enforcement functions in the wake of rising criminality in the country. In practice, however, they have not been established due to the lack of proper training facilities, standardized guidelines of recruitment and insufficient funds. As many as 30,000 untrained vigilantes are estimated to roam the country desperately searching for viable means of support. They may have succumbed to antisocial conduct in contrast to the formal anticipation of their being constituted as crime-fighting instruments of state. However, vigilantism in whatever form indicates the failure of normal policing instruments of state effectively to maintain law and order. Even though the Zambian

36. *Police in Zambia*, *supra* note 2, at 220.

37. Rep. of Zambia Gov't Gazette 273-309 (Acts Supp. 1965) consolidated in 3 Laws of the Rep. of Zambia, ch. 133 (rev. ed. 1972).

38. Act No. 27, Rep. of Zambia Gov't Gazette 199-201 (Acts Supp. 1973). The Constitution itself is scheduled to the Act effected through Amendments to the Constitution of 1964 such as Amendment No. 5. Act 29, Rep. of Zambia Gov't Gazette, 179-182 (Acts Supp. 1972).

39. Rep. of Zambia Gov't Gazette 101 (Acts Supp. 1985). The Zambia Police Bigilantes Regulations (S.I. No. 122 of 1986) were issued to implement the idea of a vigilante force. Rep. of Zambia Gov't Gazette 323-334 (S.I. Supp. 1986).

law of 1985 accords legislative recognition to vigilante forces, their operation must be subjected to the highest standard of constitutional authority of police. This high degree is necessary to ensure their legitimacy under norms and orders of the Constitution to bring them in line with the standard required for regular law enforcement agents. Vigilantes are intended to support an overwhelmed, understaffed and ill-equipped police force of 12,000 in regular service to cater to an estimated population of 7 million people.<sup>40</sup> Other law enforcement agents also support police in their functions of maintenance of law and order including the Zambia National Defence Forces, the Anti-Corruption Commission, the Special Investigation Team for Economy and Trade (SITET), Flying Anti-Robbery and Anti-Drug Squads, the Office of the President, Zambia Police Reserve, Mine Police and private security operations. Similar support is no doubt provided to the Nigeria Police Force.

A comparative emanation of structural organization of police in Nigeria and Zambia reveals contrasts traced in both cases to the colonial evolution of the two countries and also their contemporary state functions influenced by preceding colonial structures. Thus, patterns of policing are by and large determined by the nature of society created by constitutional mechanisms. In the case of Nigeria, for example, the federal characteristics of the country as pronounced mainly from 1954 to the present reflects the structural patterns of police under the Police Ordinance of 1942. Though essentially hierarchical, Nigeria police organization and administration also reveal a lateral or parallel development corresponding to the territorial configuration of the country subdivided into 21 states.

In Zambia, the single formation of the national state necessarily determines its command structure and organization as strictly hierarchical with functional subdivisions. The nature of the one party form of government since 1973 also enhances this organizational structure of police. Similarities are discernible in the structural patterns of police forces in Nigeria and Zambia. First, the two systems of police are unitary forces to the exclusion of all other police forces such as native or local police forces as required by their constitutions. However, support forces are particularly indicated in Zambia. Second, these arrangements are substantially hierarchical, vesting direction and control of the Forces in the President or Head of State as Commander in Chief of the Armed Forces. Third, the Forces also reflect functional accountability as well as geo-

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40. Daily Reports: Sub-Saharan Africa 29-31 (Foreign Broadcast Information Service (FBIS), Tuesday, May 1989).



graphical. Should the goal of 200,000 police be reached in Nigeria, the police-public ratio of 1:500 people per police officer will surpass Zambia's ratio of 1:800 reported in May of 1989.<sup>41</sup>

### C. *State Security Forces*

In Nigeria, the premier state security agency appears to be the Nigerian Security Organization established by Decree, No. 16 of 1976.<sup>42</sup> The ubiquitous nature of this promulgation is reflected in section 2(1), mandating that the Nigerian Security Organization prevent and detect any criminal act involving or relating to national security. It supersedes any other legislative measure on the same subject. Rule-making powers are vested in the Head of State to promulgate measures for structural organization and general administration of the agency. However, the effect of sub-section (2) of section 3 is that any instrument issued under principal section 3(1) has equal force of law as a principal law notwithstanding its attributes as a subordinate law. It is conceivable under this authority for adjective legislative measures to be more overreaching than the parenting instrument, from which it derives its legitimacy, because under sub-section (2), such ancillary legislation is not required to be gazetted for public scrutiny. This promulgation is of similar import to the *Zambian Regulations under the Preservation of Public Security Act, 1960*, issued in 1964.<sup>43</sup> A parallel statute in Nigeria enhancing the extensive discretion of the executive branch of government in these matters is the *State Security (Detention of Persons) Decree, No. 2 of 1984*.<sup>44</sup> The Nigerian Security Organization was secretly organized subsequent to the assassination of then Head of State, Murtalla Muhammad. Its composition is not revealed in the constitutive promulgation, rendering discussion of its internal structure and organization largely speculative. It was established to provide supporting intelligence services to the government and has since moved from purely military functions to a key executive organ informing the President of conspiracies and plots to overthrow the government, among its numerous functions. It is reputed to comprise mainly intelligence

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41. *Id.*

42. Ann. Vol. L.N. A71 (1976).

43. 2 Laws of the Rep. of Zambia, ch. 106 (rev. ed. 1972). The principal Act contains six sections, primarily vesting unlimited discretion and rule-making powers in the President to "legislate" for purposes of preservation of public security. Regulations issued under these few sections outlined in 47 sections contain extensive powers of police and state security forces including powers of detention.

44. Fed. Rep. of Nig. Off. Gazette, A27 (1984).

officers.<sup>45</sup> It operates autonomously, though under Presidential control. The Head of the Nigerian Security Organization sits on the National Defence and Security Council. The Nigerian Security Organization must be distinguished from other military intelligence agencies, for example the Directorate of Military Intelligence and the Defence Intelligence Agency (DIA).<sup>46</sup> Its functions and relationship with the Nigeria Police Force are not cordial.<sup>47</sup>

On the other hand, the Zambia Security and Intelligence Service (ZSIS) was established by Act, No. 43 of 1973 of similar designation.<sup>48</sup> Unlike, the shroud of mystery surrounding the composition of the Nigeria Security Organization, ZSIS is comprised of a Director-General, other directors and officers as the President determines under section 3 of the Act. This formulation does not nonetheless diminish the secret nature of the Zambia Security and Intelligence Service. As in Nigeria, ZSIS is also subject to legislation protecting official secrets. Its functions *inter alia* cover collection, gathering, correlating and evaluation of intelligence activities and other information relevant to the security interests of Zambia. It also advises and disseminates such intelligence and other national security information to the government, its departments, institutions and other designated corporations and organizations. It is responsible for intelligence and security of vital installations and classified information, as required by the State Security Act of 1969.<sup>49</sup> It also supervises and coordinates all activities and information of any ministry, government departments, the armed forces and police to the extent their operations and activities relate to security and intelligence. Under the law of 1973, an intelligence officer for purposes of powers contained in the Preservation of Public Security Act, 1960 as amended and Regulations of 1964<sup>50</sup> as well as the State Security Act is a police officer with powers of detention. Officers in the Service are armed persons permitted to shoot when necessary. Rule-making powers, as in the Nigerian case, are vested in the President. A Staff Board subject to directions of the Director-General selects, appoints, promotes and disciplines officers below the rank of Director. The Board also advises the Director-General on incidental matters affecting the general welfare

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45. PERTH CORP., NIGERIA'S NEW GOVERNMENT 16 (Defence and Foreign Affairs Publications, 1985).

46. *Id.*

47. NIGERIA: A COUNTRY STUDY 275 (Harold D. Nelson ed., 4th ed. 1982).

48. Rep. of Zambia Gov't Gazette 369 (Acts Supp. 1973).

49. 2 The Laws of the Rep. of Zambia, ch. 110 (rev. ed. 1972).

50. *Id.* ch. 106.

and efficiency of the Service. As noted above, other special law enforcement agents also operate in the country akin to modalities of the Zambia Security and Intelligence Service. These include the Special Investigation Team for Economy and Trade (SITET), police and state security agents accredited to the Office of the President, specialized units of the National Defence Forces and the Anti-Corruption Commission.

Both the Nigerian and Zambian security forces enjoy extraordinary powers of detention. In Nigeria, this is contained in Decree No. 2 of 1984,<sup>51</sup> and in Zambia, in the Preservation of Public Security Act and Regulations. They both function in secret, pursuant to legislative mandate. They have been known to impact the security of fundamental human rights negatively, especially in matters affecting national security.<sup>52</sup>

#### *D. The Relationship Between Police and State Security Forces to Political Elites and Other Dominant Classes*

The affinity of police and state security forces to political elites and other dominant classes is by and large determined by their functions as instruments of power in the state.<sup>53</sup> In Nigeria, ethnicity plays a significant role in masking elite struggles for power and social stratification.<sup>54</sup> Carter and Marenin have established a link between police action, performance of a government and public perception of both police and government.<sup>55</sup> Police action is perceived as an extension of exercise of governmental power. Therefore, police are deemed an integral component of government and administration reflecting the influence of political and dominant classes especially in the executive branch of government. No other agency of government appears to impact efficacious constitutionalism of a state more than police. Carter and Marenin also have postulated that inasmuch as courts of law are among the most important instruments of government frequently in contact with people in the state, it is arguable that in terms of impact on the community, the police are a very visible force, especially in the developing countries. Because of this presence in the lives of people,

51. Fed. Rep. of Nig. Off. Gazette, A27 (1984).

52. See *infra*, section III, comparative analysis of human rights in Nigeria and Zambia.

53. *Police in Nigeria*, *supra* note 2.

54. Fed. Rep. of Nig. Rep. of the Pol. Bureau 14 (Mar. 1987).

55. Marshall Carter & Otwin Marenin, *The Political Role of the Police and the Nigerian Draft Constitution*, 1 NIG. BEHAV. SCI. J. 93-103 (1978); see also their *Human Rights in the Nigerian Context: A Case Study and Discussion of the Nigeria Police Force*, 1 UNIVERSAL HUM. RTS. 43-61 (1979); and their *Law Enforcement and Political Change in Post Civil War Nigeria*, 9 J. CRIM. JUST. 125-149 (1981).

the police clearly influence the course of constitutional function in the state.<sup>56</sup>

This postulation is equally applicable to Nigeria and Zambia police forces, as it is pertinent to other policing arrangements in Sub-Saharan African or indeed any other state. Therefore, a nexus is envisioned between police, state security forces and performance of a government. These regimes necessarily entail legitimacy and accountability of a government.<sup>57</sup>

Police in Nigeria and Zambia, as in other countries of Sub-Saharan Africa are generally criticized for abuse of their powers, misconduct, corrupt practices and other actions of anti-social behavior.<sup>58</sup> These factors negatively impact the preservation and security of fundamental human rights in certain cases. Tensions are also prevalent between police, state security forces and students, culminating in unwarranted closures of universities in both countries.<sup>59</sup> These confrontations are fueled by the nature of subsisting political systems, inherently preemptive of active student participation in the political process. We advocate liberalization of the political process in all of Sub-Saharan Africa, to facilitate this student interaction in the affairs of state. Ironically, however, both sides to this conflict can ill-afford sustained tensions between the two groups, as each is uniquely required for the efficacious development of their nations. It is the belief here that liberalization of the political process will necessarily coincide with decreases in student and police conflicts.

The issue of corruption in the public sector generally and in the police force in particular is common to both Nigeria and Zambia. The two countries also share similar problems in criminal misconduct of sitting

56. *Human Rights in the Nigerian Context: A Case Study and Discussion of the Nigeria Police Force*, *supra* note 55.

57. Otwin Marenin, *Policing African States: Toward a Critique*, 14 *COMP. POL.* 379-396 (July 1982).

58. Igbinovia, *Police in Trouble: Administrative and Organizational Problems of the Nigeria Police Force*, 28 *INDIAN J. PUB. ADMIN.* 334-372 (1982) [hereinafter *Police in Trouble*].

59. *Police in Nigeria*, *supra* note 2.

The Daily Report: Sub-Saharan Africa (FBIS) of Monday January 8, 1990, at 13 reports that the Nigerian Military Government has promulgated Decree No. 47 to deter violent demonstrations and protests. Under this Law, any student found guilty of participating in a demonstration is subject to imprisonment for five years, fined 50000 Naira or both. The Decree is reportedly also applicable to anyone convicted of organizing student protests. Any such student is triable by a special tribunal. The Decree also empowers heads of universities and colleges to terminate or dissolve any student union deemed in conflict with interests of national security, public safety, or his representative can also expel or suspend any student of a dissolved union. Anyone so punished can only appeal to the President of the Federal Republic of Nigeria. The new law also emphasized the proscription of the National Association of Nigerian Students.

police officers, contributing negatively to the public image of police.<sup>60</sup> In both cases, police also may function as state security forces.<sup>61</sup>

In Zambia, state security forces are by legislative mandate empowered to exercise powers of detention as police in similar manner as are the Nigeria state security forces under the provisions of Decree, No. 2 of 1984. In both cases, therefore, they also execute functions akin to the external defence of the country. Similarly, undue emphasis on internal security and other public order functions neglects other police duties of a purely law enforcement nature, both juridical and symbolic. In the two countries, the importance of an impartial process of law enforcement is demanded more so by the nature of prevailing political systems, namely one party rule in Zambia and military rule in Nigeria. In Zambia, extensive powers of police concerning detention of persons, buttressed by a continuous state of emergency since just before independence, are identical to those exercised by the Nigerian state security forces under decree No. 2 of 1984, noted above. In both Nigeria and Zambia, their exercise has led to abuse of basic rights in documented cases.<sup>62</sup> In the two countries, regime protection of the government in power permeates police and state security functions to the detriment of ordinary and equitable maintenance of law and order in the national states. In both Nigeria and Zambia, the overwhelming or expunging of democratic institutions supports this thesis of regime protection. These reflect unwarranted intrusion into the law enforcement function of police by the political and other dominant classes.

In Zambia, the role of the President in appointing members of the Police and Prison Service Commission, the Inspector-General of Police and Commissioner of Police, within the purview of structural patterns of one party system of government assures party control of police outside the ambit of purely civil service characteristics. This position is contrasted with that in Nigeria in which the military government ensures effective control of police signified by the abolition of functions of the Nigeria Police Service Commission and their integration into the Nigeria Police Council. Nigeria's attempts at constitutional insulation of police from influence of political and dominant classes have been thwarted over the years.<sup>63</sup> This state of affairs negatively impacts on the peaceful enjoyment

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60. *Police in Zambia*, *supra* note 2, at 223; see also Marshall Carter & Otwin Marenin, *Police in the community: Perceptions of a Government Agency in Action in Nigeria*, 15 AFR. L. STUD. 9-28 (1977).

61. *Police in Zambia*, *supra* note 2, at 223.

62. *Id.*

63. *Police in Nigeria*, *supra* note 2.

of fundamental human rights of the individual. Insofar as the use of police and state security forces for political gain spells corruption of both police and the state at large,<sup>64</sup> correspondingly, it also must reflect a crisis of confidence in law enforcement agents and the state as sanctioned custodians of governmental power. This negative perception necessarily leads to public disaffection and a heightened scrutiny of the authority and legitimacy to govern. In practice, this proposition is supported by recent uprisings in Eastern Europe, especially Romania and East Germany, where excessive recourse to state security forces as a coercive tool of government itself provided the basis of these revolutions. Since the mandate of police is intertwined with government and administration, its preemption signifies revocation of authority to rule. Therefore, unsanctioned actions by authority of the people delegated to the government, police and state security forces *prima facie* undermine governmental authority to exercise reasonable control over persons and property. In such a case, they must be reformed to comply with their mandate or risk its withdrawal.

## II. Responsibility of Nigerian and Zambian Police and State Security Forces in Law and Practice

In both Nigeria and Zambia, as in other countries of Commonwealth Africa, the responsibility or accountability of police and state security forces is constitutional in nature.<sup>65</sup> Constitutional underpinnings of this accountability evolve into *second-tier* norms of constitutional law *per se*: involving torts, administrative law, criminal law and criminal procedure, evidence and other branches of law, to the extent that law enforcement action is subject to reasonable control for the common good and not for the protection of the regime in power. As such, unreasonable measures of control impinge on individual rights. Since fundamental human rights constitute organic norms of the Constitution, all other norms, whether issued in the Constitution or under it, must be conscionable under the spirit of fundamental human rights provisions. Therefore, the primary test must be constitutional in nature, to ascribe legality and liability of police and state security forces. This view is supported by *the Nigerian case of Olushola Oygbemi v. Attorney General of Lagos*.<sup>66</sup> It is declared that if the courts of law find that the powers of the police have been

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64. See, e.g., Corrupt Practices Act, 1980, Zambia Statute, Rep. of Zambia Gov't Gazette 63 (Acts Supp. 1980); see also *Police in Nigeria*, *supra* note 2.

65. *Police in Zambia*, *supra* note 2, at 224.

66. 3 N.C.L.R. 895 (1982).

exercised outside constitutional boundaries, advertently or inadvertently, in any way which vitiates fundamental human rights provisions of the Constitution, or that any such powers of the police are at variance with a statute or any law which controls a particular subject, Nigerian courts will declare such actions unconstitutional and illegal. The courts provide the necessary buffer between the inhabitants of society on one hand and the executive through the police on the other, to ensure that their actions strictly comply with the Constitution of Nigeria.<sup>67</sup>

In both Nigeria and Zambia, as in predominantly all of Sub-Saharan Africa, the bulk of police and public encounters requiring immediate constitutional accountability is in the sphere of fundamental human rights themselves. Court resolution of these interactions invariably rotate on whether police or state security forces have in any way infringed fundamental human rights of the individual.<sup>68</sup>

The primary function of police to maintain law and order for the peaceful and unbridled enjoyment of fundamental human rights must be conciliated against their mandate of reasonable control as instruments of power in the state. Congenial balance of rights enjoyment and exercise of powers of police is in the case of Nigeria governed by article 41 of the Constitution of 1979,<sup>69</sup> while in Zambia the applicable provision is article 26 of the Constitution of 1973.<sup>70</sup> Article 41 of the Constitution of Nigeria stipulates that, notwithstanding sections 34-38 of the Constitution, the Constitution cannot invalidate any law reasonably justified in the interests of defense, public order, public safety, public morality or public health or to protect the rights and freedoms of other persons.

Under this article, the tranquility of enjoyment of rights is subject to the powers of the police and state security forces. Article 26 of the Constitution of Zambia in practice has the effect of article 41 of the Constitution of Nigeria and the Nigerian State Security (Detention of Persons) Decree No. 2, 1984 combined.<sup>71</sup> Article 26 of the Constitution of Zambia deals with both matters of detention and national public emergencies introduced in the country since just before independence.

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67. *Id.* at 912.

68. See generally Prophet Malim-Jola v. Commissioner of Police, 1 All N.L.R. 31; see also Re-Thomas Cain, 1974 Z.L.R. 71; and Charles Mwalimu, *Integrative Approaches to Constitutionalism in the Zambian One Party State: Theoretical and Practical Utilitarianism of Legal Orders* (forthcoming).

69. *Supra* note 20.

70. *Supra* note 38.

71. *Supra* note 44.

This state of affairs has continued until today. This article requires that despite the provisions of fundamental human rights in articles 15, 18, 19, 22-25, nothing contained in or done under the authority of any law can be held inconsistent with these enumerated provisions, if it is adduced that this law permits authorities in Zambia during an emergency or war to deal with these factors. However, these measures of the government must be reasonable, taking into account the surrounding circumstances at the time.

A declaration of emergency is pronounced under authority of article 30 of the Constitution. Under this article, the President has power at any time, by proclamation published in the *Gazette*,<sup>72</sup> to declare, first, that a state of public emergency exists, or, second, that a situation exists which, if it is permitted to continue, may develop into a state of public emergency. This executive power of the President is a legacy of colonial rule similarly invested in the colonial governor to deal with disturbances, mostly those associated with the liberation struggle for national independence.

When the President exercises his power to declare a public emergency, his act gives rise to the regime of the Emergency Powers Act, 1964.<sup>73</sup> If the second attribute of article 30(1) of the Constitution is utilized, it denotes exercise of presidential powers of detention conferred on him and police under the Preservation of Public Security Act, 1960 and Regulations of 1964.<sup>74</sup> The legislative history of these two enactments is like the parenting article 30 of the Constitution traced to periods immediately before independence. The atmosphere and process of emergency or semi-state of emergency, introduced by the colonial governor, have by law and practice been operational in the country since just before independence and is continuing.<sup>75</sup> Under these legislative measures, the President, police and state security forces enjoy extraordinary powers including detention of persons held in certain cases to suppress basic and guaranteed rights of freedom of movement. Regulations 33(1) and (6) of the Preservation of Public Security Regulations emphasize the broad powers of detention by the President, police and state security forces. These jointly require that whenever the President is of the view that, in order to preserve public security in Zambia, it is pertinent to control any person, he is at liberty to order that such a person be detained. Following this order, the person can be arrested.

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72. The *Gazette* is the primary medium of promulgation and publication of newly-enacted laws and amendments to any such laws.

73. 2 Laws of the Republic of Zambia, ch. 108 (rev. ed. 1972).

74. *Id.* ch. 106.

75. *Police in Nigeria, supra* note 2.



Furthermore, any Assistant Inspector of Police, or a person of higher rank (or an equivalent counterpart in the public security system of Zambia) may, without warrant, arrest any person if he believes that grounds exist which would justify detaining him under these Regulations. Thereafter, he may order the detention of the person for a maximum of twenty-eight days while a decision is pending from the President whether to bring a formal detention order against the person. However, due to the fact that the spirit of constitutionalism must regulate not only the prescription and exercise of presidential, police and state security powers, notwithstanding the draconian nature of emergency legislation, but also their accountability, a process must be created to conciliate individual and class interaction with state instrumentalities of power for review of executive action involving police powers.

Harmony between the two sets of values, namely, rights enjoyment on one hand and state rights and interests embodied in emergency legislation as the basis of detention powers of the President and police on the other, is provided by article 27 of the Constitution which states that if a person's freedom of movement is constrained or if he is detained under any law referred to in articles 24 and 26 of the Constitution, then such detention triggers a number of constitutional processes. First, the person must, as soon as is reasonably practicable, up to a maximum of fourteen days since the detention began, be supplied with a written statement in a language which he understands, explaining in great detail, the reasons and other grounds which merit his detention. Second, before a month lapses from the time his detention started, a notice should be published in the *Gazette* stating that the person has been detained. This notice should also state the legal provisions which authorize the detention. Finally, upon request of the detainee, at any point during the course of the detention but not earlier than one year from the start of his detention or since a similar request was made, his case must be reviewed by an independent and impartial tribunal constituted under a law. As of right, a detained person must have access to legal representation in court and the independent tribunal reviewing his case.

A regime of case law has emerged under these provisions to challenge the liberal exercise of Presidential and police powers of detention, arguments primarily founded on constitutional accountability but giving rise to such tort actions as false imprisonment and malicious prosecution. In *Joyce Banda v. Attorney General*,<sup>76</sup> for example, petitioner, a suspect in

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76. 1978 Z.L.R. 233.

a murder trial, was detained under police powers conferred by Regulation 33(6) of the Preservation of Public Security Regulations for nine days and then released without providing grounds of detention as required by article 27 of the Constitution. She successfully maintained an action against the state for false imprisonment. The Court criticized abuse of police powers under Regulation 33(6), stating that under this Regulation, a person can be arrested and detained only if the police officer is of the view that grounds exist which would render a detention order by the President not only probable, but justifiable as well as in keeping with Regulation 33(1). But it is illegal to use Regulation 33(6) in order to investigate a criminal offense which is not related to the public security. It is not right to put forward a proposition that in regard to detention under Regulation 33(6), the police should act on suspicion without existence of grounds of detention as required by article 27 of the Constitution. Therefore, this Regulation as any other containing powers of detention can only be used where grounds of detention are established. If this interpretation of Regulation 33(6) is not meritorious, then it would be considered *ultra vires* the Constitution.<sup>77</sup>

In *Mulwanda v. The People*,<sup>78</sup> Mulwanda, a Permanent Secretary in the Ministry of Home Affairs, was detained by police under same Regulation 33(6) for corrupt practices. The police officer who had effected the detention was of the view that this was a peculiar case which required similar unusual methods of investigation. The officer, therefore, decided to detain him and other persons without trial. The officer further adduced in evidence that had he not used his powers of detention, the truth regarding corruption in the Ministry of Home Affairs would not have been properly ascertained. The High Court of Zambia disagreed with his use of detention powers under this Regulation, warning that this attitude of the police officer was not only reprehensible but also dangerous. This is because, not only will law-abiding citizens of the Republic be incensed at flagrant abuse of office and corruption by those in power, it is also unpalatable that law enforcement agents advertently use illegal means of arrest. By their illegal methods, they simply substitute one type of unacceptable behavior with another, compounding the abuse of power by the executive branch. The police in essence negate the ideal of an orderly

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77. *Id.* at 234.

78. 1976 Z.L.R. 133.

society which they set out to protect in the first place. Police sojourns into illegal activities spell the disintegration of society.<sup>79</sup>

In Nigeria, the exercise of police or state security powers under article 41 of the Constitution is not unfettered vis-a-vis fundamental human rights provisions outlined in Chapter IV, articles 30-42 of this instrument. For example, under article 32(2) of the Constitution securing personal liberty, law enforcement agents must strictly comply with a set of rules and procedures. First, they must inform the person arrested or detained of rights to maintain silence or refuse to provide unsolicited information which can incriminate the person. Access to an attorney before providing information is a constitutional right of the accused, arrested or detained. Second, a person arrested or in police custody must be informed in writing, in a language understandable by him, of the facts and grounds of detention. These must be provided within twenty-four hours of arrest or detention. Third, if arrest or detention are executed under article 32(1) of the Constitution, in order to secure attendance of the person before a court of law pursuant to a court order or based on reasonable suspicion of this person's having committed an offense, and detention is ordered in order to avert commission of a criminal offense, then such a person shall promptly be brought before a court of law within a reasonable time. If proceedings in a court and charges against him are not preferred or brought to trial for two months from the date of arrest or detention, then such a person must be released unconditionally or conditionally on reasonable grounds. The conditions must relate only to securing appearance before a court of law. Reasonable conditions were defined in the Constitution.

Finally, compensation was payable under sub-section (6) of section 32 of the Constitution, accompanied by a public apology from detaining authorities, for unlawful arrest or detention. In any case, wrongful arrest and detention constituted incidents of civil actions in tort for false imprisonment and malicious prosecution. These constitutional provisions are no longer operational. They were revoked by Decrees 1 and 2 of 1984 discussed above. Needless to note that, in the absence of constitutional protection then offered by fundamental human rights provisions, it is not hard to imagine an environment in which abuse of rights could occur. In any case, absence of the security of law is in itself a negation of basic rights.

Section 4 of Decree No. 2, 1984 stipulates that no legal action can lie against anyone in military government for any act done or omitted to be

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79. *Id.* at 136.

done under this Decree. Accordingly, provisions on fundamental human rights of the Constitution are suspended for purposes of interpretation and administration of Decree No. 2 of 1984. Therefore, under this law, any question whether any fundamental human rights are vitiated because of the exercise of powers by the military government under this law cannot be inquired into by the courts.

During both civilian and military rule under the Constitution of 1979, however, Nigerian courts, especially the Supreme Court, continue to uphold the sanctity of cardinal provisions of the Constitution to delineate permissible intrusions in the arena of fundamental human rights based on policy considerations of national security, public order, public welfare and public morality, despite the repeal of these provisions.<sup>80</sup> Courts have particularly required a higher standard to ensure complete adherence to the mandate of police sanctioned under the Constitution.<sup>81</sup>

Accountability of police under other branches of law such as torts, criminal, administrative and criminal procedure laws is in large respects illustrated by case law. In Nigeria, one such case is *Obi v. Chukwumah*,<sup>82</sup> where the plaintiff, following a detention of more than four months, brought an action for malicious prosecution. In Zambia, *Mbandangoma v. Attorney General*,<sup>83</sup> *Kabika v. The People*<sup>84</sup> and *Mushingo v. The People*<sup>85</sup> are similar illustrative cases on accountability of police under branches of law other than constitutional law *per se*.

Under both the Nigerian and Zambian Constitutions and governing police and state security legislation, law enforcement agents, as units of a government and as individuals, are subject to administrative control. By and large, these measures constitute internal acts of discipline. In Nigeria, the body previously in control of appointments, transfer, promotion, dismissal and other disciplinary measures of police was the Nigeria Police Service Commission, established under articles 140, 194 to 196 of the Constitution of 1979. Its functions as noted above have been taken

80. MURDER OF DELE GIWA: THE RIGHT OF A PRIVATE PROSECUTOR (1988).

81. *See, for example*, *Uzodima v. Commissioner of Police*, 1 N.C.L.R. 325 (1982); *Onu-Obekpa v. Commissioner of Police*, 2 N.C.L.R. 240 (1982); *Folade v. Attorney General of Lagos State & Four Others*, 1 N.C.L.R. 270 (1982); *see also* MURDER OF DELE GIWA, *supra* note 80.

82. 2 All N.L.R. 69 (1964); *see also* *Chief Oyelakin Balogun v. Alhaju Busari Amubikhan*, 3 N.W.L.R. 27 (1985).

83. 1979 Z.L.R. 45.

84. 1979 Z.L.R. 352.

85. 1976 Z.L.R. 214.

over by the Police Council, reestablished by the Police (Miscellaneous Provisions) Decree, No. 5 of 1989.<sup>86</sup>

In Zambia, a similar administrative accountability under the Constitution is ensured by a Police and Prison Service Commission established in articles 130-134 of the Constitution of 1973. In both countries, administrative accountability by the Commissions (Nigeria, until the reinvestment of powers in the Council) is through annual reports to the public through the President as head of state.<sup>87</sup> Direct control of police through a Police Council in Nigeria, comprising the President as Commander in Chief of the Armed Forces, the Chief of General Staff, the Minister of Internal Affairs, and the Inspector-General of Police removes the civil service attributes of the Commission to reestablish the Council not only as part of military chain of command, but also infuses direct political interference in the affairs of police. Under this system, the issue is not so much accountability of police to an independent body within the executive branch of government, as direct administration and management of police in similar manner as the army, air force or other branches of the armed forces. Control is superseded by accountability.

In Zambia, exercise of disciplinary powers by the Zambia Police and Prison Service Commission led to the dismissal of 63 police officers and two demotions in 1979, 40 dismissals in 1980, 31 in 1981 and one demotion and 37 dismissals in 1982 with one discharge.

The new composition of the Nigeria Police Council combines policy formulation, administration and disciplinary control reposed in this body. Consistent with legislative policy, the hierarchical arrangement of the Force underwrites individual police accountability from least in rank up to the President as Commander in Chief of the Armed Forces. This is a feature common to both Nigeria and Zambia as in other countries of Sub-Saharan Africa. Administrative accountability is well documented under the Zambian system more than is the case in Nigeria.

We have acknowledged that the power of police to discharge their functions effectively under law requires discretion vested in them as individuals and as a units of government.<sup>88</sup> But these powers must always satisfy the requirements of guarantee and security of fundamental human

86. FED. REP. OF NIG. OFFICIAL GAZETTE, A39 (Feb. 8, 1989).

87. ZAMBIA POLICE ANN. REP. for the years 1974, 1976, 1980 and 1981 (1965 —) and POLICE AND PRISON SERVICE COMMISSION ANN. REP. for the Years 1979-1982 (1980 —); see also ANN. REP. OF THE NIGERIA POLICE FORCE 1926-1979.

88. *Police in Nigeria*, *supra* note 2.

rights of the individual. This is the responsibility or accountability of police as a unit of government and as individuals.

### **III. Comparative Human Rights Practices in Nigeria and Zambia and The Influence of Police and State Security Forces 1979-1980; 1982-1985 AND 1987<sup>89</sup>**

#### ***A. History, Development and Current Administration***

In both Nigeria and Zambia, as in other countries of Sub-Saharan Africa, formulation of fundamental human rights only formed part of constitutional mechanisms of these countries at independence. No instrument of constitutional orders in Nigeria from 1861 to 1954 and Zambia from 1889 to 1963 contained provisions of fundamental human rights as such. We have argued that this fundamental omission inherently contributed to the demise of the colonial society.<sup>90</sup> At independence however, prescription of basic rights of the individual, howbeit restricted, symbolized a new era in cognitive preservation of guaranteed human rights in Sub-Saharan Africa.

In the case of Nigeria, judicial notice must be taken of the fact that provisions on fundamental human rights then contained in Part IV of the Constitution of 1979 have at the time of writing continued to be abrogated by Decrees 1 and 2 of 1984. Despite their revocation, however, their contextual tenor and formulation are similar to those prescribed under the Constitution of Zambia. Therefore, highlight of fundamental human rights provisions in Zambia generally suffices to cover similar operational rights in Nigeria between 1979 to 1983. Both Nigeria and Zambia have been instrumental in formulating the Charter of Human and Peoples Rights adopted by the Heads of State of the Organization of African Unity (O.A.U.) on June 27, 1981, at Nairobi, Kenya.<sup>91</sup>

Articles 13 to 26 of the Zambian Constitution and 30-42 of the Constitution of Nigeria, 1979 secure basic rights and freedoms to life, liberty, dignity of the human person, privacy of the home and family life, freedom of expression and the press, peaceful assembly and association, freedom of movement, freedom from discrimination on grounds of race, affinity, gender, ethnicity, etc. and restrictions on compulsory

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89. Based on UNITED STATES, DEPT. OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES, for the years discussed.

90. *Police in Zambia*, *supra* note 2.

91. 91 INT'L LEGAL MATERIALS 58 (1982).

acquisition of private property. Where expropriation occurs, on grounds of eminent domain, compensation must be fair, equitable and promptly paid as reflected in article 40 of the Constitution of Nigeria. The peculiar feature of human rights provisions in Sub-Saharan Africa including Nigeria and Zambia is that complete enjoyment of fundamental human rights is either preempted or limited by specific restrictions also contained in the same provisions which secure guaranteed rights. These derogations to fundamental human rights are justified in the Constitutions based on national security, public order, public morality or for purposes of protecting the rights, interests and reputations of others. In Zambia, especially, fundamental human rights could be abridged at any time under article 26 of the Constitution, while similar provisions are also found in article 41 of the Constitution of Nigeria, 1979. In such cases, the victim of abuse must show that the laws or actions which vitiate his rights are not reasonably justifiable in a democratic society according to the Zambian Constitution. In Nigeria, reasonable justification to expunge rights only pertain to national emergencies. Under article 41 of the Nigerian Constitution, however, no measure instituted in such extraordinary circumstances of public emergency (except death in consequence of war) can deviate from the guarantee of rights to life and fair hearing.

Zambia has combined as well as deviated from the Nigerian method. Because the country has functioned under a state of emergency or semi-state of emergency since just before independence, the President enjoys overreaching powers to suspend the whole realm of human rights at any time. Once they are jettisoned, the onus is on the victim to show in a court of law that the action or law upon which such governmental action is predicated through police or state security forces were not reasonably justifiable in a democratic society. This is a heavier burden of proof than ordinarily required by normative rules of evidence.

### *B. New Horizons of Human Rights Law in Nigeria and Zambia*

We have opposed encroachment on fundamental human rights in both Nigeria and Zambia when based on goals of public domain. We have suggested instead complete and unbridled enjoyment of basic rights guaranteed under these Constitutions, except where they interfere with the rights of others including residual rights and interests of state.<sup>92</sup> In the case of rights and interests of states, however, these must be constrained

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92. *Police in Zambia*, *supra* note 2, at 236.

by the fundamentality of norms of individual human rights upon which they are founded. As regards the rights of others, a sizeable number of laws, rules and regulations especially the criminal law (though in need of reform) are already prevalent to ensure peaceful coexistence of law-abiding inhabitants of society as well as to secure the interests of state. In any case, fundamentality of the norms of human rights demands a reappraisal of prescriptive levels of formulation between guaranteed human rights and interests of state.

We have proposed that since norms regulating rights and interests of state are subordinate to and framed on the foundation created by norms of fundamental human rights, goals of public domain are juridically incompetent to abridge them. Therefore, considerations of national security, public order, welfare and others erected on fundamental human rights to protect the individual are *second-tier* prescriptive norms tracing their sanctity from the generality of norms of basic human rights. Therefore fundamental human rights must be incapable of state proscription by reference to its own powers, subordinate to the norms of fundamental human rights. Any restrictions by states to limit or curtail the complete enjoyment of fundamental human rights decimates the power base upon which the state is built.

The Constitution signifies an amalgam of diversity and yet is symbolic of the commonality of human spirit uniquely ascribed and reposed in each and every individual. This is the foundation of constitutional mechanism representative of the collective will of the people. In essence, this humanity or rights fundamentally inherent in this humanity can not be diminished in any way.

We concede that wrongdoing must be redressed through state apparatus erected for such purposes. However, formulation and erection of the institutional edifice are *second-tier* constructions supporting the amalgam of fundamental human rights. Therefore, even though the government is permitted on this *second-tier* level to act legally, it can only execute those functions which by their very fundamental nature are not prohibited. Since *The People* have declared that their individual rights are fundamental as sanctified in the Constitution, the government lacks the requisite authority to proclaim otherwise. Why? In our view, *The People*, under the fundamentality of their rights, create the government and state and not *vice versa*. Since the government is an instrument of *The People*, it can only carry out those specific functions not prohibited by *The People*. It is submitted that *The People* themselves have prohibited the government, state, police or state security forces from abridging fundamental human



rights except to affect such rights in the case of intrusion in other people's rights or that external threat or perils of tangible national emergencies are such that these rights must be affected. In the case of national emergencies, these are by their very nature transient and cannot be deemed to last more than a fixed term necessary to deal with this emergency. The continuation of this draconian power by the state is a flaw in Zambian constitutionalism.

We have argued that fundamental human rights enshrined in the Constitutions of Nigeria and Zambia are enunciated at levels way beyond that which it is permissible to restrict or derogate at the whim of the state. Thus, on this fundamental level no law or action of state can properly permit extinction of life, torture or other forms of cruel and unusual punishment or degrading treatment, deprivation of liberty, freedom to peaceful assembly and association, etc., as long as they do not impinge on the rights of others, notwithstanding considerations of national security, public welfare, public order or other policy justifications. Any such law or action is *ultra vires* the Constitution.

It is laudable to prescribe the following in the Constitution. First, that in the case of wrongdoing penalty is justified. Second, that stringent measures, enforced by a wide range of law enforcement agents, may be imposed to preserve the sovereignty of the state. Finally, that those members of that segment of the population whose role it is to preserve order (i.e. the police and the armed forces) must act only in a lawful, orderly and prescribed manner themselves.

This articulation is fundamentally at variance with pronouncements contained in the Constitutions of countries in Sub-Saharan Africa, including Nigeria and Zambia, that basic or fundamental human rights are secured while the state reserves itself power to determine when, where and whether they are indeed secured and protected and finally that they can be withdrawn at the discretion of political elites and other dominant classes. This is a negation of the concept of fundamentality, because human rights of the individual in our view are not discretionary at the instance of the state. They constitute the cornerstone for the founding of the state. The latter view signifies illegitimate usurpation of rights of individuals by a government or state by recourse to an erroneous application of state power and authority. In the former case, however, determination is one of *second-tier*, namely that under appropriate regimes of law such as the criminal law and laws applicable to armed forces, police and security forces, for purposes of preservation of public order and security (policy of a government), rights are bargainable to the extent that a wrong has been committed or that fundamental human rights may legally be affected in the permissible interaction between state and the

individual such as during a national public emergency. As long as proscription takes place at the fundamental level, the government has no power to take them away. However, the government, while it cannot abrogate fundamental human rights, legally can affect their enjoyment, *but* only at the level of *second tier* upon which the state is created, for example as provided by the criminal law. In other words, both the law and, action of the government must be consistent to the norms of fundamental human rights prescribed in the Constitution. If they offend the sanctity of fundamental human rights, either as contained in the Constitution or issued under it, they preempt the fundamentality of norms of human rights. This means that the policy of a government manifested in any law, or an act of such government based on this law, cannot take the place of fundamental human rights. Thus, the government cannot assert that human rights are supplanted because of a law on national security, public order, welfare, defense or simply because its action based on any such law is reasonably justified in a democratic society.<sup>93</sup> If that were permissible, we would risk and permit a totalitarian government responsive only to itself and not subject to the tenets of human rights upon which it is created.

On the other hand, the legitimacy of policy considerations to delimit complete enjoyment of fundamental human rights juridically find expression in *second-tier* norms predominantly formulated in the criminal laws and other measures of public order. These effectuate governmental policy addressing rights and interests inherent in state sovereignty, such as public order, treason, sedition, etc. They legitimately derive their authority from norms of fundamental human rights. However, norms of state sovereignty are not in our view designed to supersede the superiority of norms of fundamental human rights as the "mother lode" for the essence and function of state. Consequently, subjecting fundamental human rights to *second-tier* prescriptive norms is to undermine their organic nature as the most important part of constitutionalism.

An example of the concept of *second-tier* prescriptive level in the Constitution upon which rights of state are founded and its interests realized is the manifestation of the criminal law, especially principles of capital punishment.<sup>94</sup> We note that judicial sanctions to terminate an

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93. For details, see *id.* at 240. This proposition is confined to the functions of government in its domestic jurisdiction and does not extend to incidents of external aggression.

94. In August of 1988, Staff of the Law Library, Library of Congress, carried out a survey based on primary and secondary sources on the status of capital punishment around the world. That study indicates that 28 countries object to the death penalty, 18 others allow it for very exceptional

offender's life under the authority of laws of capital punishment reflecting the policy of a government must be distinguished from the fundamentality of life preserved under the Constitutions of Nigeria and of Zambia. Under these orders, this guaranteed life is fundamentally protected from state preemption. We maintain that policy considerations of a government determine whether capital punishment should be part of the criminal laws. However, the government is inherently incapable of fairly determining whether the life of a political activist who has not committed any criminal offense should be expunged and the circumstances under the Constitution upon which it is acceptable to terminate his life.

The Library of Congress Law Library study makes a distinction between political action by the government to suppress political dissent and bona fide criminal behavior which must be punished. This study strongly objects to the use of law, especially disguised as criminal law, to proscribe fundamental human rights of the individual. In this instance, the law is enacted to protect the subordinate rights of a government by subjugating the superior norms of fundamental human rights reposed in each and every individual. It is justifiable to affect this life under a second tier in the Constitution, upon which state and government are founded and coordinated. But since this second tier is subordinate to the organic norm of fundamental human rights on the primary level of constitutional formulation, this policy of the government can not contradict, diminish or preempt the organic norm of fundamental human rights from whence it derives its energy or its operational and functional powers. Therefore, a second tier norm of state and governmental foundation in the Constitution, policy of the government and law reflecting this policy can only enhance the fundamentality of the organic norm of human rights for it legitimately to affect rights of individuals. Any other pronouncement to the contrary negates the basis upon which second tier norms of society are founded, namely human rights of the individual.

In our view, fundamental human rights signify the embodiment of the totality of humanity uniquely reposed in each and every individual, and yet common to all. It is this commonality as the essence of life represented in the Collective Will of the People that is manifested in the Constitution. It must be immune from torture, detention, inhuman treatment, forced

labor or any other nocuous use of state powers. It must be free, unless in some way, it offends similar fundamental norm of human rights. In such a case, it enters the arena of second tier in which the State is predominate under the law of the land conscionable to the fundamentality of human rights.

Therefore, any enunciation and enshrinement by the State to justify preemption of fundamental human rights in specific instances by erroneous reference to the superiority of state sovereignty over fundamental human rights of the individual erodes their inherent sanctity and fundamentality. A formulation that they are repealable at the discretion of the state necessarily admits that death, torture and other forms of inhuman and degrading treatment or punishment are conscionable in these state-justified circumstances.

This proposition in our view is not only dangerously misguided, but also erroneous, morally corrupt and constitutionally unsound. It is the exact opposite from that which must be deemed meritorious, namely enunciation, declaration and enshrinement of the fundamentality of human rights in the most organic of all instruments, custom or practice in the state representing the collective will of the people. These pillars of government must safeguard, secure, preserve and recognize fundamental human rights. They must provide for their protection against abuse of any kind, including abuse by the state. Infringement and abuse of fundamental human rights is more ominous when executed obliquely or by a forceful display in the misuse of powers by the state executing acts, fundamentally prohibited by the organic nature of fundamental human rights recognized in the Constitution, erroneously predicated on regimes of national security, defence, public order or other considerations of public domain.

It is illegal for both the state, created under fundamentality of human rights in the Constitution, and the individual, enjoined in the affirmation of life through the Constitution, to derogate, abridge or infringe basic rights. The opinion here is that there appear to be no legally-justifiable instances in support of restriction, abrogation or preemption of fundamental human rights of the individual, in particular insertion of such restrictions or usurpation of individual rights on the same fundamental level of original conception, upon which only the fundamental norm itself is competent to operate. This fundamental norm cannot be preempted by itself, but rather by something greater than the norm of fundamental human rights. In our view, the constitution must reflect both the fellowship and nourishment of the human spirit expressed in the unity of divergent interests and yet similar fundamental human rights of each and every individual. It cannot be a representation of draconian entrenchment of

state rights and interests to the detriment of fundamental human rights of the individual.

We therefore maintain that sustenance of sovereignty and residual rights of state is only possible on one condition, namely that fundamental human rights of the individual are sacred and immune from incidents of state functionality. They must be respected and preserved at all times. No rights of state sovereignty, polity, association or organization or grouping of people are possible without this fundamental recognition of the sanctity of fundamental human rights of the individual. The "winds of change" currently sweeping Eastern Europe, the Soviet Union, South Africa and other totalitarian regimes around the world bear testimony in support of our proposition.

We concede and endorse the concept of punishment for wrongdoing especially when used to correct the antisocial elements of society, or to protect the constitutional shield of unity of the people in the state. The law and process providing for the concept of punishment in the State must be second tier, because of the level of state creation upon which they are predicated. Liability of inhabitants of society for wrongdoing is based on principles of "tacit agreement" between people of a state to be bound by societal norms. Lack of consent denotes freedom to claim exemption from these norms. Any such state of affairs requires dissenters to forego the benefits of organized polity and establishment of their own system of cohabitation or alternatively seek other methods of accommodation to forestall exclusion or expulsion from a particular polity. Either a different level of compliance is secured from these individuals or they are expendable, deemed outside the confines of pertinent structural organization of state marked by their inability to participate fully in the political process. It is proper, therefore, that trespass to the person or her property be specifically authorized and executed either by the state or the individual with the full sanction and compliance to fundamentality of the human rights tradition. Trespass on this compact by both individuals and the state on both fundamental and second tier levels invites the process of conciliation of rights and interests both public and private; but even the body of conciliation is also founded on the second tier level, permitting the government of a state to carry out functions as long as they are not fundamentally prohibited by the norm of human rights. Therefore, the state as an agent of the collective will of the people must also guard against intrusion by both the individual and the state. A number of qualifications to the proposition of an absolute concept of fundamental human rights on the fundamental level of constitutional orders are merited as follows.

First, our postulations are based on the understanding and appreciation that the joy of unrestricted freedom and liberty of the individual embodied in the splendor of human life must be the pillar of constructing structural patterns of state including incidents of state sovereignty. The very survival of the human family, whether as individuals, states, organizations, etc, must be erected on the fundamentality of individual human rights. Therefore, state sovereignty in all of its manifestations must be brought to an appreciable level of veneration of fundamental human rights. Tragic lessons of history occasioned by consistent disregard of this tenet serve as perpetual reminders of our vulnerability to machinations of state sovereignty conceptually unsupported under the organic norms of fundamental human rights. The fragility of fundamental human rights is especially revealed when they are abused. Their strength, therefore, must come from the vigilance of individuals to arrest sojourns in the private arena of fundamental human rights of the individual.

Second, we have alluded to the concept of capital punishment to delineate the policy attributes of this phenomenon from the fundamentality of life protected under these Constitutions. As a sanction imposed by the state, capital punishment is also second tier, not only because of the level of state rights and interest, but also because of attributes of policy reflected in a law issued by the government.

Third, our proposition excludes external interference with the normative function of domestic functionality of state sovereignty. Our proposition simply translates to a tenet that the essence of law is to safeguard and protect life and property built around it. An edifice of state to expunge life at this fundamental level must be construed as a flaw and a negation of the concept of fundamentality. Denial of fundamentality of human rights similarly denies the base of society. Thus, no legal reasoning about state sovereignty is important or fundamental enough to warrant the demise of the rule of law by extinction of life fundamentally protected. If any law at this fundamental level — as Constitutions of Sub-Saharan African import — permits the state or individual to tamper with life and basic rights derived from it, turbulence and chaos must accompany this formulation so as to destroy society.

To avoid withering and retain a dynamism in society, law preserves life first in a fundamental form. On a secondary level, however, influenced by incidents of policy reflecting residual rights and interests of state, law empowers tribunals of conciliation under protection of the collective will of the people (not the President or Head of State, Police or State Security Forces) to impose penalties as a remedy or redress of infringement, namely the bargaining process between the individual and the state. In the course

of this process, rights of the individual whether fundamental or not, are affected. They are affected as prescribed by law including termination of life in those countries which permit capital punishment. But even in the case of the death penalty, the decree of a court is not issued on the same level as the fundamental norm of human rights in the Constitution, but under it, on a second tier where the executive branch, the legislature and the courts and any instrument of power in the state are properly established and function.

Modern society calls for a reappraisal in emphasis of the human rights tradition to succinctly delineate the wide berth of individual rights and the rights and interests of state. The ignition to this reappraisal must necessarily be individualistic in its mobility and yet positively impacted by the momentum of individual awareness transcending national boundaries of state power demanding as of right complete sanctity of fundamental human rights. The growth process of both individual and state must incorporate a cognitive and conscious understanding of the visionary splendor of the human rights tradition. Once this appreciation is made, no one in our view is uniquely qualified and well equipped to protect against state transgressions of human rights more than the individual. Only after the achievement of such individual awareness can state instruments of power be oriented and compelled by a government based on the inviolable nature of fundamental rights of the individual.

We have argued that the demise of the colonial society as an enterprise of domination is in principle attributable to the prescriptive lack in recognition of fundamental human rights of the indigenous people in orders of governance. In our view, no consolidated power base equitably apportioning public and private rights and interests of all people in these societies could be advanced as their foundations in perpetuity. We have maintained that oblique or clandestine recourse by colonial governments to the fundamental human rights of the local people through the criminal laws, juridically misaligned their prescriptive levels of formulation in the Constitutions at independence and in the post-independence era. Incidents of criminal law and public order formed the basis of administration of justice as regards respect and enforcement of inarticulate norms of fundamental human rights as well.

Because no specific instrument of the Constitution, custom or practice at national state level was erected as a reference point of fundamental human rights of the indigenous people, no strong support as the pillar of the colonial structure was available for the sustenance of this form of society over time. It could have survived as long as "fundamental human rights" of settlers prescriptively or functionally could be extended to cover

the composite of basic rights of the local people. However, decadence of this structural edifice of colonial rule was inherent due to the very lack of normative recognition of fundamental rights of the local people in contradistinction to the commercial undercurrents upon which these societies were primarily founded.

Because fundamental rights enjoyed in the countries of colonizing powers are not extendable at the discretion of this polity, similar fundamental rights were required to be appropriated to the local people on the same level, content and character to sustain the resultant structures in the colonies and vanquished territories. It is the view, here, that fundamental human rights must always subsist in each of the inhabitant of society to provide a fountain and wellspring for the efficacious discharge of societal functions. Failure to ascribe this recognition in the fundamentality of rights inherently and *prima facie* spells prospective disintegration of society as constructed. Consequently, we are guided by this sentiment to postulate a vision that oppressive regimes erected outside the milieux of fundamental human rights must eventually give way to others solidly founded and built on their sanctity. In the case of Commonwealth Africa, it is a paradox that the long tradition and custom for the sanctity of the human rights tradition as the basis of society in the United Kingdom was not similarly extended until independence of British colonies. However, because of the already prevalent system to regulate basic rights subject to incidents of public domain, the level of prescription inserted in the independence Constitution of fundamental human rights intertwines both the fundamental level of norms of human rights and second tier level upon which state is created and functions.

We are encouraged by the fundamentality of human rights as the basis of state functions to visualize eradication of apartheid in South Africa and other oppressive regimes around the world based on the inner force and power of fundamental human rights themselves. The dignity of humanity in our view is such that it eventually must rise up in triumph.

In post-independent Sub-Saharan Africa, including Nigeria and Zambia, the formulation of fundamental human rights on the organic norm of the Constitution and their preemption by intertwinement of both the organic norm and *second-tier* levels of state functions follows the pattern of colonial formulations. But, because the second tier level is conceptually incapable of adversely affecting the organic norm of fundamental human rights, we continue to witness unwarranted conflicts and tensions between individual human rights and residual rights and interests of state. The two levels are closely connected to one another, except that the premodial characteristics of fundamental human rights are by their nature, formu-



lation and application the source of legitimacy of second tier norms (namely, state sovereignty, state rights, policy of a government and laws combining both policy and ostensible societal input to realize interests of state). It follows that a legislative measure, whether contained in the Constitution itself or issued under it, must be conscionable under the joy and merriment of norms of fundamental human rights in the Constitution. Any governmental measure which does not withstand the test of compliance with fundamental human rights is *null and void* (i.e. has no legal effect). It is invalid for its repugnancy to the supremacy of the Instrument representative of the collective will of the People. It is also profoundly illegitimate because it usurps and destroys the warm embrace and protection offered to all by the sanctity and fundamentality of human rights.

We hold, therefore, that there is no exception to the illegality of torture, forced labor, slavery and other forms of cruel and unusual treatment or punishment even for those who are incarcerated. Any labor or military service or punishment authorized by law is governed by numerous laws in Nigeria and Zambia to support state structures and consonant constitutional mechanism.<sup>95</sup>

Any singular torture, forced labor or punishment not authorized by law is prohibited under the provisions of fundamental human rights in the Constitutions. The view here is that there is no exception to the fundamentality of human rights so prescribed. This prohibition is reinforced by the numerous legislative enactments cited above. They also cater to the exigencies of national service, armed forces, defence, labor permissible as punishment and civic communal activities, etc. These are the

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95. Note, for example, statutory enactments in both Nigeria and Zambia relating to public order, state or national security, criminal law and others adequately safeguarding *second-tier* rights of others and also protecting rights and interests of state irrespective of the archaic nature of some of these measures. In Zambia for example, these include the Explosives Act 1929, ch. 106; Trading with the Enemy Act 1939 ch. 103; Public Order Act 1955, ch. 104; Societies Act, ch. 105; Preservation of Public Security Act 1964 and Regulations of 1960, ch. 106; Protected Places Act 1960, ch. 107; Emergency Powers Act 1960, ch. 108; State Security Act 1969, ch. 110 and the Fire Arms Act 1970 ch. 111 — all contained in 2 Laws of the Republic of Zambia (rev. ed. 1972). They are legitimate by virtue of bona fide incidents of state founded on the protection and preservation of fundamental human rights and not their derogation or abridgement by misapplication of powers inherent in state sovereignty. These laws are complimented by the Witchcraft Act 1914, ch. 145; Penal Code 1931, ch. 146; Probation of Offenders Act 1953, ch. 147; Suicide Act 1967, ch. 148; Zambia Police Act 1964, ch. 133; Police Reserve Act 1950, ch. 130; Defence Act 1964, ch. 131 — all contained in 3 Laws of the Republic of Zambia (rev. ed. 1972). Others include the Criminal procedure Code 1934, ch. 160; Extradition Act 1969, ch. 161; Extradition and Fugitive Offenders Act, ch. 162; Evidence Act 1967, ch. 170 — all published in 4 Laws of the Republic of Zambia (rev. ed. 1972) Similar legislation is available in Nigeria except for the Emergency Powers Act.

only legal instances for their execution in second tier formulation. But these measures do not permit institutions of the state to order torture, cruel and unusual punishment, forced labor, etc., on some theory that the State possesses unlimited license to do so obtained by recourse to its sovereignty under ostensible sanction of the organic norm of fundamental human rights. Such a proposition would be an illegal act of the State. It is because of this primary reason that the Constitution fundamentally prohibits these activities that second tier norms manifested in the above-cited legislation have been enacted to reinforce and enhance this fundamental prohibition. This prohibition is not only fundamental and constitutional, but also residual as well traced to any act or rule issued under the constitution.

All labor, military, police and other laws of public order prohibit negation of fundamental human rights. In case of violation, however, the state is permitted to apprehend and present the perpetrator before an appropriate tribunal established for such purposes by law. Neither can the tribunal impose a sentence prohibited under fundamental human rights. Such penalty is *null* and *void*, *ultra vires* the Constitution. On the contrary, stipulations in these measures attest to the following alternatives.

First, that in the case of infringement of rules therein contained for purposes of preservation of the welfare of people erected on fundamentality of rights under the sentinel of the state as an agent of the People, a person by reference to the compact of the People may be required by this agent of the People under authority of this Compact to render service to the State, because it is his duty as agreed to in the Collective Will of the People.

Second, that service to the state is reasonably required because the individual in the role as a public servant must render it. Third, that such service must be performed as punishment for transgressions on rights of others including the residual rights and interests of State. Fourth, that prevailing circumstances in the state, such as the transient conditions of national public emergency or an act of war, demand unequivocal deference to the needs of the State, etc. But these orders cannot be to discharge duties and obligations to the state which are illegal or unlawful under organic norms of fundamental human rights in the Constitution. Therefore, the armed forces, police or state security forces have no power to order torture or other forms of inhuman treatment in the interests of national security, defence, public order, or other justifications of eminent domain. Such an order or decree is fundamentally flawed as contrary to the spirit of sound constitutionalism offered by the organic norms of fundamental human rights. Consequently, police or other law enforcement agents must be penalized or sanctioned in case of violation of detainee

or prison rights. There appears to be no single lawful instance in which deprivation of liberty is justified without evidence of transgressions on similar rights of others. Where these occur, appropriate process and procedure in a formally-constituted and ordinarily recognized adjudicative tribunal must be utilized to conciliate and ameliorate conflicting rights and interests. On this fundamental level, in the Constitution there seems to be no single exception when preemption, derogation, or limitation of fundamental human rights are permissible in deference to the public interest, because the public interest and fundamental human rights are not on the same level. Since the public interest fundamentally must be traced from the organic norm of basic human rights of the individual, it is a lesser norm which must be subservient to the fundamentality of rights of individuals.

No single instance should lawfully be permissible, nor is it legal in the interest of national security, public defence or other public welfare justifications to abridge the fundamental human rights of the individual. If these public welfare interests are to protect the sanctity of the state in unity of the individual, then such public interests cannot legitimately be used to commit acts preempting the basis of what they are intended to protect, namely, rights of each and every individual united as one under the Constitution.

The entire argument is not only circuitous but also breeds absurd constitutional questions as well. It is illogical to argue for preservation of the public interest, if this public interest is in itself founded on protection of victims intended to be abused by instruments of the public or state, which in turn is an agent of each and every individual united as one.<sup>96</sup>

Continued sustenance of unity under the Constitution demands a fundamental adoption and embrace of the totality of the human rights tradition without exception as long as individuals do not traverse on similar rights of others including the subordinate rights and interests of state. If transgressions occur, the discourse is by implication second tier, a level cognizant of the majesty of State as an agent of the People. At this secondary level, they are subject to negotiations taking place between the individual and state. They are affected to the extent that action of the individual must be examined to ascertain and determine encroachment on similar individual rights or secondary rights and interests of State. Even on this secondary level, however, the act of state which affects

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96. See generally *Police in Zambia*, *supra* note 2.

individual rights cannot be illegal under the organic norm of fundamental human rights, the basis of Constitutional mechanism and the State. Furthermore, where corresponding fundamental human rights of others are infringed, many laws of a criminal nature mentioned above, delineating eminent domain and private rights in both Nigeria and Zambia, are sufficiently particularized to address these contingencies. It is important to separate the levels of formulation in the Constitution for a seasoned appreciation of the organic nature of fundamental human rights.

I submit that rights of the state and policy considerations affecting an instrument of this state function are consonant within the milieu of sound constitutionalism, *only* as long as they strictly comply and subordinated to the fundamentality of human rights upon which they are founded. More than anything, the fundamentality of human rights unified in its sanctuary by the Constitution manifests itself in the pronouncement: We the People are united by the delicacy and yet common thread of humanity. We the People endow ourselves with unbridled liberty to create a structural edifice called the State. This structure constitutes a trusted custodian or agent to whom we delegate specific functions of government. However, We the People specifically inscribe that the fundamentality of our humanity cannot be tampered with, because it is the basis upon which we have created this structure called the State. Therefore, these fundamental rights of Who we are as People are beyond the scope of incursions by the State, except as necessary to enforce and safeguard against transgressions by anyone of us including the State, united in this Covenant designated as the Constitution. Consequently, abrogation of this Covenant including the narrow rights of State founded on our fundamental human rights, but whose interests are varied and wide because of its functions to secure our rights as people, merits stringent sanctions.

This mandate in our view does not incorporate usurpation of individual rights by the State at its discretion. Unity of individuals as People is necessary for the establishment of a polity or other forms of association and organization such as the Nigerian and Zambian national states. The state and government are erected under the collective will of the people expressed in the Constitution in both their individual and collective capacities.

The collective will of the people and the totality of rights inherent in them are no more significant than rights of the individual who forms the nucleus of rights contained in this association. Therefore, collective rights of people are no more important but extensive because of the strength inherent in unity of purpose. However, the creator of unity is the individual at the center of all activities taking place in the polity

or organization. Therefore, creatures of this individual cannot claim to possess more than the unit which created them in the first place, namely the individual. An arrangement in which the state possesses more rights than the individual alters the source of state and governmental power and legitimacy to constitute the state and government as creators of the individual. . . This proposition is not only morally corrupt, but is also not consistent with the natural order of things. The Creator creates the individual, who in turn creates the state and government. The state and government constitute sanctioned custodians of the various units or conglomerate of individuals as people subject to their will as creators. A successful government. . . hinges on the proper understanding of this relationship.<sup>97</sup>

Consequently it must be deemed illegal for the state or government to inflict penalties against anyone whose conduct is not criminal and permissible under the norms of fundamental human rights, even though, it may be in conflict with or contradictory to governmental policy on the specific issue. The fact that a government executes certain foreign policy objectives does not render this particular governmental decision more appropriate than a personal view expressed by a citizen in the state. Therefore, opposition to such governmental measures by the individual or criticism of its policies does not make the individual a traitor to his country. It merely symbolizes the utility of free participation of the individual in the political process of her country which includes dissent or disagreement with the government of the day.

Insofar as the state and government do not permit the individual to transgress on the rights of others, they are also preempted from reserving to themselves rights which properly are within the province of individual rights. Neither are they permitted under the Constitution to share in the rights of the individual by reference to some specific restrictions or criteria to curtail complete enjoyment of fundamental human rights. The Constitution must recognize sanctions in case of infringement of rights as they appertain to other corresponding individual rights. Regarding rights and interests of state, these must be determined invariably predicated on preservation of the sanctity of individual rights and also to ensure continuity and superiority of fundamental human rights upon which state power finds expression.

We reiterate our views on abundance of other legislative measures noted above in support of basic norms of fundamental human rights. These enactments, however, are second tier, adequately providing for the

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97. *Police in Nigeria supra* note 2.

domain of sovereign rights and interests of the Nigerian and Zambian states. They also sufficiently safeguard against incursions on residual rights of others traced from norms of fundamental human rights. Others can and should always be formulated to meet new challenges of society, but should always be subjected to the organic norm of fundamental human rights. Sound constitutionalism is only possible if incidents of public domain are tested against the sanctity of fundamental human rights. If these rights are restricted in any way, we then concede a level of ordinary behavior capable of derogation at the whim and will of political and dominant classes in the state. But fundamental human rights are not theirs to subject to their discretion, determined at will whether they should be respected, enforced and preserved depending on the mood of these instruments of power in the state.

Fundamental human rights in our view must be so fundamentally recognized as an imperative for the very survival of the polity under them. Any other formulation to the contrary inherently indicates the transient nature of the polity created outside the sanction of fundamental human rights. This particular point is especially important for examination of the sustenance of the Zambian one party state for the past seventeen years. Without recognition and preservation of fundamental human rights, this form of government would have followed similar unsuccessful post-independent governments in Uganda, Lesotho, Central African Republic, Guinea and many others. This thesis does not by implication state that those states which have survived since independence completely adhere to the human rights tradition. It merely attests to the fact that in the case of Zambia with the personal commitment of President Kaunda to the human rights tradition, the system of one party state in this country has provided a relatively stable Zambian society notwithstanding the underlying inhibitions of the one party system of government. These inhibitions manifest themselves in limitations on full participation in the political process outside the ruling United National Independence Party (U.N.I.P.). In itself, this is a major flaw of any one party state. In the case of Zambia, it is compounded by continued exercise of emergency powers of the President reflected in detention of individuals on grounds of national security.

On the other hand, the inherent frustration of fundamental human rights and conflicts in Nigerian society immediately before and after independence prospectively identified the source of destruction of successive civilian and military governments, more especially during the post civil war era. Despite certain appreciable efforts of some of these governments to maintain effective control of the structural patterns of the

Nigerian state, these measures were conceptually negated by the very inscription common to military forms of government: that fundamental human rights are suspended or abrogated. Elimination of this fundamental tenet of society itself spells the interim nature of the government. The sanctuary of fundamental human rights is necessary for the perpetuation of the state edifice as long as instruments of power in the state ensure that they not only abide the fundamental norms of human rights of their people, but also that they will vigorously enforce laws prohibiting transgressions by anyone including the state apparatus on fundamental human rights of the individual. Concerning levels of formulation for fundamental human rights in the Nigerian and Zambian Constitutions (as in other countries of Sub-Saharan Africa), permitting their functional preponderance at this fundamental level and proscription similarly predicated (as it is on *second-tier* levels in these Constitutions and laws issued under them), offers some lessons in amorphous rule-formulation.

In their concurrent formulation both at the fundamental level and second tier prescription, we also render legislative drafting a mere repetitive exercise to rewrite normative rules already exhaustively regulated. Therefore, a government cannot justify derogation of these rights for example on freedom of movement due to extraordinary circumstances themselves contained in the Constitution, but because of the ordinary laws, rules and regulations or executive orders if properly issued under the Constitution regulating criminality which prescribe the lawful instances where these rights are bargainable. They are not bargainable in the constitution even on the level upon which state rights and interests are founded, (but *under* or outside the Constitution looking *into* the Constitution for guidance. The only time bargaining *on* the Constitution takes place is when there is a constitutional amendment. It is for this reason referenda are utilized to aggregate public and private rights and interests subject to fundamental human rights).<sup>98</sup>

It is also illogical for a basic law to secure and guarantee rights one had and then on the same level and in the same vein turn around and choke them and essentially take them away. It is either they are preserved and recognized to be fully enjoyed and any one who interferes with other enjoyments individually or collectively must be subjected to the already existing measures of criminal law balanced in a court of law under a process of determination of breach, the norms which have been infringed, the type of sanctions in case of guilt and the manner in which penalty

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98. *Id.*

will be carried out. Any government which operates under the Rule of Law must be subjected to this proposition. The celebration of the mystery of life demands that human rights be indeterminate in their fundamentality and visionary dimensions. Those who violate the law especially tread on the delicacy and yet the most protective shield of the individual against state incursions into his private life.

It is the view here that the sanctity of law be for the tranquility of the nation or other polity organized under organic norms of fundamental human rights. Law in any form cannot be for destruction and violence to the sacred nature of human rights of the individual, especially law in the Constitution which permits operatives of the state to infringe on fundamental human rights of the individual on some misguided notion of state sovereignty.

It is laudable for the Constitutions of Sub-Saharan Africa including Nigeria and Zambia, to ground authority for punishment in a subordinate law issued under the Constitution founded on the superior norm of fundamental human rights. Therefore, laws of treason, sedition, violence to peace and tranquility in their countries, security of the state and state of emergencies for a specific duration, namely general criminal laws or norms of public order as policy of a government, are legitimately functional as long as they do not offend the superiority of fundamental human rights upon which the state finds expression. A stipulation in their Constitutions that fundamental human rights are protected, but subordinated to public order, security and welfare, reveals the following: First, that conduct of a political activist which is not criminal under the norms of fundamental human rights may nevertheless be prosecuted as a criminal offense. This is where the conflict starts.

Second, because two different levels in sources of power have been fused, there is tension in the constitutional document itself. This tension is created by a misalignment of sources of authority for government action. In this instance, the government is wrong to provide for punishment of the political activist for any action which relates to the legitimate and full enjoyment of fundamental human rights, merely because the government does not agree with it. The action of the government is erroneous, because it appeals to the rights and powers of the state as superior to the norms of fundamental human rights of the individual. However, because human rights of the individual *are* supreme and provide the basis upon which the government is founded, we see the manifestation of this conflict in sources of power in the detention laws for non-criminal and political activities. It is the view here that this formulation of fundamental human rights as restricted is a rebellious act on the part of



the state as an agent of the people, or appropriately against We the People as its creator.

If exercise of fundamental human rights in limited modalities of Constitutions of Sub-Saharan Africa is fundamentally criminal in nature, then it properly must function on the second tier level of policy justifications where state and government are free to exercise reasonable control to enforce and balance rights of individuals. If they cannot equitably and justly perform this function of reasonable control to balance rights and interests both public and private, then a government established under the mandate of the Collective Will of the People, namely the Constitution, lacks the authority to continue to govern. Therefore, the State or Government is inherently incompetent to insert into the Constitution, Custom, Practice or any other organic law which provides for its establishment and function, measures which supersede the fundamentality of human rights of the individual. Such an exercise eliminates the basis of governmental function.

In essence, the juristic effect of attempts by constitutions of Commonwealth Africa [including Nigeria and Zambia] to limit full enjoyment of rights against diminished enjoyment sets these Constitutions against themselves to self destruct. Fundamentally, even this enunciation is also incorrect, because, there is only one source of organism for the enjoyment, namely the fundamental human rights provisions themselves. As such fundamental organisms cannot be used against themselves to prescribe and formulate liability. They must be tested against something else in the Constitution more superior than fundamental human rights. But because, there is nothing more fundamental than human rights under which rights and interests of state are founded, then everything else must draw their strength from fundamental human rights themselves unrestricted in any way.<sup>99</sup>

It is concluded therefore, that under the norms of fundamental human rights inscribed in the Constitution, no analytical or logical incident of limitation of rights can be advanced to preempt or restrict their fundamentality. They cannot concurrently be fundamentally formulated and simultaneously negated. In those permissible circumstances where they are affected, they are subjected to the process of negotiation as bargained between the state as an agent of the Collective Will of the People and the individual. It is in this sense that we reserve our commentary on the proposition of "peoples rights" in contradistinction to individual rights.

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99. *Id.*

Suffice to note that one of the tests for the consonance of either proposition is the principle of liability or responsibility for wrongdoing and penalties imposed as sanction.

It is rare that courts of law impose "people's punishments" except maybe as regards punishment imposed on states within the purview of regional or international groupings and associations, for example crimes of war. But even in these cases individual liability is determined first before an overall condemnation of the entire state. The point is: rights of people either as a unit or as a conglomerate stem from individual rights or the entity composed of a group designated as People. Once they are united, they function as one, not to the detriment of individual rights but to reinforce and enhance the fundamentality of the basis which united them in the first place, namely rights of the individual. But for this reason, that unity with others will ensure a better safeguard of individual rights, no one needs another person, group of people, a state, a region, sub-regions or the entire universe to come together to frustrate rights of this individual.

Where these rights are subject to negotiations between the individual and the state, this negotiation process takes place outside the scope of fundamentality of the norm of human rights, namely on the *second-tier* level at which the state as an agent of the people has authority to enter into such negotiations. The theater of negotiations is not even in the Constitution, but rather outside, looking into the Constitution. If bargaining were taking place on the Constitution, the individual and the state would be unequal partners in this process to the detriment of the individual. It also signifies alteration of the constitutional mechanism, because the Constitution is the "melting pot" in which the condiments of Life of People and that of the state are cooked at constant temperature. Negotiation on the Constitution simply means changing the nature of the Constitution. Thus negotiation between the state and the individual must be outside this instrument, seeking guidance from its norms such as the fundamental norms of human rights, second tier norms upon which the state is created, practice, process and procedural norms, norms of enforcement if any, etc. All of them must be consonant with the overall constitutional mechanism, and must especially be absolutely compliant to the fundamentality of norms of human rights. The new approach to the human rights tradition in the Constitutions of Commonwealth Africa generally and Nigeria and Zambia in particular espoused above, finds support in both the Nigerian and Zambian Constitutions. In Nigeria, Article 30(1) of the Constitution of 1979 provides:

*Every person has a right to life, and no one shall be deprived intentionally of his life save in the execution of the sentence of a court in respect of a criminal offence which he has been found guilty in Nigeria [emphasis supplied].*<sup>100</sup>

Similarly, article 14(1) of the Constitution of Zambia, states:

*No person shall be deprived of his life intentionally save in the 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 [emphasis added].*<sup>101</sup>

Under these provisions, outside the permissible circumstances, the taking of life by the state is illegal if carried out by the President, police, state security forces, the courts, or a private individual under ostensible authority of national security, public order, public welfare or morality. If the reason for taking a life be a criminal act by anyone, the taking must then be subjected to the requirements of these two provisions. The effect of these provisions, therefore, is that as long as the individual does not in any way interfere with the rights of others, the right to life is deemed outside the scope of public domain. Similarly, other fundamental human rights enumerated in these Constitutions are, without qualification, immune from incidents of national security, public welfare, defense, etc. in the same way as the fundamental right to life. In case of infringement of any kind whatsoever, the state must then take over to conciliate and effect enjoyment of rights through a process of negotiation involving the perpetrator and the state.

Because the state is merely custodian, the involvement of different branches of government ensures that representation and conciliation of conflicting private and public interests is carried out and executed by an entity independent of the fray between individuals or between individuals and the state. This arbiter must be an autonomous adjudicative tribunal specifically designed for this purpose. This process of negotiation is not only second tier, but also influenced by policy considerations of a government. It is the view here that no one should maintain a right whether as an instrument of power in the state or as an individual to be at liberty to abridge the fundamental human rights of another.

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100. NIG. CONST., art. 30(1), in *Nigeria*, CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert P. Blausten & Gisbert H. Flany eds. 1986), at 90.

101. ZAMBIA CONST., art. 14(1), in *Zambia*, CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert P. Blausten & Gisbert H. Flany eds. 1985), at 38.

Gross violations of human rights by tyrannical governments have been committed by deliberate misconstructions of constitutional sources of power for government action. They have improperly manipulated law to vest in themselves authority to abridge fundamental human rights. In our view, neither the Constitution nor any law properly issued under it vests such authority in any government.<sup>102</sup> Therefore, this paper calls for the removal of restrictions to complete enjoyment of fundamental human rights.

### *C. Comparative Analysis of Human Rights Practices in Nigeria and Zambia*

Our studies of human rights practices in both Nigeria and Zambia<sup>103</sup> have revealed the extent and nature of abuse of fundamental human rights in these two countries by police and state security forces. Significantly, however, no state-supported abuse of fundamental human rights in both countries has been reported.

In the case of Nigeria, however, Amnesty International documents indicate that hundreds of people have been executed in that country since the inception of military rule in 1983. For example, a number of executions are reported as follows: 6 in 1983; 355 in 1984; and 301 in 1985.<sup>104</sup> Though these figures do not indicate whether they include deaths caused by police or state security forces, they are a matter of grave concern and alarm in the process of preservation and security of fundamental human rights in Nigeria. Persistent reports by the press and other authorities also indicate abuse of human rights by police and state security forces in Nigeria.<sup>105</sup> Though these abuses have been proven, they appear to occur outside official sanction of government. Our research also reported systematic use of "brutal force" by police and the Nigeria Security Organization against those arrested, interrogated or detained.<sup>106</sup>

Furthermore, that research also indicates use of excessive force by police and state security forces when extracting confessions. Police and state security forces' mistreatment of prisoners or detainees or those under interrogations appears common. Consequently, the Ministry of Internal

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102. *Id.*

103. *Police in Zambia, supra* note 2, at 231.

104. AMNESTY INTERNATIONAL, NIGERIA: THE DEATH PENALTY (Feb. 1989: AFR 44/02/89). Ten members of the armed forces are also reported to have been executed in March of 1986.

105. *Police in Trouble, supra* note 58, at 28.

106. See generally Figure IV in *Police in Nigeria, supra* note 2, at 567-9.

Affairs announced in 1980 the creation of a Board of Inquiry to investigate treatment of persons in detention centers and prisons.<sup>107</sup> In 1987, police officers engaged in abuse of fundamental human rights were apprehended with a view to prosecution.<sup>108</sup> In addition, the murder of Dele Giwa in 1986 by a parcel bomb believed to have been caused by the Nigeria State Security Service (SSS) also affected the picture of Nigerian human rights during the course of the 1980s.<sup>109</sup> It is also true that the quality of human rights must necessarily be affected by the system of military rule as reflected in such promulgations as Decrees 1 and 2 of 1984.

In Zambia, the functionality of the one party state is in itself restrictive of the right to complete freedom to participate in the political process of the state outside the parameters of party politics. The right to political participation is not dependent on the rights of a state and its interests to organize people in a certain fashion, but subsists on itself independently, founded on the fundamentality of human rights themselves. Therefore, political participation within the confines of one party rule is not a *sine qua non* for freedom to unrestricted participation in the political process of any state based on incidents of citizenship and inhabitancy in a state. Regimes of party politics are founded on the latter and not on the former.

It is my view that an individual within the purview of the absolute concept of fundamental human rights espoused above must be at liberty to participate in the political process of any state in which she is a member, notwithstanding that she does not belong to any political party in the country. This right is as fundamental and cardinal as others for this member of society to find justification for belonging to a particular polity. Since no one covered by the collective will of the people, namely the Constitution, is excludable in any way from participation in the political process, incidents of party politics must always be cognizant of the fact that political rights of the individual, as long as they are legal under norms of fundamental human rights, are premodial to the function of state rights and interests founded in second tier norms. If anything, this is the fundamental flaw in the system of the one party form of government.

Participation in the political process for any member of society is not discretionary at the instance of a government or political elites and other

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107. UNITED STATES DEPT. OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES 1980, at 194 (1984).

108. *Police in Nigeria*, *supra* note 2.

109. 1976 Z.L.R. 136.

dominant classes in power. It constitutes the cornerstone of being part of the polity or organization in the first place. But for this right, no one in essence needs to associate with anyone else. Once this association takes place (not the association reflected by a government, but association of people in the state), participation in the function of this association becomes the barometer to indicate the level of day-to-day consent to be bound by norms of this association. It is because of this sentiment and commitment to unrestricted participation in the political process of Zambia that we have encouraged and endorsed pluralism taking place today in the country's political system.<sup>110</sup> More than ever, events in Eastern Europe have proven this commentary more than welcome and imperative.

Prevailing regimes of national public emergency since just before independence vest wide discretion in the President, police and state security forces to suspend and interfere with enjoyment of fundamental human rights. These powers are only possible in a system in which the executive branch of government is supported by a system of political patronage inherent in any system of one party form of government. Our research indicates consistent allegations of abuse of fundamental human rights of detainees, prisoners or those arrested by use of brutal force by police, state security forces or prison officials, especially in cases dealing with national security.<sup>111</sup> As noted above, this type of abuse is common to both Nigeria and Zambia and merits further governmental and scholarly investigations.

The courts in Zambia must generally be commended for their rejection of statements and confessions obtained under duress. Their practice of awarding compensation in proven cases of abuse by police and state security forces is also a welcome judicial remedy in narrowing expansive modalities of detention powers. This practice must always constitute an integral component of judicial review of administrative action. Mistreatment of prisoners or detainees was the subject of a proposed meeting in 1985 under the auspices of the Director of Public Prosecutions. Reports of unsanitary prison conditions are an identical problem for both Zambia and Nigeria. They provide fertile grounds of abuse of inmates' basic rights by law enforcement agents.

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110. Today Zambia is a multi-party state following the activism of the Multi-Party Movement and other opposition groups in the country. Official government measures leading to multi-party rule in Zambia are reflected, for example, in REPUBLIC OF ZAMBIA NATIONAL ASSEMBLY, REPORT OF THE SPECIAL PARLIAMENTARY SELECT COMM., APPOINTED MONDAY, JULY 9, 1990, at 1-45 (1990). For details, see generally *Police in Nigeria*, *supra* note 2, at 33 and 41.

111. *Police in Zambia*, *supra* note 2, at 238.

#### IV. Conclusion

In this comparative analysis, a number of propositions have been espoused relative to the absolute concept of fundamental human rights in the organism of state formation and their constitutional prescription in both Zambia and Nigeria. Furthermore, we have also contoured parameters of mandate of police and state security forces in their roles, functions and duties for efficacious preponderance of sound constitutionalism in these countries based on the principle of *reasonable control*. We have emphasized this principle as a requisite balance between the mandate of police and state security forces in their law enforcement functions and the tranquility of an environment, political, cultural, economic, social, etc., for peaceful enjoyment of fundamental human rights.

We concede that the nature of contemporary national states characterized by diffuse and conflicting interests necessitates an effective and efficient machinery of law enforcement. It has been cautioned, however, that this machinery of law enforcement must be focused primarily on the proper law enforcement function of police and state security forces accountable to the collective will of the people by a unit or organ in the state ordinarily representative of their will. Invariably, this body has traditionally meant the legislature or any of its component bodies. We have discouraged and strongly opposed regime protection by police and state security forces by which these law enforcement agents as instruments of power of state are subjected to political control. We have urged their establishment and constitution as primary tools of law directly responsive to the Collective Will of the People and not as operatives of political and dominant classes.

In both Nigeria and Zambia, as in other parts of Sub-Saharan Africa, functions of law enforcement agents are complicated by general developmental problems of these countries, which *inter alia*, pertain to rising populations, urbanization and conflicting ethos of social stratification. Social change is as much a factor as regimes of law and practice of police and state security forces.

In Zambia, a general respect of fundamental human rights is more prevalent than in Nigeria since the inception of military rule, notwithstanding that the state functions under a one party form of government. Therefore, evaluation of performance of police and state security forces as they affect fundamental human rights cannot be divorced from the political systems currently obtaining in these countries, in particular, military rule in Nigeria. This observation also validates our earlier articulation that accountability of law enforcement agents is primarily constitutional in nature.

In Zambia, an examination of human rights practices as affected by police and state security forces largely reveals the strength of the executive presidency of President Kaunda and his personal commitment to the human rights tradition. This commitment is not institutionalized so as to demand a similar commitment by others within the party and government hierarchy. It continues as long as the personal commitment of the President endures and not because the system of the one party state is such that it is primarily founded on the fundamentality of norms of fundamental human rights. This postulate finds support in article 13 of the Zambian Constitution as the premier article formulating security of fundamental human rights and freedoms. It states:

It is recognized and declared that every person in Zambia has been and shall continue to be entitled to the fundamental human rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, *political opinions*, colour, creed or sex, but subject to the limitations contained in article 4 and this part . . . .<sup>112</sup> [Emphasis added.]

Article 4 of the Constitution stipulated:

*There shall be one and only one political party or organization in Zambia, namely the United National Independence Party . . . . Nothing contained in this Constitution shall be construed as to entitle any person lawfully to form or attempt to form any political party or organization other than the Party or belong to or assemble or associate with or express opinion or do any other thing in sympathy with such political party or organization.*<sup>113</sup> [Emphasis added.]

It is submitted that Article 4 was not only formatively contradictory, but also reflected sustained confusion to consider fundamental human rights as second tier and discretionary at the will of political elites and other dominant classes. If fundamental human rights as recognized in the Zambian Constitution were deemed formulated on the organic norm offered by fundamentality of human rights in the Constitution, therefore institutionally secured, Article 4 finds no basis upon which it can be predicated and would be considered *null* and *void* fundamental human rights norms of the Constitution. However, because of the then prevailing one party state and continuous exercise of emergency powers since just before independence, exercise of these extensive powers has been the

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112. ZAMBIA CONST., art.13, in *Zambia*, CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert P. Blausten & Gisbert H. Flany eds. 1985), at 38.

113. *Id.* at 34.



primary cause of abuse of fundamental human rights of detainees, prisoners and those under interrogations by police and state security forces, especially as regards matters of national security.

Because of the fundamental elimination of the legislature as the power broker of executive powers in any system of one party state, such powers compliment the strong position of the executive branch to the detriment of consonant development of law and the political process. Therefore, the system of policing cannot entirely be divorced from the deeply rooted intertwinement with the nature and system of the government of the time. It is probable therefore, that the extent to which fundamental human rights of any society are respected by law enforcement agents largely depends on freedom and democratic ideals of the state in which they function as instruments of power. Therefore, reorientation to the new approach of human rights proposed above must commence with the fundamental reappraisal of systems of government in Sub-Saharan Africa including Nigeria and Zambia. In Zambia, this review supports the termination of the one party state. It also calls for the repeal of laws providing continuous applicability of powers of detention derived from regimes of national public emergency. These powers must necessarily be restrained in the hands of the President, police and state security forces.

In Nigeria, we are gratified by the imminent return of civil rule in 1992. This process will address some of our concerns by the operative effects of detention laws and suspension of fundamental human rights under Decrees 1 and 2 of 1984.

In both countries, as in other parts of Sub-Saharan Africa, police and state security forces must also be conscientized in the value and wealth of the human rights tradition. In these countries, no challenge to their systems of government is as formidable as the one presented by ensuring general education for all in the proper understanding and appreciation of the absolute nature of fundamental human rights of the individual. Correspondingly, a free society must always facilitate a better understanding of the relationship between the state and the individual including police, state security forces, political and dominant classes themselves. As individuals, they have no better rights than the rest of individuals in the state. It is the strong belief here that law enforcement agents must function humanely first before they function as instruments of power in the state. Therefore, they must, in similar manner to that of the rest of the inhabitants in society, fully understand and adhere to the beauty offered by the human rights tradition.