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A Focus on Politics of Human Rights in the Midst of *Nolle Prosequi* at Kamwala Remand Prison in Zambia: The Bad, The Good and The Rhetoric

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Abstract

This paper aims at analysing the reasons for human rights abuses in Zambia. To do this, the paper used the validity of Allen Buchanan ^[1] arguments applied in Zambia, at *Kamwala* remand prison, that says: “*in The Heart of Human Rights law, is that it possesses a strength that allows it to govern issues that were traditionally within the jurisdiction of the state, such as how it treats its own citizens.*” With a posterior knowledge of numerous efforts to address human rights violation at *Kamwala* remand prison, nothing progressive has been done due to the unequal enforcement of the *Nolle* law. This because, in Zambia, citizens assumed that protection of human rights is a mere and empty rhetoric by the state because, they are accused as being both the primary guarantor and abuser of human rights to citizens. Mostly, the state has been accused as the abuser in the unfair application of the *Nolle prosequi* law towards political opponents, which is a significant concern to the socio-legal development approach in Zambia. To the Zambians, the *Nolle prosequi* law is mere rhetoric used by the state in their quest to persuade the Zambian people about the rule of law. The opposition political parties affirm the unfair application of the *Nolle Prosequi* principle especially in criminal matters by citing decisions to discontinue certain criminal charges before the court coming from the President of the Republic or from the Minister of Justice, with a very few number of insignificant cases being *Nolle* prosed by the State Counsel or the Attorney General. This confirms how

the Zambian Executive has a strong influence over the Judiciary contrary to the Principle of Separation of Powers as propounded by Aristotle in his Book “*Politics*”. This act validates the significant gaps in the socio-legal framework, which perpetuates inequalities, even with the human rights principles available in the post-independence constitutions of Zambia. Therefore, one wonders how human rights that have typically been viewed under international law as embodying interests that are natural, universal or human can be upheld in the midst of the *Nolle* law that is constantly abused by the state authorities in Zambia.

Methodologically, the paper used a qualitative method of analysis to identify unfair practices sustaining human right abuses linked to the unfair execution of the *Nolle* towards inmates at *Kamwala* correctional facility in Zambia. Theoretically, the paper was guided by compliance theories. These approaches underpinned enforcement strategies, seeking to coerce states into compliance, through sanctions, material inducement or name-and-shame strategies. The paper brings to bare issues that prevent human rights compliance such as through the unjust application of the *Nolle*, corruption and bureaucracy by state institutions. The study postulates that the enhancement of a national protection system in each country, reflecting national and international human rights norms, should be the principal objective of the Zambian government.

Keywords: Human Rights, *Nolle Prosequi*, Corruption, Compliance Theories, Political Rhetoric

1. Introduction

Human rights are commonly understood as inalienable fundamental rights to which a person is inherently entitled simply because she or he is a human being¹ Generally, human rights are commonly understood as the rights that are inherent in every human being. Unfortunately, in Zambia, there is a contention to this argument, due to the unfair application of the *Nolle*

¹ Sepúlveda, Theo van Banning Guadrún, Gudmunds, Dóttir *et al*, (2004) Human rights reference hand book.

prosequi law by the government accused of applying the law on its citizens selectively². But, this is considered impossible due to the unfair application of the *Nolle* law for the accused. This is despite the belief behind the concept of human rights that states that every individual is entitled to enjoy their rights without any form of discrimination. There are two key differences between human rights and other rights. Firstly, human rights are inherent in all human beings solely by virtue of their humanity. This means that they do not need to be purchased or granted, and they are equally inalienable within certain legal boundaries. Additionally, human rights are applicable to all individuals. Secondly, the primary responsibility for upholding and enforcing human rights lies with states and their authorities or agents, rather than with individuals. It is important to note that human rights must be protected by law, ensuring the rule of law³. Furthermore, any disputes about these rights should be submitted for adjudication through a competent, impartial and independent tribunal, applying procedures which ensure full equality and fairness to all the parties, and determining the question in accordance with clear, specific and pre-existing laws, known to the public and openly declared.

The idea of basic rights originated from the need to protect the individual against the arbitrary use of state power. Therefore, attention was initially focused on those rights which oblige governments to refrain from certain actions. Human rights in this category are generally referred to as 'fundamental freedoms'. As human rights are viewed as a precondition for leading a dignified human existence, they serve as a guide and touchstone for legislation. The specific nature of human rights, as an essential precondition for human development, implies that they can have a bearing on relations both between the individual and the state, and between individuals themselves. The individual state relationship is known as the "vertical effect" of human rights. While the primary purpose of human rights is to establish rules for relations between the individual and the state, several of these rights can also have implications for relations among individuals. This so-called "horizontal effect" implies, among other things, that a government not only has an obligation to refrain from violating human rights, but also has a duty to protect the individual from infringements by other individuals. The right to life means that the government must strive to protect people against homicide by their fellow human beings. Similarly, Article 17(1) and (2) of the international Covenant on Civil and political rights (ICCPR) obliges governments to protect individuals against unlawful interference with their privacy. Another typical example is the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), which obliges states to prevent racial discrimination between human beings. State obligations regarding human rights may involve desisting from certain actions such as arbitrary arrest of citizens. This infers that

² Phiri Chidongo (2022) Internal strategies and mechanisms of combating corruption: The *Nolle Prosequi* phenomenon in Zambia International Journal of Advanced Multidisciplinary Research and Studies.

³ See Phiri Chidongo (2022) Internal strategies and mechanisms of combating corruption: The *Nolle Prosequi* phenomenon in Zambia. International Journal of Advanced Multidisciplinary Research and Studies. Int. j. adv. multidisc. res. stud. 2022; 2(4):188-193

rights are typically viewed as embodying natural, universal, or human natural interests. Unfortunately, the advent of identity politics in Zambia fundamentally disrupts this universalizing and objectifying tendency of rights, due to unfair application of the *Nolle prosequi* a subsidiary law in legal discourse, emphasizing not to arbitrary prosecute individuals and groups in Zambia. The commonly held understanding of the *Nolle prosequi* phenomenon by the Zambian people is that it is abuse of authority in the form of racketeering by state prosecutors and business executives⁴. From observation, one issue affecting the attainment of the sustainable development goals in Zambia is the selective enforcement of the *Nolle prosequi* law contained in the CPC. Of particular concern is an assumption that evoking the *Nolle* of the penal code, Chapter 87 of the laws of Zambia and the international law has exacerbated human rights abuse by the state.

2. *Nolle prosequi*

The phrase *Nolle prosequi* is a Latin one which can be transposed into English as "I do not want to Prosecute, or I do not want to continue the prosecution". *Nolle* is a Common Law practice of allowing a litigant to terminate or discontinue proceedings in court before final judgment that is evoked unfairly. That is, where a plaintiff or prosecutor no longer wants to continue with the court action against the defendant, it becomes necessary to have the proceedings terminated through a legal process, called *Nolle prosequi*. Therefore, it is a declaration by the prosecutor/plaintiff that civil or criminal proceedings will not continue. *Nolle Prosequi* owes its origin as far back as 1675, in the Common Law tradition in England. A technique by which the Attorney General terminated proceedings in court, by entering into the record of proceedings his declaration not to continue prosecution of an accused or defendant, or not to prosecute some of the charges against the defendant, or not to prosecute one or more defendants of an offence committed jointly. This practice applies both in criminal and civil matters in Zambia. The principle has become very significant and mostly used in criminal matters. Britain as a colonial master extended the *Nolle* law to her colonies as a legal tradition under the Common Law. Zambia, as a former mandated territory under the administration of Britain, inherited the *Nolle* legal tradition under the Common Law.

3. Human rights

In agreement with Sen⁵ this article suggest the need for political freedom which guarantees economic development and good governance practice everywhere in the world. Originally, human rights may be found both in Greek philosophy and the various world religions. For example, in the Age of Enlightenment in the 18th century the concept of human rights emerged as an explicit category. Man and woman came to be seen as an autonomous individual, endowed by nature with certain inalienable rights. The fundamental rights that could be invoked against a

⁴ Phiri Chidongo (2022) Internal strategies and mechanisms of combating corruption: *The Nolle Prosequi* phenomenon in Zambia. International Journal of Advanced Multidisciplinary Research and Studies. Int. j. adv. multidisc. res. stud. 2022; 2(4):188-193

⁵ See Sen A (1992). *Inequality Re-examined*, Oxford: University Press, 1992

government and should be safeguarded by it. Henceforth, human rights were seen as elementary preconditions for an existence worthy of human dignity. Before this period, several charters codifying rights and freedoms had been drawn up constituting important steps towards the idea of human rights. The first were the Magna Charta Libertatum of 1215, the Golden Bull of Hungary (1222), the Danish Erik Klippings Håndfaestning of 1282, the Joyeuse Entrée of 1356 in Brabant (Brussels), the Union of Utrecht of 1579 (The Netherlands) and the English Bill of Rights of 1689. These documents specified rights, which could be claimed in the light of particular circumstances such as threats to the freedom of religion, but they did not yet contain an all-embracing philosophical concept of individual liberty. Freedoms were often seen as rights conferred upon to individuals or groups by virtue of their rank or status. In the centuries after the Middle Ages, the concept of liberty became gradually separated from status and came to be seen not as a privilege but as a right of all human beings. Spanish theologians and jurists played a prominent role in this context. Among the former, the work of Francisco de Vitoria (1486-1546) and Bartolomé de las Casas (1474-1566) should be highlighted. These two men laid the (doctrinal) foundation for the recognition of freedom and dignity of all humans by defending the personal rights of the indigenous peoples inhabiting the territories colonised by the Spanish Crown.

4. Problem statement

The problem statement is simply: what can be done to make the law of *Nolle prosequi* more equitable and socially justifiable in terms of human rights promotion in Zambia? Simply what is bad, good and rhetorical application of the *Nolle prosequi* law to human right in Zambia. There are cases where the authorities have been accused of human rights abuses due to the selective enforcement of the *Nolle prosequi* law. This is because, worldwide, the retention of the *Nolle prosequi* law has evoked growing debates in most commonwealth jurisdictions in Africa inclusive. Most Zambians, have complained about the unfair application of the *Nolle prosequi* law, arguing it is being used as a political strategy and mechanism to “punish” and “silence” political opponents, rather than it, to curb corruption, it stifles human rights for the citizens. Most human rights watch organisations have argued strongly about its bad implication on human rights for political opponents in Zambia. Therefore, does this mean that when it is unjustly evoked facilitates the stifling of human rights for the accused in Zambia? In agreement with Mensah⁶, who argued that the DPP has powers to enter *Nolle prosequi* in any matter that is deemed right confirms the biases in the enforcement of *Nolle prosequi* and how it has basically been abused in Zambia.

5. Objectives and delimitation of the paper.

The overarching objective of the paper is to analyze human rights abuse at *Kamwala* Correctional facility in the midst of the unfair application of the *Nolle prosequi* law. The paper

⁶ Mensah Kwadwo Boateng (2006). Discretion, Nolle Prosequi and the 1992 Ghanaian Constitution. Journal of African Law. School of Oriental and African Studies. Stable, 50 (1):47-58.

relies upon a two-fold postulate. First, this evolution cannot be understood in isolation from the wider normative disputes over ideal models for public management, with new governance currently serving as a dominant ideology. Second, these correctional institutional arrangements must be understood within the context of their diffusion and practice, in particular how they transform, and are transformed by, national public authorities. As such, the paper sought to answer three questions:

1. What is the effect of *Nolle prosequi* law to human rights in Zambia?
2. How do these human rights abuses inflict with wider institutional models and redefine strategies for the advancement of human rights?
3. What are the effects of these abuses on human rights practices in Zambia?

To answer these questions, the paper took a distinctly socio-legal approach, and identified two legal and two empirical case studies in the Zambia's correctional facilities. The socio-legal concepts are human rights and *Nolle prosequi* laws. In relation to question (2), I delved into the 2006 Convention on the Rights of the accused as a catalytic moment in the institutional turn of international human rights law

6. Justification of the paper

Rights are typically viewed as embodying interests that are natural, universal or human. This universalizing and objectifying tendency of rights is fundamentally disrupted by the advent of identity in legal discourse in Zambia. For example, the selective enforcement of the *Nolle prosequi* law has proven to be disruptive to certain people's rights in many African states. This author assessed and provided solutions to mitigate the effects of the *Nolle prosequi* law. Simply, the overriding justification for this paper stems from the continued persistence of human rights abuse by the state mirrored in the *Nolle prosequi* law in Zambia. The study is particularly relevant in the face of wide abuse of human rights using the law on *Nolle prosequi*. Given a focus on human rights mirrored in *Nolle prosequi*, the bad, the good and the rhetoric, the paper filled a gap in knowledge on the socio-legal process in Zambia.

7. Theoretical framework: Compliance theories

In recent years, theorists have explored three main approaches for explaining the complex factors and mechanisms that determine compliance⁷. According to Etteinne, compliance is the extent to which the target populations behave the way policymakers expect them to.⁸ This means that the utilitarian standard is not the GRZ own greatest happiness, but the greatest amount of happiness for society altogether. Simply, it is ascribing to the preferred enjoyment, a superiority in quality, outweighing quantity in terms of the social norms of society. This is in comparison to small account of people. For this paper, compliance theory was approached from the perspective of social norms as standard ethics for the Zambian people. This approach highlighted ceremonial conformity, which echoes ritualistic compliance rather than for the greater good of the majority. For instance, the Republican President of Zambia, Mr.

⁷ Etteinne Julien, in Revue française de science politique Volume 60, Issue 3, 2010, pages 493

⁸ Ibid (2010), pages 493.

Hichilema's pronouncement to observe the rule of law is indicative of ceremonial conformity than social reality. Only a few are released under *Nolle* law than a greater good of all. Arguably, compliance theory on this paper provided a reference point to explain the perpetuation of human rights abuses at *Kamwala* remand prison mirrored in *Nolle prosequi* law. There are several typologies of compliance theories under the socio-legal studies, namely; the game and utilitarian⁹ theories. The GRZ non-compliance to the game and utilitarian theories is anchored on upholding human rights is due to masking intentions of upholding these human rights. This because, the state has a mixture of motivations in the application of the *Nolle* law, which mainly is not to foster human rights for those incarcerated at *Kamwala* but to gain political favours from citizens. For example, compliance theories by the state have helped the United party for National development (UPND) to maximize political gains than minimize losses in the execution of the *Nolle* law. This ascertains the reason why the GRZ has insignificant compliance statistics of upholding human rights for political opponents. All human rights principles are ignored as the *Nolle* law is applied. Of concern is GRZ unfair application of the *Nolle prosequi* for the utility good of their popular morality. A notable example in the exercise of the *Nolle prosequi* law in recent times by the DPP intervention in case of Milimo Lungu¹⁰ and Mrs Mumbi Phiri incarcerated for more than seven months. This confirms how the non-compliance theory of utilitarianism affects political opponents through the unfairly enforcement of *Nolle* to political opponents at *Kamwala* remand prison. It is quite obvious that the principle of utility is more desirable and more valuable for others than everybody. Therefore, it is quiet true that quality (i.e., in the eyes GRZ) is considered morally right than quantity, for political correctness of the ruling party than upholding human rights.

8. Methodology

Given the nature of this topic, the methodology chosen was the one that is 'continuous'. The article encapsulated a qualitative research methodology¹¹. Simply, qualitative and an "on-going" one to allow the topic for a systematic follow up on the critical processes as they unfold over time, which enabled the collection of data specific from institutions. Thus, the development of the tools was an iterative process in which inductive results were subjected to discussions and modifications depending on the findings at the end of each phase of the paper. Succinctly, the author employed ethnographic approach and reflectivity analysis to investigate real human right abuses mirrored in *Nolle prosequi* at *Kamwala* remand prison. Therefore, the methodology adopted for this study is purely qualitative. The research methods adopted in accomplishing this

methodology are the doctrinal research method and the interview of key informants on the subject. The doctrinal research method consists of the content analysis of primary and secondary data. The primary data include the constitution of 1996 and the Criminal Procedure Code of 2005. All these processes were important in the disseminations of results. This implies that; the overarching methodology was the qualitative (i.e. interviews, site visits and focus groups respectively). By implication, the approach was oriented towards accompaniment ethos and participatory techniques with activities focusing on both the learning and capacity improvements of the participant's knowledge and skills so as to maximise utilization and ownership of the entire processes. These methods were applied within the framework of the following tools: questionnaire and learning charts as well as field visits. Even though, largely the study used qualitative methods, throughout this approach that was very rigorous and use forms of triangulations to validate information. There are obviously some numerical victim targets and milestones that were examined and the scales of the interventions and the extent to which these have been achieved. It is these numerical targets that may entail that a limited sample of project beneficiaries were contacted to accurately determine the impact of *Nolle prosequi* on human rights in Zambia.

9. Literature review: The Zambian Nolle Prosequi law and Human rights

The *Nolle prosequi* law in the Criminal Procedure Code (CPC) Zambia allows the DPP's power to enter a *Nolle prosequi* found in section 88 of the laws of Zambia. It states that: in any trial before a subordinate court, any Public Prosecutor may, with the consent of the court or on the instructions of the Director of Public Prosecutions (DPP), at any time before judgment is pronounced, withdraw from the prosecution of any person; and upon such withdrawal (a) If it is made before the accused person is called upon to make his defence, he shall be discharged, but such discharge of an accused person shall not operate as a bar to subsequent proceedings against him on account of the same facts; (b) If it is made after the accused person is called upon to make his defence, he shall be acquitted. A notable example of the exercise of this power in recent times by the DPP intervention in case of Milimo Lungu the provisional liquidator involving the insolvency of KCM in 2021¹². It should be noted that most Zambians consider *Nolle prosequi* as the preserve to friends of prosecutors. Nevertheless, there are notable differences between *Nolle prosequi* and criminal withdraw. For example, in agreement with Mensah¹³ (2006) a *Nolle prosequi* can be entered at any criminal trial. Yet, according to section 88 of the penal code of Zambia, withdrawals can only occur at district magistrates' courts. Equally, only the DPP or his delegate can enter a *Nolle prosequi*. Any prosecutor either with the consent of the Attorney-General, the DPP or the consent of the trial court can only enter a withdrawal. Further, they have different consequences. The effect of a *Nolle prosequi* is a discharge of the accused person only but what extent does the law on

⁹ Mill John Stuart, *Utilitarianism*. Floating press, (2009). From an 1879 edition. ISBN 978-1-775410-61-4

¹⁰ Phiri Chidongo (2022), Internal strategies and mechanisms of combating corruption: The *Nolle Prosequi* phenomenon in Zambia. International Journal of Advanced Multidisciplinary Research and Studies. Int. j. adv. multidisc. res. study.; 2(4):188-193

¹¹ See Chidongo Phiri, *et al* (2023) Corruption-Violence Against Women in Zambia and Lesotho Correctional Facilities of Abettors and Heroines. International journal of Research DOI: 10.51584/IJRIAS.2023.8609

¹² News diggers (2022).

¹³ Mensah Kwadwo Boateng. (2006) Discretion, Nolle Prosequi and the 1992 Ghanaian Constitution. Journal of African Law. School of Oriental and African Studies. Stable, 50 (1):47-58

Nolle affect people's human rights in Zambia? The effect of a withdrawal could be a discharge or an acquittal depending on the stage the trial reached before the withdrawal was entered. It is important to note the similarities between these two procedures in the criminal legal process. This is because, both procedures involve the exercise of discretion. The conventional assumption in Zambia is that both powers of criminal withdraw and *Nolle prosequi* are not subject to judicial review because they are applied only to political opponents or friends. Arguably, this study dealt specifically with human rights issues for those affected in Correctional facilities in the affected by the unequal enforcement of the *Nolle prosequi* law in Zambia.

9.1 Global human rights provisions and the *Nolle Prosequi* law.

First, the 1990s were marked by the end of the Cold War and the establishment of new democracies. In this context, the "logics and expectations of human rights coalesced into the world's only supernormativity"¹⁴, becoming the language of transitions, reforms and state building. What is clear is that human rights issues are contentious globally. For instance, according to Tony Evans¹⁵, in his book "the politics of human Rights: A global Perspective", emphasises power relations and the legitimization of dominant interests as the cause of many human rights violations that are found in the structures of the global political economy. And, that human rights now legitimate the economic actors and practices at the heart of globalisation to abuse these rights rather than supporting the interests of the vulnerable. Globalisation frames human rights as its contemporary setting ('all issues of global politics must be subordinated to the imperatives of globalization. For Phiri¹⁶ Globalisation is interpreted in many ways by various scholars and researchers. For instance, Mazrui interprets globalisation in three divergent ways, namely; economic interdependency across vast distances, information availability and movement across vast distances and reduction of the world into a global village¹⁷. Therefore, this assertion is supported by John Montgomery, a professor in public administration and development studies, began his 1999 piece on the "Administration of Human Rights" by stating that human rights administration is globally practiced in modern life that it is not perceived as a special field of study¹⁸. He highlights the complexity, universality, and ubiquity of human rights

globally as critical problems that any study on the matter faces. He also emphasizes the difficulty and contentious nature of studying the politics of 'human rights issues' worldwide, as well as the inherent ambivalence of states as both guarantors and abusers of human right. The responsibility for human rights is "so pervasive that no single department can take responsibility for human rights as a whole worldwide," even when a specialised agency exists. Studying the politics of 'human rights abuse' is not only difficult, it is also contentious worldwide¹⁹. A daunting conundrum for researchers is the inherent ambivalence of the state that they are both the primary guarantors and abusers of human rights. For instance, the decision to prosecute is the most problematic role of the prosecutor. In line with Mbewe²⁰ citing Mwalili stated that unlike other areas of the law where it is possible to resort to reported or unreported authorities, there are no such authorities to guide a prosecutor in reaching a decision to mount a prosecution or not²¹. To address this fundamental issue, one inmate at *Kamwala* remand prison suggested to separate the examination of protective and abusive aspects reflected in the *Nolle law*. And that government should concentrate on rule making rather than hold discretionary political powers that seems to abuse the *Nolle prosequi* law. This is against the feasibility and desirability of these distinctions being a matter of debate. One debatable issue in the presence of *Nolle prosequi* law, is that it is used as a tool of abuse and oppression of inmates rights, rather than what its substantive function which states that, "it will no further prosecute the case, either to some of the defendants, if jointly charged, or altogether"²². For instance, interviews with those affected revealed that there is a common notion among the inmates at *Kamwala* remand prison that the universality of human rights does not exist in the practical implementation sense. Further, in agreement with Koskeniemi²³, government of the Republic of Zambia feels that incorporation of human rights into reality practices is seen as a takeover of political discourse by a bureaucratic jargon," where inmates use rights as tools to enhance their own positions while downplaying the *Nolle prosequi* law. This confirms the abuse of human rights at *Kamwala* remand prison in Zambia being grossly misapplied.

10. Discussion of findings

¹⁴ See Mark Goodale (2006) *The Practice of Human Rights: Tracking Law between the Global and the Local*. Cambridge: Cambridge University Press, Human values and moral exclusion

¹⁵ See Tony Evan (2005) *The Politics of Human Rights: A Global Perspective: Human Security in the Global Economy*. Pluto Press. Pp.176-
<https://www.jstor.org/stable/j.ctt18fsb9g>:
<https://doi.org/10.2307/j.ctt18fsb9g>

¹⁶ See Phiri (2020) Exploring the Concept of Globalization and its Effects on Women's Lives at *Kulamba* Traditional Ceremony for the Chewa Speaking People of Zambia. *Journal of Lexicography and Terminology*. Volume 2, Issue 1. pp 83-108

¹⁷Ibid, (2020), p85

¹⁸ John W. Montgomery (2005) *Human Rights and Human Dignity*. Canadian Institute for Law, Theology & Public; 2nd edition

¹⁹ Ibid, (2005), p 20

²⁰ Mbewe, Chazunga Jacob (2018) *Review of the Constitutional Powers of the Director of Public Prosecutions and Public Protector in Zambia: A Case Study Dissertation Paper* (May 20, 2018). Available at SSRN: <https://ssrn.com/abstract=3758963> or <http://dx.doi.org/10.2139/ssrn.3758963>

²¹ Mwalili, John Jonathan (2002), *The Role and Function of Prosecutors in Criminal Justice*, p.3

²² See the black law dictionary available at: <https://thelawdictionary.org/nolle-prosequi> which states that *Nolle prosequi* is a formal entry upon the record, by the plaintiff in a civil suit or the prosecuting officer in a criminal action, by which he declares that he "will no further prosecute" the case, either as to some of the counts, or some of the defendants, or altogether

²³ See Koskeniemi M (1999, p99). *international law and hegemony: A Reconfiguration*. *The Modern Law Review*.

10.1 The challenge of *Nolle Prosequi* enforcement in Zambia

The article argues that human rights can be achieved with fair enforcement of the *Nolle prosequi* law. The effect of *Nolle prosequi* is on the people of Zambia is that; those affected by it have no much choice to contribute to the reduction of human right abuse because of not being members of the political elite. The question is: who are the political elites in Zambia? In developed democracies such as Zambia, political elites are elected representatives who stand at the top of the political decision making pyramid. These have influence to benefit those that are aligned to them. By design, they are authorized and required to regularly make decisions that affect the lives of millions, at all levels of government²⁴. For example, the anti-corruption Act of Parliament, the Forfeiture of Proceeds of Crime Act of 2010 which provides for the confiscation of the proceeds of crime, the deprivation of any person of any proceed, benefit or property derived from the commission of any serious offence and facilitates the tracing of any proceed, benefit and property derived from the commission of any serious offence. The ACC charges any person suspected to have benefited from proceeds of crime and forfeiture them to the state. Domestically, these are called; non-conviction-based forfeiture. Unfortunately, the beneficially to these non-conviction forfeitures are elites perceived to be part of the executive organ of government. For instance, the Director of Public Prosecutions (DPP), Gilbert Phiri applied for non-conviction-based (NCB) forfeiture order of property believed to have been acquired through criminal activity. Among the properties involved in the above case are 15 flats belonging to the former First Lady of Zambia, Madam Esther Lungu; Crest Lodge in Ibex Hill belonging to Charles Phiri and lawyer Chiyeso Lungu; a house, three flats and a poultry belonging to Chiyeso Lungu; land in Ibex Hill belonging to Charles Phiri and a farm in Sinda district of the Eastern Province, belonging to Honourable Tasila Lungu, the patriotic front (PF) member of Parliament for Chawama Constituency²⁵. Yet, a similar offense, committed by Milimo Lungu, the government entered a *Nolle prosequi*, confirming the abuse of citizen's human rights by the unfair application the of the *Nolle law* evoking it on political opponents in Zambia. This confirms how the *Nolle prosequi* law is increasingly showing a danger of unregulated discretion of public prosecutors in Zambia²⁶. The *Nolle* law provides an effective avenue for the abuse of human rights in Zambia, even though, it should be noted that human rights records in most post-colonial states are somewhat similar. This is in

agreement with Welch²⁷ observation that the histories of most African states are similar, generally involving European colonization. They have common characteristics such as: despotic, post-colonial and underdeveloped socially and economically. Interviews with inmates at *Kamwala* remand prison concerning *Nolle prosequi* revealed that inmate experiences with *Nolle prosequi*, attributed its abuse to post-colonial historical past in Zambia. Nevertheless, it is good and important to understand the legal consequences of entering a *Nolle prosequi* before judgment is delivered. For instance, the discontinuance of criminal proceedings shall be without prejudice to their reinstatement when this becomes necessary. This simply means entering a *Nolle Prosequi* and releasing the accused does not stop the state prosecutor from reopening or reinstating criminal proceedings against the same accused. This is so because a *Nolle Prosequi* is not an acquittal; rather, entering a *Nolle Prosequi* simply means leaving matters as if charges were never filed. This affirms the significance of the *Nolle prosequi*, a key principle to any legal system in Zambia. However, the practical reality, from observation and discussion with those affected at *Kamwala* remand prison is that magistrates will enter a *Nolle* based on "cronyism" and social relations especially when the affected is a politician connected to those in the ruling elite. For instance, in agreement with Phiri²⁸ citing Begley, Khatrii and Tsang²⁹, cronyism is the practice of partiality in awarding jobs and other advantages to friends or trusted colleagues, especially in politics and some organizations.

10.1.1 The challenges of *Nolle prosequi* under international law principles: Classical and Social rights

The principle of *Nolle prosequi* law was first introduced into the domestic laws of Zambia in the Criminal Procedure Code. Sadly, the unfair application of the *Nolle* principle has had negatively affected human rights in Zambia. One classification that the *Nolle* law has been applied unfairly is the division of both classic and social rights. "Classic rights" are those that require the non-intervention of the state (negative obligation), and "social rights" as requiring active intervention on the part of the state (positive obligations). In other words, classic rights entail an obligation for the state to refrain from certain actions, while social rights oblige the state to provide certain guarantees. Lawyers often describe classic rights in terms of a duty to achieve a given result (obligation of result) and social rights in terms of a duty to provide the means (obligations of conduct).

The evolution of international law, has led to this distinction between "classic" and "social" rights becoming increasingly awkward. Classic rights, such as civil and political rights often require considerable investment by the state. The state does not merely have the obligation to respect these rights, but must also guarantee that people can effectively enjoy

²⁴ Sheffer.A. (2018) American Political Science Review, Volume.112, Issue 2, pp. 302–321DOI: <https://doi.org/10.1017/S0003055417000569>

²⁵ Muyebe Alex (2023). Non-Conviction Based Forfeiture of Assets as a Tool to Fight Corruption: Some Policy Considerations *Jesuit centre for theological reflection* 3813 Martin Mwamba Road, Olympia Park P.O Box 37774, 10101 Lusaka, Zambia.

²⁶ Phiri Chidongo (2022) Internal strategies and mechanisms of combating corruption: The *Nolle Prosequi* phenomenon in Zambia. International Journal of Advanced Multidisciplinary Research and Studies. nt. j. adv. multidisc. res. stud. 2022; 2(4):188-193

²⁷ Claude e. welch, protecting human rights in Africa: strategies and roles of non-governmental organizations. Philadelphia: university of Pennsylvania press, 1995. xiii + 356 pp

²⁸ See Chidongo Phiri (2017) the social act of exchange in power relations: a study of the phenomenon of Nichekeleko at the weighbridges (wbs) in Zambia Ph.D. Thesis. Available at <http://etd.uwc.ac.za/>

²⁹ See Begley. T and Tsang N 2010. Network and cronyism. A social exchange analysis. Asia pacific. Journal of management27; pp28-39

them. Nevertheless, these rights have never been fully enjoyed by people in Zambia. A case in point is the release of the former Patriotic Front (PF) deputy secretary general Mumbi Phiri who was set free after the state entered a *Nolle Prosequi* in a murder case where she was jointly charged with former President Edgar Lungu's barber Shebby Chilekwa. In agreement with Slater, who argued that: "the claim to human rights protection is not being made in a vacuum but within the current system of international law, hence, the right to a fair trial"³⁰. Nevertheless, the lack of well-trained and experienced judges, prosecutors, lawyers and police officers, as well as administrative support has made the rights of the accused to a speed and fair trial abused in Zambia. For instance, Ms Mumbi Phiri's social and classical rights that entitled her to a fair trial was ignored by the state when it entered *Nolle* against her. Simply, on an individual level, women accept the violence due to economic, physical psychological and unequal power relations that they suffer and are rarely recognized for their heroine act of succumbing to the experience³¹ hence the violation of human rights in the midst of the *Nolle* law. This confirms the bad side of the *Nolle* law in that the accused rights were ignored, and she was not considered to be a person because she could not exercise a capacity to choose to proceed with criminal trial. Her personhood was not protected as a human being, despite remaining as a person denied by the state entering *Nolle* which undermining her fundamental human rights and freedoms as stated in the Zambian constitution part 111 (1) b of 1996. Further, it undermined the principle of non-discrimination of rights to any person as the utmost importance in international law. Equally, this is against the various formulations of prohibition of discrimination as contained in, for example, the UN Charter (Articles 1(3), 13(1)(b), 55(c) and 76), the Universal Declaration of Human Rights (Articles 2 and 7), the ICCPR (Articles 2(1) and 26) and the CRC (Article 2)³² which Zambia is a signatory to.

Another Human rights abuse affected by *Nolle* is based on the legitimate political rights enjoyed by citizens who oppose the regime in place. These citizens are arrested and detained without thorough state investigation, indicative of the bad side of *Nolle* law. For example, Mr. Given Lubinda, was acquitted for being in possession of property likely to be proceeds of crime³³. This is an example where, in order to secure the accused release from detention, had to succumb to the terms and conditions of the UPND regime before the state entered a *Nolle prosequi* by dropping charges. This is in agreement with Phiri, who argues that the other core reason for the persistence of human rights abuse mirrored to the *Nolle prosequi* law is the weakening strategy and mechanism in prisons to combat corruption that lies in

"social justice theory"³⁴. For Phiri, this infers that all people should be treated equally in relation to receiving social benefits that are available in their lives. To the contrary, inmates at *Kamwala* remand prison are unequally treated. This gives insights to the government insincerity in the provision of social benefits to the accused. By implication, the government action of being insincere is rhetorical. In this case, the term rhetoric pertains to vacuous, insincere speech or simply political "spin"³⁵, as reflected in the English expressions such as "mere rhetoric," "empty rhetoric," or "rhetorical question." For example, the President of the Republic of Zambia Mr. Hakainde Hichilema is quoted by saying that he will govern the country based on "the rule of law"³⁶. But to many minds in Zambia, the President's pronouncement on the rule of law are associated with an idea of empty declamation, or of dishonest artifice. In agreement with Browne & Dickson³⁷; McCrisken, or Easterly & Williamson and Hehir, on rhetoric, the President's pronouncements on the rule of law is simply rhetoric and a science of "speaking well" For instance, the effect of entering a *Nolle prosequi* is the discretion of the Director of Public Prosecutions (DPP) which has led to raucous abuse of the powers on *Nolle* by the former DPP, Mr. Mutembo Nchito who entered a *Nolle Prosequi* in his own case contrary to the long held principles of public interest and the protection of the rule of law in the criminal court. This is an example of political rhetorical, where on paper, the language used is that the Government of the Republic of Zambia (GRZ) is committed to the rule of law, and yet in reality, this is vacuous, insincere speech or simply political "spin" as stated by Partington³⁸. From focus group discussion with inmates at *Kamwala* remand prison: on current and previous ruling political power, they responded by stating that: "every government that has assumed political power in Zambia has employed rhetoric at every moment through the use of invisible signs or symbols." The slogan of *Don't Kubeba*" meaning shut up was a political slogan by the former ruling political party the patriotic front (PF) government. In lexical area, the slogan is interpreted as a reflection of human rights abuse, conducted through torture. This has some effect on human rights to the ordinary people. However, as in agreement with Gill and Whedbee noted, it is commonly knowledge that "the essential activities of rhetoric are located on a political stage"³⁹. In the case of Zambia, these activities are located in

³⁰ Slater Daskhar (2023) *The True Story of a Racist Social Media Account and the Teenagers Whose Lives It Changed* Slater. Farrar, Straus and Giroux (BYR) ISBN9780374314347

³¹ Phiri Chidongo, Milupi Inonge, Mokone Musi *et al* (2023) *Corruption-Violence Against Women in Zambia and Lesotho Correctional Facilities of Abettors and Heroines*.

³² See Magdalena Sepúlveda Theo van Banning Gudrún D. Gudmundsdóttir Christine Chamoun and Willem J.M. van Genugten. (2004) *Human rights reference handbook*

³³ News diggers (2024),

³⁴ See Phiri Chidongo, Kalisto Kalimaposo, Daka Harrison Daka *et al* (2024) *Unmasking Corruption-Fraud in the Compensation Systems of Zambia: A Case of Retirements on Medical Grounds*. International Journal of Research and Scientific Innovation 11(5):511 – 519 DOI: 10.51244/IJRSI.2024.1105034

³⁵ See Partington Allan (2003) *The linguistics of political argument: The spin-doctor and the wolf-pack at the White House*. London, England: Routledge.

³⁶ See News diggers (2021)

³⁷ Browne, J., & Dickson, E. (2010). "We don't talk to terrorists": On the rhetoric and practice of secret negotiations. *Journal of Conflict Resolution*, 54, 379-407

³⁸ See Partington, Allan. (2003) *linguistics of political Argument*. London: Routledge

³⁹ Gill, A., & Whedbee, K. (1997). *Rhetoric*. In T. A. van Dijk (Ed), *Discourse as structure and process*. pp.157-184. London, Sage

the unfair application of *Nolle* law to the opposition political persons, violating their right to a fair trial.

10.1.2 The Public Order Act and *Nolle prosequi* Human rights challenges in Zambia

The African Charter on Human and Peoples' Rights (African Charter) includes specific economic, social, and cultural rights in articles 2, 14-18, 20-22, and 24. These rights encompass freedom from discrimination, property rights, equitable and satisfactory working conditions, good health, education, child rights protection, self-determination, existence, freedom of assembly and development, among others. The African Commission on Human and Peoples' Rights (African Commission) has deemed these rights justiciable under article 45 of the African Charter. But the full enjoyment of these rights have been affected by the unclear clauses allowing the Zambia police the suspension of these rights. For example, under Chapter 113 (4) of the laws of Zambia where it states that: "Every person who intends to assemble or convene a public meeting, procession or demonstration shall give police at least seven days' notice of that person's intention to assemble or convene such a meeting, procession or demonstration"⁴⁰. This shows how the ideals of freedom of assembly, justice and equality are faulted in the Zambian constitution. Those who ignore the Zambia police (ZP) are arrested for an law assembly contrary to part III (11), a, b, and c of the Zambian constitution on fundamental rights and freedoms of individuals. Sadly, the arbitrary arrested of individuals by the Zambia Police is an act of ignoring the constitutional supremacy. The problem of unclear interpretation clauses of the public order Act, affecting human rights is also compounded by the unfair application of the *Nolle prosequi* in Zambia. Therefore, this means that the public order Act (POA) and the *Nolle* law entire existence and running is not guided by the tenets of the Constitution that has a direct effect on human rights. For instance, In the landmark case of *Thomas Mumba v The People*, on emphasising Constitutional supremacy, The High court held that;

The Anti-Corruption Act of 1980 is in direct conflict of the Constitution, as the Constitution is the supreme law of the land. Any Act of the legislature that contradicts the constitution is null and void. The Anti-Corruption Act of 1980, Section 53(1) is hereby nullified and struck down from the statute books.

A failure to uphold these constitutional provisions by the high court judgement increases the risk of inadvertently infringing on the human dignity of communities and individuals with existing fundamental freedoms rights, as well as on their individual and collective sense of self-determination as members of Zambian society. Unfortunately, the constitutional provisions are infringed upon by evoking the *Nolle* law as well.

Another challenge established by this article is the corruption in the political spaces of Zambia that has made the *Nolle prosequi* abused by the state machinery. This is where one needs to pay something in return for participating in politics. According to Phiri the Zambian people think that politics is about "corruption in the form of racketeering and abuse of authority" by the political parties and business executives of the party that fuels it. While some lower organ party officials pointed out that corruption was rife during

primary elections, senior party officials also confirmed that they did receive allegations of corruption during the adoption process. When investigating the spread of corruption in political parties, Phiri observed one issue affecting the attainment of the sustainable development goals that have excluded women from participation in politics in Zambia is the selective enforcement of the *Nolle prosequi* law contained in the criminal procedure act (CPC). A constituency official revealed that there was usually payment of bribes localized as the *Nichekeleko* phenomenon to the candidate selecting committee members by aspiring candidates. The commonly held understanding of *Nichekeleko* by the Zambian people is that it is corruption, ranging from bribery, theft, embezzlement, and gratification to favouritism⁴¹

11. Conclusion

The field of human rights in Africa is strewn with political complex package. Equally, the general principles of law occupy an important place in case-law regarding human rights. A clear example is the principle of proportionality, which is important for human rights organizations to assess whether interference with a human right may be justified. This paper has shown that human rights are interfered with due to the unfair application of the *Nolle prosequi* law in Zambia. For instance, the paper has applied the non-conviction-based (NCB) forfeiture order of property believed to have been acquired through criminal activity as examples of human rights abuse in Zambia. Further, it highlights the prosecutorial discretion as a central component of the criminal justice system in Zambia which is unfair. The article, has further added that that human rights law requires the reconstruction of societies and redefinition of it in Zambia to reflect local versions of what rights are. Equally, that the government of the Republic of Zambia (GRZ) should create a culture that values diversity and inclusion, where everyone's human right topic contributions are respected and appreciated⁴² to avoid being perceived as mere rhetoric in its application in upholding the rule of law. Additionally, that inmates at *Kamwala* remand prison should be encouraged to network and build relationships with colleagues in other correctional facilities and leaders in their field to avoid being discharged using the *Nolle prosequi* law.

12. References

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⁴² Kalumba, M., Daka, H., Kalimaposo, K., Phiri, C., Mulenga-Hagane, L. M., & Mugala, A. (2023). Navigation Strategies by Women into Decision-Making Positions in the Ministry of Education, Zambia. *European Journal of Development Studies*, 3(3), 147–155. <https://doi.org/10.24018/ejdevelop.2023.3.3.276>

⁴⁰ See Mbewe Chazunga Jacob (2006) Electronic copy available at: <https://ssrn.com/abstract=3758963>