

**23 April - 7 May 2001**  
**Communication No. 211/98**

**AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS**  
**Twenty-Ninth Ordinary Session**  
**23 April - 7 May 2001**

**LEGAL RESOURCES FOUNDATION**

**v.**  
**ZAMBIA**

**DECISION**

**BEFORE:** CHAIRMAN: E.V.O. Dankwa  
VICE CHAIRMAN: K. Rezag-Bara  
COMMISSIONERS: A. Badawi El Sheikh, Isaac Nguema, N. Barney Pityana, H. Ben Salem, J. Ondziel-Gnelenga, A. Raganayi Chigovera, Vera M. Chirwa, Jainaba John

**Citation:** Legal Resources Found. v. Zambia, Comm. 211/98, 14th ACHPR AAR Annex V (2000-2001)

**Publications:** IHRDA, Compilation of Decisions on Communications of the African Commission On Human and Peoples' Rights Extracted from the Commission's Activity Reports 1994-2001, at 382 (2002); Documents of the African Commission on Human and Peoples' Rights, Vol. 2, at 284 (Malcolm D. Evans & Rachel Murray eds., 2009); (2001) AHRLR 84 (ACHPR 2001)

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**RAPPORTEUR**

23rd Session: Commissioner Nyameko Pityana

24th Session: Commissioner Nyameko Pityana

25th Session: Commissioner Nyameko Pityana

26th Session: Commissioner Nyameko Pityana

27th Session: Commissioner Nyameko Pityana

28th Session: Commissioner Nyameko Pityana

29th Session: Commissioner Nyameko Pityana

## SUMMARY OF FACTS

1. The Complainant, an NGO that has Observer Status with the African Commission and is based in Zambia, is bringing this complaint against a State Party to the Charter, Zambia.

2. The Complainant alleges that the Zambian Government has enacted into law, a constitution which is discriminatory, divisive and violates the human rights of 35 percent of the entire population. The Constitution (Amendment) Act of 1996, it is alleged, has not only violated the rights of its citizens, but has also taken away the accrued rights of other citizens, including the first President, Dr. Kenneth Kaunda.

3. The Complainant alleges that the said Constitution of Zambia Amendment Act of 1996 provides inter- alia, that anyone who wants to contest the office of the president has to prove that both parents are/were Zambians by birth or descent.

4. Article 35 of the said Constitution Amendment Act further provides that nobody who has served two five-year terms as President shall be eligible for re-election to that office.

5. Complainant alleges that the amended constitutional provisions are in contravention of international human rights instruments in general and the African Charter on Human and Peoples' Rights in particular.

6. Complainant has taken the case to the Supreme Court of Zambia between May and August 1996 seeking:

- A declaration that Articles 34 and 35 of the amended Constitution are discriminatory.
- A declaration that Parliament lacks the power to adopt a new constitution; and
- An injunction restraining the President from assenting to the constitution.

7. Complainant alleges that while the case was pending in court, the ruling party dominated parliament went ahead to adopt and enact the controversial constitution which the President assented to one week later.

8. The Complainant's case was therefore thrown out of court.

9. The Supreme Court of Zambia is the highest Court of jurisdiction in the land, thus all local remedies have been exhausted.

## COMPLAINT

10. The Complainant alleges that the following provisions of the African Charter have been violated;

- Article 2 - which prohibits discrimination of any kind including place of birth, social origin and other status;

- Article 3 - which provides for the equality of all individuals before the law;
- Article 13 - which guarantees every citizen the right to participate freely in the government of his or her country;
- Article 19 - which provides for the equality of all peoples, irrespective of their place of origin etc.

## PROCEDURE

11. The communication is dated 12th February 1998.
12. On the 10th March 1998, the Secretariat sent a letter acknowledging receipt of the complaint.
13. At its 23rd ordinary session held in Banjul, The Gambia from 20th to 29th April 1998, the Commission decided to be seized of this case and requested further information in order to decide on admissibility at the next session.
14. On 25th June 1998, the Secretariat sent letters to the parties notifying them of the Commission's decision.
15. At its 24th ordinary session held in Banjul, The Gambia from 22nd to 31st October 1998, the Commission postponed consideration of admissibility of the communication to the 25th ordinary session and instructed the Secretariat to request more information from the Parties.
16. On 26th November 1998, the Secretariat informed the Parties of the decision accordingly.
17. At its 25th ordinary session held in Bujumbura, Burundi, the Commission declared the communication admissible and postponed its consideration on the merit to the 26th ordinary session.
18. On 13th May 1999, the Secretariat of the Commission notified the parties of this decision.
19. At the 26th ordinary session of the Commission held in Kigali, Rwanda, the Commission considered the communication and invited parties to present oral arguments on the merits of the case.
20. Letters conveying this decision were dispatched to the parties by the Secretariat on 18th January 2000.
21. Reminders to this effect were sent on 14th March 2000, with a copy to the Embassy of the Republic of Zambia in Addis Ababa.
22. On 30th March 2000, the State Party responded to the above request.
23. On 31st March 2000, the Secretariat of the Commission acknowledged receipt of the document, but reminded it of the necessity of it sending the relevant sections of the Constitution together with the Supreme Court's decision on the case, as soon as possible. A copy of this Note was forwarded to its Embassy in Addis Ababa. A copy of the State Party's submission was also forwarded to the Complainant in Lusaka.
24. On 7th April 2000, the State Party sent a fax to the Secretariat requesting for a copy of the report

of the 26th ordinary session.

25. In view of the requirements of Article 59 of the Charter, the Secretariat instead sent to the State Party a copy of the Final Communiqué of the said session. It also intimated it of the decision of the Commission during that session.

26. On 30th April 2000, the Respondent State submitted additional arguments to its initial response of 30th March 2000.

27. On 2nd May 2000 while at the session, the Secretariat received a letter from the Complainant expressing its desire to continue with the case.

28. At the 27th ordinary session held in Algeria, the Commission heard representatives of the Respondent State. It decided that parties should address it on specific issues, particularly on whether or not the provisions of the amended Constitution were in conformity with the Republic of Zambia's obligations under the Charter. In addition, the Secretariat was requested to seek an independent legal expert opinion on the issues raised for determination.

29. Parties were informed of the above decision on 7th July 2000.

30. On 31st August 2000, the Secretariat of the Commission wrote reminders to the parties and emphasised the necessity for them to furnish it with their submissions as soon as possible for use in the preparation of the draft decision for the 28th session.

31. On 26th September 2000, the Secretariat received a response from the Respondent State on the issues raised by the Commission during the 27th ordinary session.

32. On 2nd October 2000, the Secretariat of the Commission acknowledged receipt of the submission and also forwarded a copy of it to the Complainant for its comments

33. At the 28th Ordinary session in Cotonou, Benin the communication was considered and further consideration of the merits was deferred until the 29th Ordinary session.

34. The parties were informed of this decision on the 14th November 2000.

35. A Note Verbale was sent to the Government of Zambia requesting a copy of the Commission of Inquiry report on the 5th April 2001.

#### STATE PARTY'S RESPONSE

36. The matter concerns the Republican Constitution of Zambia and is therefore an open matter for discussion. The background to the Constitution of Zambia (Amendment) Act of 1996 is attributable to the desire of the Zambian people to save and preserve the Office of the President for Zambians with traceable descent.

37. The position was arrived at in the Mwanakatwe Commission of Inquiry Report commissioned to gather views on the content of the Republican Constitution. The amendment to the Constitution was not targeted at any person in the country.

38. Zambia welcomes views expressed on its Republican Constitution as a way of building a strong

democracy. It is open to expert opinions on the issue, and will continue to listen to views expressed on it.

39. Zambia views the complaint filed by the Legal Resources Foundation as an opinion on the Constitution. The variance of opinion of the Complainant from that of the majority therefore is in accordance with democratic principle of freedom of opinion. Despite this difference, democracy entails the rule of the majority. Hence the amendment to the Republican Constitution incorporating the views expressed in the Mwanakatwe Commission of inquiry Report for an indigenous Zambian to hold Office of President.

40. Zambia is prepared to co-operate with the Commission and to elaborate further on the issues, if necessary.

#### ADDITIONAL ARGUMENTS FROM THE RESPONDENT STATE TO ITS INITIAL RESPONSE

41. The Government avers that although the communication is vague as to the details of the judicial process that was exhausted, Zambia would however assume that the issues raised by the Complainant were finally settled by the Supreme Court in Zambia Democratic Congress and the Attorney General SCZ Appeal No. 135/96, SCZ Judgement No. 37/99.

42. The Zambian Parliament has the power to adopt an alteration to the Constitution and the President may assent to a Constitution that has been altered. However, if Parliament had amended the entire Constitution, there would have been a mandatory need for a national referendum in respect of Article 79 and Part III of the Constitution, which contains the Bill of Rights.

43. The Government contends that the powers, jurisdiction and competence of Parliament to alter the Constitution of Zambia are extensive provided that Parliament adheres to the provisions of Article 79 of the Constitution. The constitutional history of Zambia has shown that the alteration of the Constitution has depended on who controls the majority in Parliament. The ruling Party dominated Parliament could therefore adopt the altered Constitution.

44. All individuals in Zambia are equal before the law and everyone enjoys the protection of his/her human rights and fundamental freedoms as provided for by the law.

45. Zambia abhors any type of discrimination. Article 23(1) of the Republican Constitution provides that:

Subject to clauses (4), (5) and (7) a law shall not make any provision that is discriminatory either of itself or in its effect.

This Article, however, needs to be read and understood with the provision of Article 23(5), which states that:

Nothing contained in any law shall be held to be inconsistent with or in contravention of clause (1) to the extent that it is shown that it makes reasonable provision with respect to qualifications for service as a public officer.

46. The Government points out that it is in this context that Zambian people were of the view that it was reasonable for the Office of the President to be subject to other qualifications i.e. an indigenous Zambian candidate of traceable descent. Therefore there was no contravention of Article 2 of the

Charter.

47. To ensure Zambia's policy of non-discrimination, Article 11 of the Constitution provides that:

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

The limitations being reasonable within the law, the Government avers further that there has therefore been no violation of Article 2 of the Charter as the limitations provided for by Article 34 of the Republican Constitution are within the law. Zambia also submits that there is no violation of Article 13 of the Charter, which guarantees every citizen the right to participate in government. If anything, there is a proviso that such should be "in accordance with the provisions of the law."

48. It underscores the fact that Articles 34 and 35 of the Constitution are within Zambia's laws and therefore there is no violation of Article 13 of the Charter.

49. It stated that Zambia considers the inclusion of a violation of Article 19 of the Charter by the Complainant as not being within the purview of the present communication. It is of the opinion that Article 19 of the Charter relates to the principle of "self-determination" by the mere mention of the term "peoples". This position notwithstanding, the peoples of Zambia are equal. It urges the Commission not to entertain this ground, as it is inappropriate to the issues raised in the communication.

50. It argues that the discrimination alleged in Articles 34 and 35 of the Constitution is not unlawful and it reflects the popular desire of the majority of the Zambian people to save and preserve the "Office of the President" for Zambians. The Constitution of Zambia (Amendment) Act, 1996, therefore, seeks to give effect to the will of the people.

## THE LAW

### ADMISSIBILITY

51. Having considered that the communication satisfied the provisions of Article 56 of the Charter, the communication was declared admissible.

### MERITS

52. The allegation before the Commission is that Respondent State has violated Articles 2, 3 and 19 of the Charter in that the Constitution of Zambia Amendment Act of 1996 is discriminatory. Article 34 provides that anyone who wishes to contest the office of President of Zambia had to prove that both parents were Zambian citizens by birth or descent. The effect of this amendment was to prohibit a Zambian citizen, former President Dr Kenneth David Kaunda from contesting the elections having been duly nominated by a legitimate political party. It is alleged that the effect of the amendment was to disenfranchise some 35% of the electorate of Zambia from standing as candidate Presidents in any future elections for the highest office in the land.

53. The enactment of the amendment to the Constitution is not in dispute. Neither is it denied that Dr Kenneth Kaunda was thus denied the right to contest the elections for the office of President. Respondent State, however, denies that some 35% of Zambian citizens would be constitutionally

denied the right to stand as President and alleges that in any event such facts have no relevance to the matter at hand. It nevertheless argues that the said amendment was constitutional, justifiable and not in violation of the Charter.

54. In the matter of Zambia Democratic Congress v The Attorney General (SCZ Appeal No: 135/1996), the Zambia Supreme Court was petitioned to declare the then proposed amendments to the Constitution unconstitutional in that the amendments contained in Articles 34(3)(b) and 35(2) of the Constitution (Amendment) Act bar persons qualified to stand for election as President of the Republic under the 1991 Constitution and deny them the right to participate fully without hindrance in the affairs of government and shaping the destiny of the country and undermine democracy and free and fair elections which are the basic features of the Constitution of 1991.

55. It is alleged that the matter was rushed through parliament by the ruling party and enacted into law while the legal and constitutional principles were before the courts for adjudication. In the event, the court dismissed the appeal for the reason that the petition was "attacking an Act of Parliament on the ground that it violated Part III of the Constitution relating to Fundamental Rights. We are satisfied that the application was commenced by a wrong procedure and that in our jurisdiction the application was untenable" (per Sakala JS at 292).

56. The following provisions of the African Charter have relevance:

Article 1:

The Member States of the Organisation of African unity parties to the present Charter shall recognise the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them.

Article 2:

Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national or social origin, fortune, birth or other status.

Article 3:

1. Every individual shall be equal before the law.
2. Every individual shall be entitled to equal protection of the law.

Article 13:

1. Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.
2. Every citizen shall have the right of equal access to the public service of his country.
3. Every individual shall have the right of access to public property and services in strict equality of all persons before the law.

57. The African Commission on Human and Peoples' Rights is a creature of the Charter (Article 30). It was established "to promote human and peoples' rights and ensure their protection in Africa." The functions of the Charter are spelt out in Article 45 of the Charter, inter alia, as follows:

- Give its views or make recommendations to Governments;
- Formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African Governments may base their legislation;
- Ensure the protection of human and peoples' rights under the conditions laid down by the present Charter;
- Interpret all the provisions of the present Charter at the request of a State Party...;

58. In the task of interpretation and application of the Charter, the Commission is enjoined by Articles 60 and 61 to "draw inspiration from international law on human and peoples' rights" as reflected in the instruments of the OAU and the UN as well as other international standard setting principles (Article 60). The Commission is also required to take into consideration other international conventions and African practices consistent with international norms etc.

59. Although international agreements are not self-executing in Zambia, the government of Zambia does not seek to avoid its international responsibilities in terms of the treaties it is party to (vide Communication 212/98 Amnesty International / Zambia). This is just as well because international treaty law prohibits states from relying on their national law as justification for their non-compliance with international obligations (Article 27, Vienna Convention on the Law of Treaties)[FN1]. Likewise an international treaty body like the Commission has no jurisdiction in interpreting and applying domestic law. Instead a body like the Commission may examine a State's compliance with the treaty in this case the African Charter. In other words the point of the exercise is to interpret and apply the African Charter rather than to test the validity of domestic law for its own sake. (vide cases of the Inter American Commission against Uruguay (Nos 10.029, 10.036, 10.145, 10.10.372, 10.373, 10.374, 10.375 in Report 29/92, October 2, 1992).[FN2]

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[FN1] Vide General Comment No 9 (XIX/1998) on The Duty to Give Effect to the Covenant in the Domestic Order. The UN Committee on Economic and Social Rights has established that "legally binding international human rights standards should operate directly and immediately within the domestic legal system of each State Party, thereby enabling individuals to seek enforcement of their rights before national courts and tribunals." The Committee argues that States have an obligation to promote interpretations of domestic laws which give effect to their Covenant obligations" (COMPILATION OF GENERAL COMMENTS AND GENERAL RECOMMENDATIONS ADOPTED BY HUMAN RIGHTS TREATY BODIES; HR1/GEN/Rev.4; February 2000; pp48-52. Although directed at the application of international law in domestic courts, Benedetto Confortu's note of caution is appropriate:

In our view, it is necessary to take a cautious approach in accepting the existence of an exceptional category of international norms that owe their non-executing nature to their substantive content. Such an exception must not lead to political manoeuvring in the form of non-implementation of rules found to be 'undesirable', either because they are considered contrary to national interest, or because they entrench progressive values, or finally, because they are viewed suspiciously by an internal judge purely by reason of their origins.



With F Franscioni (Eds) in ENFORCING INTERNATIONAL HUMAN RIGHTS IN DOMESTIC COURTS; 1997: The Hague; Martinus Nijhoff; 8.

[FN2] The Commission held in respect to the amnesty laws promulgated by the Government of Uruguay: where it had been argued that these were valid and legitimate in terms of domestic law and the constitution and that they had approval by the democratic majority in a referendum:

...it should be noted that it is not up to the Commission to rule on the domestic legality or the constitutionality of national laws. However, the application of the Convention and the examination of the legal effects of a legislative measure, either judicial or of any nature, insofar as it has effects compatible with the rights and guarantees embodied in the Convention or the American Declaration, are within the Commission's competence.

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60. What this does mean, however, is that international treaties which are not part of domestic law and which may not be directly enforceable in the national courts, nonetheless impose obligations on State Parties. It is noticeable that the application of the Charter was not part of the argument before the national courts.

61. Conscious of the ramifications of any decision on this matter, the Commission had invited the parties to address the question of the extent of the jurisdiction of the Commission when it comes to domestic law including as is the case in this instance the Constitution. Counsel for the Respondent State argued that the Commission had no locus standi to adjudicate on the validity of domestic law. That position is correct. What must be asserted, however, is that the Commission has the duty to "give its views or make recommendations to Governments.../ to formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African Governments may base their legislation / and interpret all the provisions of the present Charter..."(Article 45).

62. In addition, the Commission is mindful of the positive obligations incumbent on State Parties to the Charter in terms of Article 1 not only to "recognise" the rights under the Charter but to go on to "undertake to adopt legislative or other measures to give effect to them" The obligation is peremptory, States "shall undertake" Indeed, it is only if the States take their obligations seriously that the rights of citizens can be protected. In addition, it is only to the extent that the Commission is prepared to interpret and apply the Charter that Governments would appreciate the extent of its obligations and citizens understand the scope of the rights they have under the Charter.

63. Article 2 of the Charter abjures discrimination on the basis of any of the grounds set out, among them "language... national or social origin... birth or other status..." The right to equality is very important. It means that citizens should expect to be treated fairly and justly within the legal system and be assured of equal treatment before the law and equal enjoyment of the rights available to all other citizens. The right to equality is important for a second reason. Equality or lack of it affects the capacity of one to enjoy many other rights[FN3]. For example, one who bears the burden of disadvantage because of one's place of birth or social origin suffers indignity as a human being and equal and proud citizen. He may vote for others but has limitations when it comes to standing for office. In other words the country may be deprived of the leadership and resourcefulness such a person may bring to national life. Finally, the Commission should take note of the fact that in a growing number of African States, these forms of discrimination have caused violence and social and economic instability which has benefited no one. It has cast doubt on the legitimacy of national elections and the democratic credentials of States.

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[FN3] Vide UN Committee on Human Rights General Comment No 18 (XXXVII/1989), pp103-106  
for a fuller discussion on non-discrimination in the ICCPR.  
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64. All parties are agreed that any measure which seeks to exclude a section of the citizenry from participating in the democratic processes as the amendment in question has managed to do, is discriminatory and falls foul of the Charter. Article 11 of the Constitution of Zambia provides that there shall be no discrimination on the grounds of "race, place of origin, political opinions, colour, creed, sex or marital status..." The African Charter has "national or social origin..." which could be encompassed within the expression "place of origin" in the Zambian Constitution. Article 23(1) of the Zambian Constitution says that parliament shall not make any law that "is discriminatory of itself or in its effect..."

65. The Respondent State, however, seeks to rely on some exceptions as justification in Zambian law for the exception. It is held that the right to equality has limitations which are justifiable and that the justifications are based on Zambian law and the Charter.

66. Article 11 of the Zambian Constitution states clearly that the right to non-discrimination is "subject to limitations..." Among the limitations reference is made to Article 23(5) which provides that:

... nothing contained in any law shall be held to be inconsistent with or in contravention of clause (1) to the extent that it is shown that it makes reasonable provision with respect to qualifications for service as a public officer..." It is argued that following a consultative process, the Zambian people were of the view that the Office of President be subject to the additional qualification that the President be "an indigenous Zambian candidate of traceable descent."

67. There has been some persistent confusion in arguments before us between "limitations" and "justification". Limitations refer to what may be referred to as the statute of limitations which gives a lower threshold of enjoyment of the right. Such limitations are allowed by law or provided for in the Constitution itself. In the African Charter these would typically be referred to as the 'claw-back' clauses. "Justification" however applies in those cases where justification is sought setting perimeters on the enjoyment of a right. In other words, there has to be a two-stage process. First, the recognition of the right and the fact that such a right has been violated but that, secondly, such a violation is justifiable in law. The Vienna Declaration and Programme of Action (1993) has affirmed that "all human rights are universal, interrelated, interdependent..." and as such they must be interpreted and applied as mutually reinforcing. It is interesting to note for example, that Article 2 does not have a 'claw-back' clause while Article 13 limits the right to "every citizen" but goes on to state that "in accordance with the law."

68. In the matter before us therefore the Government of Zambia concedes that the measures were discriminatory but then goes on to argue (1) a limitation of the right, and (2) justification of the violation. It is argued that the measure was within the law and Constitution of Zambia. It was stated before the Commission that Zambia has a constitutional system of parliamentary sovereignty hence even the Supreme Court could not "attack" an Act of Parliament (as Sakala JS put it). The task of the Commission, however, is not to seek to do that which even the Zambian courts could not do. The responsibility of the Commission is to examine the compatibility of domestic law and practice with the Charter. Consistent with decisions in the European and Inter-American jurisdictions, the Commission's jurisdiction does not extend to adjudicating on the legality or constitutionality or

otherwise of national laws. Where the Commission finds a legislative measure to be incompatible with the Charter, this obliges the State to restore conformity in accordance with the provisions of Article 1 (cf *Zanghi v Italy*, 194 Eur Ct HR (Ser A) 48 (1991)).

69. It is stated further that the limitation of the right is provided for in the *Zambian Constitution* and that it is justifiable by popular will in that, following the work of the *Mwanakatwe Commission on the Constitution*, it was recommended that the *Zambian people* desired "to save and preserve the *Office of the President for Zambians with traceable descent...*" Regarding the claim that the measure deprived some 35% of *Zambians* of their rights under the previous *Constitution*, counsel for Respondent State dismisses this as mere speculation.

70. The Commission has argued forcefully that no State Party to the Charter should avoid its responsibilities by recourse to the limitations and "claw-back" clauses in the Charter. It was stated following developments in other jurisdictions, that the Charter cannot be used to justify violations of sections of it. The Charter must be interpreted holistically and all clauses must reinforce each other. The purpose or effect of any limitation must also be examined, as the limitation of the right cannot be used to subvert rights already enjoyed. Justification, therefore, cannot be derived solely from popular will, as such cannot be used to limit the responsibilities of State Parties in terms of the Charter. Having arrived at this conclusion, it does not matter whether one or 35% of *Zambians* are disenfranchised by the measure, that anyone is, is not disputed and it constitutes a violation of the right[FN4].

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[FN4] Vide UN Human Rights Committee General Comment No 25 (XXXVII/1996) where it says that "Persons who are otherwise eligible to stand for election should not be excluded by unreasonable or discriminatory requirements such as education, residence, or descent, or by reason of political affiliation..." (para 15 @ p.127).  
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71. The Commission has arrived at a decision regarding allegations of violation of Article 13 by examining closely the nature and content of the right to equality (Article 2). It cannot be denied that there are *Zambian citizens* born in *Zambia* but whose parents were not born in what has become known as the *Republic of Zambia* following independence in 1964. This is a particularly vexing matter as the movement of people in what had been the *Central African Federation* (now the *States of Malawi, Zambia and Zimbabwe*) was free and that by *Zambia's* own admission, all such residents were, upon application, granted the citizenship of *Zambia* at independence. Rights which have been enjoyed for over 30 years cannot be lightly taken away. To suggest that an indigenous *Zambian* is one who was born and whose parents were born in what came (later) to be known as the sovereign territory of the *State of Zambia* may be arbitrary and its application of retrospectivity cannot be justifiable according to the Charter.

72. The Charter makes it clear that citizens should have the right to participate in the government of their country "directly or through freely chosen representatives..." The pain in such an instance is caused not just to the citizen who suffers discrimination by reason of place of origin but that the rights of the citizens of *Zambia* to "freely choose" political representatives of their choice, is violated. The purpose of the expression "in accordance with the provisions of the law" is surely intended to regulate how the right is to be exercised rather than that the law should be used to take away the right.

73. The Commission believes that recourse to Article 19 of the Charter was mistaken. The section dealing with "peoples" cannot apply in this instance. To do so would require evidence that the effect

of the measure was to affect adversely an identifiable group of Zambian citizens by reason of their common ancestry, ethnic origin, language or cultural habits. The allegedly offensive provisions in the Zambia Constitution (Amendment) Act, 1996 do not seek to do that.

FOR THE ABOVE REASONS, THE COMMISSION

Finds that the Republic of Zambia is in violation of Articles 2, 3(1) and 13 of the African Charter;

Strongly urges the Republic of Zambia to take the necessary steps to bring its laws and Constitution into conformity with the African charter; and

Requests the Republic of Zambia to report back to the Commission when it submits its next country report in terms of Article 62 on measures taken to comply with this recommendation.

Done at the 29th Ordinary Session, held in Tripoli, Libya from 23rd April to 7th May 2001.