

**DEMOCRACY DURING THE REIGN OF DR. FREDRICK JACOB
TITUS CHILUBA: A CRITICAL ANALYSIS**

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SCHOOL OF LAW

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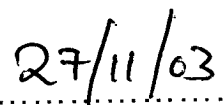
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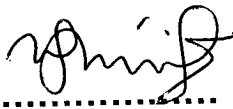

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DECLARATION

I, William Phiri, do solemnly declare that this note is to the best of my knowledge original and bona fide work and that to the best of my knowledge, no similar piece of work has previously been produced at the University of Zambia or any other institution for the award of a Bachelor of Laws Degree. The works referred to in this note have been acknowledged.



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WILLIAM PHIRI

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DEDICATION

To Dad: thank you for imparting in me the values of life, for making me realize that, “you can be what you want to be in life as long as you put your mind to it”.

To mum: I have not yet found someone who is so caring than you are.

Thank you for having been there for me in times when no one else seemed to care.

My brothers and sisters: thank you all for the support that you have given me. Your encouragement means a lot to me than ever before.

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I would also like to acknowledge the following people for the support that they have given me in the quest to make this work a success.

To begin with, I would like to give my sincere gratitude to my supervisor, Dr. A.W. Chanda whose academic criticisms and supervision has not gone unnoticed.

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all the time I needed it, furthermore, I also want to acknowledge Mr.
Keith H.M. Mweemba, Mr. Osborne Ngoma and all the rest whose
names I cannot manage to mention...**

CHAPTER ONE

INTRODUCTION

This study is carried out to show that the reign of Dr. F.J.T Chiluba was not democratic contrary to the claims that have been made. The study will briefly examine governance in the second republic so as to steadily build up on the argument. The study will finally recommend that has to be done for democratic governance to be achieved.

On every given occasion of any democratic rule, sacrifices have to be made and compromises have also to be struck. In a country like Zambia where there is a multiplicity of ethnic groupings, the above is essential for a stable government and rule; no single ethnic grouping should find pleasure in adversely interfering with the interests of the others. Democracy is a process; it has values and principles and when these are well understood by the citizenry, their application is less embarrassing. In the light of the above, it is of paramount importance that statements bordering on ethnic or tribal inclinations be done away with in the interests of the nation¹.

It is important to stress that any democratic rule requires that those entrusted with the mandate to govern take into account the set standards 'widely' recognised in the country as the basis for the rule. It is further stated that the prerequisite for any democracy to function well and for any country to talk of good governance is the restoration of the virtues and values of that society, that

¹ Chiluba, F.J.T., *Democracy: The Challenge of Change*, (1994) p.27.

is, to have a code of conduct that is accepted by all.² President Paul Biya of Cameroon who himself is not a notable democrat in his closing speech of the 5th National Council of the CNU party on the 21st November 1983 said:

" There can be no viable society without an accepted code of ethics which expresses the ideals pursued, denounces aberrations, sheds light on the path to follow, exalts ...virtues and values of society."³

In the above quest, many states have adopted for themselves ultimate standards that they have enshrined in a document called the constitution. It is with reference to this law that all the other laws are evaluated; all the other laws are subordinate to it and all inconsistencies in the said laws are to the extent of the inconsistencies regarded as void.⁴

As above-mentioned, this study spells out the nature of the restraints placed on government.

So many questions have been posed as to what 'democracy' really is. It is acknowledged and submitted herein that so many attempts have been made on the definition of the concept of 'democracy.' However, the commonly accepted one is the one put forward by one of the former Presidents of the United States of America, Abraham Lincoln, who defined democracy as "the government of the people by the people and for the people."⁵ The underlying idea of any democracy is the popular basis of government, the idea that government rests on the consent of the governed, given by means of elections in which the franchise is universal for both men and women, and that it exists for their benefit. From the

² Essoka, Peter, *Democracy, Good Governance and Communication*, (1993), p.32.

³ Ibid.

⁴ Compare with Article 1(3) of Chapter One of the Laws of Zambia

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foregoing, it is evident that in any democracy, none can be certain that their political interests will ultimately triumph. This is due to the fact that all interests are required to be the product of the majority except only for some policy interests of the Executive arm of government. Thus, all forms of political interests and uncertainties should be subjected to competition.⁶

From the aforementioned, it must be emphasised that the process of decision making in a democracy should ultimately become transparent; decisions should be made for the people because they 'under democratic norms make the decisions through their elected representatives'. Democracy can be established only if there exist institutions that would make it unlikely that the competitive political process would result in outcomes highly adverse to anyone's interests given the distribution of economic, organisational and other relevant resources.⁷

It is an unarguable fact that those entrusted with the mandate to govern, other than the established democratic institutions, play a vital role in any democratic regime. In this regard, the executive arm of government should not wilfully violate the very ideals that they proclaim to stand for. It is axiomatic that most of the leaders have been so much obsessed with power that very few of them have been willing to relinquish it. What is important to stress is that leadership does not entail domination over the governed. Democracy entails a leadership, which seeks effective and efficient governmental activity, which has a beneficent purpose. It further requires that a leader feels sufficiently secure to devote his

⁵ Nwabueze, B.O., *Constitutionalism in Emergent States*, (1973) p.1.

⁶ *Supra* note p.61.

thought and attention to the well being of his subordinates and the perfection of his task.⁸

Democracy implies many correlative aspects that must exist before it can suffice. Some of these essentials are that there must be the supremacy of the supreme law of the land which should also be legitimate, the existence of an independent judiciary, respect for human rights, a free media (that is, both print and electronic), tolerance for divergent political views, transparency and accountability as regards the operations of the government of the day, the proper use of presidential powers, separation of powers, a proper system of checks and balances and regular periodic elections, etc.

1991 was to many a ' turning point ' for democracy in Zambia. With the re-introduction of multi-partism, there was so much renewed hope for the existence and exercise of democratic values and principles in the country. This was emphasised with the many commitments that the MMD government made to secure and foster democratic governance; for instance, it made so many pronouncements as to the existence of the rule of law in the country. It is on this premise that this research is prompted. This entails a critical analysis of all the fundamental constituent elements of democracy.

1.0.The Meaning of the Rule of Law

Few phrases in the recent years have been so well known by all the members of the community as the 'rule of law', and yet it is doubtful whether many of the

⁷ Ibid p.66.

⁸ Montgomery, P, *The Teachings of His Majesty*, vol.3., (1979) p.15.

people who commonly use the expression have more than a vague idea of the meaning of the concept.

In a nutshell, different scholars have described this expression differently; for instance, the International Commission for Jurists stated that the phrase subsumes the accepted fundamental legal rights, privileges and immunities of the citizen.⁹ It is stated also that for the rule of law to prevail, there must be legal institutions by whose action a “right” may be recognized or ‘procedure’ by which it may be applied and enforced.

The concept has been summarized in the following terms;

- (a) Freedom from private lawlessness provided by the legal system of a politically organised society;
- (b) A relatively high degree of objectivity with the formulation of legal norms and a like degree of even-handedness in their application;
- (c) Legal ideas and juristic devices for the attainment of individual and group objectives within the bounds of an ordered society;
- (d) Substantive and procedural limitations on governmental power in the interest of the individual for the enforcement of which there are appropriate legal institutions and machinery.¹⁰

The above implies that the government ought to ordinarily conduct its business according to law, which is, within the limits set by the law. The rule of law prevails over all forms of public authority (central government authorities, local authorities,

⁹ Statement by the Committee to Cooperate with the International Commission of Jurists, New York, 1958.

¹⁰ Howard, B, *The Rule of Law in the United States of America*, (1958), p. 9.

police and other bodies), which is subject to review by the ordinary courts of law to which all the citizens have equal access.¹¹

Democracy entails the exercise of power within the limits conferred by law. It is important, however, to state that, there is always in existence arbitrary exercise of authority through delegated legislation, and this authority more often than not confers wide discretionary powers, which may be exercised arbitrarily as against the citizens.

It has also been noted that the concept of the rule of law implies too the 'equality of all before the law as outlined in the even-handedness of its application. In practice, it is noted that the above is not always the position as for instance, the President may not be sued in his personal capacity whilst he holds the office of President¹².

Furthermore, an infant cannot be sued under the law of contract for acts done whilst in minority for any luxuries except for necessities¹³. On the same lines a diplomat cannot be sued under the ordinary law in the country in which he serves as diplomat¹⁴.

Therefore, based on the above submission, it is not entirely true to state that the rule of law should or rather entails the equality of law as administered against all the people.

The rule of law also means that there has to be an adequate institutional legal framework, which has to be set in motion in any event where there has been

¹¹ Padfield C.F., *British Constitution Made Simple*, (1972), p.14.

¹² See Article 43(3) of the Constitution, Cap 1 of the Laws of Zambia.

¹³ Treitel, G.L., *The Law of Contract*, 7th edn, (1987), p.416.

¹⁴ Ibid.

abuse of governmental powers, that is, the exercise of power outside the ambit of the law.

1.1.ORGANISATION OF CHAPTERS

This study comprises six chapters. The second chapter will give a brief background of governance in Zambia in the first and second republics. To be precise, this chapter will examine the exercise of the rule of law in the aforementioned eras; and this will entail an examination of the respect of human rights, the activities of the media and impediments to the freedom of expression and association as guaranteed in the Republican Constitution.

The third chapter will basically analyse the many pledges that the MMD government made as regards the exercise of the rule of law, respect for human rights, press freedom and constitutional amendments and the prospects of establishing a legitimate constitutional order.

In chapter four, the study will focus on some of the factors that undermined democratic governance in the Third Republic.

The last of the chapters will outline the prospects for the future of democratic governance in Zambia; all that ought to be done will be discussed and analysed so that one day, we might live in a country in which we will be proud to call a democracy.

1.2. METHODOLOGY

This study will essentially be on analytical and conceptual levels of the subject matter under consideration. It is worth stating that events and speeches in the third republic will also be analysed and so will various newspaper articles. Where need be, interviews have been conducted on the subject with people who are experts on the topic like lawyers, media specialists etc.

CHAPTER TWO

A SYNOPSIS OF ZAMBIA'S POLITICAL SYSTEM

It is important to note from the onset that the exercise of the rule of law is in most instances dependent on the existence of many parties. Democratic politics have been said by some analysts to be the politics of participation and until some threshold level of popular participation has been crossed, the democratic credentials of a polity and of the elected government might still be in doubt.¹ It is also important to stress, however, that all participation should be made within the provisions of the constitution. The Second Republican President, Dr. F.J.T. Chiluba in his book, 'Democracy: The Challenge of Change' states that:

“Zambia needs to develop a widespread culture of participation, evidenced at its most simple in strong electoral turnouts as well as a spirit of tolerance and mutual respect among the political elite”²

It is also important to mention that Zambia was from its inception a multi-party state where the different parties enjoyed the freedom of expression, assembly and association as guaranteed in Part III of the National Constitution. It is also important to stress that the various parties existing at that time tended to differ in terms of the political beliefs and aspirations.

There was a notable sectionalism that ensued within UNIP³. It is against this background that the party and its government decided to introduce the one -party

¹ Chiluba, F.J.T, *Democracy: The Challenge of Change*, (1996), p.82.

² Ibid.

system under the guise of preservation of peace and security in the nation. Thus, from 1973 after the inception of the one party system, there was a change in the administration of the affairs in the country; for instance, there was a notable violation of the guaranteed human rights, as was demonstrated from some detentions, (for example, Simon Mwansa Kapwepwe a former Vice President in the Kaunda Government, was detained for purely political reasons)⁴. These detentions were carried out without trial under the state of emergency and in some instances under the guise of carrying out some investigations. Professor Patrick Mvunga, an eminent lawyer and scholar observed that:

“Personally I feel it is a serious blow to the development of democracy. I am very disappointed and disillusioned. The state of emergency is preventive... it has nothing to do with investigations⁵”

After the formation of United Progressive Party and the increased sectionalism within UNIP, the government announced in 1972 that it had decided to turn Zambia into a One-Party State and it was stated that this was in the interests of unity and economic development, but the context of the decision strongly suggests that, it was in reality a response to the mounting divisions within the ruling party perceived as threatening its hold on power⁶. As a consequence of the foregoing, the UNIP government appointed a Constitution Commission to recommend the form and details of the single party system and Mainza Chona headed this commission.

³ Ollawa, P.E., *Participatory Democracy in Zambia: The Political Economy of National Development*, (1977), p.251.

⁴ Mwanakatwe, J.M., *End of Kaunda Era*, (1994), p.147.

⁵ Ibid, p.142.

⁶ Ndulo M., & Robert Kent, The Constitutions of Zambia, in *Zambia Law Journal*, vol.30, (1998), p.11-12.

It is not the intention of this study to be a narrative of how Zambia's Political past has been but rather to determine the existence of the rule of law in the first two republics. This will essentially entail an examination of the protection of human rights, particularly the protection of the freedom of the press.

The examination of the exercise and existence of the rule of law extends too to the following aspects: respect for the guaranteed human rights as provided for in the National Constitution. In line with this, the research will analyse human rights violations, the proper use of the presidential powers to reduce arbitrariness and, in the final analysis, the unhindered operations of the press.

2.0. THE RULE OF LAW IN PRACTICE DURING THE SECOND REPUBLIC IN ZAMBIA

The government of Dr. Kaunda after the introduction of the one party committed some seriously human rights violations in the history of Zambia. This segment will examine critically the impact of the one-party on the existence of democracy.

2.1.0. EFFECTS OF THE ONE-PARTY ON HUMAN RIGHTS

Introduction of one-party states in Africa has occurred under conditions where opposition political leadership has been weak or virtually non-existent and under conditions where the ruling party has been entrenched⁷. In Zambia, the one-party State was brought into being despite considerable resistance from the opposition⁸.

Democracy, it has been noted, thrives best in a country where there are plural politics. In this regard, it is important to state that the introduction of the One-Party

⁷ Tordoff, William, *Administration in Zambia*, (1980), p.139.

State had serious repercussions on the existence of democratic governance in the country; a lot of vital constituent elements of democracy were quickly eroded.

2.2.1 Freedom of Expression

Freedom of expression has been defined as:

“Freedom to hold opinions without hindrance, freedom to receive ideas and information without interference, freedom to impart and communicate ideas and information without interference whether the communication be to the public generally or to any person or class of persons, and freedom from interference with his correspondence...”⁹

It is only through a diversity of opinions that the limits of sanity can be kept in check and therefore the evil of silencing the expression of the opinion is that it is robbing the human race of those who dissent still more than those who hold it¹⁰. If the opinion of those that dissent is right, they are deprived of the opportunity of changing error for truth. If wrong, they lose the clearer perception and livelier impression of truth produced by its collision with error.

After the declaration of the One-Party State freedom of expression was virtually rendered useless as it could only be exercised within the context of UNIP, and illegality would subsequently ensue from any act that was done that had the effect of establishing another political association other than UNIP. The constitution to this effect declared UNIP as the one and only party allowed existing and operating in

⁸ Ibid.

⁹ Article 20(1) of the Constitution, Cap One of the laws of Zambia.

¹⁰ Lichtenberg, J, *Democracy and the Mass Media*, (1990), p.370.

Zambia.¹¹ The existence of alternative parties presupposes a 'government in-waiting', the arrangement also entails that the electorate can at any time decide to withdraw from the members of government the mandate they were previously given to be responsible for the administration of the affairs of the country.¹² In this event, there ought to be one or more political entities to which the mandate might then be transferred.

It is sad to note that the freedom of expression could not even be fully enjoyed by the members of parliament even within the confines of the ruling party. In this regard, the then President Dr. K.D. Kaunda once stated that:

“ Parliament is not an opposition device to the party itself or other political institutions under our system. Under our One-Party Participatory Democracy, I regard parliament as a committee of the National Council charged with the responsibility of enacting laws of this country ”¹³.

From the above, we can assert Parliament was rendered a place of enforcing the objectives of UNIP and hence the right to freely express themselves within the confines of the house was non-existent. Therefore, shutting a Member of Parliament is not only unfortunate for that member but ultimately to the electorate that mandated him to represent them in the house. In this regard, representative democracy fails to function.

¹¹ Article 4(1) &(2) of the 1973 Constitution of Zambia.

¹² Mwanakatwe J.M., *End of Kaunda Era*, (1994), p.85.

¹³ Ollawa, P.E., *Participatory Democracy in Zambia: The Political Economy of National Development*, (1977), p.251.

The importance of freedom of expression can thus not be overemphasized. Most African States are ruled by venal elites who know that their survival depends upon denying good governance to their citizenry. In this regard, it is important that they freely express themselves when the governors evidently exceed their limits of power. The citizens must be at liberty to express their opinions without intimidation in any form. It must be stressed also that it is not the duty of the government to check its own excesses but rather for the people to perform that task.

Any democratic dispensation demands that the masses be given an opportunity to enjoy their freedoms as guaranteed under Part III of the Constitution without any hindrances. The one-party declaration meant that the masses would only exercise this right within the parameters of the ruling party and this was subsequently seen from the many detentions that were carried out by the Kaunda regime on those that did not share the same aspirations with the party in power ¹⁴.

The one-party system denied the people an opportunity to criticise its policies within the party structure... and even outside it, the people were rarely free to offer constructive criticism as these were in various cases seen to be inimical to the interests of the state. It is thus arguable whether a one-party state can be democratic. ¹⁵

2.2.2 Violation of the right to be treated with dignity

¹⁴ Chiluba, F.J.T., *Democracy: The Challenge of Change*, (1995), p.45.

¹⁵ ICJ, *Human Rights in a One-Party State*, (1976), p.45.

It is an unarguable fact that the Kaunda government committed most cruel acts against its critics whilst proclaiming to be a participatory democracy where all would participate in the affairs of the nation.¹⁶ It must be mentioned that democracy thrives only under the spirit of 'give and take'. In this regard, it is essential to build a political system based on tolerance for opposing views of whoever is likely to be affected by government policies and these should be legally entitled to express an opinion on the same.

All who may be adjudged to have violated some provisions of law or all those who are suspected to have violated any express provisions of law should be accorded treatment in line with the provisions of and within the parameters of the law. The case of Chimba v Attorney-General¹⁷ is an illustration of how the UNIP government violated the humane treatment clause as guaranteed and required by the constitution, section 17 as it then was. The plaintiffs in this case were detained under regulation 33 of the Preservation of Public Security Regulations. Whilst in detention, they were taken to an unknown place in the bush where they were brutally treated and this action was thus commenced for assault, battery and false imprisonment. The court found as a fact that the plaintiffs were treated in contravention of section 17 of the independence constitution. The case of Mwaba v Attorney General brings out similar set of events as Chimba v Attorney General, in which there was serious inhuman and degrading treatment contrary to the provision in section 17 as aforesaid.

¹⁶ Afronet, *Police Brutality in Southern Africa-A Human Rights Perspective*, (2001), p.88.

¹⁷ (1972) ZR

Democracy, actual or professed, should not be seen as a way of watering down the freedoms as guaranteed and protected under Part III of the Republican Constitution. The philosopher Plato writing on the same said:

“Democracy should not be seen as a form of anarchy, in which various political interests dedicate themselves to the extermination of all others...”¹⁸

Thus, it is imperative that all law should be used for ‘praise and blame’ and not solely for praise as the case was in the UNIP government during the single party period as no authority is infallible. Therefore, where disagreement ensues, it should be addressed with caution and flexibility. Democratic governance is about consensus and such consensus equips the different political groups to play an active role in creating a substantive political system in accordance with their own general and comprehensive views.

2.2.3 Use of Presidential Powers

In every state where democracy is in issue, it is essential to consider the use of the powers conferred by the law. Democracy demands that there is as much as possible a reduction in the arbitrary use of power as conferred. It was to be noted in the single party period in Zambia, as it was too after Constitution Amendment No. 18 of 1996 that the president amassed so much power that was to a certain extent used for the wrong political reasons. For instance, the law that conferred power on the president and his government to determine who goes through to contest as a candidate in a given election. It is contended that the whole essence of the Electoral

¹⁸ Ward, I, *An Introduction to Critical Legal Thinking*, 1998,p.46.

College was to eliminate all aspiring candidates who were opposed to the many undemocratic vices prevalent in the Kaunda Government. Thus, the government used the system of vetting on all those candidates as explained above. This was done under the pretence of them having interests that were inimical to the state. It was later noticed that the party did not usually adopt those who were critical of the policies of the government. The guidelines for the said adoptions were altogether arbitrary, as the president would through the Central Committee of the party adopt the candidates who had that unquestionable presidential and party loyalty. Among those who were vetted were Arthur Wina and Valentine Kayope. In 1973, 26 aspiring candidates were vetted and 30 in 1978.¹⁹ The government prior to and through the subsequent years detained without trial most of the outspoken political figures, for instance, Nalumino Mundia and Simon Mwansa Kapwepwe and 123 of his United Progressive Party were arrested and detained without trial on allegations of fuelling violence in the country.²⁰

In March of 1972, opening the UNIP National Council in Mulungushi Hall, Kenneth Kaunda told delegates that;

“ The One-Party democracy will help us weed out political opportunists and people who have become professionals at telling lies, spreading rumours... and pretending to oppose what they inwardly welcome and exploit for their own personal benefits in the name of democracy ...the era in which the policies of patronage has been a feature is gone.”²¹

¹⁹ Mwanankatwe, J.M., *End of Kaunda Era*, (1994), p.99.

²⁰ *Ibid.*, p.146.

The Second Republic witnessed the executive powers under constant abuse for purposes of ensuring Kaunda's grip on power. A lot of dictatorial tendencies had emerged which adversely affected the enjoyment of the rights of the people as guaranteed and protected by the Republican Constitution. Therefore, it can aptly be stated that the 1973 Constitutional order was not aimed at enhancing the effectiveness of the governance. Muna Ndulo, an eminent scholar, notes that;

“The aim of any constitutional order should be to achieve a constitutional order which is legitimate, credible and enduring and that is structurally accessible to the people without compromising the integrity and effectiveness of the process of governance.”²²

The 1973 Constitutional order did not in any way enhance the efforts and ideals that it purportedly strove to achieve but in lieu thereof, we saw an order that perpetrated arbitrariness common to dictatorial regimes where it became the duty of the government to keep the activities of the individual in check.

2.2.4 Freedom of the Media

Power by its nature needs to be tamed otherwise it gets out of control quite easily. It is essential that the masses through the press exercise that task. In this regard, press or media freedom is the cornerstone of human rights and a governance of other freedoms; it encourages transparency and good governance, it ensures that over and above the mere rule of law, society enjoys the rule of true justice as it is indispensable for the very existence of a democratic society.²³

²¹ Ibid., p.88.

²² Ndulo, M & Robert Kent, The Constitutions of Zambia in *Zambia Law Journal*, vol. 31. (1999), p.11.

Any democratic society requires the existence of a real and credible media. It has been submitted that;

“Within the context of a democratic society therefore, there must operate a free, independent, pluralist, comprehensible and credible press, which should act as a gatekeeper or watchdog of the society...it should be able to check on the bad management, corruption and other excesses rampant in society...”

The former United States of America President Thomas Jefferson speaking about the American Press in the early years of its independence reiterated the importance of the press;

“ Were it left to me to decide whether we should have a government without newspapers or newspapers without a government, I should not hesitate to prefer the latter ”

The media in the Kaunda regime was used as a tool for spreading its propaganda to the various parts of the country; it was part of the party structure to the extent that it was denied to the opposition political parties especially in the Second Republic to make informative decisions to the people. In this regard, it should be mentioned that the dependence of the press in the Kaunda regime jeopardized the exercise and existence of the rule of law in the country. This was emphasized by Kaunda's prerogative to appoint media heads from among committed members of the party.²³ Thus, insofar as the government owned the print media, with UNIP being supreme...any erring head of the media or even any journalist who wrote any article critical of either the party or the government was either disciplined by suspension or

²³ MISA, *Media Institution of Southern Africa*, September 2002, p.25.

²⁴ Banda, F, *Elections and the Press in Zambia; The Case of the 1996 Polls*, (1997). p.10.

dismissal by the party machinery.²⁵ In a large measure consequently, Kaunda projected this immense influence over the media activity as a direct outcome of a hugely presidentialist legal system.

The exercise of the rule of law was also hindered by such legislation as the State Secrets Act, which piece of legislation prohibited civil servants from divulging information to the public and this was made worse by the perpetual state of emergency that the country witnessed throughout the UNIP regime.

The normal functions and operations of government may not adequately handle some problems and directives and the voice of the press is essential for that reason.²⁶ The importance of the press is particularly vital in states where there is not yet a fully developed political structure. It is for this reason that Sanford J. Ungar, writing on the same, commented that;

"In any country where political institutions and opposition groups are not yet- or are no longer operating freely, a press able to report and reflect popular discontent with the course of national policy or with the government of the moment can serve as an important warning light, identifying early problems that demand solutions if political stability is to be maintained."²⁷

²⁵ Chirwa C.H, *Press Freedom in Zambia, A Brief Review of the Press During the MMD'S First Five Years in Office*, (1997), p.10.

²⁶²⁶ Lichtenberg, J, *Democracy and the Mass Media*, (1990), p.370.

²⁷ Ibid.

Under the One-Party State, the independent press was a necessary aspect of society; the people critical of government policies would only do so through the press, as the existence of opposition parties was illegal. Desmond Tutu²⁸ stated that;

“It is critical, especially in Africa where democracy is fragile that we become used to asking the ... question, ‘but why?’... The work of the journalist, is to help us become more aware of the issues and those who govern must come to expect that they will always be accountable and be kept on their toes by a critical public made aware by a vigilant, vigorous and free press”.²⁹

Media freedom was also undermined through the express provisions in the law of the land.³⁰ The law gave the president absolute powers to ban any publication or publications published within and outside Zambia under the pretext of the publications being inimical to the interests of the nation.

The implication of the provision above was that the government committed serious misconduct, in relation to whatever the public needed to know.

Conclusion

It is on the above submission that the author submits that democracy in the Kaunda government left much to be desired. As continuously stated, the Kaunda regime was far from being a participatory democracy that it professed to have been. This has been demonstrated from the many human rights violations that were essential to the existence of an ideal democratic state. The regime failed to keep up to the demands

²⁸ He was at the time Archbishop of Emeritus in South Africa.

²⁹ MISA, *Media Institution of Southern Africa*; Free Press, (2000) p.25.

³⁰ S.53 (1) of the Penal Code Cap 146 of the Laws of Zambia as it then was.

of the rule of law as expressed in the many arbitrary acts it committed whilst in office. Furthermore, there was so much inhibiting factors to the smooth operations of the media that were used as an extension of the party. From the above, it would true to conclude that the Kaunda government lacked the essential elements of a democracy

CHAPTER THREE

DEMOCRATIC PLEDGES OF THE MMD GOVERNMENT AT THE DAWN OF THE THIRD REPUBLIC

The MMD government was formed with the main purpose of liberating the people from UNIP's One Party Dictatorship and introducing a democratic, pluralist system of government and politics¹. The aim was to institute the ideals of democracy, namely, respect for human rights, such as, freedom of association and assembly, freedom of expression and above all, accountability of government to the people as a whole.

The people of Zambia were disillusioned with the dictatorial tendencies of the One Party State of government imposed upon them since 1973. The 1991 Presidential and Parliamentary elections that saw the MMD government into office were to be a turning point for Zambia's young democracy. In this regard, the new government made so many pronouncements to the effect that the government was committed to ensuring democratic principles existed in the country from thereon: For instance, its manifesto provided that "the MMD is committed to the protection of fundamental human rights for the benefit of Zambians; the promotion of justice and equality of all the people without any distinction; the maintenance of the rule of law and the independence of the judiciary; further, the MMD is committed to upholding democracy based on a multi party system with effective checks and balances as offering the best form of government"². Furthermore, it was stated that it would ensure democracy based on universal adult suffrage that guarantees government by popular consent³.

¹ Mwanakatwe, J.M., *End of Kaunda Era*, (1994), p.217.

² MMD Manifesto of 1996, p.4.

³ Ibid.

In view of the foregoing aspects, it is essential to examine in detail the pledges and opportunities that the MMD government had to create an enabling environment for democratic governance in the country.

3.0 Reform in the Legal System

Firstly, in line with the changing social and political conditions, it was necessary that the legal system be reformed. This, the MMD recognised as critical in governance in order to ensure that government policies are properly backed by appropriate legislation. In the Second Republic, it was noted that gross human rights abuses were committed without recourse to legally established institutions that would enhance protection for those that had their rights infringed. It was thus important that new legislative initiatives be identified to answer new challenges and old statutes be reviewed so that they do not become obsolete and hence slowing down the development process.

On matters of corruption, it is important to state that it should be the duty of the relevant law enforcement organs to prosecute and not wait for the discretion of the president to sanction prosecution. In this regard, accountability would be enhanced in those holding public offices that are closest to the president. Thus, laws that relate to aspects of public accountability would need to be reformed to bring them in line with the values that easily enhance accountability and transparency. Therefore, the law that related to the ombudsman should be amended to bring it in conformity with the situation outlined above.

3.1. Freedom of the Press

In any democracy, the presence of an effective media able to report impartially on issues affecting the public cannot be overemphasised. All the activities of

government must be brought to the attention of the public so that accountability and transparency can be achieved. It was on this premise that former President of the former Union of Soviet Socialist Republics, Mikhail Gorbachev emphasised it as one of his pillars of administration; it was among the central elements in his policies of 'glasnost', (openness) and 'perestroika' (restructuring) and because the media had served as a useful weapon ferreting corruption in the Soviet system⁴. In this regard, a free and independent media sets a platform for dispute resolution; people should be able to freely debate and publish works in the print media without fear of prosecution and persecution. In the absence of the foregoing statement, it has been noted that most problems are caused by persistent failure by leaders to allow legal opposition movements or failure to establish a constitutional succession system; and this is the root of most instability ⁵. Thus, it is an inevitable fact to allow a media that is independent of government influence and control to operate in an environment that is befitting democratic principles and ideals.

The media acts like a mouthpiece for the public. It is from here that the freedom of expression is enhanced. The MMD government, it was stated recognised the media as an effective tool for the provision of information necessary for the public's participation in the governance of the affairs of the country.

It is important to mention that most states have been seen to restrain the press from making the public aware of what goes on even when its exposure would not in any way be damaging⁶. To use the words of Lord Keith:

⁴ Lichtenberg, J., *Democracy and the Mass Media*, (1990), p.368.

⁵ Ibid.

" A communication about some aspect of government activity which does no harm to the interests of the nation cannot, even when the original disclosure has been made in breach of confidence, be restrained on the ground of a nebulous equitable duty of conscience serving no practical purpose".

In the light of foregoing statement, it is inevitable in the interests of democracy that laws that relate to state security be amended to bring them in conformity with democratic principles of governance. It is important to also state that it is not always easy to come up with a measure that would or would not be damaging to the interests of the nation.

3.2. Elections in a Democratic Regime

Elections in the world and Africa in particular often bring into sharp focus the ugly face of democracy. It is thus important to mention that no democracy can exist in the absence of free and fair elections held at regular intervals in a country. However, it is necessary also to state that elections on their own do not guarantee any existence of democracy; in essence this means that elections should be conducted on an even playing ground as for instance, there should be no use of public resources for the benefit of the party in government.

Based on this premise, the MMD government made some commitments to the effect that it would ensure that all the affairs of the country are conducted in a transparent manner. The new government had an opportunity to correct the arbitrary electoral system that prevailed in the Second Republic where the citizens denied an opportunity to exercise their right to freedom of expression.

⁶ Shimon Shetreet, *Free Speech and National Security*, (1987), p.23.

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⁶ Shimon Shetreet, *Free Speech and National Security*, (1987), p.23.

3.3. Separation of Powers

Another aspect of democracy is that there has to be a separation of the different functions of government. In this regard, the 1991 MMD in its Manifesto fully subscribes to the doctrine of separation of powers to ensure accountability, the rule of law as well as effective checks and balances⁷. Enhancement of the doctrine in question should not only be seen from the pronouncements that the government makes; rather, it ought to be seen in practice. The MMD also provided in its manifesto that it would create conditions under which the executive would become more accountable to parliament through ratification of some key appointments in the public service such as, the secretary to the cabinet, judges, etc. It was further stated that the government would create an environment under which the judiciary would enjoy autonomy under the Judicature Administration Act of 1994.

3.4. Protection of Human Rights

The democratic dispensation in Zambia after having broken down in the Second Republic once again had a resuscitated hope of a fresh existence with the dawn of multi-party politics in the Third Republic. From the assumption of power, the MMD government made so many pronouncements to the effect that democracy has come to stay with its reign. In its manifesto, the MMD stated, inter alia, that it would ensure the observance of democracy through the observance of the different precepts of democracy; for instance, it stated that the government would guarantee the protection of human rights⁸. This study states that any government should not only regard the respect for human rights, for instance as a fundamental value, but also a crucial element in the development of a stable and democratic society. Based on this premise, the government undertook major reforms both in the Zambia Police

⁷ MMD 1991 Elections Manifesto, p.26.

and Prisons Services aimed at strengthening capacity and professionalism in these institutions for effective service delivery.⁹

3.5. Popular Participation

In the Kaunda regime, the desire of the ordinary people to participate in the affairs of the nation suffered at the hands of a centralised polity. To illustrate this, the opportunity to exercise free choice was limited through coercion used to try to boost the turnout at elections, and this was always stage-managed. The decline in the turnout in the Second Republic after 1968 testifies to the growth in disenchantment with the electoral process brought about by a climate of fear and intimidation¹⁰. With the reintroduction of multi-partism, it was an opportunity for the government to revive the culture of participation after its overwhelming ascension to power. This needed the new government to ensure that there is no participation based on intimidation but rather, on the people's free volition.

As a democratic nation, Zambia needs to uphold the freedom of expression and that of the media, to ensure the free flow of ideas as providing a means of feedback from the public to the government and vice versa. Democratic governance is enhanced in an environment where the government is freely criticised on issues that concern the public. It should, however, be stressed that this freedom of the media should not be abused by those that are enjoying or exercising it for the consequences thereof are fatal for the existence of democracy.

3.6. Constitutional Amendments

Among the aims of every constitution should be to regulate the exercise of power by those entrusted with the mandate to conduct the affairs of the country. Sadly, it has

⁹ Ibid.

been noted that the process of constitutional enactment in most countries has proved disheartening. The change of national constitutions has often laid bare the inner character of many regimes whose main agenda has been the perfection of devices for survival and perpetuation of opportunities for private accumulation.

It is worth mentioning that as society is not static, law should in the same vein not be static as it constantly needs to be amended to bring it in conformity with the prevailing situation at a particular time. Some pieces of legislation can be changed by, for instance, a simple majority while the constitution cannot. In view of this, a constitution should be regarded as being a sacrosanct document that should not be amended by a simple majority. It is for this reason that any amendments to be made should involve a cross section of society. The process of constitutional making is crucial; it is no ordinary legislation to be replaced or amended by an ordinary procedure. It must be perceived as a higher law, authorising and governing ordinary law and commanding adherence to its precepts enshrined therein¹¹. It can be said that a constitution should be a document that ought to command all the people's respect; this is to say that there is need for a consensus to be reached before any amendment or adoption relating to the constitution is made.

Conclusion

Any democratic dispensation ought to be responsive to the demands of society. This entails among other aspects that the law has to be amended to bring it in line with the changing social and political conditions of a particular time.

⁹ Ibid.

¹⁰ Chiluba, F.J.T., *Democracy: The Challenge of Change*, (1995), p.36.

¹¹ Ndulo M, & Robert Kent, The Constitutions of Zambia, in *Zambia Law Journal*, vol.30, (1998), p.2.

Democracy entails too that the public is free to criticise the government on issues that are dear to their hearts. There can be no democracy in the absence of regular free and fair elections in any country. The separation of powers, it was stated was to be observed with the coming into power of the MMD government. The new government made a strong stand on the need to protect human rights. The Chiluba Regime also recognised the importance of popular participation of the masses in the democratic process. In this regard, the MMD Government committed itself to amending the republican constitution so that it could stand the test of time. This, it recognised would only come about if a cross section of the people were involved in its enactment.

CHAPTER FOUR

FACTORS THAT UNDERMINED DEMOCRATIC GOVERNANCE IN THE TEN YEARS OF PRESIDENT CHILUBA'S REIGN

The existence of a multi-party system in a country does not necessarily guarantee democratic governance; true democracy includes among others a guarantee and respect for individual and civil rights and strict ~~observance~~ of the rule of law, which would not only guarantee a high standard of accountability by those in high offices, but also the full democratic participation of the people¹.

This chapter is dedicated to the analysis of some of the notable factors that adversely affected democratic governance in the Chiluba regime.

4.0 Human Rights Violations

As defined in the 1991 MMD Manifesto, the party committed itself to ensuring that basic and universally recognised human rights are enshrined in the Republican Constitution.² It is vital, however, to stress that the above without an effective enforcement mechanism will not suffice: for instance, the Police Service is legally mandated to act promptly on allegations of these violations regardless of who the victims and perpetrators are. Thus, the protection of these rights entails, to a large extent political will on the part of the government especially in circumstances where the law enforcement agencies are themselves the culprits.

The Police have a duty to enforce Criminal Law; they are not servants of the ruling governments. In this regard, the Police should not advance the interests of the party in office. The foregoing was stated in the case of Attorney General for New South

¹ Sichone, O & B, Chikuto, (eds), *Democracy in Zambia: Challenges for the Third Republic*, (1996), p.224.

² 1991 MMD Manifesto, p.2.

Wales v Perpetual Trustee Co.³ that the duty in question is owed to the citizenry and not the party in authority despite the fact that their wages and uniforms are provided by the State⁴. Although the government has control of the police, its control should be limited for effectiveness and impartiality's sake.

It is saddening to note that the biggest violator of human rights is the government⁵. The year, 1997 was a testing time for Zambia's democracy vis-à-vis respect for human rights; a coup 'd' etat masterminded by Captain Stephen Lungu, failed. The study submits that the issue of treatment of the coup plotters was inevitably a concern for all human rights activists. The soldiers involved were brutally tortured contrary to Article 15 of the Constitution which prohibits torture treatment. It is herein submitted that the inhuman treatment should be seen against a backdrop of tacit approval of the executive arm of government⁶. Article 10 of the International Convention for Civil and Political Rights (ICCPR) of which Zambia is a signatory provides that;

"All persons deprived of their liberty shall be treated with humanity, and respect for the inherent dignity of the human person".

Furthermore, the case of Christine Mulundika and 7 Others v Attorney-General⁷ shows how the rights of association and assembly and expression were inhibited.

³ (1955) 1 ALL ER 846, (1955) AC 457.

⁴ Yarley, D.C.M, *Introduction to British Constitutional Law*, 3rd edn, (1969), p.42.

⁵ Ndlovu, Hope, The Judiciary and the Protection of Human Rights in Southern Africa in *Southern Africa Human Review*, Issue No. 10 (2002) p.13.

⁶ Afronet, *Zambia Human Rights Report*, (1998), p.6.

⁷ (1995-97) ZR 20 SCZ

The rights of the appellants were violated under the administration of the Public Order Act.⁸

Furtherstill, the police tear-gassed lawyer Sacika Sitwala and his clients for alleged 'unlawful assembly'. The alleged assembly was a meeting outside his office because the office was too small to accommodate all of them⁹.

The closure of the University of Zambia on 30th August, 2000 is another instance that police tortured some students who were protesting against the increase of tuition fees. In the same saga some students were paraded naked¹⁰. The police flagrantly violated the right to physical integrity, and their use of brutal force was an affront to individual dignity, security and liberty.

It was disturbing to note that the government did not condemn the acts of violence, Dr. Peter Machungwa, then Home Affairs Minister on September 13th, issued a statement in support of the police actions¹¹. This is how far the Chiluba government had acquiesced to perpetration of human rights abuses in the country.

4.1 Press Freedom

The MMD Manifesto, states that "state owned media will serve as vehicles to promote national unity, reconstruction, development and international cooperation". Press freedom is vital for the enhancement of accountability in the country. In Castells v. Spain, the European Court of human rights stated that the press not only

⁸ Cap 113 of the Laws of Zambia.

⁹ Afronet, *Zambia Human Rights Report*, 2000, p.16.

¹⁰ Ibid, p.13.

¹¹ Ibid.

has the task of imparting information and ideas on matters of public interest but the public also has the right to receive them. The court further stated that,

" Freedom of the press afford the public one of the best means of discovery and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of democratic society."¹²

The implications of press freedom are that the people shall;

- (a) enjoy the right to publish news and information without interference;
- (b) enjoy the right to publish views and comments without interference;
- (c) publish his/her works without pre and or post publication censorship by those with the power to do so, particularly government. If censorship has to be done, it should not be for reasons that the government might lose credibility due to bad policies or misconduct of those in high offices;
- (d) removal of inhibiting laws from statute books and avoidance of enacting similar laws;
- (e) enacting of laws that give journalists privileges to carry out their duties 'and responsibilities to society in conformity with the principles of democratic governance; and
- (f) have the media accessible to the public¹³.

It should be noted that the press should, however, desist from publishing false information in the interest of peace and tranquility.

¹² Dr. A.W. Chanda, *The State Security Act vs Open Society: Does a Democracy need Secrets?*, In *Zambia Law Journal*, vol., 29,(1997), p.46.

¹³ Chirwa, C.H., *Press Freedom in Zambia, 'A Brief Review of the Press during the MMD's first five years in Office'* (1997), p.14.

Therefore, all subsequent acts of government are to be measured against this statement.

The codification of the civil rights to be protected by the state does not necessarily give any "more practical force to their protection than the will of the people especially those in leadership." The government is tasked with the duty of governing and should be able to protect this right. Sanford J. Ungar in an article "The Role of a Free Press in Strengthening Democracy", says a free media can actually promote conciliation by encouraging discussion of controversial issues before they reach a volatile or explosive stage¹⁴. It is important to state that most governments share a considerable degree of antipathy to the press.

In Zambia, the government has been slow to appreciate the importance of genuine press freedom. Thus, the rarity of press freedom shows how difficult it is for democratic values to hold in the country.

Media freedom is aimed at bridging the information gap that exists between the government and the people; it is not to be used to propagate the will of the state.¹⁵.

The MMD government has committed some notable violations of the freedom of the press. This has been done through some overt and subtle means, for instance, the Parliamentary and Ministerial Code of Conduct Act No. 35 of 1994 has a clause which requires members of the press to divulge the source of their information if a member of parliament or minister was offended by some article or other.¹⁶ The use of legislation to ban publications was thus detrimental to the existence of democracy in

¹⁴ Lichtenberg, J (ed), *Democracy and the Mass Media*, (1990), p.369.

the country. The banning from circulation of edition 401 of the Post Newspaper had negative implications on the freedom of the press.

Another piece of legislation that can be used to suppress information likely to discredit a government official or State Secrets Acts to safeguard public interest may merely be used to obviate embarrassing some government officials¹⁷. Dr. Alfred Chanda, in an article entitled, '*The State Security Act vs Open Society: Does a Democracy need Secrets?*' writes;

"Much as it can be argued that the State Security Act can serve legitimate causes, it seriously undermines some of the pillars of democracy, particularly freedom of expression, transparency and accountability of government"¹⁸.

Thus from the foregoing, it is stated that while it might be true to say that the Statutes in question might be in the interests of the nation, empirical evidence suggests that they have in most cases been used to frustrate efforts of the press.

Furtherstill, the use of the State Secrets Act¹⁹, For the imprisonment of Fred M'membe, Bright Mwape, and Masautso Phiri for allegations of making statements that in the opinion of parliamentarians lowered the dignity of the house. The Canadian Clerk Assistant said;

" Those who choose to enter political life should accept that they are targets for criticism, just as they too have the right to criticism ".²⁰

¹⁵ Banda Jackson, *Elections and the Press in Zambia; The Case of the 1996 Polls*, (1997), p.4.

¹⁶ Ibid, p.17.

¹⁷ Ibid, p.27.

¹⁸ Zambia Law Journal, vol, 29, (1997), p.33.

¹⁹ Cap 111 of the Laws of Zambia.

²⁰ Times of Zambia, 24th June, 1995.

Some of the other instances of press freedom inhibition are demonstrated through: storming of ZANA offices by the police in Lusaka. The raid was in an effort to discover the source of information concerning the Zambian Soldiers on peace keeping mission abroad being on half pay²¹.

The Weekly Post photographer Sheikh Chifuwe was detained at Lusaka Central Police for photographing the police beating a suspect.²²

The importance of a free press in a democratic state cannot be overemphasised; it particularly helps the people to make informed choices on issues of national interest. Thus, the government should desist from activities that hinder the free functioning of the press.

From the above, it can be stated that the government had a very bad relationship with the press. The Post of Monday, February 12th 1996 carried an article entitled, '*Chiluba is taking Zambia back to the Eighteenth Century*' which stated that;

"The attitude of President Chiluba towards the press is primitive and belongs to the eighteenth century. French Emperor Napoleon in 1799 declared, with no pretences that: " if I loosened the reigns on the press, I would not stay in power for three months".²³

The above situations indicate the attitude of the Chiluba government towards the press. It is hence submitted that in the absence of a free and independent press, democracy remains an illusion.

4.2 Political Intolerance

Democracy is about consensus and the idea of such a consensus equips the citizens of the political community to play an active role in creating a substantive political

²¹ Banda Fackson, *Elections and the Press in Zambia; The Case of the 1996 Polls*, (1997), p 62.

²² Ibid,

system in accordance with their own general and comprehensive views.²⁴ Tolerance, Kofi Annan the Secretary General of the United Nations states is the key principle of democracy in our multi- ethnic and multi-cultured societies. Kofi Annan once mentioned that intolerance is often rooted in the fear of the unknown, the other being ignorance and lack of education which is the breeding ground for prejudice²⁵. The government should not use the state machinery at its disposal to intimidate those that dissent. The essence of political plurality is divergence of political views; and in its nature, democratic politics entails a form of government that is dedicated to the management of conflict and the settlement of disputes by non-violent means ²⁶.

There are some notable instances in the Chiluba government where there was so much intolerance especially on political issues; for instance, there have been arrests of political opponents of the party in government. The police arrested Mazabuka Member of Parliament, Griffiths Nang'omba for holding an indoor meeting with his constituency officials. Government later apologised in front of delegates of the Consultative Group Meeting in Livingstone.²⁷.

4.3 Use of Presidential Powers

Governance is all about the use of power. The Zambian Constitution spells out the use of power in line with the limits that the constitution prescribes. In most instances, the exercise of express power does not raise many controversial issues. Conversely, it is the use of discretion that normally is at the centre of controversy. It is worthwhile to state that the exercise of such power should be done in the interest of the nation.

²³ Post of 12th February 1996, p.5.

²⁴ Ward, I, *An Introduction to Critical Legal Theory*, (1998), p.46.

²⁵ The Post 14, November, 2002, p.5.

²⁶ Chiluba, F.J.T., *Democracy: The Challenge of Change*, (1996), p.6.

²⁷ Supra note 8, p.20.

Towards the run-up to the 1996 Presidential and Parliamentary elections, President Chiluba announced the sale of government owned houses. It can be argued on one hand that the decision was for the benefit of the Zambians that acquired the same. However, this study submits that the motive for the sale was to solicit for votes from the public. Thus, the study states that, in most cases, the use of discretionary power secures outcomes that benefit the people without the corresponding individual gains to those that execute the measures. It is also important to state that the sale deprived the councils of the major source of revenue; the end result is that the councils have been reduced to be merely dependent on government grants which either delay in disbursement or are never disbursed at all.

The other questionable exercise of power was the introduction of the office of District Administrators (hereinafter called DAs). Much as it is acknowledged that the President has power to introduce or abolish some offices under the constitution, legitimate interests should be sought.

Article 61(1) of the Constitution provides that;

” Subject to the other provisions of this Constitution and any other law, the power to constitute offices for the Republic and the power to abolish any such offices shall vest in the President.”

The sole purpose of DAs was to advance the interests of the political grouping in power²⁸. The DAs were ill-informed and malignant arms of the executive and not necessarily agents at district levels. Thus, based on the above, it can be said that the office of DAs was created with the sole purpose of furthering the objectives of the

²⁸ Mbinji-Tange Mufalo & Christine Kanyengo, 2001 Elections in Zambia: A Question of People, Law and Governance , *Southern Africa Human Rights Review*, issue No. 9.(February,2002), p.12.

party in power, in this case , the MMD government. This is just another example where there was abuse of power in the sense that the same DAs were paid from the public treasury.

Another exercise of presidential power was seen by the introduction of the Presidential Discretionary Fund alias the 'slush fund'. Although the introduction of the fund was approved by parliament, the study submits that the power was abused; for instance, the President used the same to grant money to social clubs like golf clubs, private schools, churches etc. In this regard, there was no proper accountability in relation to the legitimate disbursement of the funds. Budgetary allocations in most of the years have been insufficient to critical sectors of the economy, such as education, health, local government, etc. However, amidst these financial difficulties, President Chiluba wasted government resources in allocations to entities mentioned above. It is stated that the power was too wide for one man to use as he pleased without the necessary checks from other institutions. Simon Kabanda writing on Presidential powers notes that the President in Zambia has so much power. He submits further that,

" The type of presidency that we need in Zambia is one whose powers are limited, like those of a prefect in a school. A prefect is not above the school rules, and cannot change any of them to suit her/his desires "²⁹

The increase in centralisation of powers in the office of the president, and the lack of appropriate political checks and balances within the system and civil society contributes to the abuse of power vested in him. His acquiescent use of powers at his

²⁹ The Post, 23 February, 2003, p.12.

disposal created a repressive political system.³⁰ The study submits that the exercise of discretionary power should entail the existence of safeguards from abuse.

4.4 Judicial Independence

In all the countries, for a legal system to function effectively, it is important that it includes not only legislation but also an effective and efficient institutional infrastructure for the design of administration of the law, and by far the most important of these institutions is the constitution.³¹ In addition to a constitution, every country needs an independent judiciary that should be able to interpret the law of the constitution and other subordinate laws.

It must be noted that from pre-independence to date, Zambian Judges have generally leaned towards the executive arm of government. In the colonial era, judges, who were all white, supported colonial authorities to defeat or weaken African nationalism which was agitating for independence. It must be emphasised that in the post-independence era, the inclination towards the executive continued for three reasons;³²

- (a) the display of patriotism with their political leaders against subversive actions of the former colonial authorities;
- (b) the judges did so to fight neo- colonialism by former colonial rulers; and
- (c) job preservation.

Judges are legally required to be impartial regardless of the era in which they operate if justice is to be enforced. Sadly, it has been noted that almost thirty-two years after

³⁰ Supra note p.11.

³¹ Ndulo, Muna, 'The Democratic State in Africa: The Challenge for Institutional Building,' *Zambia Law Journal*, vol., 31, (1999), p.6.

³² Justice Kabazo Chanda (retired) The Conduct of the Judiciary in the 27 December, 2001 General Elections, *Southern Africa Human Rights Review*: Issue # 9, (February 2002), p.4.

independence, there has been a lot of factors that have undermined the functioning of an independent judicial system in Zambia.

Judicial independence ideally means that the judiciary should be able to freely exercise its functions without any interference from the other arms of government. The attributes of judicial independence, are among others, protection of tenure for the judges, absence of arbitrary removal from office, etc.

The office of judgeship should be given to people of integrity. It must be stated that although the independence of the judiciary is affected by such issues as appointments of judicial officers, remuneration' etc, so long as judges are appointed, paid, promoted or dismissed by persons or bodies controlled directly or indirectly by the executive...the judiciary's independence may be more theoretical than real.³³

The other significant instances have been the increase of the remuneration of judges and the furnishing of their offices during the period before elections. The study submits that in such circumstances, the motive for the increase should always be questioned.

Judges should understand that they stand for the delivery of justice and nothing should distract them from that cause;

" In general, judges ought to realise that ...they have been entrusted with the responsibility of protecting the rights of the people and must therefore attempt to serve with the spirit of selflessness and integrity..."

Further, it must be stated that judicial independence should entail too that the tenure of office of judges is protected, that is to say, they should only be dismissed for misconduct, incompetence or infirmity of body and this should occur only after a thorough investigation has been carried out.³⁴

It can, however, be said that the judiciary has done fairly well except to stress that the submissions above can seriously undermine the integrity of the judiciary if not handled with caution.

4.5 Corruption

Democracy is based on popular participation or rather the consent of the people to be governed by a particular group in a particular way. The public consents to democratic governance and to the mandate it gives to those entrusted with power to rule. It is in no way a consent to plunder and misapply the resources of the state however meagre. In this regard, the people's representatives and leaders ought to be responsible to those who elected them and must account to them for their actions³⁵. The purpose of participation is accountability by those holding public office. Zambia was during the reign of President Chiluba ranked the ninth Most corrupt nation in the world. The allegations of corruption started as early as the second year of the reign of President Chiluba.

On July 10 1992, the then Minister of Youth, Sport and Child Development, the late Mr. Baldwin Nkumbula resigned; ten days later, Akashambatwa Mbikusita Lewanika

³³ Hope Ndlovu, 'The Judiciary and the Protection of Human Rights, *Southern Africa Human Rights Review*, Issue # 10, September, 2002, p.12.

³⁴ Kunda, George, 'The Zambian Judiciary in the 21st Century,' *Zambia Law Journal* vol.30, (1998), p.34.

resigned citing government's failure to deal what he called, " the threatening cancer of financial irregularities".³⁶

Among many allegations of corruption are;

- ◆ diversion of two billion kwacha from National Assembly to finance the MMD's convention;
- ◆ ZESCO scam involving misuse of several billions of kwacha (Auditor-General's Report);
- ◆ ICASA scam involving misuse of over K4bn; An audit by the Auditor-General's Office handed over to Ministry of Health Permanent Secretary Dr. Kashiba Bulaya in August, 2000, states that no internal control system were put in place to effectively account for the finances provided by the XI-ICASA 1999 Secretariat³⁷.
- ◆ Mismanagement of the sale of ZCCM; the privatisation or commercialisation of any State owned enterprise is governed by the Privatisation Act, Cap 386 of the Laws of Zambia and its subsidiary legislation: the Act creates the Zambia Privatisation Agency as the only legally entitled body responsible to conduct the process of divestiture of the State owned enterprises as opposed to a parallel structure in the name of GRZ/ZCCM assets. In the sale of the of the enterprise in question, President Chiluba in a highly suspicious move appointed chairman of the GRZ negotiating team and hijacked the responsibilities of ZPA³⁸.
- ◆ Carlington maize scam involving \$4m reserved for relief maize during the period that Zambia was facing a drought. In an Article,"Chiluba stole the \$4m

³⁵ Chiluba F.J.T, *Democracy: The Challenge of Change*, (1996), p.5.

³⁶ Sichone, O, & B Chikulo, *Democracy: Challenges for the Third Republic*, (1996), p.225.

for relief maize, it was revealed that the president was involved in the disappearance of the money in question³⁹.

- ◆ All these revelations indicate that there was massive corruption in the Chiluba regime. Therefore, no democracy can ever exist in the prevalence of corrupt practices by those in authority. Furthermore, the country's meagre resources were expended on activities which had little to do with the promotion of the basic needs of the people; for instance, huge other amounts were spent on DAs who were MMD workers (on salaries and allowances, expensive vehicles, accommodation office, utilities etc) overseas delegations of government officials and MMD cadres.⁴⁰

4.6 Electoral Conduct

All are cognisant of the fact that those entrusted with the authority to rule are not saints and thus need to have the exercise of power checked by the electorate. It is on this basis that we have regular periodic elections and also because the needs of the community change and the people entrusted to deliver the original needs may have failed to effect the same.

In the absence of mechanisms of accountability, at the very least free and fair elections on a regular basis and the existence of genuine competition for the people's vote, the people can easily cease to be regarded as important by the politicians.⁴¹ In the Second Republic, free and fair elections were but mere rhetoric.

³⁷ Article from the internet, for more information see e-mail af-aids@hivnet.ch posted on Wednesday, 12 June, 2001.

³⁸ For a full discussion of the matter, visit www.oneworld.org.

³⁹ See AfricaOnline.comltd for a fuller discussion on the subject.

⁴⁰ *Zambia Human Rights Report*, 2000, piii.

⁴¹ Chiluba, F.J.T., *Democracy: The Challenge of Change*, 1996, p.5.

It was hoped with the coming of plural politics that there would be fair and free elections in line with democratic principles.

As stated above, the basis of elections is that the will of the citizens is expressed but in some countries, Zambia included, only a semblance is conducted, and done in a deliberately disorganised style, flouting all the internationally accepted electoral rules,...and applying most unorthodox practices such as swapping legal ballot boxes with illegal ones and bribing election officers at the polling stations, with the purpose of subverting the people's general will.⁴²

A lot of factors ought to be taken into account when writing about electoral conduct and one such, is media coverage; it increases voter knowledge of the parties and their leaders and this inevitably plays a vital role in determining the choices at election time.⁴³ Despite assurances that the public media was not a mouthpiece for the ruling MMD, it was subsequently noted that political coverage did not confirm the assurances, for instance, the number of adverts in 1996 were as follows, in the print media;

- ◆ MMD-37 representing 97.37% of the total coverage;
- ◆ ZDC-1 representing 2.63% of the total coverage;
- ◆ MDP-0 representing 0% of the total coverage;
- ◆ NP-0 representing 0% of the total coverage; and
- ◆ AZP-0 representing 0% of the total coverage⁴⁴.

⁴² Justice Chanda, K.C. (Retired) *The Zambian Election that Might Have Been...* Special Edition, *Southern Africa Human Rights Review*, Issue # 9, February 2002, p.4.

⁴³ Banda Fackson, *Elections and the Press in Zambia; The Case of the 1996 Polls*, (1997), p 27.

This confirms how biased the print media was although some may be inclined to argue that the same may be due to the lack of monetary resources for the opposition political parties.

There were many instances where the MMD government took undue advantage over the other political groups through the use of the Presidential Discretionary Fund. The fund was used to entice the electorate from voting for the opposition under the pretext of donations at the expense of such sectors as the health and education.

The fact that elections exist in a given country is not conclusive of the existence of democracy as seen above; there must be a level playing field for all the participating political parties; this is to say that no single party should have undue advantage over the others.

Oppression of political opponents is another element that affects election results. The ruling MMD cadres were seen to oppress the leaders of the other political parties so as to intimidate them from further campaigning. One such incident was where one Esther Nakawala who openly victimised the opposition parties with the aid of call boys. Based on the above submissions, it can be said that the reign of President Chiluba had a very devastating electoral conduct and adverse for the existence of democracy.

4.7 Law Reform

The law is open to criticism that in general it may be conservative. Many statutes are ancient , appertaining to the by-gone age ...for instance the Public Order Act, Cap 113 of the Laws of Zambia. It is appropriate to say that some of these criticisms are

fair and reasonable. Law is a living thing and reform is continual.⁴⁵ It is important to state that law is a feature that has to be responsive to society; it has to change as society changes.

The other piece of legislation that needs to be critically examine is the Commission for Investigations Act, Cap 39 of the Laws of Zambia. The Act for instance requires the Commissioner to submit the findings to the President for action to be taken at his discretion.⁴⁶

The Public Order Act is one piece of legislation enacted to perform very different functions than it is serving at the moment; it was brought in to effect to subvert the efforts of the natives that were agitating for independence. It is not an ideal piece of legislation in a democratic State. The Public Order Act has been susceptible to manipulation, and even in the absence of that, it is still rigid. It is the submission of this research that the Public Order Act should be reality based, it should be used to regulate aspects of public life that would cause instability in the country and not for the interests of the government of the today.

In the Chiluba regime, it was noted Southern Africa Human Rights Review, " The Zambian Election that Might Have Been..." Special Edition that the Public Order Act, was used to violate the citizens freedoms; for instance the freedom of Association and assembly and freedom of expression.

It was not until 1996 that the Public Order Act was amended after some declaration by the court that some of the provisions were contrary to the Constitution of Zambia

⁴⁴ Ibid, pp. 27-30.

as the provisions of the Public Order Act could not override. It is stated that even in this situation, the government amended the legislation to use it as a device to curtail the activities of the opposition parties. Thus, contrary to the promises that it made regarding law review, it has continued to use the same oppressive legislation that the colonial masters used.

Conclusion

The existence of democracy cannot be attained in the absence of respect for human rights. It is one of the pillars for the existence of ideal democracy. It was noted in the reign of Former President Chiluba that the fundamental freedoms were violated all will.⁴⁷ It is important to note that human rights protection requires political will from government.

Freedom of the press is vital for the free and impartial dissemination of information to the public. There is need for the people to make informed decisions and this can only be achieved where the media is free to report on the issues that affect them. The Chiluba regime largely intimidated the media through arrests and physical abuse by the police⁴⁸.

In every democracy, the existence of divergent views is not an option. The difference of policies for the country by various political groupings indubitably brings into focus numerous perceptions of things. However, in a democracy, these should be amicably handled as they may lead to political and social instability. Arbitrary arrests as seen

⁴⁵ Padfield.C.F., *British Constitution Made Simple*, (1972), p.205.

⁴⁶ s.20 of the Commission for Investigations Act, Cap 39 of the Laws of Zambia.

⁴⁷ One instance is the inhuman treatment that happened during the August 30,2000 saga at the University of Zambia. Furthermore, this violation of human rights was seen from the torture of the coup plotters in 1997. For more details see the Zambia Human Rights Report of 1997/8.

in the Chiluba regime were a sign of intolerance; it is important to mention that the toleration of divergent views does not constitute a weakness as some may be inclined to believe.

Every country needs some law that limits the exercise of power. The first ten years saw the use of presidential power to have an undue advantage over the other political participants. It is worth mentioning that the exercise of discretionary power should be in the interest of the nation and not only a few men that want to cling to power⁴⁹.

It cannot be argued that the increments in the salaries of the judges during election time could have easily undermined the independence and integrity of the judicial arm of government. It is an undeniable fact that the judiciary needs among others, adequate funding for it to operate freely and independently without any hinderance. The judiciary encompasses too all the support staff and not only judges and this has to be taken into account when effecting any increments.

The relevance of popular participation in any democracy cannot be overemphasised. The essence is that the government should be called to account for the conduct of the affairs of the country.

Elections are an essential ingredient of democracy, but the existence of regular periodic elections does not in themselves entail the existence of democracy. They

⁴⁸ Chirwa, C.H., *Press Freedom in Zambia: A Brief Review of the Press During the MMD's First Five Years in Office*, (1997), p.66.

ought to be conducted on a level playing field; no party should take undue advantage over the others. It was noted from the MMD government, that so much government resources were used to finance the activities of the party.

Since the MMD's assumption of power, there has been so much change in both social and economic situations in the country. Thus, given this situation, it is imperative that the legal system is adjusted to suit these conditions. The MMD has, however, failed to rise to this occasion to reform the system; for instance, there was an opportunity to enact a legitimate constitution but instead, it chose to incorporate issues that would be in the favourable interest of the ruling party.

⁴⁹ The sale of government houses was made to solicit for votes from the public. It is also necessary to consider the price at which the same houses were sold. From this, it can be concluded that the motive for the sale was mere gain of political mileage.

CHAPTER FIVE

OVERALL CONCLUSION

This chapter draws an overall on the issues raised in the preceding chapters concerning the democratic state of affairs in Zambia in the second and third republic up to 2001. The chapter also draws some recommendations on what has to be done to secure democratic governance in the country in the future.

The declaration of Zambia as a Single Party State in the Second Republic seriously undermined 'existence of democracy in the country. The declaration was imposed on the people due to he desire by the Kaunda government to hold a grip on power due the increased sectionalism within the UNIP. It was subsequently seen that the government committed so many human rights violations under the pretence of national security.

Furthermore, there was little press freedom and the public was constantly kept uninformed on the malpractices of government. The media became a tool of UNIP and not a mouthpiece for the public that could be used to check the activities of government. Thus, because of the foregoing, there was a lot of intimidation on the people that were considered vocal the policies of the party.

The existence of democracy entails that the people should be allowed to participate in the management of the affairs of governance in the country. This also implies that the process of legislation of the supreme law of the land should indubitably within their domain. It was however seen from the second ^{republic} and also in the reign of second republican President that the same was never done. In consequence of the same, the country has continuously been dealing with the

supreme law. Democracy is all about participation and this is not an option to all countries that are pursuing democratic principles of governance.

In both periods, there has been so much interference in the operations of the media. However, with the enactment of the Independent Broadcasting Authority No.17 of 2002, media freedom might be able to be enhanced. For instance, the Act in s.6 provides that the Board of Directors shall not be under the control of any person. It is further provided in s.8 that the Appointments Committee shall consist of nominated members from the Law Association of Zambia, Non-Government Organisations, Religious Organisations, Media Support Organisation and one member from the Ministry of Information and Broadcasting. It must be stated that this will also need political will on the part of the government. This inevitably undermined the existence of governmental accountability.

Furthermore, with the amendment of the Zambia National Broadcasting Corporation Act, the media might be able to operate without much hindrance and this is of course subject of political will on the part of government.

5.0 RECOMMENDATIONS FOR ZAMBIA'S DEMOCRACY

5.1 Reform of the Legal System

It is important to note that law reform is not exclusively a legal problem. Contemporary society requires that it is given the opportunity to test its laws by its own criteria; it insists that law is either to serve the needs of society or to be rejected.¹ It is for this reason that there is need to subject the constitution to the people if it is to be legitimate. Therefore, to overcome the challenge of law reform,

we must not only call for the technical learning of the lawyer, but to the full understanding of, and the habits of the ordinary men.²

The people need to realise that law shapes society and society at the same time shapes the law. In this regard, law should not remain far behind as regards any development that goes on in society. This can only be achieved where the institution charged with the duty of enactment keeps abreast with all these changes. Therefore, we ought to have a Law Development Commission that is always monitoring the changing state of economic and social affairs in the country.

Writing in 1861, John Stuart Mill, speaking of codification of the law said;

"If the laws of this country were, as surely they will soon be, revised, and put into connected form, the commission of codification by which this is effected should remain as a permanent institution to watch over the work, protect it from deterioration, and make further improvements as often as required."³

In this regard, the law would always remain responsive. Therefore, although the Public Order Act was amended, it is submitted that it still needs further amendments for it to meet the standards of a democratic state. Professor Patrick Mpanza Mvunga writing on the same subject notes;

"Although the current Act does not require the acquisition of police permit, it still affects democracy as police officers could cancel scheduled gatherings on flimsy grounds".⁴

Furthermore, there is need that the Act provides a waiver during certain periods; for instance, the election period should be given priority in order to give the

¹ Lord Lloyd of Hampstead, *Introduction to Jurisprudence*, 4th edn, (1979),

² Ibid.

³ Ibid, p.978.

campaigning parties an opportunity to sell their policies to the electorate as this is cardinal to the decision making by the electorate. Democracy entails the existence of legislation that is befitting of democratic ideals.

The police has been seen to be much accustomed to be partial in terms of policing opposition political gatherings.

There is also need that the Commissions for Investigation Act, Cap 39 of the Laws of Zambia be amended. The delivery of justice under its current state would not be readily achieved. The submission of the report of the commission to the President (as provided for under s.20) is not necessary in the interest of accountability in the government; furthermore, the commission should have the power to prosecute its offenders where found guilty. Thus, based on the above the Act in question should be amended to enhance impartiality as it is possible that those that are close to the President but are guilty under the Act may go unpunished.

Further, s.21 of the same Act needs also to be amended as it should not be the discretion of the President to take action on the decision of the result of the Commission, but the Act ought to provide expressly what ought to be done in relation to the matter under investigation.

5.2 Media Reform

The media is a very important tool in a democracy but its working can easily be undermined especially under circumstances where the government controls its activities. As a democratic nation, Zambia needs to uphold freedom of expression

⁴ Afronet, *Zambia Human Rights Report* (2000), p.15.

and the media, to enhance a free flow of ideas and provide a means of a feedback from the public to the government and vice versa.

In both periods, there has been so much interference in the operations of the media. However, with the enactment of the Independent Broadcasting Authority No.17 of 2002, media freedom might be able to be enhanced. For instance, the Act in s.6 provides that the Board of Directors shall not be under the control of any person. It is further provided in s.8 that the Appointments Committee shall consist of nominated members from the Law Association of Zambia, Non-Government Organisations, Religious Organisations, Media Support Organisation and one member from the Ministry of Information and Broadcasting. It must be stated that this will also need political will on the part of the government. This inevitably undermined the existence of governmental accountability.

Furthermore, with the amendment of Zambia National Broadcasting Corporation (Amendment) Act No.20 of 2002, provides that the affairs of the corporation shall be regulated by a Board that will be appointed by the Minister of Information on the recommendation of the Appointments Committee subject to ratification by the National Assembly. The committee shall invite and consider applications for appointment to the Board⁵.

As the media stands at the moment, it leaves much to be desired; hence, it would be in the interest of democracy if the government media could be privatised to enable efficient and effective coverage of events. Placing government media in

private hands would be 'healthy' for democratic governance and free governance.

Professor Patrick Mvunga emphasises that;

"Once the two dailies are in private hands, they will provide the necessary environment for those running them to inform and educate the masses without fear or favour; without being privatised, the press cannot propagate true freedom which should exist under democratic governance "⁶

The public should not be denied information that directly affect them just because the government would lose credibility.

5.3. Appointments of Judges and Senior Law Enforcement Personnel

One factor that may have brought bias in the law enforcement agencies is the mode of appointment of the senior staff. For instance, the appointment of the Investigator General and the other Commissioners under the Commissions for Investigations Act Cap 39 are appointed by the President under section 4(1) of the Act which states that:

"There is hereby established a Commission for Investigations which shall consist of an Investigator-General and three Commissioners who shall be appointed by the President. "

The appointment of the judges and other senior law enforcement agencies should not be the prerogative of the President regardless of whether the appointments are effected in consultation with the Judicial Service Commission and with ratification by parliament. However, this may lead to a strong inclination toward the appointing authority. To avoid this, it is herein recommended that before these

⁵ s.4A (4)(a) of the Zambia National Broadcasting Corporation (Amendment) Act No. 20 of the Laws of Zambia.

⁶ Chirwa, C.H., *Press Freedom in Zambia: A Brief Review of the Press During the MMD's First Five Years in Office*, (1997), p.42.

officers are appointed, advertisements need to be placed in the media (both print and electronic) so that there is a wide range of candidates to appoint from. The applicants ought to be people from varying backgrounds including both from the judicial and the legal profession.

The appointing authority should be a Select Committee of Parliament and ratified by 2/3 majority in the house.

Where this happens there can be owing allegiance to the house as the appointment is not by way of a favour but duly earned because of one's credibility.

The legislature as the law maker needs special attention in this research. It must be mentioned that parliament should not be dominated by a single party. The house should be a house of compromises and this is vital for the survival of democracy.

"It would be good to have an institutional organisation especially in parliament where no single party would obtain the majority needed to alter basic laws,...that corporalist arrangements would not be enforced. "

5.4. Constitutional Adoption

The starting point is to state that there have been many opportunities that Zambia has had as regard the enacting and adoption of the constitution. It is sad to note that all the opportunities have gone unutilised. Government is a delegate of authority from the people and it should strive to exercise the will of the people. This view is emphasised by Alexander Hamilton who writes;

" There's no position which depends on clearer principles than that every act of delegated authority, contrary to the tenor of commission under which it is exercised, is void ."

The view above emphasises the fact that even where the adoption of the constitution is through the National Assembly, the Members of Parliament should do what the electorates desires, but this sort of adoption has failed for reasons that:

- (a) The adoption of the constitution is based on the numbers in the house and hence so much open to manipulation especially by the ruling party;
- (b) Apart from the numbers, appointment of commissioners might be based on those that are loyal to the appointing authority;
- (c) The representations on the Commission is not broad based ⁷.

Constitutional making requires a consensual approach to decision making. This ideally means that the people should be given an opportunity to have their say⁸ A constitution should be a product of integration of ideas from all stakeholders in a country, including all political parties, organised civil society, and individuals in the society.⁹ In this way, it will be possible to come up with a constitution that would endure as many would be able to identify with it. Consequently, the ultimate problem of power on the part of government would be settled.

⁷ Ndulo, Muna, 'The Democratic State in Africa: The Challenges for Institutional Building, *Zambia Law Journal*, vol.,31, (1999), p.30.

⁸ Chiluba, F.J.T., *Democracy: The Challenge for Change*, (1996), p.108.

⁹ Ndulo Muna & Robert Kent, 'The Constitutions of Zambia, *Zambia Law Journal*, vol.,30, (1998), pp.1-2.

5.5. Constituency Accountability

A member of parliament is a representative of the people that elected him/her into office. History records that the trend is that the representatives have been seen to only visit their constituencies at election time. This does not encourage development of any kind. Therefore, to enhance development in the representatives, it be necessary that the Constitution includes provisions that establish an office for every Member of Parliament in the area in which he stands elected. The people should also be mandated to remove them for specific reasons such as incompetence and corrupt practices. With this arrangement, it is hoped that the members of parliament can be more accountable to their electorates. The future election to the house would be very much dependent on their activities within their constituencies. Ultimately, democracy would be enhanced in the country.

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