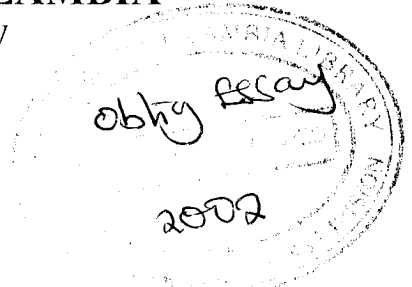


**THE UNIVERSITY OF ZAMBIA
SCHOOL OF LAW**



**IS MERE PARTY MEMBERSHIP BY A REPUBLICAN
PRESIDENT A RECIPE FOR CONSTITUTIONAL CRISIS?**

By

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**BEING AN OBLIGATORY ESSAY SUBMITTED IN PARTIAL
FULFILMENT OF THE EXAMINATION REQUIREMENTS FOR
THE AWARD OF THE DEGREE OF BACHELOR OF LAWS
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SUPERVISOR: JUDGE K.C. CHANDA (RTD)

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I recommend that the Obligatory Essay prepared under my supervision by

JOHN CHIBALABALA

entitled

**IS MERE PARTY MEMBERSHIP BY A REPUBLICAN PRESIDENT A
RECIPE FOR CONSTITUTIONAL CRISIS IN THIS SUBSEQUENT
EXPULSION FROM THE PARTY?**

**be accepted for examination. I have checked it carefully and I am satisfied that
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DEDICATION

I dedicate this essay to my family, all relatives and friends

ACKNOWLEDGEMENTS

I wish to record my appreciation to my Supervisor Judge K C Chanda (Rtd) for his corrections and suggestions to put this essay in its proper perspective.

I give also special thanks to Hon. G Chola (MP) and current Deputy Minister of Community Development and Social Services for accepting to read through my script and remove certain misnomers. I must also put it on record that I differed with him on *inter-alia* corruption, bribery, vote buying, and voter rigging allegations against MMD contained in this paper.

I am equally indebted to my former Moot Court ‘adversary’ but now a very close friend Mr Jones J Gwaba who sacrificed his time to proof read my whole script.

I further extend my gratitude and appreciation to Mrs Alice K Ndhlovu who typed this paper without complaining about my incessant changes to the script.

Finally, I thank my wife Mirriam Chelu Chisanga and the children Lupupa, Mulenga, Chisha, Bwalya, Emmanuel, Dan and Mirriam for their ebullient companionship and personal sacrifices they made towards my academic pursuits.

ACRONYMS AND ABBREVIATIONS

A-G	Attorney General
AZ	Agenda for Zambia
ANC	African National Congress
CNU	Cameroon National Union
FDD	Forum for Democracy and Development
HP	Heritage Party
MMD	Movement for Multi-party Democracy
NA	National Assembly
NCC	National Citizen Coalition
NLD	National Liberal Democracy
NPP	National Progressive Party
PF	Patriotic Front
SDP	Social Democratic Party
UFP	United Federal Party
UNIP	United National Independence Party
UPND	United Party for National Development
NEC	National Executive Committee
ZRP	Zambia Republican Party

ABSTRACT

The office of President is the pinnacle of power in this country and is a creation of the Constitution, which is the fundamental Law in Zambia.¹ The Constitution provides *inter-alia* for the establishment of the three traditional arms of government, namely, the Executive, the Judiciary and the Legislature.

The President heads the Executive and exerts considerable influence over the other organs of government in terms of appointments and passing of Parliamentary Bills into Statutes.

The constitution therefore vests broad and enormous powers in the President.² Three sweeping amendments have been made to the constitution using Constitutional Commissions as the originating devices,³ and rubber stamped by the majority members of ruling parties in the National Assembly. The current composition of the Members of Parliament however, may prove to be a turning point in the Zambia's history because for the very first time, during the December 2001 general elections the ruling party, MMD, failed to secure an overwhelming majority in the National Assembly (though this could change by political manipulations).⁴

Notwithstanding, this paper deals with, *inter-alia*, the constitutional requirement that a presidential candidate be either a member of or sponsored by a political party. 'Party'

¹ Zambia Law Journal Volume 30 of 1998 at 6.

² Ibid. at 16.

³ Ibid. at 28.

⁴ Human Rights Review Special Edition No. 9. February 2002 at 10.

membership was introduced in the Second Republic by UNIP when it introduced the one party system of government, while ‘sponsored’ by a political party arose from the compromise between MMD and UNIP before the 1991 elections and was embodied in the 1991 constitution.⁵

Thus in the event of a serving President being expelled from the party, does he or she become an independent? Could this create a near constitutional crisis? What could the courts say?

In an attempt to answer these questions this paper will, *inter alia*, scrutinize the synopsis of past general elections since independence, constitutional arrangements and consider the implications of his or her expulsion from the party that facilitates his/her ascendancy to power, in the First, Second and Third Republics.

⁵ Constitution of Zambia (1973) 38(2), 1991 34(3) 1996 34(3)

STATEMENT OF THE PROBLEM

This is an attempt through constitutional, political and historical analysis to assess the impact and implications of expelling a serving Republican President from the political party on whose ticket he or she ascended to the presidency.

This is unprecedented in Zambia. But as this study shows, no person is indispensable. The rift in Zambia's oldest political party, UNIP, between the pro-Francis Nkhoma loyalists and a reformist faction supporting Tilyenji Kaunda in 2001, which culminated in the suspension and subsequent expulsion of the former, a duly elected president of the party despite the High Court ruling to reinstate him provides a good political sign post.

In the ruling MMD, the former Republican and Party President Frederick Chiluba's ill-founded third term bid not only divided the party cadres but also the nation. The controversial ascent to power of Levy Mwanawasa, an ordinary member of MMD who found himself in the party's NEC as National Trustee was a subject of disquiet for some elected members. His appointment as MMD presidential candidate was also not well received by the some party members. This led to the split of the party in the aftermath of the 2001 general elections with one faction pro and other against Mwanawasa's "New Deal Administration".

These divisions in political parties and other factors may undermine the position of the Republican President who has no immunity against expulsion from the party which facilitated his elevation to power.

OBJECTIVES

In tackling the issue at hand this study sets the following objectives:

1. To analyse the election of a Republican President in Zambia vis-à-vis his or her party as an ordinary member.
2. To establish the implications of this membership.
3. To determine the consequences of expulsion of a sitting Republican President.
4. To investigate whether this could lead to a constitutional crisis.
5. To evaluate the provisions of the constitution relating to the subject matter.
6. To make recommendations which may forestall a constitutional crises

LITERATURE REVIEW

Since the subject matter is an original one literature is mainly obtained from the newspaper publications (and the Electronic media) supported by the Republican Constitution, Constitutional History and political books, journals and magazines.

METHODOLOGY

The method is mainly desk based research.

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The method is mainly desk based research.

OUTLINE OF CHAPTERS

- Chapter 1** Zambia’s general political and constitutional landscape.
- Chapter 2** The expulsion of a Republican President in the one-party state
- Chapter 3** The expulsion of a Republican President in the multi-party era.
- Chapter 4** Summary, Observations and Recommendations

CHAPTER ONE

ZAMBIA'S GENERAL POLITICAL AND CONSTITUTIONAL LANDSCAPE

1.0 INTRODUCTION *Colonial Constitutions*

During colonial rule, the British were not concerned with the democratic governance of Zambia then Northern Rhodesia. Thus basically there was no constitution other than that of Westminster¹. However, in the wake of increasing nationalistic sentiments and the emergence of national political parties demanding independence², the British government decreed a series of structural arrangements loosely termed as constitutions designed to promote governance with the active cooperation of white settlers and acceptance by the Africans, who only achieved limited franchise by 1958. This became substantial in 1962 and full suffrage only arrived in the January 1964 elections³ which brought political independence. Here below is the synopsis of past General Elections and their constitutions.

1.1 1964 Pre-Independence Elections

The general elections which for the first time introduced full adult suffrage⁴ participation were held in January 1964.

These were very significant in that they played a dominant role in the shaping of the political and constitutional landscape of this country. The elections

¹ Zambia Law Journal Volume 30, 1988 at 5.

² Kwame Nkruma Africa Must Unite at 51

³ Ibid. 1.

⁴ Journal African Law Vol. 40 No. 2 p.259

were not only a departure from a restricted franchise to full adult suffrage but also tilted the balance of power from the minority white settlers toward the majority indigenous Africans⁵.

Three major parties namely, UNIP, ANC and NPP formally UFP contested the seats in a 75 Member Legislative Assembly.

UNIP, led by Kenneth Kaunda won 55 (24 unopposed) leaving ANC led by Harry Nkumbula and NPP led by Robert⁶ with 10 seats each.

1.2 First Zambian Prime Minister

UNIP's sweeping victory resulted in the appointment of its leader Kaunda as the country's first Prime Minister at the end of January 1964 who formed the first all African cabinet⁷. Further, all political parties saw no need for another election in the same year, and an agreement was reached that the Independence Order should name Kaunda as the first President⁸. Accordingly, Section 32 of the Independence Constitution stated that 'the first President shall be Kenneth Kaunda'⁹.

However, one may be wrong to think that Kaunda was simply the hand-picked choice of the British government because he ascended to power as a

⁵ Ibid.

⁶ B.O. Nwabueze *Presidentialism*, p.222.

⁷ Richard Hall, *Zambia 1890-1964. The Colonial Period*, p.174.

⁸ Ibid. 2

⁹ Art. 32.

result of his party's triumph at the polls¹⁰ which politically signified the importance of party membership.

1.3.0 1964 Independence Constitution

Zambia became independent on 24th October 1964 under a new Independence Constitution¹¹ which appeared as a schedule to the Zambia Independence Order 1964, thus making it a statutory instrument made by the British executive with some reflection of colonial ancestry.¹²

1.3.1 Qualifications for Presidency

This Constitution created for the first time the establishment of the office of President and prescribed the qualifications required for that office. These were straight forward:

- (i) Zambian Citizen
- (ii) Attainment of thirty years of age
- (iii) Qualified as a voter in elections to the National Assembly.¹³

1.3.2 Future Manner of Election of President

The Presidential elections were part of the process of election of members to the National Assembly. Thus, every parliamentary candidate was required to declare the presidential candidate he or she supported.¹⁴ Every vote cast for a

¹⁰ Ibid. 2

¹¹ The Northern News, May 20 1964.

¹² Zambia Law Journal, Vol. 30, 1998 p.6

¹³ Ibid., 1964 Independence Constitution Art 33(1) (2) (a) (b) (c)

¹⁴ Art. 33(4)(b).

parliamentary candidate was also considered to be in favour of the presidential candidate the former supported.¹⁵

1.3.3 Tenure of Office

The tenure of office of the President corresponded with that of Parliament i.e. five years unless the President sooner dissolved Parliament or was removed from office on the grounds of mental or physical incapacity, violation of the constitution or gross misconduct.¹⁶

1.3.4 Amendment of Constitution

The 1964 Constitution contained a strict procedure for altering the constitution, particularly the parts relating to fundamental rights, which could not come into force until submitted to a national referendum for approval, but this was eliminated by a 1969 constitutional amendment through a referendum billed as the referendum to end all referenda¹⁷. This facilitated large scale nationalization and adoption of a one-party system of government later.

1.3.5 Executive Power

The Constitution vested broad executive power in the President¹⁸ who became the chief executive, taking the former place of the Queen, the Governor

¹⁵ Art. 33(4)(e).

¹⁶ Art. 36(1)(a)(b) (2) (3)(a)(b)(c) (4) (5)

¹⁷ Constitutional (Amendment) (No. 3) Act of 1969

¹⁸ Art 36(1) (A)(b) (2) (3) (a) (b) (c) (4) (5)

General and the Prime Minister.¹⁹ It is thus no exaggeration to describe the powers of the President under the 1964 constitution as enormous.²⁰

1.4 In the aftermath of Independence Elections

In the aftermath of the independence elections Kaunda predicted that any disappearance of the opposition would not be the act of the government but wishes of the people²¹. By this he conceived that due to his party's popular support, the opposition would go into the oblivion after independence,²² to usher in a **de facto One Party State**. But the 1968 election indicated otherwise.

1.5 First Post-Independence Elections

Zambia's first post independence elections for both the NA and presidency were held on 19th December 1968 in which UNIP won 81 seats against 23 for ANC and 1 for an independent - in a 105 member National Assembly²³. With this result the opposition gained more seats instead of decreasing as wrongly predicated by Kaunda who himself polled 1,079,972 votes for the Republican presidency against a meagre 242,017 votes for Nkumbula. Despite this overwhelming popularity, Kaunda feared to lose grip and thus decided to introduce a One Party State system of government in 1973.

¹⁹Gower LCB Independent Africa the Challenge to legal profession, p.55

²⁰Ibid. 2.

²¹The Northern News: March 21, 1964.

²²John Hatch: Kaunda of Zambia, p.97.

²³William Tordoff: Politics in Zambia, p.190.

1.6.0 The 1973 Constitution

The Zambia Independence Act 1964 and the Zambian Independence Order 1964 were repealed by the 1973 Constitutions of the Second Republic which came into effect on 25th August 1973. During the preceeding year, the Chona Constitutional Commission was established in which people were not given the chance to either accept or reject the introduction of the One Party State. In its preamble the constitution introduced the Philosophy of Humanism. The provisions of the Constitution relating to the Executive, the Judiciary and Parliament remained substantially the same as those contained in the 1964 Constitution. But in the new political order, the post of Secretary General and the Office of the Prime Minister were created. The former deputized the President while the latter became the leader of government business in Parliament.

This Constitution declared Zambia a One Party State. UNIP was the only party allowed to exist and operate in this country²⁴. To this end, it became illegal to form or belong to any political party other than UNIP which assumed supremacy over and above all other institutions in the country²⁵.

The legality of the change over was unsuccessfully challenged in the Nkumbula V AG²⁶ where the petitioner applied to the High Court to stop Kaunda from introducing a One Party State. And, the eventual signing of the

²⁴ The Constitution of Zambia Act 1973 Art. 4.

²⁵ D.M. Luywa: Obligatory Essay, 1998.

²⁶ Human Rights Special Edition No. 9, February 2002, p.4.

Choma Declaration effectively absorbed ANC in UNIP thereby confirming the introduction of the One Party State.

The Party and the State were merged in a nucleus of hierarchical leadership, whereby effective power in both was laid in the president of the party²⁷ who was also simultaneously the Republican President or Head of the State, Commander-in-Chief of the Armed forces and Chief of the Executive²⁸.

1.6.1 Qualifications for Presidency

- a. a citizen of Zambia
- b. a member of the Party
- c. attained the age of thirty five years
- d. eligible to be a voter in the NA elections

1.6.2 Elections of President

The trend in the Second Republic was that a person elected as president of the party by the General Conference of UNIP was the sole candidate in an election to the office of Republican President.

This was based on the philosophy that the party was supreme; which supremacy was recognised by the Constitution of Zambia (Amendment) Act No. 22 of 1975.

²⁷ UNIP Constitution Art. 31.

²⁸ Constitution of Zambia 1973 Art. 37, 53, 54.

Accordingly the electorate were merely enabled to vote 'Yes' or 'No' for the party's adopted sole presidential candidate²⁹.

1.7.0 1991 Constitution and General Elections

The provision establishing UNIP as the sole political party was removed and later the constitution changed after the Mvunga Constitutional Commission. Consequently, no reference was made to the Philosophy of Humanism. It also ended the notion of party supremacy, and limited the tenure of office to two terms, providing for computation of such terms from the date of the constitution³⁰.

To be President a candidate had to be:

- (i) a Zambian citizen
- (ii) attained the age of thirty-five years
- (iii) a member of, or sponsored by a political party.³¹

This constitution was perceived as one that could serve the interests of the people for a long time³².

1.7.1 Elections

This constitution re-introduced multi-partism; thus in the general elections held on October 31, 1991 more than four parties participated, including MMD and UNIP. For one to be elected President, one was required to obtain 50 per

²⁹ The Constitution of Zambia Act 1973 Art. 32.

³⁰ The Constitution of Zambia Act 1991 Art. 1(2) ZLJ 30/98 p.17.

³¹ Ibid. Art. 34(3) (a) (b) (c) (d).

³² John Mwanakatwe at 233.

cent or more of the total votes cast. Fredrick Chiluba of MMD was elected President by a landslide margin over Kaunda of UNIP. MMD captured 125 of 150 seats in the National Assembly.

1.8 1996 Constitution

This constitution originated from the Mwanakatwe Constitutional Commission and brought with it variety of innovations. In its preamble it declared Zambia a Christian Nation³³, and introduced, *inter-alia*, the Human Rights Commission. It also banned chiefs from taking part in active politics. Another notable change was that a person to be qualified as candidate for election as President, had to be a citizen of Zambia, born of both parents who were Zambians. It is clear that the presidential candidate's parents' birth was an attempt to bar former President Kaunda from becoming a candidate for presidency and rule again. This provision resulted in UNIP boycotting the elections. The other amendment to the 1991 Constitution was the introduction of an Article which provided for a presidential candidate who secured the highest number of total votes cast³⁴ to be declared the winner.

This election was won by MMD. The incumbent, Chiluba, received about 75 per cent of the votes cast polling 835,537 votes against his closest rival who had only 145,000 votes³⁵.

³³ Constitutional of Zambia (Amendment) Act-Preamble

³⁴ Ibid. Art. 33(8)

³⁵ Ibid., 25.

1.9 2001 General Elections

The 2001 elections were held on December 27, 2001 contested by 11 presidential candidates.

These were the most heavily contested elections in the country's history where 11 presidential candidates contested the presidency. The political drought or apathy experienced in the past election also subsided. Amid controversy concerning the electoral system the following results were announced in the one hundred and forty-five out of one hundred and fifty constituencies.

Out of 145 Constituencies

Party	No. of Seats	President	
MMD	65 (72)*	Mwanawasa	496 083
UNPD	41 (48)	Mazoka	460 053
UNIP	11 (13)	Kaunda	174 269
FDD	9 (12)	Tembo	226 548
HP	4 (02)	Miyanda	140 325
ZRP	1 (01)	Mwila	85 136
PF	1 (01)	Sata	58 689
Independent	1 (01)		
NCC		Mumba	38 514
SDP		Konie	10 165
AZ		Inonge	9 642
NLD		Shampande	9 242

Accordingly Mwanawasa won by a simple majority as provided for by the 1996 Constitution. This was in contrast with other previous constitutions which provided for fifty and above percent of the total votes cast³⁶.

³⁶ Times of Zambia 02/01/02. *October 2002 situation

1.10 CONCLUSION

In sum, this chapter has attempted to show that since independence Zambia has changed its constitution on three major occasions. On the first occasion, the government and ruling party UNIP decided to change the political system from multi-partism to One Party State, on the recommendation of the Chona Constitutional Commission. This was followed by the Mvunga Constitution Commission (1990) to reintroduce multi-partism. In 1996, the Mwanakatwe Commission introduced controversial clauses to suit the aspirations of the ruling party. The reasons for these changes have mostly been political and to the advantage of the leaders in power. Kaunda and UNIP claimed that there was public demand for One Party State which demand only emanated from his party cadres. The other reason given was to achieve unity, peace and development. However, the underlying motive was to eliminate the opposition so that he could cling to power for as long as he and the party wished. On the other hand, Chiluba campaigned on the platform of making the Constitution non-partisan, liberalization of the economy and enhanced enjoyment of human rights using MMD as the 'conveyor belt'. But what could happen if the conveyor belt was cut? To effectively answer this question it is useful to start with the chances of expulsion of party president in the Second Republic in the next chapter. What is more significant though is that before the One Party State an independent presidential candidate could contest the elections.

CHAPTER TWO

EXPULSION OF A REPUBLICAN PRESIDENT IN THE ONE-PARTY STATE

2.0 INTRODUCTION

The preceeding chapter dealt with various changes regarding the constitutional qualifications of presidential candidates in the general elections held in Zambia between 1964 and 2001. In that chapter we contended that most of these changes were politically motivated and only served to consolidate the position and status of the leader in power, or more precisely the incumbent President.

This chapter now looks, inter-alia, at the dominant role the President plays in party and national politics, with a view to determine the possibility of his expulsion from the party. We shall therefore examine the political climate in the First, Second and Third Republics. This entails a brief historical account of Kaunda's title to presidency, demise of constitutionalism, declaration of One Party State, wind of change and revival of constitutionalism.

2.1 TITLE TO PRESIDENCY

The Independence Constitution provided for a Republican President who was the Head of State, and categorically mentioned Kenneth Kaunda by name as the first President. But it was silent about his party membership or

sponsorship.³⁷ By implication this meant that any suitable person could have offered oneself as a presidential candidate regardless of whether one was a party member or not. Put differently, one could have contested presidential elections as an independent candidate.³⁸ Since Kaunda's name was "incorporated" into the constitution it appeared as if his tenure of office was guaranteed on personal-to-holder basis save for removal by death, incapacity or dissolution of Parliament.³⁹

2.2 CONSTITUTIONALISM

Notwithstanding, the constitution was based on democratic principles. It provided for a parliamentary system, Bills of rights which restricted the power of the executive and legislature, and ensured the presence of checks and balances. In other words, the culture and habit of living with and being regulated by the constitution existed then.⁴⁰ However, this did not amuse Kaunda who was both the party president and Republican President. He argued that Zambia was not the right environment for a British system and it was wrong to adopt it.⁴¹

2.3 SERIOUS CHALLENGES

Although Kaunda and his ruling party were then popular, they none-the-less faced a small but persistent opposition in the ANC.⁴² Kaunda's major

³⁷

³⁸ Momica Crowley Nixon off the record p.85

³⁹ Ibid Art. 35, 36

⁴⁰ The Human Rights Observer (SA) vol. 5 Sept. 2001 p. 1

⁴¹ Times of Zambia December 31, 1968

⁴² C. Gertzel the Dynamics of One Party State p. 7

challenges did not however arise from the opposition but within UNIP itself. The unity within the party disintegrated on tribal lines with the disappearance of the common enemy-colonial rule.⁴³ This led to intra-party conflict which resulted in splitting the party into sectional factions. Some members of these factions formed their own parties like the United Party (UP) and the United Progressive Party (UPP) led by former prominent members of UNIP. These developments posed a serious challenge to Kaunda's rule and eroded UNIP's effectiveness and popularity. They also exacerbated inter-party violence which culminated into bloody and sometimes fatal consequences.⁴⁴

2.4.0 EROSION OF CONSTITUTIONALISM

In response to these challenges, Kaunda proscribed the fledging parties and detained their leading members.⁴⁵ He further resorted to austere measures, by appointing the Chona Commission to recommend the form and structure of a new system of One Party State, without giving the people the choice of deciding whether they liked it or not.⁴⁶ Nkumbula challenged the government's intention to introduce One Party State but to no avail.⁴⁷

On the pretext of constant and widespread demands Kaunda declared Zambia a One Party State by legislation contrary to his earlier prediction that the opposition would disappear through the ballot. Thus on December 13, 1973

⁴³ W. Torodff politics in Zambia p. 10

⁴⁴ Ibid p. 17

⁴⁵ Ibid 6. P. 9

⁴⁶ 1972 Chona Commission report

⁴⁷ Nkumbula V. A – G HP 1.72 unreported

Zambia entered the Second Republic with a One Party Constitution which dispensed with multi-party system, the Zambia Independence Act, 1964 and the Zambia Independence order, 1964.⁴⁸

Under this political order, the ideals of liberal democracy were replaced with *those of the Philosophy of Humanism coined by Kaunda. The party, in One Party State, like in Tanzania or Kenya then was elevated above all the institutions in the land. All organisations or associations of national significance had to belong to UNIP. The Civil Service and Local Government were politicised. The decisions of the party's politburo-Central Committee took precedence over those of Cabinet. In short, the party then directed the political and economic destiny of the country.*⁴⁹ The party and government became synonymous.

.4.1 Legislative

There was no opposition in the National Assembly. Therefore it could not provide the checks and balances typical in a parliamentary system. The MPs had to toe the party line as laid down by the party president who was also the Head of State. They had no real control over the national budget as their role was restricted to rubber stamping the bills drafted by the executive. The President assumed the role of the legislator by initiating various constitutional reforms on the advice from the staff at State House. The parliamentary

1973 Zambia Constitution
LS Nsimba 1979 Thesis p. 622

privilege of MPs was also tampered with by making the party's disciplinary code part of the Standing Orders of Parliament thereby curtailing them to criticise the activities of the party and its government.⁵⁰ The Legislature therefore failed to make the executive accountable for its actions.⁵¹

2.4.2 Judiciary

The judiciary which was supposed to be a bulwark of defence for human rights did not escape the tentacles of the President. Judges were subjected to intimidation from politicians or cadres of UNIP. This was an erosion of constitutionalism.⁵² The independence of the judiciary was also compromised through transfers of judges to other functions particularly those who held different views from those of the party and its government.⁵³

2.4.3 The Executive

The dominating role played by the President was self evident. The powers of the party president and Republican President were all centralised within the person of Kaunda. He had unlimited powers to promote or dismiss senior party or government officials. Both the party and government conducted their affairs in an arbitrary manner and in accordance with the whims and caprices of Kaunda.⁵⁴

⁵⁰ Ibid P. 538 - 540

⁵¹ Ibid 4

⁵² Ibid

⁵³ Ibid 14

⁵⁴ Ibid 4

He controlled the state resources, the state owned media, both electronic and print which were used to reflect his views and showed little tolerance for private media.

The vesting of enormous de-facto and de-jure powers in the person of Kaunda made it very difficult to make him accountable for his actions. It was therefore unthinkable to force him out of the presidency by any form of pressure. Therefore the time of constitutional crisis arising out of the expulsion of a serving Republican President was not ripe then.

2.4.4 Elections

Although elections were held at regular intervals they did not result in a change of the ruling party, which entrenched itself in power by abolishing all the opposition parties. The electoral scheme devised under the one-party constitution required that to be either a presidential or parliamentary candidate one had to be a member of the only ruling party UNIP. The controlling role of the party in the elections therefore could not be underated. The general conference of UNIP elected a person to the presidency of the party and the same person became the sole candidate presented to the electorate for the office of Republican Presidency. The electorate then had no choice, apart from ratifying the nomination by casting ‘Yes’ or ‘No’ vote.⁵⁵ The elections were therefore a mere formality and sham.

⁵⁵ Ibid 15 p. 520

As for the parliamentary candidates, they had to be chosen by the party's members of Central Committee who were Kaunda's loyalists. And if they were expelled from the party, they also forfeited their seats in parliament. This started in 1966 when Mundia, a former UNIP Cabinet Minister, was expelled from the party.⁵⁶ But the Constitution was silent on the status of a serving President who was expelled from the party. All in all everything revolved on the President – Kaunda.

2.5 Wind of Political Change

Kaunda tacitly introduced the One Party State on the pretext of curbing political violence and concentrate on economic development.⁵⁷ While violence was curbed, economic development was not achieved resulting in severe shortages of food and essential commodities. By the end of 1980, there was increasing dissatisfaction with the Kaunda regime and his one party rule among the Zambian people. Sharp increases in the price of national staple food ignited a wave of food riots and looting on the Copperbelt and Lusaka in which several people were killed and property worth billions of Kwacha destroyed.⁵⁸ An attempted coup d'etat, although unsuccessful, plunged further the government into deeper crisis.⁵⁹ The change was imminent.

⁵⁶ Ibid 13 p. 405

⁵⁷ Kaunda Humanism in Zambia Part II p. 13 - 21

⁵⁸ Zambia Law Journal vol. 30 1998. P. 16

⁵⁹ Ibid 4

ratification by Parliament which refused to be used as a mere rubber stamp.⁶³

So was with the declaration of a public state of emergency. A Permanent Human Rights Commission was also created to deal with cases of human rights abuses. Party supremacy was dispensed with together with the Philosophy of Humanism. The economy and the media were liberalised too. The party and government were also delinked.

The opposition began to criticise government actions or omissions and parliamentary privileges were restored as recently witnessed during the removal of the former Republican President's immunity.⁶⁴ The civil society such as the OASIS FORUM, AFRONET and other NGOs began to put pressure on the ruling elite to respect human rights and conduct their affairs in accordance with the tenets of democracy. The successful campaign by the civil society to force Chiluba to abandon his ill-conceived bid for an unconstitutional third term of office demonstrates the rekindled fight for constitutionalism in Zambia.

2.5.2 Altercation with the President

Public altercation between a citizen and a president was never dreamed of in the First or Second Republics, but it is a reality in the Third Republic. The point in case is the altercation between Mwanawasa, the current Republican President and Acting ruling Party President, and Vernon J. Mwaanga, then

⁶³ The Post July 31, 2002

⁶⁴ The Post July, 17, 2002

National Secretary of MMD, over party matters. The genesis of the existing cleavage in MMD may be said to lie in Chiluba's Third Term bid and his controversial choice of Mwanawasa as his successor. This has split the ruling party into two hostile camps – one for Chiluba and the other for Mwanawasa. Mwaanga who supported the former initially suspended Mbita Chitala, a Deputy Minister in Mwanawasa's "New Deal" government, without consulting the president. This action did not please the president. But he further suspended another pro-Mwanawasa Peter Filamba, a Deputy Minister, for alleging that some MMD members were plotting to unconstitutionally remove the "New Deal" government from power. Mwaanga wanted these serious allegations to be substantiated. In response Mwanawasa ordered Mwaanga to reinstate Filamba or else to resign from the party. Mwaanga defied Mwanawasa's order stating that under the party constitution, he had powers over Mwanawasa to discipline erring members of the party and that this was not the domain of the acting party president.⁶⁵ Although Mwaanga later resigned, it clearly demonstrated that unlike in the Second Republic, a president's order today could be challenged.

In this dispensation, the media has taken its rightful place in consolidating constitutionalism by exposing corruption by persons holding public offices as revealed in the ZAMTROP case.⁶⁶ This and other factors show that there is a tremendous change in the political climate between the Second and the Third

⁶⁵ Ibid

⁶⁶ Ibid

Republics. The President wielded unquestionable powers before, but it is not necessarily the same today as shown above.

2.6 CONCLUSION

In conclusion the democracy which the country inherited at independence broke down in the Second Republic and the attrition of human rights became the order of the day as the first President used the state of emergency which he had maintained since 1964 as a pretext for arresting and detaining his political opponents. He used the party as means of fortifying his influence and power. The public put all their trust in one man in the person of Kaunda who disguised the true motives for constitutional changes by presenting them as indigenous to African traditional society, but in fact uniquely suited to his personal ambitions and aspirations, for it increased the pre-eminence and power of his presidency. He made serious inroads into fundamental rights by limiting the right of association and freedom of expression which are cardinal to the survival of democracy.

The President had control over all levels of power. The whole apparatus and patronage of state power were at his disposal. He appointed all personnel to serve in government, public institutions, parastatal companies, political posts, police and defence forces.

He linked the party to the government, nationalised the industries and commerce, thereby making the livelihood of all kinds and groups of people ultimately to depend on his goodwill.

All the cooperatives, trade unions, women and youth groups were coopted into the machinery of the party and therefore ceased to protect the interests of the people and independent sources of power.

The President used the law on preventive detention to punish and undermine people with different views and thereby prevent accountability of the President and government. One could neither sell nor buy if one did not belong to the party, neither could he be issued with a trading license.

In this scenario no one could therefore afford to question the president's views or policies. Lower level officials hid behind the President's authority when they violated the people's rights. The judiciary was rendered impotent and so was the legislature. Who can therefore dare to discipline the President, let alone his suspension from the party? No one. Little surprise therefore that Richard Dowden described Kaunda

“as the man who was Zambia. He believed that he was the embodiment of his nation. His picture was every where and his face on the money. He was Zambia. He ruled with an iron fist and power turned him into paternalist and an autocrat and his followers sycophants.”⁶⁷

⁶⁷ J. Mwanakatwe End of Kaunda Era p. 258

However, with the reintroduction of multipartism and the supremacy of the Constitution and the rule of law, the public is now more suspicious of the leaders and their claims. This scepticism is undoubtedly healthy for the fledgling young democracy and prevents dictatorial tendencies experienced in the Second Republic.

In sum, it is clear that a Republican President is neither infallible nor indispensable. He can under this era be expelled from the party. As Sata, the predecessor to Mwaanga observed, MMD could create a constitutional crisis the country had no capacity to handle.⁶⁸ This will be elaborated in the next chapter dealing with the expulsion of the President in the Third Republic.

CHAPTER THREE

THE EXPULSION OF A REPUBLICAN PRESIDENT IN MULTIPARTY ERA

3.0 Introduction

This chapter continues with the trend set in the previous one concerning the increasing reduction in the dominance of a party president. We shall begin by discussing succession problems in UNIP which resulted in the expulsion of its party president Francis Nkhoma. Later we will analyse the constitutional crisis that could result from expelling a serving Republican President and its impact and consequences.

3.1.0 Succession Problems

The rift in Zambia's oldest political party, UNIP, after Kaunda's second retirement from active politics between pro-Nkhoma loyalists and a reformist faction supporting Kaunda's sons Tilyenji, in the run up to the 2001 presidential and general elections, resulting in the expulsion of a democratically elected UNIP party president Francis Nkhoma provide a good precedent.

Beyond UNIP's intra-party conflict, this paper proceeds to reflect on Mwanawasa's controversial ascendancy to power in MMD and examines the consequences of the threats to expel him from the party while serving as a Republican President. In this regard, we start with Kaunda's first successor to party presidency in the person of Kebby Musokotwane.

3.1.1 Background - Sham Party Elections

Since elected to party presidency in 1960, Kaunda never experienced competitive party elections. At all occasions he was elected unopposed. The first semblance of a democratic election in UNIP was at Namayami in 1993 when the late Kebby Musokotwane, succeeded him.⁶⁹ Kaunda himself temporarily quit politics, and never rendered support to the new party president.

In no time a make believe party congress was held at the University of Zambia in 1995 where Kaunda bounced back as party president defeating Musokotwane whom he had anointed as his successor.

Following his defeat, Musokotwane and his supporters embarked on a vicious campaign against Kaunda calling him immoral.⁷⁰

3.1.2 Political Engineering

The man who ruled Zambia for 27 years seemed retired but not tired to vie for another electoral contest for the Republican presidency. However, his hopes were dashed by the constitutional amendment which effectively barred him on the grounds of foreign parentage⁷¹ and the fact that the amended constitution

⁶⁹ Times of Zambia, October 17, 1999.

⁷⁰ Ibid.

⁷¹ Sunday Times of Zambia, October 10, 1999.

barred any aspirant who had already served as Republican President for two terms from contesting the elections⁷². And instead of stepping down to allow another person to take the party into elections Kaunda and UNIP boycotted the elections, thereby awarding MMD an undeservedly easy victory. The decision by Kaunda to boycott the elections put him at the centre of controversy within UNIP. Thus, instead of commanding the status of a supreme party leader, some members of the central committee refused to bow to Kaunda's dictates and exchanged harsh words with him. Others resorted to court action to deter him from suspending or expelling them from the party, resulting in the emergence of two factions. 'One pro and another anti-Kaunda.

Love-hate relationship and suspicion became too entrenched to be ignored and it needed an iron hand to keep the warring parties apart and much more steel for them to work together again.⁷³

3.1.3 The Rise of Nkhoma

When it became clear that he would not contest the elections, Kaunda quit politics for the second occasion with a strong warning that he would keep a close eye on the internal activities of the party.⁷⁴ To fill the vacancy, Francis Nkhoma beat the other 8 party presidential candidates including Professor Patrick Mvunga and Chief Inyambo Yeta under very controversial

⁷² Constitution of Zambia Art 34 (3) (b), 35(2)

⁷³ Ibid. 1

⁷⁴ Ibid.

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⁷² Constitution of Zambia Art 34 (3) (b), 35(2)

⁷³ Ibid. 1

⁷⁴ Ibid.

circumstances. The elections were characterized by electoral scandals, rampant corruption and tribalism.

Strategically, Kaunda favoured Chief Inyambo Yeta as his successor in the belief that the presidency would easily pass to his son Tilyenji when constitutional limitations on the chiefs barred him.⁷⁵ Tilyenji who also scooped the post of party secretary general meant the survival of Kaunda's legacy in Zambian politics. His intentions were not hidden. He categorically said that he intended to take over the reigns of UNIP and later run for Republican Presidency in order to carry on from where his father had left, once the former ruling party bounced back to power.⁷⁶

This development greatly undermined Nkhoma's party leadership, as the party found itself fettered and chained by chronic internal problems and violence, between his loyalists and the Tilyenji faction.

The woes of the embattled UNIP president deepened when some rival youths physically 'air lifted' and molested Nkhoma in the presence of his members of the Central Committee.⁷⁷

These unruly youths staged violent protests against Nkhoma and demanded his immediate removal from the party and sought Tilyenji to head the party. They

⁷⁵ The Post, November 5, 2001, p.5.

⁷⁶ Times of Zambia, May 13, 2000., Times of Zambia May 15, 2000

⁷⁷ Times of Zambia October 4 2000

claimed that there was a national consensus among the members to remove Nkhoma as party president and save it from extinction. The other allegation was that Nkhoma was an MMD puppet.

3.1.4 Suspension of party president

Regardless of his top most position in the party, Nkhoma was charged with 6 counts including “abashing” his party during a public rally, calling a Lusaka District Official a Congolese, poor performance and wilful refusal to convene the party’s national council.⁷⁸

Particulars of suspension in part stated that, Nkhoma on May 12, 2000 in Ndola made false promises to the party’s fourth extra-ordinary congress delegates that he would purchase bicycles and motor vehicles for distribution to wards, districts and provinces for use in party mobilisation. The failure to fulfill the promise stirred frustration in the general membership of the party.⁷⁹

Nkhoma persistently opposed his suspension as president and dragged his party to court. But while challenging his suspension, the Police arrested him and charged him for alleged involvement in the manufacturing of black dollars. Nkhoma persistently denied all the allegations against him.

⁷⁸ Ibid. 7

⁷⁹ Ibid.

3.1.5 Expulsion of party president

When the court ruled in his favour concerning his suspension, the party suspended him again, for putting the party's name into disrepute and contempt. The party maintained that Nkhoma could not continue as its president when he was appearing in court on criminal charges. Thus, finally the suspended UNIP president was expelled from the party.⁸⁰ A total of 565 delegates voted for the expulsion of Nkhoma while one voted against. Meanwhile, Tilyenji Kaunda who had been nominated as acting UNIP president was unanimously elected as the new party president at the party's national council.

3.1.6 Author of Confusion

Nkhoma strongly believed that the confusion and problems in the party were the childbrain of Kenneth Kaunda whom he accused of having organised some individuals to rise against him when he beat Chief Inyambo Yeta, at party presidential elections. He thus, did not accept his expulsion and maintained that he would lead the party into elections.

3.1.7 Leadership Wrangle

Shortly before the presidential and general elections, the UNIP leadership wrangle shifted to the Electoral Commission of Zambia (ECZ) where both Nkhoma and Tilyenji claimed to be the party's legitimate presidential

⁸⁰ Ibid.

candidate.⁸¹ It took the Chairman of the Electoral Commission, Judge Bobby Bwalya to warn UNIP that a party with two presidents risked having no presidential candidate.⁸²

At the eleventh hour, Nkhoma swallowed the bitter pill and dropped his bid to contest the elections to the great relief of Tilyenji and UNIP. It was earlier argued by pro-Nkhoma supporters that, those who wanted to get rid of an elected party president should have waited until a new leader was elected in 2005, at the expiry of his five year tenure of office according to the party's constitution.

But then, Kaunda told party cadres that members who wanted Nkhoma removed had the liberty to call for extra-ordinary national council at which the presidency could be challenged⁸³.

In sum the above shows that politics will never be the same as in the Second Republic where both the means and grounds to challenge Kaunda lacked.

His name became synonymous with UNIP, just as ANC was Harry Mwaanga Nkumbula and UPP, Mwansa Simon Kapwepwe, and there was a legacy for a party to fizzle out with its leader.

⁸¹ Times of Zambia November 6 2001

⁸² Ibid.

⁸³ Sunday Mail November 19,2000

However calls for the expulsion of party presidents is not uncommon in UNIP. Some members of UNIP have, called for the expulsion of Tilyenji from the party because he appears to spend most of his time in Zimbabwe instead of organising the party.⁸⁴

3.2.0 Constitutional Analysis

The expulsion of Nkhoma from UNIP, maybe said to have had marginal impact on the general political landscape of the nation, though it can be argued that it strained intra-party relations which adversely affected the party's performance in the presidential and general elections as much time was expended on intra-party wrangles rather than mobilising party membership.

But what could have happened if Nkhoma had been a serving Republican President? Or if Mwanawasa was to be expelled from MMD as advocated by some MMD members opposed to his New Deal administration?

3.2.1 Theoretical Argument

From a purely theoretical argument, it seems that since the President's tenure of office is entrenched in the Constitution save for resignation, incapacity, impeachment and dissolution of Parliament⁸⁵, the expulsion of the serving President does not affect his presidency. But this is not conclusive, when one considers the fact that the Zambian Constitution, unlike the American Constitution, does not provide for an independent presidential candidate *ab*

⁸⁴ Times of Zambia August 15, 2002.

⁸⁵ Ibid. 17 Articles 35, 36, 37, 38

initio. An expelled President will thus be a *de facto* Independent President and not a *de-jure* one, thus arousing fears of creating a dictatorship, which is inconsistent with good governance and liberal democracy.

The expulsion from the party, may also perhaps raise a presumption of loss of confidence which could necessitate a fresh recourse to the electorate as in the case of elected Members of Parliament (MPs). Though this also is not conclusive as can be demonstrated by the fact that ‘carpet crossers’ may be voted back to the National Assembly on new party labels⁸⁶ after they had resigned or being expelled from their initial political parties.

3.2.2 Analogy with MPs

Since there is no precedent in Zambia over an expelled serving Republican President, it makes good sense to make reference to the status of an elected MP who resigns or is expelled from his party.

The case in point is the A-G and MMD v Lewanika and Others,⁸⁷ where four MPs elected on MMD tickets resigned from MMD and wanted to retain their seats in Parliament.

In interpreting the 1991 constitutional provision which stated that if an elected MP became

O. Nuebuer, p.288
1994 SCZ (2) Unreported.

A member of a political party other than the party of which he was an authorised candidate when he was elected... or if having been an independent candidate he joins a political party,⁸⁸

he forfeits his parliamentary seat, the High Court ruled in favour of the MPs. But the Supreme Court applying the golden rule rather than the literal rule overruled the High Court decision by adding three words “or vice-versa” to the Constitution. This was indeed an unprecedented move by the Court whose role is to interpret the law and not to make it. Notwithstanding it underpins the fact that an MP forfeits his seat in Parliament if he changes the political status he had at his candidature.

On the premise of this analogy, it can be implied that an expelled Republican President from the party on whose ticket he ascended to power may also forfeit his presidency. This is logical, in the sense that both MPs and a Republican President hold their mandate of office directly from the electorate. Thus, these two like cases may be treated alike.

Incidentally, the Republican Constitution is silent on the status of a serving Republican President who is expelled from the party that authorised his candidature; although party membership or sponsorship is one of the constitutional qualifications for presidential candidature.

⁸⁸ 1991 Zambian Constitution Art. 71 (2)(c).

However, the MMD constitution is very clear on this issue. It expressly states that party membership is terminated upon expulsion from the party, and in such an event, an expelled member relinquishes his party posts and all responsibilities held by virtue of his membership in the party.⁸⁹

By implication this means that an expelled President can not effectively perform his function in the Cabinet⁹⁰ which is usually composed of members of the ruling party. He also ceases to be a member of NEC which is responsible for the formulation of policy and party programmes.⁹¹

In short, the expulsion of a serving Republican President signifies loss of confidence in him on which ground MPs may dissolve the Parliament if a two thirds majority resolve that way⁹². This and other situations may give rise to serious constitutional crisis.

3.2.3 Power to Discipline Members

Under the UNIP constitution the party president was vested with among other things:

the power to take any disciplinary action against any member of the party on the grounds of the member's behaviour.⁹³

and reported such action to the appointments and disciplinary sub committee of the central committee for the usual ratification by the central committee.

⁸⁹ MMD Constitution Art. 5(1) (b) (3).

⁹⁰ Zambian Constitution Art. 44(2).

⁹¹ MMD Constitution Art. 19.

⁹² Zambian Constitution Art. 88 5(b).

⁹³ UNIP Constitution (1973) Art. 14(h)

This too reveals the overarching place of then party president in UNIP who had the characteristics of a godfather and a symbol of unity, stability and continuity in a non competitive political environment. No person then in his right mind would think of taking disciplinary action against Kaunda.

On the contrary, in MMD, a party president is a 'titular' head of the party who has no constitutional power to take disciplinary action against a party member. The power to ensure discipline and to take disciplinary action among the officers, members and employees of the party lies with the National Secretary.⁹⁴

From this basic premise, the former National Secretary Mwaanga was constitutionally 'aboard' when he argued with Mwanawasa that the function of disciplining erring members of the party was under his jurisdiction and not the latter as already mentioned earlier in the altercation with the president.

This clearly shows the dilution of power in the centre, which has the effect of providing a series of checks and balances to prevent a one man rule. It also signifies the vulnerability of the office of a party president, who maybe disciplined by party machinery like any other member. It is this vulnerability that arouses our concern, in the event of an expulsion of a party president who is also a serving Republican President. This can be a recipe for a constitutional crisis as shall be illustrated below.

⁹⁴ MMD Constitution Art. 50 (3) (4).

3.2.4 Party Membership vis-à-vis the Presidency

During the Chona Constitutional Commission, a substantial number of petitioners expressed among other things that the Republican President should be an active party member and a humanist. There was also a view that Kaunda should be life President, which proposal was rejected by the Commission on the reasoning that it exposed the holder of the office and the country to many risks.⁹⁵

While the Commission conceded that the presidency should be open to every citizen, it recommended to introduce a novel item in the constitution to the effect that:

a presidential candidate must be a paid
up member of the party.⁹⁶

which was embodied in the Constitution of the Second Republic. The Commission felt that as the party in the one-party state was deemed to be a mass movement only party members should be eligible to stand for elections⁹⁷.

However, during the Mvunga Constitutional Commission, eighteen years later, a majority of the petitioners expressed no view on the requirement that a candidate should belong to a registered political party, and a few expressed

⁹⁵ The Chona Constitution Commission Report p. 10-12.

⁹⁶ Ibid. p.5.

⁹⁷ Ibid. p.17.

the view in favour of independent candidates contesting presidential elections.⁹⁸

But the commission did not see any major deficiencies in the then existing qualifications of a presidential candidate. It added that the basic tenet of multi-party democracy was optional programmes offered by political parties to the electorate.

It thus recommended that the qualification for presidential candidate be continued to be linked to party membership and sponsorship. Constitutionally therefore, there are only two ways one may ascend to the Republican Presidency; either through political party membership or sponsorship and no other way.

3.3.0 Constitutional Crisis

A party president who is also a Republican President wields enormous power and influence. He ascends to power by the medium of the party, thus expelling him from the party may create serious political instability. The impact of expelling an MP is marginal compared to the expulsion of the President because the whole country is his constituency.

⁹⁸ Mvunga Constitutional Commission Report (1990) p.20.

The main problem is not the power itself but how to limit that power. The rancorous third term debate conceived by Chiluba provides a good example where what initially started as party issue spilled over to the entire nation.

3.3.1 Third Term Debate

The debate to amend the MMD constitution so as to allow Chiluba to continue with party presidency, pushed the nation closer to a sharply polarised society *with great prospect of civil unrest, social breakdown and widespread violence*. It split the churches, opposition parties, NGOs and professional associations.⁹⁹ Chiluba contended that if the party constitution was amended and retained his party presidency, he would strengthen the foundation of the party and reduce party pressure from the Republican President.

But the Zambia Episcopal Conference (ZEC) counter argued that it was not prudent to have one person heading the party in power and another ruling the nation because in such a situation people were bound to have divided loyalties.¹⁰⁰

Others suggested that in order to avoid possible conflict between the president of the ruling party and the Republican President it was wiser to unite both offices in the Republican President like in most other countries, because power in Africa tended to be absolute¹⁰¹.

⁹⁹ UNZA Lusaka Star Magazine Vol. 3 No. 32 May 2001.

¹⁰⁰ Times of Zambia March, 18, 2002.

¹⁰¹ The Human Rights Observer Vol. 7 March 2002, p.10.

3.3.2 Tragic Example

Professor Carlson Anyangwe draws a closer parallel between what happened in French Cameroon in 1982/3 to the prevailing power struggle between Chiluba and Mwanawasa. Briefly the facts are that 20 years ago, Ahidjo who was both a chairman of his ruling party the Cameroon National Union (CNU) and republican president, in an unanticipated move retired from his republican presidency, but retained the chairmanship of CNU.¹⁰²

In his place he handpicked Biya to be the successor. Biya was not even a member of the central committee of the ruling party, and had a voice problem. He was little known outside the capital although he was once a prime minister. But the sarcasm of the day was that it is these qualities that qualified him for the appointment as republican president.¹⁰³

But barely a month later trouble emanating from the power struggle between the predecessor and successor ensued. This quickly resulted in bitter hostility and enmity not only between the two men but also their supporters and sympathisers.

The predecessor was a very well known figure who rallied behind to his side among others, party cadres country wide, civil servants, the police, military and intelligence service. By contrast Biya as an appointed rather than an elected president found himself wanting. But he managed to rally his heavy

¹⁰² A.S. Bauks Political Handbook of the World p.74.

¹⁰³ Human Rights Observer March 2002.

bodied tribesmen to his side and gave Ahidjo an ultimatum to relinquish the party chairmanship. He also threatened to form his own political party if his predecessor failed to oblige.

Ahidjo wittingly, decided to co-opt Biya in the central committee and grudgingly relinquished power to him for the sake of continuity of the ruling party. He was angry with Biya whom he accused of not treating him in a brotherly manner, and accused him of being ungrateful and biting the finger that fed him.

From there, he conspired with some military officers to assassinate Biya but the attempt failed, and those involved were arrested, tried and convicted of treason. Ahidjo, again instigated the presidential guards most of whom he left to stage a coup d'état. For four days there was savage fighting in the city between pro-Ahidjo and pro-Biya soldiers in which many people were killed including innocent civilians.

Biya hid himself and his family in the State House tunnels. By sheer luck, the pro-Biya faction emerged victorious and in the aftermath exacted murderous revenge on Ahidjo's tribesmen and all his perceived sympathisers. The police, military, intelligence service and CNU party were all purged of pro-Ahidjo elements.

All in all, many people were killed and property worth of billions of dollars destroyed.

This tale from the French Cameroon is timely and pertinent to all Zambians. It has demonstrated in an exacting measure the tragic consequences that follow power struggle between persons in leadership.

3.4 Pragmatic View and Conclusion

From this tragic Cameroon tale, we can presume that the constitutional crisis does not only lie in the act of expelling the serving republican president from his party, but also in the catastrophic consequences that may follow his expulsion.

It thus appears that the expulsion may lead to polarisation of the nation into pro- and anti- expelled president factions, with potential wide spread violence between them. Inevitably every citizen is affected in one way or another. The unreliable and timid judges who are expected to resolve issues impartially may also be found wanting when there is a constitutional crisis as was in the Nkumbula case where the judges deliberately misinterpreted the phrase ‘threatened by existing law’ to suit a partisan judgement. More often than not the Zambia judiciary decides in favour of the state.¹⁰⁴

¹⁰⁴ The Human Rights Review Issue No. 9 February 2002.

To remedy this serious situation, therefore a number of recommendations will be made in the next chapter.

CHAPTER FOUR

OBSERVATIONS AND RECOMMENDATIONS

4.0 INTRODUCTION

This essay has attempted to show the synopsis of the political and constitutional landscape of Zambia since independence. The paper has been alive to the highlights of all the general elections and qualifications for presidential candidature. This was a deliberate move to explore the extent to which party membership affected the presidency.

It is also admitted that the expulsion of a serving republican President is unprecedented in Zambia, as it was unthinkable to ostracise a party president from his party because it was synonymous with his personal name.

The President therefore wielded unlimited power and influence in the political and economic affairs of the nation to the exclusion of all others. According to some concerned citizens, this situation made the leadership in Zambia to be characterised by progressive dictatorial and oppressive tendencies towards the already severely oppressed people.¹⁰⁵

However, with the advent of multi-partism in the third republic it appeared as if the political pendulum started to slowly swing in the reverse as the powers of the President begun to be questioned. From questioning, people started to

¹⁰⁵ Icengelo Special English Edition No. 1, 2001, p.24.

contemplate his removal by means of impeachment or expulsion from the party in the event of his misconduct.

4.1 Summary

Clearly, this suggests that the once ‘sacred’ and invulnerable office in the land is now vulnerable and highly susceptible to the extent of becoming a recipe for constitutional crisis. The crisis could degenerate into physical violence and anarchy and hence poses a threat to peace and stability this country is renowned for.¹⁰⁶ This chapter now concludes by submitting the author’s observations and recommendations.

4.2 Observations

4.2.1 Diminishing Powers

It is observed that a spectre of tension runs throughout all the pages of this essay. From pro-independence nationalism against colonial rule to pro-multiparty democracy activism against the one-party state. And it continues in the multi-party era where it is manifest in the activities of the opposition parties, civil society organisations, churches and professional associations.

The continued tension is a safeguard of democracy the roots of which are inherent in the struggle for the balance of power between the leaders and the led.¹⁰⁷ Ultimately it reduces the powers of the executive.

¹⁰⁶ Ibid.

¹⁰⁷ The Parliament Journal Issue No. 4, 2001.

4.2.3 Controversial Succession

Chiluba's nomination of Mwanawasa a then ordinary member of MMD to the ruling party's NEC as national a trustee and presidential candidate aroused controversy within MMD. This caused many senior NEC members to defy Chiluba's hand-picked choice to unsuccessfully contest the republican presidency on the tickets of their own newly formed political parties. For example, the former National Secretary, Michael Sata stood on the Patriotic Front (PF) party ticket, while former Vice-Presidents Brig. General Godfrey Miyanda, and Lt. Gen Christon Tembo stood on Heritage Party (HP) and Forum for Democracy and Development (FDD) party tickets respectively.

This implies that, the party that commanded national support to oust UNIP, in 1991, is entrenched in intra-party wrangles since Chiluba's third term bid, and Mwanawasa's ascension to power, just compounded the situation. This implies that Mwanawasa's party leadership, instead of being the unifying force may be a divisive factor, which could undermine his influence and power over his party members.

4.2.3 Frustrated and Divided NEC

It appears that the genesis of the wrangles in MMD is the NEC itself, which is frustrated by its own inability to exercise control over Mwanawasa who ascended to party leadership without popular mandate from all the members of the party. NEC members perceived that, since Mwanawasa was nominated,

rather than elected, as presidential candidate, he would owe them allegiance, and thus fall prey to their manipulations. But hitherto, the opposite seems to be the case as evidenced by Mwanawasa's request to Parliament to remove the immunity of the former Second President under Article 43(3) of the constitution, in order to facilitate the full investigations of his alleged plunder of the economy.¹⁰⁸ Earlier, Chiluba's loyalists within MMD threatened that if Mwanawasa went ahead to arrest Chiluba they would expel him from MMD.¹⁰⁹

This signifies that Mwanawasa is heading a divided party and does not seem to command overwhelming support from NEC.

4.2.4 Handover that was never fulfilled

Chiluba, at the inauguration of Mwanawasa, pledged to relinquish his party presidency and hand it over to his successor within weeks. But because of the reasons given above, Chiluba stayed put until pressure mounted on him to surrender party presidency to Mwanawasa. This he did not do. Instead he chose to abruptly resign from the party three months later¹¹⁰, leaving a vacuum. To fill this vacuum, NEC appointed Mwanawasa as the acting party president. Those opposed to Mwanawasa described the appointment as illegal and contrary to MMD constitution, which required the vice-party president, or failing, the party chairman to fill the vacancy of party president. Worse still,

¹⁰⁸ Times of Zambia July 17, 2002.

¹⁰⁹ Today Issue No. 39 February 13-19, 2002

¹¹⁰ The Monitor Issue No. 213 March 29 April 2002.

up to the time of writing, NEC had not set a date for the party convention at which Mwanawasa may be elected party president.

This in itself heightens suspicion, power struggle and hostility between the predecessor and successor in MMD party leadership, and threatens the tenure of office of the acting president. The other area of controversy was the unreliable election results.

4.2.5 *Controversial Election Results*

The voter turnout during the landmark December 2001, presidential, general and local government elections was exceptional, despite the fact that it was not a public holiday and hence some potential voters were denied the opportunity to vote. Further, the date was ‘sandwiched’ between the Christmas and New Year’s festive holidays meaning that a certain number of persons could have been disfranchised by this factor. During that period, some areas were not easily accessible due to the wet weather conditions. Suggesting that some voters were also adversely affected. But what was even worse, was the vote counting that ran frustratingly slow,¹¹¹ and announcement of results merely compounded the situation. These announcements were very unsystematic and seemed selective which factor heightened fears of rigging.¹¹² Without waiting for the final results, Mwanawasa was declared the winner by about 29 per cent of the voters. Prior to this declaration, Anderson Mazoka, the opposition

¹¹¹ The Herald (Zimbabwe) December 29, 2001.

¹¹² The Human Rights Review Special Edition February 2002.

leader of UPND took an early lead and claimed early victory but it was short lived by the ECZ's subsequent result announcements.

4.2.6 Comparative Approach

Controversial election results are not uncommon phenomenon. In the United States of America's November 7, 2000 presidential elections, the results between the Republican candidate George W. Bush and Democrat Al Gore tallied. The impasse, was only broken by overseas absentee ballots in Florida which gave Bush the lead. This took 11 days of legal, political and public wrangling over the final results. During that period, the Florida Supreme Court forbade the announcement of a certified winner until a court ruling was made by the State high court. Further the state judge dealt a major blow to the Al Gore camp by rejecting a Democratic bid to have manual recounts included in Florida's final official tally.¹¹³

Al Gore unconvincingly conceded defeat in the national and not party interest to signify a clearly matured democratic system.

4.2.7 Election Irregularities

It suffices to add that although the elections were generally peaceful, serious electoral irregularities were made by some election observers and opposition parties such as vote-buying, corruption, widespread abuse of the state resources by the ruling MMD and unequal access to the state owned electronic

¹¹³ Sunday Mail November 19 2000

and print media.¹¹⁴ These and other factors prompted the losing candidates to seek verification and recount of results in Northern, Lusaka, Copperbelt and Luapula Provinces, as well as a Court Order restraining the returning office (Chief Justice) from announcing the Presidential results and declaring a winner until after verification and recount.¹¹⁵ But in the similar manner the Nkumbula's case was dealt with, the court advised the applicants to petition the election of President fourteen days after his inauguration.¹¹⁶ Hitherto the matter is in court.

Nonetheless, the election results raised serious concerns from both local and international observers who expressed reservations about the credibility and certainty of these results.

4.2.8 Dissolution of Parliament by the National Assembly

Although constitutionally the dissolution of Parliament by the National Assembly, is basically attached to the existence of a crisis caused by a state of war or a state of emergency, it now seems likely that the same constitutional provision may be invoked if the majority Members of Parliament faced serious disagreements or conflicts with the President. Such conflicts could easily originate from a divided cabinet and ruling party.

¹¹⁴ Ibid.

¹¹⁵ Ibid.

¹¹⁶ Ibid.

The constitution provides that, the National Assembly:

may, by a two thirds majority of the members thereof,
dissolve itself¹¹⁷.

This implies that a disputed President may inevitably lose his presidency and thereby fail to manoeuvre the country away from civil strife typical in other African countries. This may be detrimental, not only to the welfare of the citizens but also to the current and would be investors whose investments may be threatened by political instability.

All these seven observations made above, and those that have been left due to brevity, go to underline the vulnerability of the fledging 'New Deal' administration.

The presidency is a very serious and demanding position which requires the holder to enjoy a mandate from a reasonably higher number of voters, to preserve the credibility and prestige of this important office.

Marcus Cunliffe in his book, *American Presidents and Presidency*, argues that:

the President was the head of a party, but in becoming President he necessarily took a larger role, as the voice of not a party but the entire nation.¹¹⁸

This implies that by virtue of his office, the President establishes a social contract or an alliance with all the citizens to whom he owes his right to rule and his responsibility for the government.

¹¹⁷ Constitution of Zambia Art. 88(5) (b)

¹¹⁸ Marcus Cunliffe *American Presidents and the Presidency* p. 190.

Put differently, the President is voted into office not only by his party cadres but also those belonging to other political parties and those who do not belong to any political party at all. In short the principle of public consent and popular control is implicit¹¹⁹ in that his mandate to rule is beyond the realm of his own political party. If this is the case, then it means that party disciplinary action, to expel the President from the party would inevitably affect those citizens who are non-partisans but voted for him.

As seen from the MMD constitution, any member including its president may be expelled from the party, and once expelled, all party positions and responsibilities held by virtue of party membership are relinquished.

Since the republican presidency is contested on either party membership or sponsorship, it can not be denied that the republican presidency is intrinsically connected to political parties. This phenomenon was introduced by the second Republic Constitution. It thus seems plausible for the President to relinquish his presidency once expelled from the party which sponsored his candidature.

The legal effect of the exercise by a political party of its powers to expel a republican President amounts to the exercise of public power, which is not normally held by a private social club or group like the political party itself. This explains the intricacy of the matter at hand. This could create a constitutional crisis as illustrated above. So what is the solution?

¹¹⁹ Louis Fisher Constitutional Conflicts between Congress and the President, p.7.

4.3.0 RECOMMENDATIONS

4.3.1 Taking into account the aforesaid, and in keeping with the idea that the republican presidency should be open to every citizen it is RECOMMENDED that:

independent candidates be allowed to contest presidential elections.

as was the case with the Independence Constitution. Under this situation the expulsion of serving republican president from the party that sponsored him would have very little effect on his national presidency.

4.3.2 With the fear of being held 'hostage' by his political party or sponsor, a republican President's inevitable partisan behaviour may have deleterious practical effects on Zambia's social and economic fabric (e.g. appointment of District Administrators).

It is thus RECOMMENDED that:

presidential candidature must remain loose from political party membership or sponsorship.

This is similar to other democratic countries like America and India, where party membership is not one of the qualifications for one to be presidential candidate (albeit they use electoral colleges to select the President from political parties).

4.3.3 The country has undergone several political changes after the one-party system of government which are not reflected in the constitution. The constitutional framework must therefore be altered to incorporate the changed political realities.

It is thus **RECOMMENDED** that the below stated requirement under Article 34(3) (d) for presidential candidature repealed

“he is a member of, or is sponsored by, a political party”
be repealed and abolished forthwith.

This will not only secure the President’s tenure of office but also afford him or her ample time to concentrate on finding solutions to serious national issues like HIV/AIDS, poverty reduction, unemployment, street kids, economic development and other non-partisan, social and economic concerns of the Zambian society, instead of being embroiled in intra-party conflicts.

It will also cure the inherent discrimination in the eligibility clause for the presidency which in effect bars non-partisan candidates to contest the presidential elections.

It will also remedy the lacuna in law regarding the silence in the Constitution of a President expelled from the party that sponsored his candidature.

4.3.4 Accordingly the following draft proposal for presidential qualifications is suggested:

A person shall be qualified for election as President if, and shall not be so qualified unless he or she -

- (a) is a citizen of Zambia
- (b) has attained the age of thirty five years; and
- (c) is otherwise qualified to be elected as a member of the National Assembly.

This proposal is akin to the provision of the Independence Constitution and dispenses also with the controversial parentage clause introduced by the Mwanakatwe Constitutional Commission aimed at barring Kaunda from contesting presidential elections.

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