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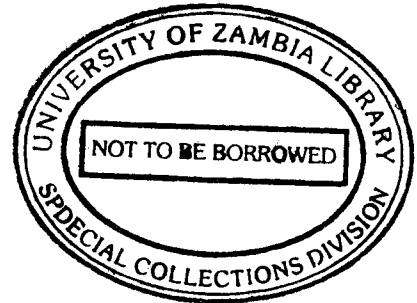
SCHOOL OF LAW

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BY

NZALA MUTUMU

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HUMAN RIGHTS AND THE MILITARY IN ZAMBIA

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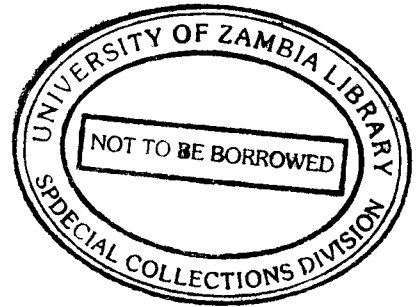
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SCHOOL OF LAW

HUMAN RIGHTS AND THE MILITARY IN ZAMBIA

BY

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A dissertation submitted to the school of law of the University of Zambia in partial fulfilment of the requirements for the award of the bachelor degree of laws (LLB)

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December 2005

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ACKNOWLEDGEMENTS

Firstly I would like to thank God, for enabling me to write this obligatory essay and most importantly for me to finally complete my degree programme. At times it seemed I was chasing clouds but now I am here, God has kept His promise that He would not forsake me. He has carried me through the blur and uncertainty of life, has blessed me with good health and my wonderful companions that have made the days at UNZA seem not so long and completely memorable.

Special thanks go to my supervisor, Professor Anyangwe, for his patience, guidance and kindness, through this whole experience, without which writing and completing this essay would have been almost unimaginable.

My thanks go to Colonel Phiri, Major Makanta, LT Amukena, for allowing me a glimpse of the military through their eyes.

Special thanks go to my crew, Mukumba, Gideon and Fred; you guys are the best. My experience in the law school would not have been the same without you.

To Cathy, for your constant and indispensable advice, you most certainly make life seem so easy.

I would also like to thank my favourite people the Law class of 2005, my roommates, Jade and Malingose, my dear friend Augustine, Lombe, my brothers Charles and Munyati

Finally but most importantly I would like to thank Lwenga, for being my anchor in these tempestuous waters!

V

DEDICATION

This obligatory essay is dedicated to my mother for her strength, encouragement and excitement for life. Through her so many of us females have had the privilege to enjoy the wonders of education and the opportunities that come with it for without her and the efforts of so many other women like her, this would be but a dream. I Thank you mother for the possibility to make my dream a reality.

Special thanks also go to my father, the sturdy rock to which we all cling. I thank him for paving the way; it would have certainly been more daunting without him.

INTRODUCTION

Fundamental human rights are inherent and inalienable. They may be provided for in a national constitution, but they are not given by the constitution. This is so because the theory of government is that the people, in full possession of inherent, inalienable rights, create government in order to protect these rights, and incorporate them into the national constitution as a shield against unwarranted interference by any department of government.

The rights guaranteed by a constitution are those specifically enumerated therein, those existing at common law and thus available under statute at the time the constitution was adopted.

The basic principle of a constitutional system is that all political power is inherent in the people, and that the people under a constitution adopted by them exercise this inherent power.

Rights guaranteed by one clause of the constitution may not be overridden by power exercised by the legislature under another part of the constitution. This clearly emerges from article 1(3) of the constitution of Zambia, which states, "this constitution is the supreme law of Zambia and if any other law is inconsistent with this constitution that other law shall, to the extent of the inconsistency, be void."

The Bill of Rights found in part III of the Zambian constitution guarantees fundamental human rights.

The Bill of Rights is contains an embodiment of the individual rights and freedoms as entitled the individual by virtue of their being a human being.

Human rights cannot be seen or touched, they are inherent and inalienable.

Every human being has rights by virtue of their being human.

It follows therefore that every person, civilian or military has rights.

Article 11 of the constitution of Zambia states in part “ it is recognised that **every person** in Zambia has been and shall continue to be entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed, sex or marital status, but subject to the limitations contained in the constitution”

These rights may not always be enjoyed in their absolute form. This is to ensure the need to protect and maintain harmony between individuals. Only one particular right is protected without derogation by the zambian constitution.

Article 15 of the same constitution states “ a person shall not be subjected to torture, or to inhuman or degrading punishment or other like treatment”

This provision is non derogable.

This essay focuses on the right to freedom of expression and freedom of association in the military.

The military is a special arm of government, it possesses the major part of a country's coercive power. It also consists of men and women who by virtue of being human have fundamental rights and freedoms.

Although they are military, they are *prima facie* entitled to human rights as guaranteed by the constitution.

The military profession demands a high level of discipline upon which many of its functions are based. Discipline is essential to maintain state security which is a core function of the military.

The rules and regulations that stem from the need to maintain discipline in the military place a limitation on the the fundamental rights and freedoms enjoyed by the military.

The question to be answered is how this need to preserve discipline and provide state security impinges on the exercise and enjoyment of freedom of expression and association by those in the military

This study will examine to what extent a member of the defence force may enjoy the rights and freedoms, with particular reference to freedoms of expression and association.

CHAPTER ONE

THEORETICAL AND HISTORICAL BACKGROUND

“Until recently, the Zambian military was the only major public institution whose role in the reform processes was not publicly discussed despite it being a major recipient of public funds. Not even the powerful international multilateral institutions have ventured to scrutinise the military. The 1990s, for instance, witnessed two attempted coups in Zambia. The first, in 1990, was widely regarded at the time as a protest by the pro-democracy movement. Generally, the civil society groups welcomed the protest despite its methods. This was probably due to fatigue in their struggle with the paternalistic control of the well-established one-party system. The perception today is that although the 1990 coup did not succeed, it was a catalyst for the reintroduction of multiparty politics that had been consigned to political oblivion for 17 years, and is now associated with the return of democracy to Zambia.”¹

The second coup attempt in the past decade occurred in 1997 under a multiparty regime. The junior officers who had temporarily seized the national radio station cited economic decadence and poverty as reasons for their action. They outlined what they thought were failures of the government as a justification for its overthrowal. A state of emergency was declared a day after the coup attempt.

¹ L, Habasoonda CIVIL AND MILITARY RELATIONS IN ZAMBIA ;the African security journal. Volume two. Penguin books.(2000)

If the attempted military coup of 1990 was intended to bring about democracy through multi-partism, then what was the coup attempt of 1997 intended to bring about? According to the officers involved, it was due to some form of economic decadence and poverty. This brings on the realisation that the military perceive themselves as guardians of the people and of overall public interest.

Their professional code of conduct however precludes them from participating freely in the expression of their thoughts and opinions.

It may be proposed that the military do not feel that it is justifiably reasonable that they be sidelined in the democratic process.

Pressed upon this also, could be the need for better conditions of service, pay, housing, all of which are human rights conditions.

The military may not be able to say so openly but it may be proposed that their expression of discontent is through rebellion, through the military coup.

Three elements define the parameters within which the military operates:

- Measures that are contained in or derived from international law, the constitution or legislation;
- Elements that fall outside the formal ambit of the state and so pertain to civil society; and

- Those elements related to the military itself, its culture, the nature of a military disciplinary system, including the doctrines governing the roles and tasks of the military.²

THE MILITARY (DEFINITION)

The following definition takes into account the premise that there exists an institution that has properly within it's the definition of an army, and that this institution is a sub-society of the larger society in which the civilian population is a majority.

Gwyn Harries-Jenkins and Jacques van Doorn³ define military institutions as **those institutions with a monopoly of arms, whose expertise are in the management of violence and possess a strong sense of corporate identity that creates a purposive force.**

The Zambian military

The modern defence forces as we know today in Zambia were a colonial creation whose role was initially that of facilitating colonisation and colonial rule. The northern Rhodesia regiment was a tool for the domestic task of protecting the British colony and was mainly involved in policing

² Jackie Cilliers **MILITARY AND CIVIL RELATIONS IN SOUTHERN AFRICA.** www.africa-talk.com 6jul 2005

³ J van Doorn **THE MILITARY AND THE CRISIS OF LEGITIMACY** in G, Harries-Jenkins' **THE MILITARY AND THE PROBLEM OF LEGITIMACY.** www.africa-talk.com 21jan2005

colonial subjects. However the concept of defence force predated colonialism.

Historically, the Northern Rhodesia Regiment- the forerunner to the Zambian army- grew out of the Northern Rhodesia Police. The northern Rhodesia police was established soon after the British South Africa (BSA) Company was granted its charter and began to administer northern Rhodesia on behalf of the British Crown in 1891. Consequently, the early history of the Northern Rhodesia Regiment forms part of the history of the Northern Rhodesia Police. It was for this reason that even after its establishment, the Northern Rhodesia Regiment remained essentially a military force engaged in mainly constabulary duties of protecting the colonial power.

In 1933, the military functions of the Northern Rhodesia Police were separated from the purely civilian functions. Henceforth, the northern Rhodesia regiment grew into a homogeneous unit. It was originally composed of a variety of men, units and traditions, all of which helped to shape its development. The regiment reflected the BSA Company's intentions for its establishment.

What is most significant is that from its inception in 1933, the military leadership accepted and recognised civil control of the defence forces, and this tradition has proved enduring. Although there have been five

military coups attempts in Zambia, the military as an institution has never tried to seize control in government. Granted all the attempts have been carried out by groups within the military.

In Zambia the defence forces fall under three categories. These are the Zambia Army (ZA), the Zambia Air Force (ZAF), and the Zambia National Service (ZNS). The ZNS was used to train a large number of Zambians for the military duty in response to the military threat arising out of the liberation wars in neighbouring countries. It combined military training and training in agricultural skills. Those trained under the ZNS were expected to continue to both the security of the nation as well as to the production of food for the nation.

THE LAW GOVERNING THE MILITARY

The military is established under Part VII of the Zambian Constitution. It comprises three major components: the Air Force, Army and National Service. The military is trained and commanded in terms of fixed organisational requirements and in terms of service. They have components is called the Zambian Defence Force. The functions of the defence force are to:

- Preserve and defend the sovereignty and territorial integrity of Zambia;

- Co-operate with civilian authority in emergency situations in cases of natural disasters;
- Foster harmony and understanding between the Zambian Defence Force and civilians; and
- Engage in productive activities for the development of Zambia.

The military is assumed to be non-partisan, national in character, patriotic, professional, disciplined and subordinate to the civilian authority.

Laws regulating the military are made by parliament and provide for the:

- Organs and structure of the Zambia Defence Force;
- Recruitment of personnel;
- Terms and conditions of service; and
- Deployment of troops outside Zambia.

The heads of the Army, Air force and National Service are appointed by the head of state and are subordinate to the civilian authority. The president is the commander-in-chief of the armed forces. He also removes the commanders and is the head of the military chain of command, supported by civilian personnel who oversee the day-to-day activities of the armed forces through the Ministry of Defence.

The principal goal of the defence forces is to protect national interest, including democracy, by deterring attacks on those interests. The military is a powerful institution because it has statutory authority over the means of violence.

Seen in a different light this also means that the military have the duty To protect the violation of their own rights and freedoms as they are protected by the constitution, this as a protection of the country's democratic ideals which are a matter of public interest.

The Defence Act, Chapter 131 of the Laws of Zambia, was framed in such a way that it provided a legislative environment that aimed at starting the process of harmonising the relations between the defence force and the civilian community right from 1964.

The Act provided for:

“The creation and maintenance in Zambia of a Defence Force
Consisting of an Army comprising the Regular Force of the Army,
The Territorial Force of the Army, the Army Capital Reserve, and
The Territorial Army Reserve, and an Air Force comprising the
Regular Force of the Air Force, the Auxiliary Air Force, the Air
Force Reserve, and the Auxiliary Air Force Reserve; ... to provide
The conditions of discharge of soldiers from the Regular Force
And for their transfer to the Reserve Force; ... to provide for the

Composition of and enlistment of persons in the Territorial Force,
For the training of persons enlisted in such force; ... for the
Embodiment of such Force when necessary in the public interest,
For the discharge of persons from the Force and for all other
Matters affecting the discipline of the Force.”

The mission of the military is defined as the defence of the country’s sovereignty and the integrity of its territory, and its role in other sectors is often restricted to supportive or cooperative tasks. The military is a permanent institution at the service of the nation. It is an indivisible whole often comprising land, air and naval forces. Its organisation is hierarchical and is based on the principles of discipline and obedience, and will operate within a given doctrine.

A military doctrine should aim at respecting the constitution, human rights, ratified international military instruments, defence of sovereignty and national independence, and the integrity of the country’s territory for a firm and lasting peace⁴

⁴ Henry Mtonga ENCAPSULATING ZAMBIA’S CIVIL-MILITARY RELATIONS IN THE THIRD REPUBLIC. Zambia publishing house 2003. Lusaka.

CHAPTER TWO

FREEDOM OF EXPRESSION

Perhaps the most essential right is that of communication. Without the freedom to communicate, other rights deteriorate. The right to one's own thoughts and their disposition is a fundamental human right.

At the core of the United Nations action to protect and promote human rights and fundamental freedoms is the international bill of human rights. The bill consists of three instruments: the universal declaration of human rights, proclaimed by the United Nations general assembly in 1948, the covenant on civil and political rights, and the covenant on economic, social and cultural rights. Both covenants were adopted by the general assembly in 1966.

These three key documents define human rights and fundamental freedoms. They set basic standards, which have inspired more than 50 United Nations human rights conventions, declarations, sets of rules and principles⁵.

The international covenant on civil and political rights provides in article 19(1) every one shall have the right to hold opinions without interference. (2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all

⁵ editor@freedom.org

kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

(3) The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- a) For respect of the rights or reputations of others;
- b) For the protection of national security or of public order or of public health or morals.

Governments have long since and still continue to forward the need to maintain national security and public order as an excuse to deny those in the military profession from enjoying their exercise of the freedom of expression, whether this is justifiable or not is the scope of this essay.

The right to one's own thoughts and their disposition is a fundamental human right. Authors, artists, designers, and the myriad of others in creative and intellectual fields have the right to share their words or ideas with others or not. If they choose to share them, they also have the right to control the way in which they may be shared.⁶

Freedom of expression is undoubtedly essential for the operation of any democratic society. Professor Carl Fredrick said "freedom of expression

⁶ FREEDOM MAGAZINE: investigative reporting in the public interest www.freedommag.com 21jan 2005

is primarily concerned with the citizen's rights to political expression-effective by participation in political life, hence constitute democracy itself. Democracy requires that all conflicting view points compete in the market place of ideas, so that the best views or ideas emerge.... in the U.S. the 1st amendment⁷ protection exists against the background of profound national commitment to the principle that debate on public issues should be uninhibited and robust and wide open and that it may well include vehement caustic and public officials

In NEW YORK TIMES V. SULLIVAN⁸ justice branders in his concurring opinion in WHITNEY V. CALIFORNIA⁹ gave the principle underlined in the 1st amendment its classical formulation "those who won our independence that public discussion is a public duty; that this should be a fundamental principle of the USA government. They recognised the risks to which all human institutions are subject but they knew that order can not be secured merely through the fear of punishment for its infraction, that its hazardous to discourage thought, hope and imagination that fear breeds repression; that repression breeds hate; that hate menaces state government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies and that the fitting remedy fro evil counsels is a good one. Believing in the power of reason

⁷ The First Amendment to the United States Constitution says that Congress shall make no law . . . abridging the freedom of "speech."

⁸ 376 US 54 at 270 (1964)

⁹ 274 US 357,375-6

as applied through public discussion they eschewed silence covered by law- the argument of force in its worst form, recognising the occasional tyrannies of governing majorities, they amended the constitution so that free speech and assembly should be guaranteed.”

The constitution of Zambia, which is the supreme law of the land, has in its part III ,enshrined the Bill of Rights at section20, it refers to the freedom of expression as follows:(1)” except with his consent, a person shall not be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions without interference, 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.

It can be noted that this freedom though entrenched in the constitution is not an absolute right, it has limitations.

Section20 (3) states “nothing contained in or done under the authority of any law shall be held to be consistent with or in contravention of this article to the extent that it is shown that the law in question makes provision-

- a) That is reasonably required in the interests of defence, public safety, public order, public morality or public health; or

- b) That is reasonably required for the purpose of protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, regulating educational institutions in the interests of persons receiving instruction therein, or the registration of, or regulating the technical administration or the technical operation of, newspapers and other publications, telephony, telegraphy, posts, wireless broadcasting or television or
- c) That imposes restrictions upon public officers;

And except in so far as that provision or, the thing done under the authority thereof as the case may be, is shown not to be reasonably justifiable in a democratic society”.

It is perhaps ironic that despite finding a permissible limitation on freedom of expression in the *Handyside* case, the European court of human rights issued an obiter dictum, which has been taken as the foundation for the law on freedom of expression since. The court said that ‘freedom of expression constitutes one of the essential foundations of such (democratic) society, one of the basic conditions for its progress and for the development of every man...it is applicable not only to information and ideas that are favourably received and regarded as

inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the state or any sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no democratic society.’¹⁰

There is no lack of equally convincing formulations of freedom of expression as a prerequisite for democracy, going all the way back to the genesis of classical liberal thought in the English, French and American documents that lie at the origin of western tradition of human rights thinking. Within this tradition, it is common to consider that freedom of expression, like other civil and political rights, requires only negative obligations on the part of the state. *In other words, the state would have an obligation to refrain from interfering with these rights, but not an obligation to undertake positive action of such rights.*¹¹

The military is well known for its secrecy. Every military organisation in the world thrives on secrecy.

Its whole working mechanism is dependent on the need for constant secrecy.

The need for closeness in the military is tactical.

The one major function of the military is defence and security and this can only be achieved behind the veil of secrecy and confidentiality.

¹⁰ European Court of Human Rights, *Handyside* case judgement of 7 december 1976, seriesA NO.24,23 para 49.

¹¹ Clapp R. CHALLENGING THE TRDITIONAL CONCEPTION OF CIVIL RIGHTS:Positive Obligations of the State under Freedom of Expression. Zambia Law Journal vol33, 2001. pg51

It would not do to have matters of public security accessible to anyone, this would in itself jeopardise the maintenance of such security.

It has been established that for tactical reasons the freedom of expression is limited in the military and as earlier alluded to, the state has long since submitted the argument for the need to limit the freedom of expression as regards the military, the law itself supports this preposition.

This chapter will examine the extent to which the freedom of expression is exercised in the military.

FREEDOM OF EXPRESSION IN THE MILITARY

The freedom of expression in the military is highly limited. Military personnel are most certainly aware of this freedom, but also understand that in a military setting this can only be done with limitation.

The military operates through a chain of command. This means that; military personnel express themselves through their superiors. It can be argued then that these ideas are not necessary of their own making but those of the superior but the rationale for this it seems, behind is the to preserve hierarchy and most importantly discipline which are at the core of the military institution.

It shall be noted here however that the soldier does not by enlistment divest himself of the character of citizen. He is still subject to all the

duties and has all the rights of the ordinary citizen, except in so far as they have been expressly altered by statute.¹²

It follows therefore that the substantive law of the military must now be compared not only to the provisions referred to in the previous chapter but also to the practice of military law itself on the ground.

The State Security Act Chapter 111 of the Laws of Zambia at section 5 refers to the penalties of communicating classified matters to unauthorised persons, the Act however does not define what is meant by classified matters, and as such this lacuna may be filled by the imagination of the ordinary man on a Clapham bus¹³

The Defence Act itself at section 70 refers to the issue of making false statements it states “any person subject to military law under this act who

- a) Makes an accusation against any officer or soldier subject to service law, which he knows to be false or does not believe to be true; or
- b) In making a complaint in which he thinks himself wronged, makes a statement affecting the character of an officer or soldier subject to service law, which he knows to be false or does not believe to be true, or wilfully suppresses any material facts;

¹² D,L. Keir and F,H. Lawson.CASES IN CONSTITUTIONAL LAW. Universal law publishing company. New delhi.1997. pg 175

¹³ H Winfield.**Winfield and Jolowicz on THE LAW OF TORTS**. Sweet and Maxwell LONDON. 1998. pg 91

Shall on conviction by court-martial, be liable to imprisonment for a term not exceeding two years or any less punishment provided by this act.”

However the scope of this essay is this: with the view that the freedom of expression is limited in what ways if any is it expressed:

According to the research findings, in the evident that an officer is discontent or wishes to express some form of information, idea or thought, this is done through the superior via a special mechanism provided for called an *indaba*.

An *indaba* is an informal forum that is carried out even every unit monthly. It has no legal basis or documentation establishing its use or indeed its existence. It is determined to have evolved into use by prescription. It is a setting in which all officers attend and express their views on a host of issues. However it must be noted that the *indaba* is not a wholly informal setting, granted it is a more relaxed setting but the officers or military personnel still abide by the rules governing hierarchy and discipline in the military.

One cannot freely castigate one's superior or express some form of political bias and it is generally accepted that those of a higher rank in the military hierarchy are more clearly heard than those at the bottom.

This is not to say that this is by any means the only way in which military personnel may exercise their freedom of expression.

The Defence Act provides at section 168 a measure to redress complaints, it states

- 1) “ If an officer of the defence force thinks himself wronged in any matter by a superior officer and on application to his commanding officer does not obtain the redress to which he thinks he is entitled, he may make a complaint with respect to that matter to the commander.
- 2) On receiving any such complaint it shall be the duty of the commander to investigate the complaint and to grant any redress, which appears, to him to be necessary or, if the complainant so requires, the commander shall make his report on the complaint to the president in order to receive the directions of the president thereon.

Another question that begs an answer is what happens in the event that a junior officer is instructed by his superior to commit an act that he the junior officer feels and perhaps even knows to be illegal, is he in a position to express defiance? Can he refuse to obey the order?

By enlistment the soldier has also subjected himself to a special code of law, which completely regulates the relations of officers and soldiers in their military capacity. Although a soldier remains subject to the common law duties of the ordinary citizen, the fact that he is a soldier influences the attitude of the courts towards certain acts of his which bring him within the civil jurisdiction. For instance, they take into account of his duties as a soldier to this extent that they will not hold him criminally liable for an act done in obedience to an order given by his military superior and not manifestly illegal at the time.

In **REG V. SMITH**¹⁴ the accused, who was charged with murder, formed one of a patrol, which proceeded to a specified location in order to arrest certain occupants of the farm who were suspected of being in communication with the enemy. One of the occupants was found in possession of the communication instrument and was asked to produce it, the occupant was reported to be dilatory upon which the superior gave the order to shoot the occupant, the occupant still continued to delay upon which the accused levelled his rifle at him and fired a shot that killed him. On giving the judgement the president needed to answer the question as to whether Smith in the circumstance was guilty of murder. It is perfectly clear in the first case that Smith shot the deceased deliberately and

¹⁴ (1900) 17 CAPE OF GOOD SUPREME COURT REPORTS 561

intentionally, which in the ordinary course of law is murder unless it can be justified by some valid legal excuse.

It is clear that Smith did not do the killing on his own responsibility, but acted in obedience to the order received from his superior and believed that he was carrying out an order. This brings us to the next question raised: whether the order was a lawful one; whether it is necessary and proper to order under all the circumstances. It is further argued that whether or not it was a lawful order, smith and his superior are protected by provisions of law...'¹⁵

What this means then is that the junior officer is not liable if he was following orders and if the act omitted was one protected by law.

With regards the freedom expression of the military and the outside world, the research found that military personnel operate on a '*nom de plum*' or need to know basis with outsiders

The court martial case of Major Isaac Masonga is an example of this concept.

The accused was charged with committing an offence contrary to section 73 of the defence act that is to say communicating classified matters to unauthorised persons contrary to section 5(1) of the state security act chapter 111 of the laws of Zambia. Particulars of the offence allege that at

¹⁵ opcit pg 181

Livingstone on dates unknown in the year 2004 illegally obtained and communicated classified letters belonging to and properties of the Zambia air force and Zambia army to unauthorised persons.

On applying the law to the facts the court martial president stated as follows; “there is indirect evidence that the accused illegally obtained and communicated classified documents belonging to the Zambia Air Force and the Zambia Army. And also in particular oral evidence by the witness’s submissions and upon his admission of the act as evidenced by the evidence in which he authenticated... these documents were given to the Royal Highness Chief Mumena by the accused. Chief Mumena in turn gave them to his Royal Highness Chief Mukuni who delivered them to state house through the Senior Private Secretary to the President Mr Muteteka.

On attestation the accused was sworn in to the state security act, which limits him to communicate any military classified documents to unauthorised persons. The accused a senior officer in the Zambia Air Force who has held various appointments and served in the Air Force for 17 years and as such is expected to have sound knowledge of the law rules and regulations of the Air Force and also should have understood the implication and consequences of his act.”

The law rules on the communication of information reserved as qualified are very strict in the military.

As in this case where the accused communicated information about his dissatisfaction with the procedure taken resulting in him not taking up an appointment outside Zambia for which he had prepared and initially be given. The accused believed he was withdrawn from the case because of nepotism. It is almost groundless that this information was communicated to the accused's own brother who happened to be a chief, with some influence.

What is in black and white is a straight forward though perhaps lengthy procedure for what one should do in the instance that they feel aggrieved within the ranks of the military.

THE CONCEPT OF A COUP D'ETAT

Graham Adams¹⁶ has defined the concept of a coup d'etat in two ways: firstly by defining a coup d'etat as a sudden and decisive stroke of government policy, and secondly a coup becomes definitive action that is legal and by its very character designed to achieve some elusive successes. In other words, a coup d'etat projects in the most direct manner possible the letter of government's intentions.

¹⁶ G Evans and J Newharn(1998) **THE PEGUIN DICTIONARY OF INTERNATIONAL RELATIONS**, London. Penguin books, 1998, p1000

Gregory Ferguson¹⁷ reinforces this view with his personal perception of a coup as” perpetuating reform and creating a new order in which a country was being saved from itself or from the decadence and frivolity of the politicians who may be accused of weakening or dissipating the national spirit or turning the country into what the fighting men perceive to be a laughing stock”.

A simpler definition is that found in the encyclopaedia which states that Forcible takeover of the government of a country by elements from within that country, generally carried out by violent or illegal means. It differs from a revolution in typically being carried out by a small group (for example, of army officers).

This chapter is concerned with the fact that the limitations on the rights and freedoms, may allow for the military as an institution provided the permitting conditions prevail to be an unstable entity.

This comes to light with the fact that zambia has experienced a number of coup attempts though none successful, this paper seeks to investigate the relation if any between the limitation on the freedom of expression as a possible condition favouring the occurrence of a coup d’etat.

Nowamagbe Omoigui has said this about the military and its relationship with state power structures:

¹⁷ G.Ferguson COUP D’EAT, A PRACTICAL MANUAL. Arms and armour press. New york 1987. pp17-18.

The military has an unrivalled capacity to project force. This makes it an important tool for asserting state authority, enforcing the rule of law, and protecting the nation against external aggression. Unfortunately, such power, if not properly managed, can also pose a serious threat against civil authority as has been demonstrated numerous times in several African countries.¹⁸

. The demands of democracy are that the military be subordinate to political authority. With democracy becoming the norm and a condition for either bilateral or multilateral donor assistance - usually from the western hemisphere, the International Monetary Fund (IMF) and the World Bank - military coups or military coup attempts in Africa have become unacceptable to the point that the African Union has a policy position to that effect. The states in the region also have legal provisions making such acts high treason. Arising from such a firm stand, it would not be expected that a coup would be attempted, let alone accepted. In spite of the firmness towards unconstitutional changes of governments, military regimes have continued to exist, as have attempts to replace civilian-led governments by force, although these are not as frequent as in

¹⁸ N Omoigui, Military Defence Pacts in Africa, <www.dawadu.com/omoigui1.htm>.

the past. Extra-judicial activities have continued to be a worrisome phenomenon.¹⁹

Four models of military coups d'état have been identified.²⁰ One model postulates that coups are planned and coordinated by the military at the very top of the hierarchy. The second model is one in which there is a combined civilian-military plot. The participants are generally senior officers and some elements of the government or opposition political parties. In contrast to these two models, the third one – regarded by Ferguson as rather unusual - is externally mounted and involves either mercenaries or foreign troops who may be assisted by some disaffected opposition politicians in the country. Ferguson's fourth model is a *putsch*. This is a clique within the military whose membership may not necessarily be from the senior officers' corps.

THE COUP D'ETAT AS A FORM OF EXPRESSION

To a large extent, the primary source of conflict in Zambia has been and continues to be its leadership. However to understand this claim an examination of Zambia's political history is necessary.

¹⁹ The most recent military coup attempt was planned for 14 August 2004 in Mauritania. The country also had a failed *putsch* in June 2003. IRIN, Mauritania: Defence Minister confirms coup plot, arrests, August 11 2004. <www.allafrica.com/stories/200408110040.html>.

²⁰ G Ferguson, *Coup d'etat: A practical manual*, Arms & Armour Press, New York, 1987 p 113-125.

For a start, the administration of colonial rule through the British mineral explorer, Cecil Rhodes of the British south Africa BSA company, at the turn of the century, created deep resentment among indigenous Zambians. The passion for freedom propelled the 'natives' to wage an underground campaign to gain independence and chart their own political, economic, social and cultural destiny. However, the colonialists were determined to hold down the 'natives' through the use of oppressive legal instruments. A myriad of laws were fashioned for the purpose, such as the Preservation of Public Security Act, the Public Order Act and the Emergency Act, and administered brutally and indiscriminately. This state of affairs forced the 'natives' to start what became known as the Cha Cha campaign, a civil disobedience/armed resistance struggle similar to Jomo Kenyatta's Mau Mau campaign in pre-independence Kenya. Many nationalists, among them Zambia's first president, Kenneth Kaunda, were detained for allegedly "conspiring to overthrow an elected government". However, with independence attained in 1964 after many years of struggle, Kaunda conveniently "forgot" to repeal the oppressive laws that had impeded him and other nationalists during the fight for political independence. Kaunda justified the continued existence of these laws on the grounds that the young Zambia needed them to ensure stability. This was predicated on curbing the outbreak of sectional

violence, which characterised the first nine years of post-independence Zambia and attributed to the divisive nature of plural politics.

In 1972, Kaunda set in motion his boldest political plan—the one party system of government—in the now famous Choma declaration. However, this caused a lot of resentment and anger among those who supported multiparty politics. A string of treason trials ensued.

The first involved John Njapau, a former opposition African National Congress (ANC) Member of Parliament for Mwinilunga. Njapau was arrested when his close friend, Amon Kashimwata was apprehended with a document entitled "New Plan for North Western Rhodesia to Join the Lunda With Angola", which the latter had authored.

The United National Independence Party (UNIP) government accused Njapau of being a member of a group of dissidents that had attacked and burnt down 14 villages, killing one woman and injuring several others. After a lengthy trial, Judge Evans ruled that "I am left with suspicion that Njapau and others have been engaged in activities prejudicial to the state and that this investigation had merely touched the fringe of such activities. However, the plan for North-Western Rhodesia's secession from Zambia to join a Lunda empire in Katanga (in the Democratic Republic of Congo) was written by Njapau before the creation of Zambia

on 24th October, 1964. It does not advocate military training or use of force." Thus, Njapau was set free.

But, according to Zambian historian Patrick Wele, in his book *Zambia's Most Famous Dissidents*, the perpetrator of that incursion was Chief Kanongesha, alias Chipupula Ndemi Komesha, who had established a dissident army at Kazezi stream inside Angola after he was stripped of his tribal title for opposing the one-party system of government. Wele charges that Njapau "became a victim of political machinations" after trouncing the UNIP candidate Peter Matoka in the parliamentary elections the year before.

The next treason trial involved Timothy Kalimbwe Lupasa, a fierce opponent of the one-party state and a member of the opposition United Party (UP). According to Wele in *Kaunda and Mushala Rebellion*, when the UP was banned on August 14, 1968 and its leaders incarcerated, Kalimbwe recruited 100 men and took them for military training in the Caprivi Strip of South West Africa (now Namibia). The mission was to return and overthrow the Kaunda government. Instead, he was arrested and sentenced to death on July 15, 1974 for treason on his return. Lupasa stayed in prison until July 1990, when he was released following a presidential pardon by Kaunda.

Another opponent of the one-party state, William Chipango, was the third Zambian to face treason charges. He was detained in February 1972 at Zambezi after it was alleged that between December 19, 1972 and January 1, 1973, in collaboration with Albert Sitali Sishwashwa, Crispin Mwendabai and Sefulo Kakoma, Chipango had recruited 100 men in Kaoma, Lusaka and Livingstone and transported them to the Caprivi Strip for military training with the aim of overthrowing the Zambian government.

Apparently at that time, the police in Sesheke had received reports that some members of the opposition were vehemently against the introduction of the one-party state and when Chipango showed up in Sesheke to see his father-in-law, he was picked up. Some fish-mongers from Livingstone who had come to buy fish to sell in Livingstone were, through intimidation and torture, made to admit that they were former ANC youths in Chipango's company, who had come to organise people against the one-party system. A few days into the trial, the state entered a *nolle prosequi* because all the witnesses repudiated their statements to the police, claiming the statements had been "beaten" out of them.

In dismissing the case, Judge Annel Silungwe ruled that in so far as he was concerned, there was no case at all because the evidence was "quite useless and hopeless". But Chipango and his group were re-arrested days

later and charged for the same offence. This time, the trial judge, the late Godfrey Muwo, sentenced them to death. But upon appeal, Supreme Court Judges William Bruce-Lyle, Brendan Cullinan and Lee Baron quashed the lower court's ruling. After his release in 1978, Chipango contested and won the Livingstone constituency seat on the UNIP ticket and later became a councillor in Livingstone District Council.

Perhaps the most notorious dissenter in the history of Zambia is the late Adamson Mushala, whose rebellion lasted from 1975 to 1982. He was initially a "UNIPist" and prior to Zambia's independence was sent to China for guerrilla training with a view to coming back to overthrow the colonial government. But upon his return, Zambia was already independent. He then asked to be given the job of chief warden, but was turned down by the UNIP government. Mashala then joined the opposition UP out of frustration. But when the party was banned, he decided to go into exile in South Africa with a band of his followers.

In 1975, he transformed his group into a combat force and returned to Zambia to wage a guerrilla war, which ended when he was gunned down by Zambia Army soldiers on November 26, 1982. His second-in-command, Alexander Saimbwende, took over the reins and continued the terror campaign until September 25, 1990, when he surrendered to the late Alexander Kamalondo, then a member of the Central Committee for

North Western Province, and was flown to Lusaka where he was later pardoned by President Kaunda.

By the late 1980s, historic and economic forces had seriously undermined the legitimacy of Zambia's one-party state. All the countries in the sub-continent had become independent. Namibia was free and there were signs that apartheid in South Africa would eventually come to an end. Democracy was equally taking root in Eastern Europe and communism had crumbled in the Soviet Union. The economic situation in Zambia was also deteriorating: low standards of living, lack of basic food stuffs, rising unemployment, poor social infrastructure and the rapid depreciation of the Zambian Kwacha.

On October 31, 1980, a "Mister Cheese" informed the then Director of Intelligence Services that some people at a farm in Chilanga, a few kilometres south of the capital, Lusaka, were plotting to overthrow the Zambian government. The second battalion of the Zambia Army was ordered to raid the farm. After exchanging gun-fire, eight suspects were arrested. They included State Counsel Edward Shamwana, the late Valentine Musakanya, Godwin Yoram Mumba, Anderson Kabwili Mporokoso, Thomas Mpanga Mulewa, former vice president in the Third Republic Lieutenant General Godfrey Miyanda and some Zairean citizens -- Deogratias Symba, Albert Chimbalile and Laurent Kanyembu.

After a trial which lasted 11 months, trial Judge Dennis Chirwa, acquitted Lt. Gen. Miyanda and found the rest guilty. But this did nothing to change the depressing situation. The economy continued to slump while the standard of living spiralled downward. Also, the acute shortage of essential commodities, glaring nepotism and corruption continued. The price of the staple diet, mealie meal, also continued to increase steadily, while workers' salaries stagnated.

On October 5, 1988, another group of 16 men were picked up for allegedly trying to unseat the Kaunda government. The group included current Vice President Christon Tembo, energy minister Benjamin Mwila, High Commissioner to South Africa Colonel Bizwayo Nkunika, former ministers Bob Litana and Wilfred Wonani and former Zambia Railways managing director Emmanuel Hachipuka. Others were Peter Vundamina, Harrington Kayela Chishimba, Major Patrick Shula, Major Knight Mulenga, Major Nixon Zulu and Captain Wamulume Maimbolwa. The late John Kalenga, Donald Sadoki and Matiya Ngalande were also part of the group. Warrant Officer Christopher Chawinga and others were also picked up days later, accused of trying to rescue the group.

In May 1990, government increased the price of mealie meal, triggering a wave of riots in Lusaka and the Copperbelt. These riots seriously

undermined the political atmosphere and an army lieutenant, Mwamba Luchembe, took advantage of the opportunity and announced on July 29, 1990, that the army had taken over. Three hours later, the attempted coup was crushed and Luchembe and a number of his alleged accomplices were detained. An outspoken politician, Chiko Bwalya, was also arrested for celebrating Luchembe's coup attempt. But they were all released months later following a presidential pardon.

This coup attempt, coupled with growing public pressure, and pressure within the UNIP for democratisation somewhat rattled Kaunda, who immediately set October 17, 1990, as a referendum date to decide on whether to return to multi-party democracy or to maintain the one-party system.

At about the same time, a new political force was born. The national interim committee of the Movement for Multi-party Democracy (MMD) was formed to mobilise public opinion to support the return to plural politics. In July 1990, advocates for plural politics met at the Garden House Motel, in Lusaka, to press the government to return to multi-party democracy. This saw the birth of the MMD, which comprised mostly disaffected members of the UNIP government, some trade unionists, academics and other professionals, and aimed to sensitise people on the need for a return to "full" democracy.

With clear public support in favour of the restoration of multi-party democracy, President Kaunda cancelled the referendum and instead announced constitutional changes for a return to multi-party politics. Kaunda also set October 31, 1991, as the date for multi-party elections. The MMD, led by trade unionist Frederick Chiluba, won the elections and Kaunda, in a rare act of benefaction, handed over power.

The MMD government, with a comfortable majority in Parliament, reneged on many of its pre-election promises, embarking on self-aggrandisement projects, which ultimately led to intense political intimidation. The result was another string of treason trials. The first case involved a group of top UNIP cadres, who were accused of hatching a covert plan to unseat the MMD government via an operation code-named 'Zero Option'. After a lengthy trial, all the accused were acquitted. One of them, former Chama North Member of Parliament Cuthbert Ng'uni, died soon after being released from detention.

The MMD had also earlier pledged to put in place a constitution which would be above partisan consideration and reflect higher goals of national interest. To this end, a commission, headed by an academic, John Mwanakatwe, was appointed on November 22, 1993, to review the Zambian Constitution. In June 1995, the commission submitted its report

to President Chiluba, and in August, the government responded to the report by releasing a White Paper.

The White Paper added some recommendations to those contained in the commission's report, including the controversial Article 34 (3) (b) that required any presidential candidate to prove that his/her parents were/are Zambians by birth or descent. The White Paper also contained a clause barring traditional rulers from participating in active politics. The government also rejected the commission's recommendation for the Constitution to be adopted through a Constituent Assembly as well as a referendum, insisting that it be adopted by the MMD-dominated Parliament instead.

In March 1996, members of civil society groups organised a 10-day Citizens Convention, which produced a document known as the "Green Paper" in response to the government White paper and representing the citizens' contributions to the Constitution debate. The government chose to ignore the Green Paper. In the ensuing controversy, the country became polarised. Some were in favour of the constituent assembly being the best mode of adopting the Constitution, while others contended that Parliament was the most appropriate body.

By April 1996, it had become apparent that the government would not change its position on the Constitution. The government stance precipitated the emergence of a clandestine organisation called the Black Mamba. The Black Mamba was involved in activities aimed at forcing the government to withdraw the Constitution of Zambia (Amendment) Bill from Parliament. These activities included bomb scares, bomb explosions, graffiti and death threats.

In June, eight top UNIP officials, among them its vice president, Senior Chief Inyambo Yeta, were picked up in connection with the activities of the Black Mamba and were charged with treason and murder. After five months in detention, all eight were acquitted.

About the same time, the opposition Zambia Democratic Congress (ZDC) brought an action in court challenging the controversial 'presidential clause' and the powers of Parliament to adopt a new Constitution. However, the courts upheld the government's position. On May 28, 1996, President Chiluba signed the amended Constitution into law.

Concerned stakeholders, among them University of Zambia students, then Southern African Development Community (SADC) chairman President Robert Mugabe of Zimbabwe and South African President Nelson Mandela called for inter-party dialogue between the ruling MMD and the

opposition groups to find a last minute solution to the constitutional impasse. But, because of the intransigence of President Chiluba, these efforts were fruitless.

This led to the main opposition party UNIP and over 10 other "smaller" parties boycotting the 1996 elections. But five others that participated in the polls -- the National Lima Party, ZDC, the National Democratic Congress, the National Party and the Agenda for Zambia -- soon realised that it was a bad mistake. The electoral process favoured the ruling party, allegedly because the voter registration, conducted by the Nikuv Computers Limited of Israel, left out a good number of eligible voters and there were impediments to a free and fair campaign environment.

Also, the public media peddled hate propaganda against opposition parties. The ruling MMD used state resources for its campaign and, above all, during polling, there were reports of blatant connivance by electoral officers with candidates of the ruling party. The result -- President Chiluba's MMD won with an overwhelming majority in Parliament. But the five losing parties were not happy with the results and have since petitioned the Supreme Court. Judgement is yet to be passed but, whichever way it goes, many people anticipate renewed and possibly widespread political violence.

On October 28, 1997, Zambians woke up to the announcement by an army officer, Captain Steven Lungu -- calling himself "Captain Solo" -- that the Supreme National Council had taken over power. "Captain Solo", during the coup which lasted slightly over four hours, cited the growing intolerance by the MMD government, poverty, unemployment, falling standards of living and the failing economy as some of the reasons for staging the coup. It was, however, crushed by loyal troops.²¹

The 1990 and 1997 military coup attempts in Zambia represent inadequate attempts to analyse the socio-political and economic challenges that faced the country. The 1990 attempt at illegally removing the Zambian government, undertaken by Lieutenant Mwamba Luchembe, was preceded by a chaotic environment that included unprecedented food riots in a country that had generally been regarded as relatively stable.²² The riots were themselves triggered by government's attempts to adhere to economic reforms demanded by the International Monetary Fund.²³ The economic austerity programmes continued to prevail during 1997, when the infamous Captain Lungu who identified himself as Captain 'Solo'

²¹ G Machona, A harvest of treason trials, in A Onadipe and D Lord, African media and conflict. <wwwc-r.org/pubs/occ_papers/af_media/machona.shtml>.

²² G Machona, A harvest of treason trials, in A Onadipe and D Lord, African media and conflict. <wwwc-r.org/pubs/occ_papers/af_media/machona.shtml>.

²³ G Machona, A harvest of treason trials, in A Onadipe and D Lord, African media and conflict. <wwwc-r.org/pubs/occ_papers/af_media/machona.shtml>.

during the military coup attempt dubbed “Operation Born Again” undertook to replace President Chiluba’s government. Although this event has been attributed to Captain Lungu’s compatriots’ excessive intake of alcohol,²⁴ it is nevertheless pertinent to note that the action taken by dissenting soldiers was itself (as was the case in the earlier coup) embedded in a renewed multi-party environment characterised by continued economic challenges and a failure to absorb the demands of the tenets of democracy.

Some of which are the adherence to human rights such as the freedom of expression and association.

One proposition is that a coup d’etat may be viewed as a form of expression.

The relation of the military to the constitution is a matter that has had immense interpretation difficulties for military and security/political analysts.

Beginning from the viewpoint that the military is a public institution that is dedicated to the protection of the country, it could therefore be deduced that as with everybody else in the country, the principle guide in all endeavors is the constitution. The constitution is the grundnorm – the master law – upon which all other laws are derived. It may therefore be

²⁴ G Machona, A harvest of treason trials, in A Onadipe and D Lord, African media and conflict. <www.c-r.org/pubs/occ_papers/af_media/machona.shtml>.

argued that it is this basic norm, which is coveted and, indeed, a point of reference for all – including the military.

The Pinochet military regime in Chile took the relation even further by considering the military as the ‘guardians’ of the constitution, hitherto regarding it as its duty to remove the civilian-led regime with the support of a large segment of disaffected civilians. This evidently made the military the ultimate authority and interpreter of the constitution, and by definition allowed it to operate above government and society itself.

It is evident through the attempted though failed coup attempts that the military do discuss amongst themselves.

Perhaps because of their limitation to expression, they even feel left out of the democratic process

What is frightening about this interpretation is that as guardians of the constitution, with a duty to serve and in many instances protect, the military have at the core of their duty the upholding of the constitution, this constitution which in its enshrined part III refers to the adherence and protection of human rights and essential freedoms such as those of expression and association which are limited at the very least or merely overlooked.

The military consider themselves the guardians of public interest that the ordinary citizen does not have the tools to bring about urgent and necessary change.

The military feel that there is no justifiable reason why they have been sidelined in the democratic process.

CHAPTER THREE

FREEDOM OF ASSOCIATION

The Universal Declaration of Human Rights states, "*Everyone* has the right to freedom of peaceful assembly and association . . . *Everyone* has the right to form and to join trade unions for the protection of his interests."

The International Covenant on Civil and Political Rights (ICCPR) says, "*Everyone* shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests."

The International Covenant on Economic, Social and Cultural Rights (ICESCR) urges guarantees for "the right of *everyone* to form trade unions and join the trade union of his choice . . . for the promotion and protection of his economic and social interests."

Zambia ratified the ICCPR and did not enter any reservations, declarations, or understandings with respect to Article 22 on freedom of association. Zambia signed, but has not ratified, the ICESCR. Signature constitutes a preliminary and general endorsement of the covenant, and creates an obligation to refrain from acts that would defeat the objectives of the covenant, or to take measures to undermine it.

Under International Labour Organisation Convention No. 87, "*Workers . . . without distinction whatsoever* shall have the right to establish and . . . join organisations of their own choosing." International Labour Organisation Convention No. 98 says, "*Workers* shall enjoy adequate protection against acts of anti-union discrimination . . . More than 100 countries have ratified these two freedom of association conventions, reflecting a solid international consensus. Although a country may not have not ratified them, it is bound by them by virtue of its membership in the International Labour Organisation itself, since these conventions are taken to be of a constitutional nature over and above other conventions.

Under the International Labour Organisation's 1998 Declaration on Fundamental Principles and Rights at Work, championed by the United States, all member countries have an obligation, whether or not they have ratified conventions 87 and 98, "to respect, to promote, and to realise the principles concerning the fundamental rights which are the subject of those Conventions, namely: (a) freedom of association and the effective recognition of the right to collective bargaining.

International instruments make limited exceptions, mainly affecting police and military forces and government policymakers. The ICCPR's

Article 22, for example, says "[t]his article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in the exercise of this right." The ICESCR makes the same exception, and adds "[members] . . . of the administration of the state." ILO Convention 98 says, "[t]his Convention does not deal with the position of public servants engaged in the administration of the State."

The Zambian constitution at article 21 refers to the freedom of assembly and association as follows 'except with his consent a person shall not be hindered in the enjoyment of his freedom of assembly and association, that is to say, his right to assemble freely and associate with other persons and in particular to form or belong to a political party, trade union or other association for the protection of his interests.

21(2) nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this article to the extent that it is shown that the law in question makes provision-

- a) That is reasonably required in the interests of defence, public safety, public order, public morality or public health;
- b) That is reasonably required for the purpose of protecting the rights or freedoms of other persons;
- c) That imposes restrictions upon public officers; or

- d) For the registration of political parties or trade unions in a register established by or under a law and for imposing reasonable conditions relating to the procedure for entry on such a register including conditions as to the minimum number of persons necessary to constitute a trade union qualified for registration;

And except so far as that provision or, the thing done under the authority thereof as the case may be, is shown not to be reasonably justifiable in a democratic society.

It can be noted from this that the right to form or belong to political parties is not expressly denied the military by the constitution.

The military is however subject to subsidiary legislation as will be shown below.

FREEDOM OF ASSOCIATION IN THE MILITARY

The freedom of association in the military is completely inexistent in the military for a number of reasons.

The requisite need for security is ongoing, even the possibility of a lapse in the provision of security to the nation both internally and especially externally can have dire consequences. That in itself is the major reason for the inexistence of the right that may ultimately require of the military

to take such action as may be required to further the needs of a trade union, which are incidental to negotiations between trade unions and government such as a strike

This freedom involves the right to belong to a political party of ones choice. The military is an essential arm of government its members are required to provided peace, security and stability for the whole nation, this cannot be effectively done, if its personnel belong different political groups, a difference in affiliations may seriously prejudice the carrying out of their functions. It is necessary that their affiliations must be completely and utterly devoted to the party in government at whatever time.

Granted the constitution in no way states that the military personnel in particular need not participant in the privileges availed by the freedom of association. It does however specify that the limitation o this right be the defence of national security.

The legislature has however devised what is known as the Civil Service Code of conduct. This applies to all service servants or employees of government. It is contractual document between the employee and the government stipulating the sought of conduct expected from the employee and that which is expressly forbidden.

The military are civil service and as such are an extension of government employees who are obligated to abide by the civil service code of conduct.

The Civil Service Code sets out the constitutional framework within which all civil servants work and the values they are expected to uphold. It is modelled on a draft originally put forward by the House of Commons Treasury and Civil Service Select Committee in the united kingdom .

Section 1 states that “The constitutional and practical role of the Civil Service is, with integrity, honesty, impartiality and objectivity, to assist the duly constituted Government of the republic of zambia or the National Assembly whatever their political complexion, in formulating their policies, carrying out decisions and in administering public services for which they are responsible.”

Section 2 states that “Civil servants are servants of the state. Constitutionally, all the Administrations form part of the state and, subject to the provisions of this Code, civil servants owe their loyalty to the Administrations in which they serve”.

The military is an essential part of the administration of the state and this too is its Code of Conduct.

The sections most pertinent to this discussion are as follows: section four which states:

“Civil servants should serve their Administration in accordance with the principles set out in this Code and recognising:

- the accountability of civil servants to the Minister or, as the case may be, to the Assembly Secretaries and the National Assembly as a body or to the office holder in charge of their department;
- the duty of all public officers to discharge public functions reasonably and according to the law;
- the duty to comply with the law, including international law and treaty obligations, and to uphold the administration of justice; and
- ethical standards governing particular professions.”

This borders on the military duty to maintain discipline by following orders of their superiors.

Section five states “Civil servants should conduct themselves with integrity, impartiality and honesty. They should give honest and impartial advice to the Minister or, as the case may be, to the Assembly Secretaries and the National Assembly as a body or to the

office holder in charge of their department, without fear or favour, and make all information relevant to a decision available to them. They should not deceive or knowingly mislead Ministers, Parliament, the National Assembly or the public.”

It is the duty of a civil servant and military personnel to be impartial, their personal opinions must not cloud their need to perform their duties. They cannot afford to be partisan as this would break down the very fabric upon which the military exist, the military’s subservience to civilian control.

Section six of the civil service code states “Civil servants should endeavour to deal with the affairs of the public sympathetically, efficiently, promptly and without bias or maladministration”.

On the whole it is required that:

- “Civil servants should endeavour to ensure the proper, effective and efficient use of public money.
- Civil servants should not misuse their official position or information acquired in the course of their official duties to further their private interests or those of others. They should not receive benefits of any kind

from a third party which might reasonably be seen to compromise their personal judgement or integrity.

- Civil servants should conduct themselves in such a way as to deserve and retain the confidence of Ministers or Assembly Secretaries and the National Assembly as a body, and to be able to establish the same relationship with those whom they may be required to serve in some future Administration. **They should comply with restrictions on their political activities.** The conduct of civil servants should be such that Ministers, Assembly Secretaries and the National Assembly as a body, and potential future holders of these positions can be sure that confidence can be freely given, and that the Civil Service will conscientiously fulfil its duties and obligations to, and impartially assist, advise and carry out the lawful policies of the duly constituted Administrations”.

All this is covered by the civil service code of conduct which is law as it forms part of the civil service act of zambia.

What must be noted is that though the military like other employees of government administartion are restricted in their political activities, other

employees are allowed the freedom to form trade unions, through which they exercise collective bargaining for better conditions of employment, such as better pay, housing and so on. The military on the other hand cannot form trade unions as it would be inconceivable to imagine a country with no security because its security personnel were on strike as a result of a deadlock between administration and employees as is seen time and time again in the other professions.

Military do exercise the freedom of association but only to the extent that they can form, clubs, or belong to ethnic groups. They however cannot bear any political affiliation despite the fact that they are allowed to participate in elections by voting.

CHAPTER FOUR

CONCLUSION

The Zambian military is quiet on many issues, military issues, issues involving court process through the court martial, whose findings are not necessarily openly displayed and also on political issues.

It has however been evidenced that the military personnel are themselves interested in politics.

Over the years the political sphere has been graced with the participation of former military personnel in politics, many of these have even formed their own political parties, even though they all seem to have begun their political careers with the political party in power at the time.

It is interesting to note that none of those former military personnel have shed their titles after leaving the military and joining politics.

Many of these former military personnel have risen in the political ranks to as high as a full minister.

Examples of these are General Christon Tembo who was once Vice President of the country in the Fredrick Chiluba regime, Brigadier General Godfrey Miyanda who was also once Vice President and General Ron Shikapwasha who is a Minister in the current Mwanawasa administration.

This in itself shows that the military takes a keen interest in politics.

Perhaps one can take a leaf from Ghana's experience with Jerry Rawlings would instigated a military coup and ten later won elections in what was termed to be a free and fair electoral process. Military are human beings, they too have political sympathies, the nature of these sympathies is what comes out in a coup plot as in Ghana, or how they eventually join politics after retiring from the military as in Zambia.

The proposition put forward is that the military want their place in governance they want to be fully involved. The ordinary people are powerless to bring about effective change as in Zambia in 1990 or in Ghana by Jerry Rawlings; and the military are the only ones who can bring about this effective change.

Another proposition stems from the fact that the military have the highest instruments of terror, and that the people whose interests the military protect cannot on their own bring about effective change without a coercive action from the military. Democracy clearly means that there is no place for the military in government except under civil control.

RECOMMENDATIONS

The law places upon the military a need to adhere to the restrictions on both their freedoms of expression and association it states that “Civil servants should not without authority disclose official information which has been communicated in confidence within the Administration, or received in confidence from others. Nothing in the Code should be taken as overriding existing statutory or common law obligations to keep confidential, or to disclose, certain information. They should not seek to frustrate or influence the policies, decisions or actions of Ministers, Assembly Secretaries or the National Assembly as a body by the unauthorised, improper or premature disclosure outside the Administration of any information to which they have had access as civil servants.

Where a civil servant believes he or she is being required to act in a way which:

- is illegal, improper, or unethical;
- is in breach of constitutional convention or a professional code;
- may involve possible maladministration; or
- is otherwise inconsistent with this Code;

he or she should report the matter in accordance with procedures laid down in the appropriate guidance or rules of conduct for their department or Administration. A civil servant should also report to the appropriate authorities evidence of criminal or unlawful activity by others and may also report in accordance with the relevant procedures if he or she becomes aware of other breaches of this Code or is required to act in a way which, for him or her, raises a fundamental issue of conscience.”

Upon another examination; a coup attempt may be settled down to a matter of the conscience.

Granted, the freedom of expression in the military cannot be without limitation, but also the need as established by this research for the military to be involved in politics and governance needs to be reconciled.

The freedom of association too cannot be left unattended. the military as guardians of the public interest cannot be expected to ignore their own plight.

It is recommended then to forestall the need, ever for the military to express themselves via the coup d’etat, to create a military select committee, which would comprise of members from both the military and outside of it to attend to the needs of the military.

This composition is based on the rationale that, because members of the military best understand military personnel and conduct and those outside of the military will provide the necessary informality to allow for free expression of opinions, ideas and grievances.

The military because of the profession have to keep a high standard of discipline. This is achieved through the adherence to hierarchy, obedience to orders and a lack of political ambition.

However this research has shown that military personnel are politically ambitious, and though they may not be allowed to fully participate in politics while still in the military many have been seen to do so after retirement from military service.

It is proposed that merely because they cannot form or belong to political parties does not preclude them from discussing politics in those groups to which they belong, for example the football, golf clubs where much political discourse is carried out anyway.

Graham Evans defined the coup d'état as 'a sudden and decisive stroke of government policy, a coup becomes definitive action that is legal and by its very character designed to achieve some elusive successes.'

In other words, a coup d'état projects in the most direct manner possible the letter of government's intentions.

Gregor Ferguson reinforces this view with his perception of a coup as perpetuating reform and creating a new order in which the country was being saved from the decadence and frivolity of the politicians who may be accused of weakening or dissipating the national spirit or turning the country into a laughing stock.”²⁵

Therefore the military should be allowed through a special mechanism designed to take in all the peculiarities of this institution, the need for secrecy, the nations defence and security, but still allowing for its personnel to have their views heard.

This military select committee would then present these views to the executive, where the necessary adjustments if any can be made, as when a member of parliament presents the constituencies interest in parliament, upon which a motion is raised and upon which the representatives of the people take the necessary action to address the needs of the people.

It would not do to have the military taking to arms even if only for the preservation of public interest. To take Ghana as an example once again many lives may be lost in the event of a successful coup d’etat. Much blood shed was witnessed after the coup of 1981 in Ghana.

However if the military are given the opportunity to participate in governance without needing to feel sidelined and also without

²⁵ C, Das **COUP AND COUP ATTEMPTS IN AFRICA**. Africa-talk.com jan21 2005

unnecessarily placing the nation's security at risk, the threat of the coup attempt even in a democratic state may become a thing of the past.

BIBLIOGRAPHY

Cilliers J **Military and Civil Relations in Southern Africa.**
WWW.AFRICA-TALK.COM

Clapp R. **CHALLENGING THE TRDITIONAL CONCEPTION OF CIVIL RIGHTS:Positive Obligations of the State under Freedom of Expression.** Zambia Law Journal vol33, 2001.

Comrade D **COUP AND COUP ATTEMPTS IN AFRICA.** Africa-talk.com

D.L. Keir and F.H. Lawson. **Cases In Constitutional Law**, Universal Law Publishing Company. Ltd., 1997

Donelly J. **The Concept of Human Rights**, London: Croom Helm Ltd.,1985

G Evans and J Newharn. **The Peguin Dictionary of International Relations**, London. Peguin Books, 1998.

G Ferguson. **Coup Detat: A Practical Manual.** Arms and armour press, New York 1987.

G Machona, **A harvest of treason trials**, in A Onadipe and D Lord, **African media and conflict**. <wwwc-r.org/pubs/occ_papers/af_media/machona.shtml>.

Habasoonda L **Civil and Militray Relations in Zambia** ;the African security journal. Volume two. Peguin books.(2000)

Mtonga H **Encapsulating Zambia's Civil-Military Relations in the Third Republic.** Zambia Publishing House. 1998.

Omoigui N, **Military Defence Pacts in Africa**,
<www.dawadu.com/omoigui1.htm>.

Van Doorn J **The Military and the Crisis of Legitimacy** in G, Harries-Jenkins' **THE MILITARY AND THE PROBLEM OF LEGITIMACY**.

Winfield H. **Winfield and Jolowicz on THE LAW OF TORTS**, Sweet and Maxwell. London 1998.

FREEDOM MAGAZINE: investigative reporting in the public interest.
editor@freedom.org

ACTS USED

THE CONSTITUTION OF ZAMBIA CHAPTER ONE OF THE LAWS OF ZAMBIA

THE STATE SECURITY'S ACT CHAPTER 111 OF THE LAWS OF ZAMBIA

THE STATE SECURITY'S ACT CHAPTER 111 OF THE LAWS OF ZAMBIA

THE DEFENCE ACT CHAPTER 131 OF THE LAWS OF ZAMBIA

THE CIVIL SERVICE ACT

INTERNATIONAL INSTRUMENTS USED

THE UNITED STATES CONSTITUTION

THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL
RIGHTS

THE INTERNATIONAL COVENANT ON ECONOMIC AND
CULTURAL RIGHTS

THE INTERNATIONAL LABOUR ORGANISATION CONVENTION
NO.87

CASES USED

Reg v. Smith (1900) 17 Cape of Good Hope Supreme Court Reports 561

Handyside case judgement of 7th Dec. 1976 series A no. 24

New York Times v. Sullivan (1964) 376 US 54 at 270

Whitney v. California (1918) 274 US 357

Court Martial case of Major Isaac Masonga no. 911278