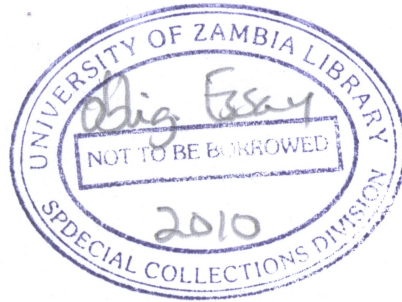


THE UNIVERSITY OF ZAMBIA

SCHOOL OF LAW



**THE ENJOYMENT OF CIVIL AND POLITICAL RIGHTS IN
ZAMBIA: A CRTICAL ANALYSIS OF A PRISONER'S
RIGHT TO VOTE.**

By Misozi Hope Masengu

**TITLE: THE ENJOYMENT OF CIVIL AND POLITICAL RIGHTS IN
ZAMBIA: A CRTICAL ANALYSIS OF A PRISONER'S RIGHT TO
VOTE.**

By Misozi Hope Masengu

Computer Number: 26127601

A Dissertation submitted to the University of Zambia in partial fulfillment of the requirements
for the award of the Degree of Bachelor of Laws (LLB) April, 2010.

THE UNIVERSITY OF ZAMBIA

LUSAKA

(2010)

DECLARATION

I Misozi Hope Masengu do hereby declare that this dissertation represents my own original work, and it has not been submitted for a degree at the University of Zambia or any other university.

Sign 

Date _____

RECOMMENDATION FOR EXAMINATION

I A. C. Chanda recommend that the obligatory Essay prepared under my supervision by Misozi Hope Masengu of Student Number 26127601 entitled:

THE ENJOYMENT OF CIVIL AND POLITICAL RIGHTS IN ZAMBIA: A CRITICAL ANALYSIS OF A PRISONER'S RIGHT TO VOTE.

Be accepted for examination. I have checked it carefully and I am satisfied that it fulfils the requirements pertaining to format as laid down in the requirements governing obligatory essays.

Mrs. Ann Chewe Chanda.

Sign: 

Date: 30/04/10

III

DEDICATION

To mum and dad; if every child received half the love the two of you have shown me over the years, they would surely be blessed.

Abstract

Zambia has ratified various international human rights instruments in order to ensure the realisation of civil and political rights. One such right is the right to vote. It is a basic tenet of any democratic society and a fundamental human right. Despite the ratification of these various instruments, certain sectors of the Zambian society, particularly prisoners are denied the right to vote during elections. Considering the fact that the right to vote is a fundamental human right and an important aspect of a democratic society, it is necessary to critically examine whether it is justified to deny prisoners this right. By international law standards, Zambia is in breach of its international law obligations to respect and ensure to its citizens the rights recognised under international instruments without distinction of any kind. Disallowing prisoners to vote amounts to discrimination on the grounds of one's status as a prisoner. This is a substantial derogation from the provisions of international instruments. Furthermore, for a law to restrict a constitutionally guaranteed right, it must be shown that the restriction provided for by the law is necessary for public safety or defence. If the restriction that is provided by law does not show that it is necessary in the interest of public safety and defence, then such a restriction is unlawful. Taking the vote to the prisoners does not in any way threaten the country's existence or its territorial integrity. Therefore, the law that restricts prisoners from voting is not reasonably required in the interest of defence, public safety and public order. It is thus not reasonably justifiable in a democratic society.

ACKNOWLEDGEMENTS

Behind this work are people who believed (when no one else did), those that sacrificed their time, ideas and efforts and most of all, those who went to great lengths to see the work through to its end. For me, these people include the following;

Mrs. Anne Chewe Chanda (my supervisor), for her firm hand and unwavering commitment to supervising my work. She was the spoon which stirred this research to completion.

My father, Mr. Ching'anze Masengu for keying in the script and for believing in me, even when I did not believe in myself. To my mother, Mrs. Mayvies Kalima Masengu, for the untiring encouragement, prayers, ideas, sound advice and the delicious home cooked meals! They kept me going.

To my siblings, Kalale Masengu and Muya Masengu, I shall remain forever grateful for your love, care and support. To my elder brother, Situmba Masengu, for the guidance and advice that you have offered, despite being far away. Also many thanks to my elder sisters Mrs. Ching'anze Masengu-Mwandila and Mrs Barbara Kalima Masengu-Phiri for their constant love and support.

I would also like to stretch a hand of thanks to Mr. Edward Kamwi (Legal Counsel of the Electoral Commission of Zambia, ECZ) for taking time off his busy schedule to discuss ideas with me and for giving me information that I certainly needed. Further, to my uncle, Mr. Mwandu Mwandu, for the constant support that he has given me throughout my research.

Finally, to my friends who are so dear to me and have supported me throughout this research; Melody Mayaka, Elizabeth Makeche. Mingeli Palata, Nchimunya Siamwiza, Mwaale Kasapo, Paul Mulenga, Isaac Jere, Richard Mwape, Maybin Mulenga and Timothy Daka.

Above all I thank God, without whom all this would surely not have been achieved.

LIST OF ABBREVIATIONS

ACHPR:	African Commission on Human and Peoples Rights
ERTC:	Electoral Reforms Technical Committee
ICCPR:	International Covenant on Civil and Political Rights
ICESCR:	International Covenant on Economic, Social and Cultural Rights
UDHR:	Universal Declaration of Human Rights
VCLT:	Vienna Convention on the Law of Treaties

VII

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Christine Mulundika and 7 others v The People (1995-1997) ZR (SC)

Kubatana v Ministry of Justice, Legal and Parliamentary Affairs Judgment No. SC 17 1991

Leech v Deputy Governor of Parkhurst Prison (1988) A.C. 533

Minister of Home Affairs v National institute for Crime Prevention and the Reintegration of Offenders (NICRO) and others March 3, 2004, Constitutional Court of South Africa

S v Manamela and Another (Director-General of Justice intervening), 2000.(3) SA 1 (CC)

Suave v Canada (Chief Electoral Officer and the Solicitor General of Canada (2002). 3S.C.R. 519, 2002 SC 68

Toonen v Australia UN DOC. CCPR/C/50/D/488/1992 (1994), Communication No. 288/1992

The People v Fred Mmembe, Masautso Phiri and Bright Mwape HP/38//1996(Unreported)

William Steven Banda v The Attorney General (92/HP/1005(1992)

Zambia Sugar Plc v Fellow Nanzaluka Appeal Number 82/2001(Unreported)

VIII

STATUTES

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1. Chapter One

1.1 INTRODUCTION

Human rights are universal legal guarantees protecting individuals and groups against actions, which interfere with fundamental freedoms and human dignity.¹ These rights are the due birthright of every human being, for the sole fact of being human. Civil and Political rights, in particular, are rights which obligate the government not to do something against its people, for example, not kill torture or detain persons. They include the right to life, due process of the law and the right to vote.²

The right of every citizen to vote and take part in the political process of a state is the foundation of its democracy. It is a citizen's right, which enshrines the principle of political and civil equality in the law.³ "A government that restricts the franchise to a selected portion of citizens is a government that jeopardises its claim to representative democracy and erodes the basis of its right to convict and punish law breakers."⁴ To this effect, Zambia has ratified various international instruments in order to ensure the realisation of human rights. Despite this, prisoners are still denied the right to vote during elections.

It is the objective of this study therefore, to critically examine the right of a prisoner to vote in Zambia. This research emanates from the backdrop that the right to vote is a human right and a basic tenet of any democratic society.

1.2 STATEMENT OF THE PROBLEM

¹ P. Jones, Issues in Political Theory. (London: At Macmillan Ltd, 1979.). p13

² Human Rights Commission, Perspectives on the judiciary and Police in Human Rights protection: Individual Rights and Democratic governance in Zambia, State of Human Rights report in Zambia.(Lusaka: At Human Rights Commission, 2008).p3

³ R. Blackburn, Rights of Citizenship. (London: At Mansell Publishing Limited, 1993).p75

⁴ Ibid, p76

Zambia has ratified various international human rights instruments in order to ensure the realisation of civil and political rights. One such right is the right to vote. It is a basic tenet of any democratic society and a fundamental human right. Despite the ratification of these various instruments, certain sectors of the Zambian society, particularly prisoners are denied the right to vote during elections. Article 75(2) of the Constitution of Zambia⁵ and Section 7 of the Electoral Act⁶ expressly forbid a person in lawful custody from casting a vote during elections. Considering the fact that the right to vote is a fundamental human right and an important aspect of a democratic society, it is necessary to critically examine whether it is justified to deny prisoners this right. Furthermore, it is important to consider the challenges (actual or perceived) associated with allowing prisoners to vote during elections, and in light of these challenges, suggest practical ways in which they can be addressed.

1.3 SIGNIFICANCE OF THE STUDY

Zambia has chosen to be a democratic country. It has also ratified various international human rights instruments, which indicate its commitment to upholding human rights and the principles of democracy. However, Zambia is still experiencing impediments towards higher levels of respect for human rights and democracy. One such impediment seems to be disallowing prisoners to vote during elections. It is important therefore, that this study is undertaken in order to ascertain as to whether not allowing prisoners to vote is a violation of human rights.

⁵ Chapter 1 of the Laws of Zambia

⁶ Chapter 13 of the Laws of Zambia

1.4 **PURPOSE OF THE STUDY**

The main objective of this research is to critically analyse the right of a prisoner to vote in Zambia, as a human right and a basic tenet of a democratic society. The specific objectives of the study will be to:

- Consider human rights in general and civil and political rights in particular
- Consider the meaning of a prisoner, prison and the purpose of imprisonment
- Analyse the status of a prisoner under Zambian law and international law(i. e international instruments ratified by Zambia)
- Analyse the enjoyment of constitutionally guaranteed rights in Zambia visa-a-vis the right to vote and freedom of expression. Evaluate whether the denial of the right to vote to prisoners is reasonably justifiable in a democratic society
- Evaluate the challenges associated with allowing prisoners to exercise the right to vote and address these challenges accordingly
- Carryout a case study of countries that have allowed prisoners to vote.

1.5 **SPECIFIC RESEARCH QUESTIONS**

1. Do prisoners lose all their human rights by virtue of being incarcerated?
2. Is the denial to prisoners the right to vote during elections reasonably justifiable in a democratic society?
3. Is it tenable in practice to allow prisoners to exercise their right to vote during elections?

4. What are the political and hence democratic implications of allowing prisoners to vote in Zambia?

1.6 RESEARCH METHODOLOGY

This study will be based on both primary and secondary information. The primary information will include interviews with prisoners, prison authorities in Zambia and the Electoral Commission of Zambia (ECZ) for purposes of ascertaining the administrative challenges of allowing prisoners to vote and how best they can be overcome: as well as to ascertain the reasons why Zambia has passed laws that deny prisoners the right to vote and if these laws should be repealed. A questionnaire will be administered to help in this research. The secondary information will include analyzing cases, articles, paper presentations, student obligatory essays and reports where necessary, by mandated bodies.

1.7 CHAPTER LAYOUT

Chapter One

This chapter discusses human rights in general and civil and political rights in particular. It also discusses the right to vote and its importance in a democratic society.

Chapter two

This chapter discusses the obligations of the Republic of Zambia under international instruments with regards to the right to vote. It further discusses the status of a prisoner under international law and the benefits of allowing prisoners to vote during elections. It also discusses two countries that have allowed prisoners to vote during elections.

Chapter three

This chapter discusses the enjoyment of constitutionally guaranteed rights in Zambia, particularly, the right to vote. It discusses the status of a prisoner under Zambian law and whether it is reasonably justifiable in a democratic society to deny prisoners the right to vote during elections. This chapter also analyses the data obtained through the questionnaires. It discusses the challenges associated with allowing prisoners to exercise the right to vote during elections and suggests ways of addressing these challenges.

Chapter four

Recommendations and Conclusion.

1.8 THE CONCEPT OF HUMAN RIGHTS

The understanding of human rights has for centuries rested upon the debate whether rights are creations of particular societies or independent of them. The earliest forerunner to human rights may be found in the notions of 'natural right' developed by classical Greek philosophers, such as Aristotle and Plato.⁷ This concept was more fully developed by Thomas Aquinas (1225-1274). He postulated that there were goods or behaviours that were naturally right (or wrong) because God ordained it to be so. What was naturally right could be ascertained by humans by 'right reason'⁸ Hugo Grotius further expanded on this notion.¹ He propounded the immutability of what

⁷J. Donnelly, and R.E Howard, International Handbook on Human Rights. (New York: At Greenwood Press, 1987).

⁸ Ibid

is naturally right and wrong. He is largely responsible for the secularisation of the natural law.⁹ It will be noted however, that the long-term difficulty for this train of political thought lay precisely in its religious foundations.

It was not long before these foundations were shaken and challenged by rationalism. Political philosophers argued for new bases of natural rights. Thomas Hobbes posed the first major assault in 1651 on the divine basis of natural right by describing a State of Nature in which God did not seem to play any role. For Hobbes, there was no longer just a list of behaviours that was naturally right or wrong.¹⁰ Hobbes added that there could be some claim or entitlement which was derived from nature. In Hobbes' view, this natural right was one of self-preservation.¹¹

Donnelly and Howard¹² argue however, that the human rights tradition is, perhaps in its inception at least closely tied to contractarian political thought. According to this theory, man possesses certain rights in his natural state, devoid of intervention or support from society.¹³ Man's basic rights derive "from (human) nature, "not from the State, law, politics, God or tradition."¹⁴ In order to be part of society, and to enable it function, man surrendered his rights to society (represented by the state). The social contract therefore, represents the relationship between the individual and society. Man did not however, give up all his rights, but retained the rights to

⁹ C. Anyangwe, Introduction to Human Rights and International Humanitarian Law. (Lusaka: At UNZA Press,2004).p11

¹⁰ A. Heard, Chimeras in Sheep's Clothing? Available at <http://www.sfu.ca/~aheard/1997>.

¹¹ Ibid

¹² J. Donnelly, and R.E Howard, International Handbook on Human Rights. (New York: At Greenwood Press, 1987).p3

¹³ C. Anyangwe, Introduction to Human Rights and International Humanitarian Law. (Lusaka: At UNZA Press,2004). p12

¹⁴ J. Donnelly, and R.E Howard, International Handbook on Human Rights. (New York: At Greenwood Press, 1987).p3

“life, liberty and property”¹⁵ for these are the natural and inalienable rights of man-the natural concomitants of being human. Through this contract, man yielded to society only the power to preserve order and enforce the law. As such, the state is legitimate only if it respects, enforces and permits the fuller realisation of natural rights.¹⁶ If it fails to discharge its part of the contract –if it grossly and systematically violates human rights-citizens either individually or collectively are entitled to revolt.

It is interesting to note that the social contract theory is profoundly reflected in Constitutions of many countries in the world today. In Zambia for instance, the rights contained under Part III of the Constitution of Zambia,¹⁷ also known as the Bill of Rights, are regarded as natural, inalienable and fundamental rights that cannot be affronted in any circumstances by the state, unless as prescribed by law. Hence, these rights cannot be easily amended by Parliament. This is evident from Article 79(3) of the said Constitution which provides as follows:

“A Bill for the alteration of Part III of this Constitution or this Article shall not be passed unless before the first reading of the bill in the National Assembly it has been put to a National referendum with or without amendment by not less than fifty per cent of persons entitled to be registered as voters for the purposes of Presidential and parliamentary elections.”

The other rights contained in the constitution can be easily amended by Parliament without a referendum. They are therefore, not regarded as fundamental and inalienable because they can be taken away at the will of the state...

The debate on the genesis of human rights is still rife today. Controversy continues to swirl over the question whether rights are creations of particular societies or independent of them.

¹⁵C. Anyangwe, Introduction to Human Rights. Lusaka and International Humanitarian Law. (Lusaka: At UNZA Press, 2004). p12

¹⁶ A. Heard, Chimeras in Sheep's Clothing? Available at <http://www.sfu.ca/~aheard/1997>.

¹⁷ These rights include *inter alia* “life, liberty and property,” as espoused by John Locke.

The effect of this paradox, is such that if rights are particular creations of society, then these rights can be delineated with ease, by the state; after all, he who gives, can also take away! On the other hand, if rights emanate from human nature, they cannot not be taken away unless by nature itself and in modern times, if reasonably justifiable in a democratic society.

It will be noted however, that despite this controversy, contemporary notions of human rights draw very deeply from the natural rights tradition. Human rights are now often viewed as arising essentially from the nature of humankind itself. The idea that all humans possess human rights simply by existing and that these rights cannot be taken away from them are direct descendants of natural rights.¹⁸ The Human rights Covenants¹⁹ note that human rights “derive from the inherent dignity of the human person.” Professor Anyangwe adds, that human rights are “rights inherent in mankind’s nature and without them, mankind cannot live like human beings; they are the foundations of existence and co-existence.”²⁰

But what is it in human nature that gives rise to human rights? Donnelley²¹ suggests two basic answers to this question. On the one hand, it is argued that human rights arise from human needs, from the naturally given requisites for physical and mental health and well-being. On the other hand, he argues that human rights reflect the minimum requirements for human dignity or moral personality.

¹⁸ J. Donnelly, and R.E Howard, *International Handbook on Human Rights*. (New York: At Greenwood Press, 1987). p1

¹⁹ The International Bill of Human Rights includes the UDHR(1948), the ICCPR and ICESCR(1966) and the Optional protocol to the former Covenant

²⁰ C. Anyangwe, *Introduction to Human Rights and International Humanitarian Law*. (Lusaka: At UNZA Press, 2004).p11

²¹ J. Donnelly, and R.E Howard, *International Handbook on Human Rights*. (New York: At Greenwood Press, 1987).p11

Clearly the “nature” that gives rise to human rights is thus moral in nature. Human nature in the relevant sense is an amalgam consisting both of psycho-biological facts (constraints and possibilities) and of the social structures and experiences that are no less a part of the essential nature of men and women.²² Therefore, human rights essentially, are rights that arise because they are a necessity for the existence, well being and survival of human beings.

1.9 **CATEGORIES OF HUMAN RIGHTS**

It has become convenient, worldwide, to divide human rights into two major classes, civil and political rights and economic, social and cultural rights.²³ Human rights scholars have gone a step further to divide human rights into civil liberties, political rights (which are but strands of ‘civil and political rights,’) economic, social and cultural rights and peoples’ or collective rights.²⁴

According to Cassese²⁵ economic, social and cultural rights are entitlements that the individual has, vis-a-vis the state, in order to obviate social inequalities and economic imbalances and also to limit disadvantages caused by nature, age and so on. Many academics label them ‘positive rights’ on the reasoning that they are rights that demand an active state role to ensure their enjoyment.²⁶ Economic, Social and Cultural Rights are enshrined in Articles 22-27 of the Universal Declaration of Human Rights(UDHR,1948) and given binding legal character in the International Covenant on Economic, Social and Cultural Rights(ICESCR). They include; the right to food and a standard of living adequate for the health and well being of oneself and one’s

²² Ibid

²³ J. Donnelly, and R.E Howard, International Handbook on Human Rights. (New York: At Greenwood Press, 1987).p6

²⁴ A. Cassese, Human Rights in a Changing World. (New York: At Polity Press, 1990). p2

²⁵ Ibid

²⁶ C. Anyangwe, Introduction to Human Rights and International Humanitarian Law. (Lusaka: At UNZA Press,2004).p26

family, the right to work, rest and leisure and social security and rights to education and to participate in the cultural life of the community.

Civil liberties consist primarily of the “free space” that every government must guarantee the individual by not interfering in a certain private sphere.²⁷ These rights as originally conceived in the West, took the form of freedoms which defined areas of conduct said to be beyond the scope of state regulation or interference, whether through the enactment of laws or otherwise. Thus, under these rights, the correlative state obligation is absolute and immediate²⁸. They are enshrined in Articles 2-21 of the UDHR and given binding force in the International Covenant for Civil and Political Rights (ICCPR). They include, inter alia the right to life and security, the right to private property, the expression of one’s opinions freely, the right to practice one’s religion and the right to peaceful assembly.

Political rights under the UDHR consist of the right to associate with others, the right to form political parties and the right to take part in elections as a voter and/or a candidate.²⁹ Finally, peoples’ rights are said to reflect the idea of solidarity and brotherhood. They are enshrined under Article 28 of the UDHR and include; self determination, existence and development.

1.10 **THE INTERDEPENDENCE OF HUMAN RIGHTS**

Despite being widely distinct, human rights are deeply interlinked. They are in essence, conceived and perceived in a holistic manner. For example, without education and food, one cannot participate effectively in the political process of one’s country. On the other hand, if the opportunity to effectively participate in the political process is denied, it is difficult to change

²⁷ A. Cassese, Human Rights in a Changing World. (New York: At Polity Press, 1990). p2

²⁸ C. Anyangwe, Introduction to Human Rights and International Humanitarian Law. (Lusaka: At UNZA Press, 2004). p26

²⁹ A. Cassese, Human Rights in a Changing World. (New York: At Polity Press, 1990). p2

state policies in order to gain an improved standard of living. Similarly, Anyangwe³⁰ observes, 'the right to a healthy environment, to food, to shelter or to one's culture, is of little use if freedom of movement, speech and assembly are denied.'

The concept of the unity of all rights is implicit in the Universal Declaration of Human Rights that mixes together all fundamental human rights and freedoms in general terms. The unity, interdependence and indivisibility of human rights are reiterated in several United Nations General Assembly resolutions as well.³¹

Every civil, political, and economic, social or cultural right is connected to, or based on a natural right. The great philosopher, Thomas Paine while making a distinction between natural rights and civil rights, acknowledged that there is a necessary connection:

"Natural rights are those which appertain to man in right of his existence. Of this kind are all the intellectual rights, or rights of the mind, and also all those rights of acting as an individual for his own comfort and happiness, which are not injurious to the natural rights of others. Civil rights are those which appertain to man in right of being a member of society. **Every civil right has for its foundation, some natural right pre-existing in the individual...**"³²

In light of the foregoing, it is indisputable that it is not just these three rights; life, liberty and property, which should be regarded as fundamental and inalienable. All human rights are equally important, because the existence of each one depends on the other. They must, for all intents and purposes, be ranked *parri passu*. This also renders fallacious the conception that only the rights enshrined under Part III are fundamental and inalienable. All rights that arise from human nature,

³⁰ Ibid, p23

³¹ C. Anyangwe, Introduction to Human Rights and International Humanitarian Law. (Lusaka: At UNZA Press, 2004). p23

³² P. Thomas, The Rights of Man. (New York: Penguin Books, 1985). p68

from human needs, from the naturally given requisites for human existence, are fundamental human rights, which cannot be affronted at the will of the state.

1.11 **ZAMBIA'S COMMITMENT TO THE RESPECT FOR HUMAN RIGHTS AND DEMOCRACY**

With the advent of multiparty politics in 1991, Zambia became a democratic State. Inevitably she chose to uphold the values of democracy and to respect human rights at all costs. The following passages lend credibility to the aforementioned. The Preamble to the Constitution of Zambia, as amended in 1996, (notwithstanding its non-binding force) states in Paragraph two that, "Determined to uphold and exercise our inherent and inviolable right as a people to decide, appoint and proclaim the means and style to govern ourselves; paragraph three states, "Recognise the equal worth of men and women in their rights to participate, and freely determine and build a political, economic and social system of their own free choice; and finally Paragraph six states, "Resolve to uphold the values of democracy, transparency, accountability and good governance." Furthermore, Article 1 of the Constitution of Zambia stipulates:

1. 'Zambia is a unitary, indivisible, multiparty and democratic sovereign State.'
2. 'All power resides in the people who shall exercise their sovereignty through the democratic institutions of the State in accordance with the Constitution.'

On the international scene, Zambia has championed the cause of human rights; by being a signatory to numerous human rights conventions, treaties and covenants, that advance the human rights agenda. Zambia is party to the two UN Conventions; ICCPR and ICESCR (1966) which have given binding effect to the rights enshrined in the UDHR. It will be noted that most of the rights and freedoms enshrined in the Constitution of Zambia are a mirror reflection of the rights

contained in the UDHR and the two covenants. At the regional level, Zambia is also a signatory to the African Charter Human and Peoples' Rights, ACHPR (1980) which guarantees civil and political rights, economic, social and cultural rights and peoples' rights.

The preceding passages are an indication that Zambia, at least in theory, is a democratic nation. Further, that she is dedicated to respecting internationally recognised human rights.

In the midst of her glamorous 'credentials' with regard to the respect for democracy and human rights, Zambia has seemingly not lived up to local and international standards. Certain sectors of the Zambian society, particularly prisoners are still denied the political right to vote during any elections. Article 75(2) of the Constitution of Zambia and Section 7 of the Electoral Act expressly forbid a person in lawful custody from casting a vote during elections.

It will be noted, more importantly, that the right to vote is not enshrined under Part III of the Constitution of Zambia. Thus, it is not perceived as a human right (or at least a fundamental human right) and inalienable. This offers justification in part, for the denial of prisoners their right to vote.

As earlier established, every civil or political right is based on a natural right. "Liberty" which is one of the basic human rights enshrined under Part III, is of no effect if one cannot freely express oneself; or if one cannot think as one wishes (freedom of conscience). It is even more ineffective however, when one cannot use one's liberty to freely participate in the political process of one's country, through voting. Civil and political rights are fundamental human rights. They are inalienable and requisite to the existence of human beings. The right to vote is therefore, no

exception. In fact, the United Nations Centre for Human Rights(UNCHR)³³ has further stated that today, taking part in government is recognised as a basic human right in almost every region of the world. Evidently, the right to vote is well entrenched even in international human rights law.

It is therefore, irrefutable, at this point, that the right to vote is a fundamental human right. However, the question whether the denial of prisoners this right, is a human rights violation and unreasonable in a democratic society, is at the core of this paper.

1.12 **THE RIGHT TO VOTE AND DEMOCRACY**

1.13 **Definitions of the terms “voting” and “democracy”**

Professor Anyangwe³⁴ defines a vote as “an expression of individual autonomy and an act of internal political determination.” It is often referred to as the right to political choice or the franchise, is the entitlement of a person to freely make political choices by casting a vote either in favour of a political candidate(through the process of elections) or a political matter at hand.³⁵ It is a formal expression of preference for a candidate for office or for proposed resolution of an issue.³⁶ It is not surprising therefore, to note, that voting is one of the most critical way that individuals can influence governmental decision making. Anyangwe³⁷ observes in this regard, that “elections are the basis of the authority of government, the cornerstone of representative democracy and an act of legitimating of government.”

³³ United Nations Professional Training Series, No. 2. Human Rights and Elections: A Handbook on the Legal, Technical and human Rights aspect of Elections. (New York: UN, 1990).p1

³⁴ C. Anyangwe, Law Journal. (Lusaka:UNZA Press, 1998). p6

³⁵ <http://www/umn.edu/humanrts/instree/bludhrhtm>

³⁶ <http://www/umn.edu/humanrts/instree/bludhrhtm>

³⁷ C. Anyangwe, Law Journal. (Lusaka:UNZA Press, 1998). p6

Democracy is a political government either carried out directly by the people (direct democracy) or by means of elected representatives of the people (Representative democracy). The term is derived from the Greek: *δημοκρατία* - (*dēmokratía*) "the power to the people"³⁸ which was coined from *δῆμος* (*dēmos*) "people" and *κράτος* (*krátos*) "power", in the middle of the fifth to fourth century BC to denote the political systems then existing in some Greek city-states, notably Athens following a popular uprising in 508 BC.³⁹ In modern times, there is no specific, universally accepted definition of 'democracy'.⁴⁰ There are however, two principles that any definition of **democracy** includes equality and freedom.⁴¹ Furthermore, any purported existence of democracy must constitute four elements; "A political system for choosing and replacing the government through free and fair elections; the active participation of the people, as citizens, in politics and civic life; protection of the human rights of all citizens and rule of law, in which the laws and procedures apply equally to all citizens."⁴²

Essentially, in democracies, it is the people who hold sovereign power over legislators and government.⁴³ It will be noted that even the Greek "democracy" which provided for mass participation in political affairs contained elements of human rights in it. But citizens in a democracy not only have rights, they have the responsibility to participate in the political system that, in turn, protects their rights and freedoms.⁴⁴ To this effect, it is perceived that the rights to

³⁸ *Demokratia*, Henry George Liddell, Robert Scott, "A Greek-English Lexicon", at Perseus, available at <http://www.perseus.tufts.edu/cgi-bin/ptext?doc=perseus:text:1999>

³⁹ Democracy is people who rule the government directly. BBC History of democracy, available at <http://www.bbc.co.uk/history/ancient/greeks/greekhistory>

⁴⁰ Liberty and justice for some, available at <http://www.economist.com>

⁴¹ Aristotle, *Politics*. 1317b available at <http://www.perseus.tufts.edu/cgi-bin/ptext?doc=perseus:text:1999>

⁴² Lecture at Hilla University for Humanistic Studies, January 21, 2004 available at www.resetdoc.org

⁴³ <http://www.hrw.org/press/index>

⁴⁴ <http://www.america.gov/st/democracy-english/2008/May/20080609194207eafas0.8688013.html>

vote (or elections) form the basis for efficient governance and administration of public affairs. Without this, a democratic society cannot be said to exist.

1.14 **The importance of the right to vote in a democratic society**

The link between voting and democracy is almost obvious. As earlier observed, elections are the basis of the authority of government. The essential corollary of the aforesaid is that, the right to vote is indispensable in a democracy as the governors must derive their power to govern from the voters.⁴⁵ Therefore, a government that restricts the franchise to its citizens, or a selected portion thereof, is a government that jeopardises its claim to representative democracy.⁴⁶

The right to vote is the hallmark of any democratic society.⁴⁷ It is a citizen's right which is of immense symbolic as well as practical importance, for it enshrines the principle of political and civil equality in the law and thereby underpins most other contemporary rights of citizenship. In many African countries, elections have become organised methods of peaceful democratic transition and represent indeed the principal institutionalised channel of peaceful participation in forming and changing governments.⁴⁸ The foundation of a democratic mode of government is that people freely make political choices by exercising their right to vote, which is embodied in constitutions and international laws.

⁴⁵ R. Blackburn, Rights of Citizenship. (London: At Mansell Publishing Limited,1993).p83

⁴⁶ Ibid,p76

⁴⁷ United Nations Professional Training Series, No. 2. Human Rights and Elections: A Handbook on the Legal, Technical and human Rights aspect of Elections. (New York: UN, 1990).p1

⁴⁸ C. Hartsmann, 'Journal of African Elections: Presidential and Parliamentary Elections in African Issue' 103, ELSA, p1

Suffice it to say, the right to vote allows citizens to control power as well as assert their own individual rights. J.N Moyo⁴⁹ observes that the right to vote is the principal means through which citizens can influence their leaders, selecting and deposing them routinely.

In terms of political responsibility, the important point about voting or elections is that they place a powerful incentive upon those who govern to interpret what is in the public interest, not upon paternalistic notions of what they think is best for the governed. This is the essence of a democratic society.

Ginsberg and stone⁵⁰ outline a four-tier analysis of the function of voting in a democratic society. They argue firstly, that elections formalise the character of popular participation in and influence over government thereby, enabling and rendering independent at least in theory, the citizen's capacity to influence the conduct of politicians. Secondly elections compensate for private inequalities in political resources introducing a formal public mechanism for influencing official political conduct. Thirdly they provide a new and subtle way in which powerful forces in society can manipulate popular influence through institutionalized mechanisms. Finally, and by no means the least, popular elections substitute participation in the selection of leaders for direct intervention in, or resistance to public policy making and implementation.

1.15 CONCLUSION

It has been established that every civil or political right is based on a natural right. This renders civil and political rights as human rights which are fundamental. Therefore, the right to vote is a fundamental human right. However, the question whether the denial of prisoners this right, is a

⁴⁹ J.N Moyo, Voting and Democracy: A Study of the Electoral Politics in Zimbabwe: A Study of the Electoral Politics in Zimbabwe.(Harare: University of Zimbabwe Publications, 1992).p7

⁵⁰ B. Ginsberg and A. Stone, Do Elections Matter? (New York: At Sharpe, 1986). p 6

human rights violation and unreasonable in a democratic society is what this paper seeks to solve.

The next chapter shall discuss the obligations of the Republic of Zambia under international instruments, with regard to the right to vote. It will discuss the status of a prisoner under international law and the benefits of allowing prisoners to vote during elections. It will also discuss two countries (South Africa and Canada), that have allowed prisoners to vote during elections.

2. Chapter Two

2.1 THE STATUS OF A PRISONER UNDER INTERNATIONAL LAW

2.2 The Human Rights Perspective of a Prisoner's Right to Vote

It has been established that the right to vote is a human right and of utmost importance in a democratic society. It is vital then, to establish whether or not prisoners do in fact have the right to vote.

Human beings possess human rights in their very nature, devoid of intervention from the state or society. The whole idea of human rights therefore, rests on the premise that human beings possess human rights simply because they are human. It follows that all human beings have human rights and further, that human rights must not be taken away (although they may be restricted), unless a person dies or ceases absolutely to be human. But even in one's death, one has the human right to be buried with dignity and respect. The latter is at the core of human rights.

A prisoner is a human being. He/she is endowed in his/her human nature, with inalienable human rights that ought to be observed and respected. The right to vote, being a human right is no exception. It is the author's submission therefore, that a prisoner too possesses the human right to vote, by the sole fact that he/she is a human being. In the words of Margaret McDonald, "The way the arms and legs are attached to the body, is similar to the way human rights are attached to the human being." They cannot be lost simply because a person is incarcerated.

This position is supported in the Zimbabwean case of Kubatana v Ministry of Justice, Legal and Parliamentary Affairs⁵¹ in which Gubbay CJ stated “fortunately the view no longer holds that in consequence of crime, a prisoner forfeits not only his liberty but all his personal rights, except those which the law in its humanity grants him.” Furthermore, in the case of Leech v Deputy Governor of Parkhurst Prison⁵² the House of Lords held that a convicted prisoner in spite of his imprisonment retains all civil rights that are not taken away by necessary implication.

This does not however, end here. Human rights are not guaranteed in absolute terms, which entails that they may be restricted by the state if such restriction is reasonably justifiable in a democratic society. This is dealt with in Chapter 3 of this paper.

2.3 International instruments that recognise a prisoner’s right to vote

There are various international human rights instruments that expressly or tacitly enshrine a prisoner’s right to vote. Some of these include the International Bill of Rights (IBR) and the African Charter on Human and peoples’ Rights (ACHPR). The IBR consists of five instruments; the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and its two Optional Protocols and the International Covenant on Economic, Social and Cultural Rights (ICESCR). However, of relevance to this paper are the UDHR and the ICCPR excluding its two protocols.

⁵¹ Judgment No. SC 17/91

⁵² (1988) AC 533

2.31 The Universal Declaration of Human Rights (UDHR)

The UDHR was adopted by the General Assembly of the United Nations on 10th December 1948 as common standard of achievement to promote respect for human rights and freedoms.⁵³ Although not intended to have any legal force, the principles proclaimed in the UDHR have acquired international customary law status, thus, binding on all states.⁵⁴

The right to vote is clearly entrenched under Article 21 of the UDHR as follows:

1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives
2. Everyone has the right to equal access to public service in his country
3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

To this effect, the UDHR is a clear manifestation that the will of the people shall be the basis of authority of government. Thus this can only be realised by the people exercising the right to vote.

It is cardinal to note, in this regard, that the UDHR does not provide any limitation to the enjoyment of this right. This is evidenced in Article 2 of the UDHR. It provides that, "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political, or other status." Article 7 further provides "...all are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination."

⁵³ UDHR Preamble

⁵⁴N. Rodley, Treatment of Prisoners under international law (London: At Clarendon Press, 1987). p257

Evidently, the UDHR grants to prisoners the right to vote, because they are human as well. It does not restrict in any respect, the persons that are allowed to enjoy and exercise this right. Any creature, that is a human being, is entitled to enjoy the rights enshrined in the UDHR. The corollary to the latter, is that, disallowing prisoners to vote, amounts to discrimination on the basis of one's status as a prisoner. This is expressly forbidden in the UDHR, and if done, would amount to a manifest violation of human rights.

2.32 **The International Covenant on Civil and Political Rights (ICCPR)**

The ICCPR seeks to restrain the state from interfering with the integrity and freedom of the individual. Article 2, specifically provides that “each state party to the covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant without distinction of any kind....”

Article 25 particularly grants the right to vote and to be voted for during elections. This article provides that, “every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions; a) to take part in the conduct of public affairs directly or through freely chosen representatives; b) to vote and to be elected at genuine periodic elections which shall be universal and equal suffrage and shall be held by secret ballot guaranteeing the free expression of the will of the electors; c) to have access on general terms of equality to public service in his country.

Like the UDHR, the ICCPR prohibits any form of discrimination in the enjoyment of the rights contained therein. The general non-discrimination clause in the ICCPR is Article 26, which is couched in the following terms; “all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any

discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

The phrase “other status” is worth being considered. In the case of Toonen v Australia⁵⁵, the Human Rights Committee gave the phrase “other status” a broad interpretation and found that sexual orientation is an “other status” for purposes of the covenant.

Flowing from the aforementioned, the author contends that the categories envisaged under Article 26 are by no means exhaustive. They should be broadly interpreted to include the categories that are not included in the Article. On the strength of Toonen v Australia it is safe to argue that disallowing prisoners to exercise their human right to vote, is discriminatory on the basis of class(that is, one`s class as a prisoner).⁵⁶ Therefore, a state that restricts the franchise to a selected portion of its citizens violates Articles 2, 25 and 26 of the ICCPR and generally, the very spirit of the Covenant.

2.33 The African Charter on Human and Peoples Rights (ACHPR)

Apart from the two international instruments(UDHR and ICCPR), the right to vote is guaranteed at regional level as well, in the African Charter on Human and Peoples Rights(ACHPR). This charter guarantees the right to vote under Article 13, in the following terms; “Every citizen shall have the right to freely participate in the government of his or her country either directly or through freely chosen representatives in accordance with the provisions of the law.” The African Charter has no derogation clause and the only legitimate reasons for limitations of the rights and freedoms of the African Charter are found in Article 27 (?), that is, that the rights of the Charter

⁵⁵ U.N DOC. CCPR/C/50/D/488/1992 (1994), Communication No. 288/1992

⁵⁶ Other status can also mean culture, creed etc

“...shall be exercised with due regard to the rights of others, collective security, morality and common interest.”⁵⁷

This entails that a prisoner is also catered for under Article 13, because the ACHPR does not restrict the persons entitled to the right to vote. A prisoner’s right to vote can only be curtailed in the interest of collective security, morality and common interest. In the absence of this, such restriction is unlawful.

2.4 ZAMBIA’S OBLIGATIONS UNDER INTERNATIONAL LAW

Zambia has ratified the African Charter and almost all the international instruments that make up the IBR, except the ICCPR Optional Protocol regarding the elimination of the death penalty). By signing a treaty or ratifying it, a country assumes an obligation at the international level to amend its national laws so as to make them conform to the provisions of the particular treaty signed.⁵⁸

The state is duty bound both under international and national human rights law, to respect, protect, promote and fulfill fundamental human rights and freedoms. It can now no longer treat the individual or a group of individuals as it pleases.⁵⁹ It must ensure equality of its citizens by eliminating any form of discrimination.

By international law standards, Zambia is in breach of its international law obligations to respect and ensure to its citizens the rights recognised under international instruments without distinction of any kind. Disallowing prisoners to vote amounts to discrimination on the grounds of class. This is a substantial derogation from the provisions of international instruments. Even if Zambia has merely signed and not domesticated these instruments, it is still obligated to respect them, by

⁵⁷ Civil liberties v Nigeria(2000) AHRLR 186 (ACHPR 1995)

⁵⁸ C. Anyangwe, Introduction to Human Rights and International Humanitarian Law,(Lusaka: At UNZA Press, 2004),p207

⁵⁹ Ibid

virtue of Article 18 of the Vienna Convention on the Law of Treaties⁶⁰ which provides, “ A state is obliged to refrain from acts which would defeat the object and purpose of a treaty when... it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty...” Therefore, even if a state has merely signed, but not ratified an instrument, it is bound to the provisions of the treaty because of Article 18 of the Vienna Convention.

2.5 COUNTRIES THAT HAVE ALLOWED PRISONERS TO VOTE

There are several countries apart from Zambia, which disallow prisoners to vote. Others however, are moving towards the realisation that allowing prisoners to vote is not only a recognition of their fundamental rights, but that it may also be beneficial to society as a whole. States are therefore, amending their laws in order to allow prisoners to vote. This paper has focussed on two countries that have allowed their prisoners to vote, namely, South Africa and Canada.

2.51 South Africa

South Africa is a constitutional democracy. Section 7 of its Constitution⁶¹ states that, “...this Bill of rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.”

The legal basis for the extension of the franchise to South African prisoners is embedded under Section 19(3) of the South African Constitution. It provides without any restriction, that every

⁶⁰ The Vienna Convention on the Law of Treaties (VCLT) is a treaty concerning the customary international law on treaties between states. It was adopted on 22 May 1969 and opened for signature on 23 May 1969. The Convention entered into force on 27 January 1980. Most nations, whether they are party to it or not, recognize it as the preeminent "Treaty of Treaties"; it is widely recognized as the authoritative guide vis-à-vis the formation and effects of treaties.

⁶¹ Section 7 of the Constitution of South Africa(1996)

adult citizen has the right to vote. The only restriction available is the general limitation clause which is contained in Section 36 of the said constitution. It provides that, “the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including; a)The nature of the right, b)The importance of the purpose of the limitation, c)The nature and extent of the limitation; d) The relation between the limitation and its purpose; and e)Less restrictive means to achieve the purpose. (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights. “

This right, as it extends to prisoners, was recently tested in 2004 in the Constitutional Court of South Africa in the leading case of Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) and others⁶² In this case, the Electoral Laws Amendment Act (34 of 2003) promulgated in 2003, provided that only awaiting trial inmates and inmates serving a prison sentence with the option of a fine would be allowed to register for and participate in elections. The result was that inmates who were serving a prison sentence without the option of a fine would not be able to register and thus, not vote.

The state argued firstly, that it would be logistically difficult and too costly to register all inmates. They also suggested that it would be unfair to make special arrangement for serious offenders (presumed serious because they are serving a prison sentence without the option of a fine), while the same arrangements were not being made for law-abiding citizens who could not vote at ordinary voting stations. Finally they argued that if inmates were allowed to vote, it

⁶² March 3, 2004, Constitutional Court of South Africa

would send a message to the public that the government favoured offenders and was therefore, soft on crime.

The Constitutional Court did not accept the costs and logistics arguments because the Electoral Commission had already visited all the prisons to register inmates awaiting trial and those not affected by the legislative amendments. Further because the government did not present the court with sufficient evidence to show to the contrary. This left the court to deal with the issue of whether policy is sufficient reason for a limitation of rights and whether this meets the requirements set out in Section 36(1) of the constitution.

The Constitutional Court declared that the relevant sections of the Electoral Laws Amendment Act were unconstitutional. The ratio decidendi was that the limitation of the right to vote does not conform to the requirements set out in Section 36(1) of the constitution. Citing the case of S v Manamela and Another (Director-General of Justice intervening), 2000.(3) SA 1 (CC), Chaskalson J, stated that section 36 requires a proportional analysis, and what must be considered is the importance of a right against the impact of its limitation, and ask if a less restrictive measure will not achieve the same result. He further stated that, “in this process, different and sometimes conflicting interests and values may have to be taken into account. Therefore, sufficient material should be placed before a court dealing with such matters to enable the court to weigh up and evaluate the competing values and interests in their proper context.”

In weighing these rights and concerns as a possible justification for the limitation, the court found that the government was not convincing. The court stated, citing the Canadian case of Sauve v Canada (2002). 3S.C.R. 519, 2002 SC 68, that the Electoral Laws Amendment Act provided for blanket exclusion of the right to vote, and hence, in the absence of information

explaining why these inmates were targeted, and considering factors such as; the potential impact of the limitation , the court had no option but to rule in favour of NICRO.

This case is pertinent because it highlights the position of prisoners in terms of their constitutional rights. It is obvious that if the government attempts to limit this right, it will have to pass intense scrutiny by the Constitutional Court and to borrow the words of P. De Vos,⁶³ “the court will not be swayed by public opinion or knee jerk reaction from government.” It therefore, sets a great precedent not just for South Africa, but for all constitutional democracies, in Africa and the world over. Zambia particularly has many lessons to draw from this decision, being a constitutional democracy itself. However, this decision may not be the end of the road should the government decide to make another attempt to limit this right and present a more convincing argument that meets the requirements in terms of Section 36 of the South African Constitution.

2.52 **CANADA**

The extension of the franchise to Canadian prisoners is perhaps, traceable to the celebrated case of Suave v Canada (Chief Electoral Officer and the Solicitor General of Canada).⁶⁴ In this case, Richard Suave, an ex-inmate, challenged the section of the Canadian Elections Act that prohibited voting by inmates serving a sentence of two years or more. The Attorney General of Canada argued that denying this right was justifiable under the Canadian Charter of Rights and Freedoms, as it served several purposes best determined by Parliament such as the goal of promoting civic responsibility and respect for the law.

⁶³ P. De Vos, South African Prisoner’s right to vote: Addendum to “Prisoner’s rights litigation in South Africa. Available at www.nicro.org.za/cspri, 2004.

⁶⁴ (2002). 3S.C.R. 519, 2002 SC 68

The court rejected this view and found that voting is a fundamental right in a democracy, and any attempt to restrict it had to be made on the basis of a compelling reason that met specific legal tests, (these included, on the basis of necessity, could not be arbitrary and that the objectives of the ban could not be met through other measures). The Supreme Court further found that:

“Denying penitentiary inmates the right to vote is more likely to send messages that undermine respect for the law and democracy than messages that enhance those values. The legitimacy of the law and the obligation to obey the law flow directly from the right of every citizen to vote. To deny inmates the right to vote is to lose an important means of teaching them democratic values and social responsibility...”

Clearly there is a growing body of local and international case law relating to the right of inmates to vote. It is evident from both the South African and Canadian cases that the right to vote is fundamental and must not be denied unnecessarily. Voting like other rights is not a privilege which government grants to citizens. It is something that citizens agree are fundamental to a democratic society and placed substantially beyond the reach of politicians to modify. Therefore, to limit this right, the government must show that allowing prisoners to exercise this right infringes on the rights of others and hence, reasonably justifiable.

2.6 CONCLUSION

This chapter has discussed the status of a prisoner under international law. It has discussed the human rights perspective of a prisoner's right to vote. The chapter has also critically analysed human rights instruments that guarantee the right to vote. It has been established that Zambia, by denying the franchise to its prisoners, is in substantial breach of its obligations under international law, to respect human rights, without distinction of any kind. The chapter has also

looked at countries that have allowed prisoners to vote, particularly, South Africa and Canada. It has been observed that Zambia can draw a few lessons from these countries, with regard to a prisoner's right to vote.

The next chapter shall discuss the enjoyment of constitutionally guaranteed rights in Zambia, particularly the right to freedom of expression and the right to vote. It will discuss the status of a prisoner under Zambian law and whether it is reasonably justifiable in a democratic society to deny prisoners the right to vote during elections. This chapter will also analyse the data obtained during fieldwork. It will discuss the challenges associated with allowing prisoners to exercise the right to vote during elections and suggest ways of addressing these challenges.

3. Chapter Three

3.1 THE ENJOYMENT OF CONSTITUTIONALLY GUARANTEED RIGHTS IN ZAMBIA

A right is a proper claim to something, or an authority to do something. It is something one may do or have by law.⁶⁵ Human rights are defined as universal legal guarantees protecting individuals and groups against actions, which interfere with fundamental freedoms and human dignity.⁶⁶ These rights are the due birthright of every human being, for the sole fact of being human. Their source is therefore, human nature, human kind or humanity.⁶⁷

Human rights are sometimes referred to as ‘fundamental’ because they are central to the dignity and worth of the human being. They form the basis of other rights and freedoms, and as such, they are the foundations of existence and co-existence.⁶⁸ Categories of these rights include; civil and political rights, (for example, the right to vote and freedom of expression), economic, social and cultural rights, (for example the right to education and the right to health) and finally, peoples’ rights (for example, the right to development and the right to self determination).

In order to give credence to human rights and to ensure their protection, states usually provide a framework for human rights protection. One way in which this is done is through the

⁶⁵ C. Anyangwe, Introduction to Human Rights and International Humanitarian Law. Lusaka: At UNZA Press, 2004).

⁶⁶ P. Jones, Issues in Political Theory.(London: At Macmillan Ltd, 1979).p13

⁶⁷ C. Anyangwe, Introduction to Human Rights and International Humanitarian Law. Lusaka: At UNZA Press,2004).p1

⁶⁸ Ibid, p11

constitution.⁶⁹In French-speaking states for example, the subject of human rights is dealt with in the preamble to the constitution (where the state merely declares its adherence to some major international human rights instruments) and/or a few articles in the enacted part of the constitution. In English speaking countries, a Constitutional Bill of Rights⁷⁰ is usually entrenched in the constitution. In most of these states, bills follow the traditional way of guaranteeing only civil and political rights. However, contemporary Bills of Rights tend to provide for a wide ranging list of human rights that take into account the developments in universal and international human rights law.⁷¹ Human rights are however, not only provided for in the constitution, but in pieces of legislation as well, in disciplines such as administrative and constitutional law, tort law and labour law. But given the supremacy of the constitution, the rights contained therein enjoy higher status.

In Zambia, which is an English-speaking state, fundamental human rights and freedoms are enshrined in the Zambian Bill of Rights (Part III of the Constitution, Articles 11 to 26). These rights are justiciable. The concept of justiciability of rights means that a person can seek redress from the court in the event that any of his/her rights which are enshrined in the law are violated. With regards to the rights under Part III, a person must move the court by way of petition through Article 28 of the constitution in the event that his/her rights are violated or likely to be violated. ⁷²Article 28 strictly applies to rights under Part III. Furthermore, Article 11 of the Constitution provides, “it is recognised and declared that every person in Zambia has been and

⁶⁹A written constitution is a special document having the force of law and status of supreme law, by which a society organises a government of itself, defines and limits its powers, and prescribes the relations of its various organs *inter se* and with the citizen. It is thus a law that is different from others in the way that it is enacted, repealed or amended.

⁷⁰ A bill of rights is a statement of basic human rights that can either be incorporated into the constitution or annexed to some other legislation aimed at guaranteeing and giving legal protection to human rights and fundamental freedoms. The Zambian Bill of rights is incorporated under Part III of the Constitution of Zambia

⁷¹ C. Anyangwe, *Introduction to Human Rights and International Humanitarian Law*. (Lusaka: At UNZA Press, 2004). p198

⁷² Article 28 of the Constitution of Zambia

shall continue to be entitled to the fundamental rights and freedoms of the individual...” This is an affirmation that human beings that are citizens of Zambia are entitled to enjoy the fundamental rights and freedoms enshrined in Part III.

The normative range of Zambia’s Bill of Rights is narrow, being confined to civil and political rights. The Bill of Rights does not contain economic, social and cultural rights (second generation rights) and third generation rights. Since these rights are not at all enshrined in the constitution, they are not justiciable in Zambia. The Bill of rights also does not contain the right to vote. This notwithstanding, the right to vote is provided for under Article 75 of the Constitution. Since it is provided for by law, it means that a person can move the court in the event that this right is violated or denied. This is as long as such person is eligible to vote. A person shall be eligible to vote if he/she is a citizen of Zambia, has attained the age of eighteen years; and is in possession of a national registration card.⁷³ To support this argument, it is cardinal to analyse the wording of Article 75 of the Constitution. It provides “Every citizen of Zambia who has attained the age of eighteen years **shall...be entitled** to be registered as a voter...” The Constitution uses the words “shall be entitled.” An entitlement is a right, a claim or a prerogative. It is not a privilege, which means that once a person qualifies as a voter, then the right to vote becomes an entitlement or a right for them. Further, Section 59(2) of the Electoral Act provides that a voter is **entitled** to vote at a polling station on production of that voter’s national registration card and voter’s card. Sub Section (5) of Section 59 states that if the presiding officer is satisfied that the requirements for voting have been met, that officer shall allow the voter to vote. This section uses the word “shall” which means that it is mandatory for an electoral officer to allow an eligible voter to vote. It further confirms the fact that voting is an

⁷³ Section 5 of the Electoral Act, No. 12 of 2006

entitlement or a right. And since it is a right or an entitlement, it means that a person that is entitled and eligible to vote can claim this right in the event that it is denied.

To support the above submission, Dias⁷⁴ observes that a right is a sign that some other person is required to conform to a pattern of conduct and that the person having the right can bring an action to recover compensation for its non-observance or he may be able to avail himself of more indirect consequences. In this regard, it was stated in the case of Ashbury v White⁷⁵ that the right to vote imposed a duty on the electoral officer not to prevent the person from voting. In light of these propositions, it is submitted that voting is an entitlement or a right of every citizen that is eligible to vote. Since it is an entitlement, it imposes a duty on the electoral officers not to prevent an eligible voter from voting. And in the event that such a voter is prevented from voting, he/she has the right to bring an action for the non-observance of this right by seeking compensation or exploring other avenues, for example seeking a declaration from the court or seeking judicial review of the decision not to allow the eligible voter to vote. To this extent, it is submitted that the right to vote is justiciable in Zambia.

It should be borne in mind that the exclusion of these rights (economic, social and cultural rights, third generation rights and the right to vote) from the Zambian Bill of Rights (particularly the right to vote) does not suggest that they are not human rights, or worse still render them redundant. It has been established in Chapter I of this paper that every civil and political right is based on a natural right. The great philosopher Thomas Paine recognised this when he stated that **“Every civil right has for its foundation, some natural right pre-existing in the**

⁷⁴ R. W. Dias, Jurisprudence. (London: Butterworths, 1985).p65

⁷⁵ (1703) 2 LD Raym 938

individual...⁷⁶ This means that every natural right (that is, rights that human beings have by virtue of being human, for example life and liberty⁷⁷), depend for their effective existence on other rights. "Liberty" for instance, which is one of the basic human rights enshrined under Part III, is of no effect if one cannot freely express oneself; or if one cannot think as one wishes(freedom of conscience). Civil and political rights are also human rights. The right to vote particularly is therefore, no exception. In fact, the United National Centre for Human Rights (UNCHR)⁷⁸ has further stated that today, taking part in government is recognised as a basic human right in almost every region of the world. Evidently, the right to vote is well entrenched even in international human rights law.

Thus, owing to the interdependent nature of human rights, it is fallacious to argue that it is only the rights enshrined under Part III of the Constitution that are important or that they should rank higher than the rights that are not enshrined in Part III. Human rights arise from human needs and they reflect the minimum requirements for human dignity or moral personality.⁷⁹ It is these needs and requirements that give rise to natural rights. The latter are regarded as fundamental and are enshrined in Part III. But they cannot stand alone and without the existence of the other rights that are not enshrined in Part III. Therefore, it is the author's submission that all human rights, whether enshrined in Part III or not, must for all intents and purposes be ranked *parri passu*. They may not be fundamental human rights, but they are equally important because they originate from natural rights. The right to vote, which is a political right, is therefore, a human right, notwithstanding that it is not embedded in Part III of the constitution.

⁷⁶ P.Thomas, *The Rights of Man*.(New York: Penguin Books, 1985).p68

⁷⁷ C. Anyangwe, *Introduction to Human Rights and International Humanitarian Law*. (Lusaka: At UNZA Press, 2004). p12

⁷⁸ United National Professional Training Series, No. 2. *Human Rights and Elections: A Handbook on the Legal, Technical and Human Rights aspect of Elections*. (New York: UN, 1990).p1

⁷⁹ J. Donnelly, and R.E Howard, *International Handbook on Human Rights*, (New York: Greenwood Press, 1987).p11

The rights enshrined in Part III, seek to protect firstly, the physical integrity of the person⁸⁰ for example, the right to life, right to personal liberty and security, right to freedom from arbitrary arrest and detention, right to freedom from torture and other ill-treatment, freedom of movement, freedom from slavery, servitude and forced labour and the right of young persons to be protected from abuse. Secondly, the rights seek to protect the legal integrity of the person⁸¹, for instance the right to be recognised before the law, the right to equality before the law, the right to fair trial, the right to freedom from retroactive penal laws, the rights of accused persons and the right of appeal. Finally, the rights seek to protect the moral and mental integrity of the person, for example, the right to dignity, privacy, right to reputation, right to freedom of opinion and expression, right to freedom from discrimination, and the freedom of thought, conscience and religion. Other rights that are guaranteed under the Bill of Rights include freedom of assembly and association and the right not to be deprived of property without compensation.

However, as is the case with human rights in general, the rights guaranteed in the Zambian Bill of Rights are subject to limitations. Apart from the protection against slavery, servitude and torture, each of the rights is elaborately punctured by clawback clauses. Justice Chitoshi acknowledged this fact in the case of the William Steven Banda v The Attorney General⁸² when he stated that none of the rights guaranteed in the Constitution are absolute because of the derogation clauses.

Furthermore, Article 11 of the Constitution of Zambia provides that every individual is entitled to fundamental rights and freedoms, but subject to the limitations contained under Part III and further, that these limitations are designed to ensure that the enjoyment of the said rights and

⁸⁰ C. Anyangwe, Introduction to Human Rights and International Humanitarian Law. (Lusaka: At UNZA Press, 2004). p202

⁸¹ Ibid

⁸² 92/Hp/1005/(1992) (Unreported)

freedoms does not prejudice the rights and freedoms of others or the public interest. The Constitution for instance, guarantees; under Article 13, the protection of the right to personal liberty. But there are enumerated ten (10) circumstances under which a person may be lawfully deprived of his personal liberty. Thus, inspite of the guarantee of the right enshrined therein, an individual may lawfully be deprived of his/her personal liberty under the circumstances stipulated in the said Article. Furthermore, the enjoyment of the rights to freedom of conscience, expression, assembly and association are subject to restrictions that are “reasonably required in the interest of defence, public safety, public order, public morality or public health or...for the purpose of protecting the reputations, rights or freedoms of other persons.”⁸³

Apart from the Constitution itself restricting the fundamental rights and freedoms that are guaranteed therein, the legislative arm of government, has the mandate to enact laws. These may either guarantee or restrict the rights enshrined under Part III of the Constitution. In some instances, the laws enacted contravene the fundamental rights and freedoms of the individual that are provided in the Constitution. A classical exposition of the aforesaid is to be found in the celebrated case of Christine Mulundika and 7 Others v The People⁸⁴ in which the Supreme Court of Zambia declared Section 5(4) of the Public Order Act⁸⁵ as unconstitutional. Therefore, notwithstanding that rights are enshrined in the Constitution of Zambia, they are not guaranteed in absolute terms. They can be restricted, as long as such restriction is in accordance with the law and reasonably required in a democratic society.⁸⁶

⁸³ Articles 20 and 21 of the Constitution of Zambia

⁸⁴ (1995-1997) ZR 159 (SC)

⁸⁵ Chapter 104 of the Laws of Zambia

⁸⁶ In the interest of public safety, defence, security and order.

3.2 THE STATUS OF A PRISONER UNDER ZAMBIAN LAW IN RELATION TO CONSTITUTIONALLY GUARRANTEED RIGHTS

Generally, the fundamental rights and freedoms contained in the Constitution are an entitlement of every person in Zambia.⁸⁷ Prisoners in Zambia are therefore also entitled to these rights and freedoms. However, as earlier observed, these rights are not guaranteed in absolute terms. The enjoyment of the said rights and freedoms by prisoners is lawfully restricted in certain instances. For example, Article 22(2) guarantees the freedom of movement, but provides in Sub Article 2 that: “any restrictions on a person’s freedom of movement that relates to his lawful detention shall not be held to be inconsistent with or in contravention of this Article.” Further, Article 13 which guarantees the right to personal liberty provides; “(1) A person shall not be deprived of his personal liberty except as may be authorised by law in any of the following cases: (a) in execution of a sentence or order of a court, whether established for Zambia or some other country, in respect of a criminal offence of which he has been convicted...”

Thus, once imprisoned, a prisoner can no longer freely exercise his/her personal liberty or freedom of movement. It is vital to note, that prisoners are not denied these rights per se, but that the rights are merely restricted. A prisoner for instance, is still able to enjoy his personal liberty and freedom of movement within the confines of the prison, but is prohibited by law, from doing so outside the prison walls.

It is critical to appreciate however, that Article 13 and 22(2) of the Zambian Bill of Rights are the only two Articles that expressly restrict the enjoyment of the rights (contained in Part III) by prisoners. The remaining provisions merely allow for derogations in the interest of public safety,

⁸⁷ Article 11 of the Constitution of Zambia

order, security and defence. They do not expressly restrict prisoners from enjoying the rights contained therein. For example, Article 19 guarantees the freedom of conscience, thought and religion. This right is restricted in Sub Article 5(a) and (b) in the interest of public safety, order and morality and also for the purpose of protecting the rights and freedoms of others. This Article does not restrict prisoners from enjoying their freedom of conscience once they have been imprisoned. If the provisions in Article 13 and 22(2) applied generally for the sake of non-repetition, then the drafters would have entrenched one limitation clause to apply to all the rights. For instance, South Africa has taken this approach by entrenching only one limitation clause (Section 36) which applies generally, with regard to all the rights in the South African Constitution. As A.W. Chanda observed, for the law to effectively restrict a right, it must be clear and unambiguous. Otherwise, such restriction is considered to be unlawful

The foregoing is a clear indication that a prisoner is not or atleast should not be denied or restricted from enjoying all fundamental human rights and freedoms upon conviction, unless those incidental to his/her conviction. This position was supported in the case of Leech v Deputy Governor of Parkhurst Prison⁸⁸ in which it was held that a prisoner does not shed off all of his rights at the prison gate, unless those incidental to his/her conviction. It is safe to argue therefore, that prisoners are entitled to all the rights and freedoms enshrined in Part III, that is, from Articles 11 to 26, of the Constitution, except those that expressly restrict prisoners from exercising them, by virtue of imprisonment (these being Articles 13 and 22).

Notwithstanding the foregoing, there are some rights in the Constitution that are not merely restricted, but are essentially denied to prisoners. One such right is the right to vote.

⁸⁸ (1988) AC 533

3.3 THE RIGHT TO VOTE

As earlier observed, the right to vote is not included under the Zambian Bill of Rights. In spite of this, it is a fundamental human right, and a key feature of any democratic society.⁸⁹ Notwithstanding, the right to vote is denied to prisoners in Zambia. A prisoner is expressly barred from casting a vote in any election. The principal source of this law is the Constitution and the Electoral Act, No. 12 of 2006. Article 75(1) of the Zambian Constitution provides:

“Every person who is registered in any constituency as a voter for the purposes of elections to the National Assembly shall, unless he is disqualified by Parliament from voting in such elections ... on the grounds of his being in lawful custody at the date of the election, be entitled so to vote in that constituency in accordance with the provisions made by or under an Act of Parliament, and no other person may so vote.”

Section 7 of the Electoral Act is couched in the following terms: “No person shall be qualified for registration as a voter and no person shall be registered as a voter, who... (f) is under sentence of death imposed by any court in Zambia, or a sentence of imprisonment imposed by such a court;...” Further, Section 19 provides; “no person shall be entitled to vote at a direct election who (c) at the date of the election is in lawful custody or the person’s freedom of movement is restricted under any law in force in Zambia.” From the latter provisions, it is apparent that prisoners sentenced to death, and those that are serving sentences as well as persons lawfully detained on the voting day (detainees), are not allowed to cast a vote.

In light of the foregoing, the cardinal issue, which this researcher seeks to determine and which is at the core of this paper, is whether or not such restriction is justified in a democratic country like Zambia.

⁸⁹ J. N. Moyo, *Voting and Democracy: A Study of the Electoral Politics in Zimbabwe: A Study of the Electoral Politics in Zimbabwe*. (Harare: At University of Zimbabwe Publications, 1992).p7

In order to be valid, a limitation or restriction to the enjoyment of a constitutionally guaranteed right must be prescribed by law and must be reasonably required in the interest of defence, public safety and public order.⁹⁰ Moreover, the law in question must be reasonably justifiable in a democratic society. These expressions have been subject of interpretation by various national and international courts and tribunals.

In the case of The People v Fred Mmembe, Masautso Phiri and Bright Mwape⁹¹ three editors of The Post Newspaper in Zambia were charged with receiving documents, in contravention of Section 4(3) of the State Security Act.⁹² The High Court found that the accused had no case to answer as the information in question had no bearing on state security. Justice Chitengi, as he then was, added that, the activities in question must tend to “subvert the interests of the State.” This entails that for the state to restrict an activity on the basis of state security or public safety, the particular activity must have a subversive or dissident effect on the same, otherwise such restriction would be unlawful.

Clearly, a restriction on any fundamental right or freedom vis- a – vis , the right to vote , that a government seeks to justify on grounds of public order, safety, or security, must have the genuine purpose of protecting a legitimate national security interest for example, a country’s existence or its territorial integrity against the use or threat of force.⁹³

It is therefore, submitted that there is no genuine national security interest for restricting prisoners from voting. For a law to restrict a constitutionally guaranteed right, it must be shown

⁹⁰ A.W. Chanda, ‘The State Security Act v Open Society: Does democracy need secrets?’ Zambia Law Journal (Volume 99, 1997) 42-44

⁹¹ HP/38/1996/(Unreported)

⁹² (1969) Chapter 111 of the Laws of Zambia

⁹³ A.W. Chanda, ‘The State Security Act v Open Society: Does democracy need secrets?’ Zambia Law Journal (Volume 99, 1997), 42-44

that the restriction provided for by the law is necessary for public safety or defence. If the restriction that is provided by law does not show that it is necessary in the interest of public safety and defence, then such a restriction is unlawful.⁹⁴ Taking the vote to the prisoners or allowing prisoners to vote, does not in any way threaten the country's existence or its territorial integrity. Therefore, the law that restricts prisoners from voting is not reasonably required in the interest of defence, public safety and public order.

In the landmark case of Christine Mulundika and 7 others v The People earlier cited, the Supreme Court of Zambia invalidated Section 5(4) of the Public Order Act⁹⁵ which gave the police broad discretionary powers to regulate public meetings and processions. Ngulube CJ delivering the judgement in this case, reasoned that a law which seeks to restrain a fundamental right must not firstly, be arbitrary. It must have adequate safeguards against arbitrary decisions and provide effective controls against abuse by those using the law. Secondly, the law must be “proportional” meaning that the limitation must not be more than is reasonably necessary. Third, that any law which seeks to limit a fundamental right must be construed strictly, otherwise these rights are rendered meaningless. The position that a law restricting a fundamental right must be ‘proportional’ is in consonance with that of other jurisdictions.

Hence, in the South African case of Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) and others⁹⁶ it was held that the limitation of the right to vote did not conform to the requirements set out in Section 36(1) of the

⁹⁴ Ibid, p42

⁹⁵ Chapter 104 of the Laws of Zambia

⁹⁶ March 3, 2004, Constitutional Court of South Africa

South African Constitution, which is a limitation clause.⁹⁷ Chaskalson J stated that Section 36 requires a proportional analysis, and what must be considered is the importance of a right against the impact of its limitation, and ask if a less restrictive measure will not achieve the same result.

Clearly, taking away the constitutional right to vote from prisoners in order to maintain public order and national security is too harsh a measure to take. If the state wants to preserve national security, they must ensure that they put in place the appropriate security measures even as they allow prisoners to vote. Simply restricting prisoners from voting without caring to devise such measures is not a proportional restriction. To borrow the words of Justice Chitoshi, “It is wise to remember that it is the right which is fundamental and not the limitation.”⁹⁸ In this case, less restrictive measures can be used for instance, if prisoners were allowed to vote from the prisons. This is however, discussed in detail in the later parts of this chapter. To this extent therefore, the restriction of the right to vote on prisoners is not reasonably justifiable in a democratic society.

3.4 POSSIBLE CHALLENGES ASSOCIATED WITH ALLOWING PRISONERS TO VOTE

It should be noted at the outset, that the challenges outlined below are based firstly, on the recommendations of the Electoral Reform Technical Committee (ERTC) and secondly, on the information obtained through interviews and the questionnaires administered during fieldwork.

The Electoral Reform Technical Committee (ERTC) was appointed in 2004 to review the country’s current electoral process and make recommendations aimed at ensuring the conduct of free and fair elections. The Committee received and analysed oral and written submissions from

⁹⁷ It provides that, “the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors...”

⁹⁸ William Steven Banda v The Attorney General (92/HP/1005(1992))

private citizens, political parties, non-governmental organisations, professional bodies, trade unions and religious bodies.

The Committee submitted its Interim Report to the Minister of Justice on Friday, 6th August, 2004. The Report contains comprehensive recommendations which could assist the country put in place an efficient and effective Electoral System and process.

In August 2005, the ERTC released its final report reviewing the electoral system in Zambia. The general position of the Committee with regard to allowing prisoners to vote indicates four (4) major concerns: security problems, overstressing the prison authority, inadequate information for prisoners and prisoners being coerced to vote. These four major points require profound reflection.

SECURITY CONCERNS

The committee submitted that ‘allowing detainees and prisoners to vote would create security problems.’ The plausible assumption with regard to this proposition is that since prisoners have presumably committed atrocious crimes, they would inevitably attempt to escape and worse still be a danger to society if let loose. However, in order to curb this, it is the author’s submission that polling stations could be introduced at major prisons in all nine provinces of Zambia. This will enable prisoners to register and vote from the prisons themselves. Prisoners camped at smaller prisons could be transported to the polling sites for purposes of voting on the Election Day. The prisoners cannot escape because prison authorities have high security transportation

systems.⁹⁹ Prisoners are ordinarily transported using huge war trucks, designed in such a way that no prisoner in his/her right mind would attempt to escape. Besides, it will be noted that prison escapees are not common place in Zambia.

OVERSTRETCHING THE PRISON AUTHORITY

The ERTC submitted that allowing prisoners to vote would overstretch the limited prison service. However, the author submits that this fear is unfounded. Firstly, there are a lot of people in Zambia that are in need of employment. Government would do them a favour if they trained these people on how to supervise elections for prisoners and employed them in the prison authorities as prisoner warders. Secondly, there is currently no complaint of inadequate prison staff by prison authorities. It is cardinal to note that the role of the prison authorities will be merely to ensure security during elections in the prisons. The Electoral Commission of Zambia (ECZ) will have to conduct the elections themselves in the prisons. The author also submits that if at all there is inadequate staff to conduct this exercise, more people can be employed and trained to conduct the elections. During an interview¹⁰⁰ with the Officer in Charge of Lusaka Central Prison, the Officer confirmed that supervising elections for prisoners would be easy. He made no mention of overstretching the prison authorities. He also remarked that “security concerns do not even come in.”

⁹⁹ Prisoners are on some occasions transported outside the prisons for purposes of carrying out manual labour, for recreation and other purposes, but with security presence.

¹⁰⁰ Interview Officer in Charge of Lusaka Central Prison, Mr. Francis Njhovu 05/10/09

INFORMATION

The ERTC submitted that prisoners have inadequate information to enable them vote during elections. However, the author submits that once they are allowed to vote, prisoners will be given an opportunity to exercise and enjoy their freedom of expression (which includes receiving information). Further, the ECZ and the prison authorities can in this regard, work hand in hand so as to ensure that voter education is taken to the prisons. This can be done through talks (for example by ECZ) about the importance of voting, as well as through the media vis-à-vis access to newspapers, radio and television. Once this is put in place, prisoners will acquire adequate information to enable them objectively assess election candidates and subsequently, to vote wisely.

COERCION

Finally it was submitted by the committee that prisoners and detainees should be disenfranchised on the basis that they could be coerced to vote against their own will. This is because they lack adequate information to enable them make sound voting decisions and also because they may be susceptible to fake promises from politicians, for instance to get them out of prison, once they form government. Connected to the same, another concern raised is that prisoners could invariably vote against the ruling party, which is responsible for their imprisonment. It is the author's contention however, that this is a speculative concern and highly subjective as well. There is no persuasive reason advanced as to why prisoners would be coerced or that they would invariably vote against the ruling party. Moreover, field research has shown that prisoners would not vote against the ruling party.

Other equally significant challenges revealed through fieldwork include the following;

PROCEDURE

It is this researcher's opinion that the voting procedure poses the greatest challenge to allowing prisoners to vote. This is because in Zambia, a voter is required to register once, in any particular constituency of his/her choice¹⁰¹ and is further required to vote from that constituency. It is for this reason that foreigners and patients (who are hospitalised) cannot vote. The voter must be physically present at the polling site in the constituency where the voter registered. So if for example, a prisoner before being incarcerated, registered in the Eastern Province, and he/she is subsequently imprisoned in Lusaka, then he/she cannot vote from Lusaka. To circumvent this, it is submitted that polling stations should be established at the prisons, so that prisoners can be registered and also vote from the prisons. However, not all prisoners are permanently incarcerated. Thus, as much as they would register from the prisons, prisoners may be released by the time the voting day arrives. In this case, prisoners would have to travel back to the prison in order to vote. This may prevent some ex-prisoners from voting, since some may not have the means to travel back to the prison from which they registered. In a situation where a prisoner is convicted after having already registered as a voter before his/her conviction, then a neutral polling station should be set up at a prison where such a person is serving sentence. This suggestion would atleast allow many more prisoners to vote, and only a few (if any) would be unable.

¹⁰¹ Sections 6(b) and 8(1) and (2) of the Electoral Act No. 12 of 2006

STAKEHOLDER SUSPICION

Generally, stakeholders in Zambia do not have confidence in the electoral system. They doubt the credibility of ECZ, especially with regards to manipulation of election results.¹⁰² There is therefore, need to build this confidence, before the vote can be taken to the prisoners. This can be done by engaging the stakeholders in election planning and the election process itself. These stakeholders include donor countries that fund the election process, various observer missions that are sent to Zambia to monitor elections, for example, Southern African Development Community(SADC), the African Union(AU) and the European Union (EU) and also local organisations that have an interest in elections, for example the Foundation for Democratic Process(FODEP) and Anti-Voter Apathy(AVAP).

DOMESTICATION

Zambia is a dualistic state.¹⁰³ This entails that for an international human rights treaty to become part of domestic law and therefore, binding locally, the necessary enabling Act must be enacted to this effect. This is evidenced in the case of Zambia Sugar Plc v Fellow Nanzaluka¹⁰⁴ in which the Supreme Court of Zambia held that international instruments on any law although ratified and assented to by Zambia cannot be applied unless they are domesticated. Most of the human rights instruments that guarantee prisoners' right to vote have been ratified by Zambia, but not domesticated (See Chapter two). Hence, they cannot be given effect by national courts. There is therefore, need for political will and respect for human rights so that the human rights instruments can be domesticated and given force locally.

¹⁰² Interview Legal Counsel for Electoral Commission of Zambia(ECZ), Mr. Edward Kamwi, 07/11/09
¹⁰³ This is opposed to a monist state where, once an international treaty is ratified, it automatically becomes binding on the state, without any legislation being enacted.
¹⁰⁴ Appeal Number 82/2001(Unreported)

3.5 DISCUSSION OF FINDINGS

From the findings, it is clear that the right to vote is of great importance in a democratic society and that it should be extended to prisoners. This owes to the fact that prisoners do not lose their citizenship by virtue of being imprisoned. Since they do not lose their citizenship, they must be allowed to vote just like any other citizen. It will be noted from the sample of prisoners, that 80percent of the prisoners are in fact eligible to vote. Therefore, the state should be under an obligation to ensure that prisoners are provided with conditions that allow them to vote for instance, there is need for the ECZ to set up polling stations in the prisons.

Further, it is also manifest that Zambia would advance democratically if prisoners were allowed to vote, in that more people would be able to vote than there are now. For instance, the current prisoner population at Lusaka Central Prison is 1, 174 prisoners.¹⁰⁵ Other prisons in Zambia may have even more prisoners. If prisoners therefore, in all the prisons were allowed to vote, the number of people voting in any one election would increase. Moreover, considering the voter apathy that currently permeates the Zambian political environment, it would be prudent to allow prisoners to vote so as to increase the level of voter participation. There is no guarantee that all the prisoners would automatically vote, but logically, the greater the number of eligible voters, the more the chances of increased voter participation. Besides, from the findings of the research, it is clear that prisoners support the view that they should be allowed to vote and that the law restricting prisoners from voting should be repealed. The essence of a democracy is that the people must rule, and the more the people that rule, the better, because the rule becomes more

¹⁰⁵ www.electcom.org.zm ECZ Website

representative.¹⁰⁶ The main legitimate means through which the people can rule in a democratic society is through voting. Hence, the foundation of a democratic mode of government is that people freely make political choices by exercising their right to vote. Thus, increasing the level of voter participation will undoubtedly advance Zambia democratically, as almost everyone will have the power to choose his/her own political candidate, freely and without undue interference.

However, while allowing prisoners to vote would increase the number of electorates, the problem of voter apathy may still be rife. It is therefore, important for the government to conduct a research, through the Electoral Commission of Zambia (ECZ) on the causes of voter apathy in Zambia, so that it may devise the appropriate measures to address this vice.

The proposition that Zambia would advance democratically if prisoners were allowed to vote is evidenced from the findings, where all the prisoners agreed that allowing prisoners to vote during elections will make them more responsible members of society. In the sample of ECZ and LAZ 35percent said yes while 50percent said no with 15percent not responding. The figures show that a greater percentage of the total sample is of the view that Zambia would advance democratically if prisoners were allowed to vote.

Furthermore, it is evident from the findings that prisoners would become more responsible citizens if they were allowed to vote, as they would have a sense of civic responsibility. By allowing prisoners to vote, they will realise that in their vote, lies the key to change the poor economic and social conditions facing Zambia. Once this happens, prisoners will begin to feel that they are a part of society because they will be responsible for bringing about this change. The reasoning behind this submission is that prisoners perceive themselves as social rejects and

¹⁰⁶ Lecture at Hilla University for Humanistic Studies, available at www.resetdoc.org or www.stanford.edu/diamod/.../whatsdemocracy0_2004.htm Professor Edward Koffe, January 21, 2004

therefore, by according them the opportunity to vote, they will begin to feel that they are part of the process of governance in the country. During an interview with Mailon Mushiani, a prisoner at Lusaka Central Prison, he remarked that prisoners ought to be given an opportunity to exercise their civic responsibilities so that they can be made to feel part of society and hence, become more responsible citizens of Zambia.

Voting is an act that emphasises the value of order and the rule law. It is a mark of citizenship which is of immense importance, because it emphasises the principle of political and civil equality in the law. Allowing inmates or prisoners to vote will enable them influence law and policy in a constructive manner, instead of alienating them totally from the society, to which they are a part.

The Canadian Supreme Court discussed the importance of allowing prisoners to vote in the case of Suave v Canada¹⁰⁷ in which it was stated that “...the legitimacy of the law and the obligation to obey the law flow directly from the right of every citizen to vote. To deny inmates the right to vote is to lose an important means of teaching them democratic values and responsibility...” In addition therefore, Blackburn R¹⁰⁸ was right when he stated that a government that restricts the franchise to its citizens, or a selected portion thereof, is a government that jeopardises its claim to representative democracy.

In light of the foregoing propositions, it is accurate to argue that the law restricting prisoners from voting during elections is not justified. Prisoners are equally citizens of Zambia and the right to vote is their badge of citizenship. They must not be treated like foreigners in their own

¹⁰⁷ (2002). 3S.C.R. 519, 2002 SC 68

¹⁰⁸ R. Blackburn, Rights of Citizenship. (London: At Mansell Publishing Limited, p 1993).76

country, especially in the absence of justifiable and well established reasons for restricting this right.

3.6 **CONCLUSION**

This chapter has discussed the enjoyment of constitutionally guaranteed rights in Zambia in relation to prisoners. It has been established that the enjoyment of these rights by prisoners is restricted by the constitution and that the right to vote is no exception. Furthermore, this chapter has argued that the restriction of the right to vote is not reasonably justifiable in a democratic society. The possible challenges associated with allowing prisoners to vote have also been discussed and the chapter has suggested practical ways in which these challenges can be addressed. Finally, this chapter has presented, examined and discussed the findings of the research from interviews and the questionnaires that were administered.

The next chapter shall draw conclusions based on the facts presented in this paper and make numerous recommendations with regards to prisoners and the right to vote in Zambia.

4. Chapter Four

4.1 Recommendations

It has been established that the right to vote is a fundamental human right. It is the basic tenet of any democratic society and it is recognised as such by international standards. Zambia by disallowing prisoners to vote during elections is in breach of its international law obligations to respect and ensure to its citizens the rights recognised under international instruments without distinction of any kind. These international instruments include the Universal Declaration of Human Rights (UDHR), International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Human and Peoples' Rights (ACHPR). The aforementioned instruments provide for the right to vote without restricting in any respect, the exercise of this right. Any person, who is a human being, is entitled to enjoy the rights enshrined in the human rights instruments. Thus, disallowing prisoners to vote, amounts to discrimination on the basis of one's status as a prisoner. It has been argued further that even if Zambia has merely signed and not domesticated these instruments, it is still obligated to respect them, by virtue of Article 18 of the Vienna Convention on the Law of Treaties which provides that "A state is obliged to refrain from acts which would defeat the object and purpose of a treaty when... it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty..." Therefore, even if a state has merely signed, but not ratified an instrument, it is expected to abide by the provisions of the treaty because of Article 18 of the Vienna Convention.

Furthermore, The Republic of Zambia is a constitutional democracy. This entails *inter alia* the supremacy of the constitution and the respect for human rights. Thus, any law that purports to

derogate from a fundamental human right must be 'proportional' and also reasonably justifiable in a democratic society.¹⁰⁹ It has been argued that the law restricting prisoners from voting is not proportional, as less restrictive measures can be employed in order to maintain public safety and security. Indeed it is wise to bear in mind that "...it is the right which is cardinal and not the limitation."¹¹⁰

In light of the foregoing conclusions, the author makes the following recommendations:

1. Domestication

It has been observed earlier that Zambia is a dualistic state.¹¹¹ This entails that for an international human rights treaty to become part of domestic law and therefore binding locally, the necessary enabling Act must be enacted to this effect. This is evidenced in the case of Zambia Sugar Plc v Fellow Nanzaluka¹¹² in which the Supreme Court of Zambia held that international instruments on any law although ratified and assented to by Zambia cannot be applied unless they are domesticated. Zambia has signed and ratified numerous human rights instruments (such as the UDHR, ICCPR and ACHPR) that guarantee the right to vote without any discrimination. However, they cannot be given effect by national courts, hence, the said rights become weak. This researcher therefore, proposes the need to domesticate the human rights provisions contained in these instruments. It is submitted that this should be done by parliament, through the enactment of a Human Rights Act. The Act must constitute all the human rights of individuals. The enactment of a Human Rights Act is better than including all

¹⁰⁹ A.W. Chanda, 1997. 'The State Security Act v Open Society: Does democracy need secrets?' Zambia Law Journal Volume 99, 42-44

¹¹⁰ Obiter dicta of Justice Chitoshi in the case of William Steven Banda v The Attorney General(92/HP/1005(1992)

¹¹¹ This is opposed to a monist state where, once an international treaty is ratified, it automatically becomes binding on the state, without any legislation being enacted.

¹¹² Appeal Number 82/2001(Unreported)

the human rights in the constitution, because, the latter being a ‘sacred’ document is not easily amended and it would therefore be impractical to include in the constitution, all the current human rights, plus those that are yet to be discovered. Suffice it to say that the Human Rights Act will also make domestication of international human rights instruments much more convenient. The author is however, cognizant of the fact that, for the foregoing to be achieved, there is need for political will to respect and promote the enjoyment of human rights.

2. Procedure

In Zambia, a voter is required to register once, in any particular constituency of his/her choice¹¹³ and is further required to vote from that constituency. The voter must be physically present at the polling site in the constituency where the voter registered. Thus, it is not procedurally possible for a prisoner to vote during elections. The solution in the author’s view is to take the vote to the prisoner. It is submitted that polling stations should be established at the prisons, so that prisoners can be registered and also vote from the prisons. Another way of enabling prisoners to vote is by using mobile kits. The latter if introduced, will enable electoral officers to travel to all prisons to enable prisoners to vote. This system has also been introduced in South Africa and it is currently being used to enable prisoners to vote.¹¹⁴ This system clearly prevents prisoners from escaping lawful custody because they would not be required to leave the prisons in order to vote.

¹¹³ Sections 6(b) and 8(1) and (2) of the Electoral Act No. 12 of 2006
¹¹⁴ Interview Legal Counsel of Electoral Commission of Zambia(ECZ), Mr. Edward Kamwi

3 Stakeholder Suspicion

Generally, stakeholders in Zambia do not have confidence in the electoral system. They doubt the credibility of ECZ, especially with regard to manipulating of election results. There is therefore, need to build this confidence before the vote can be taken to the prisoners. This can be done by engaging the stakeholders in election planning and the election process itself. To further build this confidence, it is proposed that the ECZ must become a fully autonomous body. Currently, the commissioners of the ECZ are appointed by the president of the republic of Zambia. This mode of appointment may undoubtedly compromise the independence of the judiciary and hence causing suspicion from the stakeholders over the electoral process. The researcher proposes therefore, that the ECZ commissioners should be elected by parliament or appointed by the president but subject to ratification by the national assembly.

4.2 CONCLUSION

The right to vote is the chief constituent of a democracy. It is a badge of citizenship that enables citizens to freely choose the persons to lead them. So if democracy is the rule by the people and the right to vote is the means through which the people rule, then it follows that democracy cannot exist without the right to vote. Furthermore, if the right to vote is a human right that individuals possess by virtue of their humanity, then it must follow that this right should be extended to all citizens, simply because they are human. Thus, any attempt to restrict this right constitutes a manifest violation of human rights, which is not reasonably justified in any democratic society. It therefore, follows that a state that restricts the franchise to a selected portion of its citizens, essentially curtails its claim to a representative democracy. There cannot be representative democracy without the right to vote and the respect for human rights.

Therefore, in a democratic country like Zambia, laws that restrict prisoners from exercising the right to vote, are undemocratic and must be repealed.

BIBLIOGRAPHY

Books

- Anyangwe, C. Introduction to Human Rights and International Humanitarian Law. Lusaka: UNZA Press, 2004.
- Blackburn, R. Rights of Citizenship. London: Mansell Publishing Limited, 1993.
- Cassese, A. Human Rights in a Changing World. New York: Polity Press, 1990.
- Dias, R. W. Jurisprudence. London: Butterworths, 1985.
- Donnelly, J and Howard, R. E . International Handbook on Human Rights. New York: Greenwood Press, 1987.
- Ginsberg, B and Stone, A. Do Elections Matter? New York: Sharpe, 1986.
- Jones, P. Issues in Political Theory. London: Macmillan Press, 1979.
- Moyo, J.N. Voting and Democracy: A Study of the Electoral Politics in Zimbabwe: A Study of the Electoral Politics in Zimbabwe. Harare: University of Zimbabwe Publications, 1992.
- Rodley N. Treatment of Prisoners under international law. London: Clarendon Press, 1987.
- Thomas, P. The Rights of Man. New York: Penguin Books, 1985.

Publications

- Anyangwe, C, 'Democracy and Elections' Zambia Law Journal, Volume 94, (1998)
- Aristotle, Politics. 1317b available at <http://www.perseus.tufts.edu/cgi-bin/ptext?doc=perseus:text:1999>
- Chanda A.W., The State Security Act v Open Society: Does democracy need secrets?' Zambia Law Journal Volume 99, (1997).
- Demokratia, Henry George Liddell, Robert Scott, "A Greek-English Lexicon", at Perseus, available at <http://www.perseus.tufts.edu/cgi-bin/ptext?doc=perseus:text:1999>
- De Vos, P. South African Prisoner's right to vote: Addendum to "Prisoner's rights litigation in South Africa. Available at www.nicro.org.za/cspri 2004
- Hartmann, C. Journal of African Elections: Presidential and Parliamentary Elections in African Issue 103, ELSA, 2004
- Heard, A. Chimeras in Sheep's Clothing? Available at <http://www.sfu.ca/~aheard1997>.
- <http://www.america.gov/st/democracy-english/2008/May/20080609194207eaifas0.8688013.html>
- <http://www.umn.edu/humanrts/instree/bludhr.htm>
- <http://www.hrw.org/press/index>
- Human Rights Commission.. Perspectives on the Judiciary and Police in Human Rights protection: Individual Rights and Democratic governance in Zambia, State of Human Rights report in Zambia. Lusaka: Human Rights Commission, 2008.

Edward Lecture at Hilla University for Humanistic Studies ,January 21, 2004available at www.resetdoc.org

Report of the Constitutional Review Commission(Mung'omba Commission) 2005

United Nations Professional Training Series, No. 2. Human Rights and Elections: A Handbook on the Legal, Technical and human Rights aspect of Elections. New York: UN, 1990.

Interviews

Interview Legal Counsel of Electoral Commission of Zambia (ECZ) 7/11/09

Interview Officer in Charge of Lusaka Central Prison, Mr. Francis Njhovu, 5/10/09

APPENDIX

PRESENTATION OF FINDINGS

Introduction

In this research N will be taken to mean the total sample of respondents with 10 being the total of prisoners and 20 being the sample of Electoral Commission of Zambia (ECZ) and Law Association of Zambia (LAZ) combined. In the sample N=10 of prisoners, sex of respondents was evenly represented by 5 males and 5 females translating to 50% to 50%. The average age of all prisoner respondents represented in the sample N = 10 was 31 years. Of the ten prisoner respondents, 8 were voters and 2 were not. Some of the pertinent questions and the findings of the research are presented below as follows:

1. Do you think the right to vote is important in a democratic society like Zambia?

To the question above, all the respondents, N= 10, agree that the right to vote is important in a democratic society like Zambia. This translates to 50% females and males as shown in the figure 1 below. In the sample representing LAZ and ECZ, all the respondents N= 20 are of the view that the right to vote is important to a democratic society like Zambia as shown by figure 1.a below.

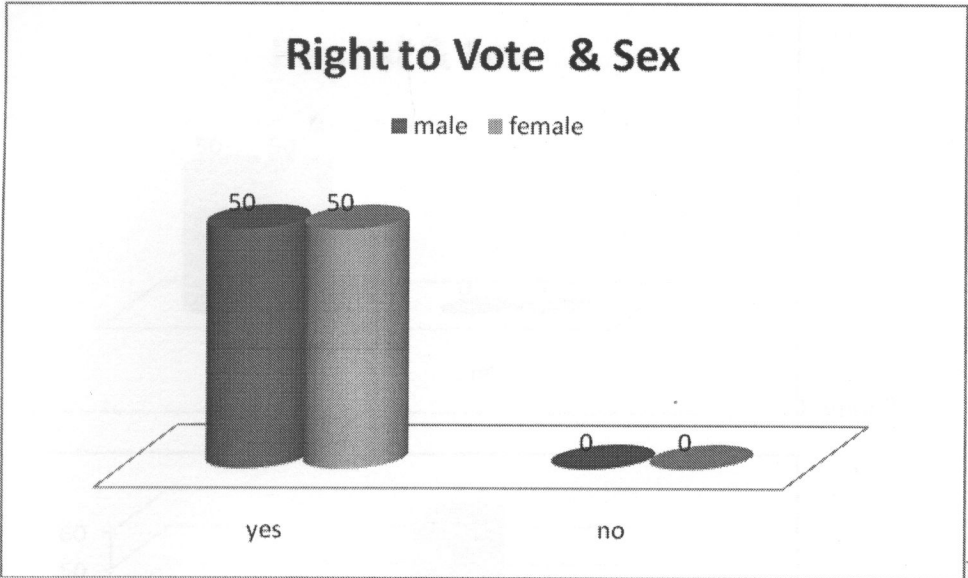


Figure 1

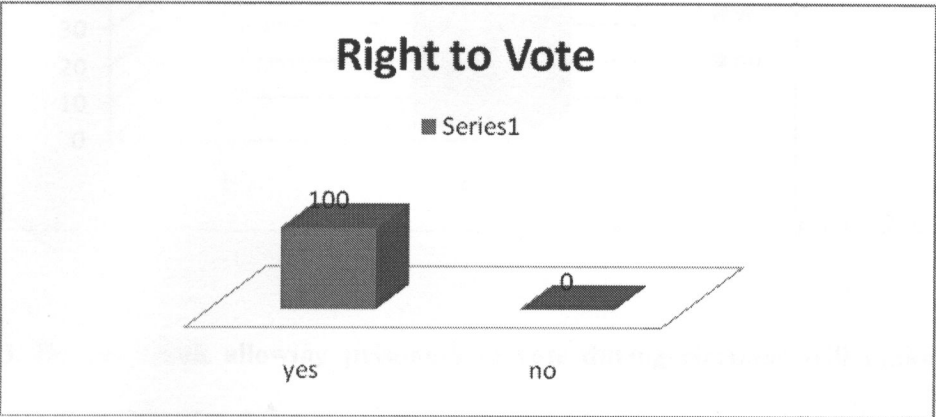


Figure 1.a

2. Do you think that the law preventing prisoners from voting should be repealed?

To the question above, all the respondents, N= 10, agree that the law preventing prisoners from voting should be repealed. This translates to 50% females and males as shown in the figure 2 below. In the sample of LAZ and ECZ where N= 20, 60% of respondents in the sample of agreed to the law being repealed while 40% disagree as shown in figure 2.a.

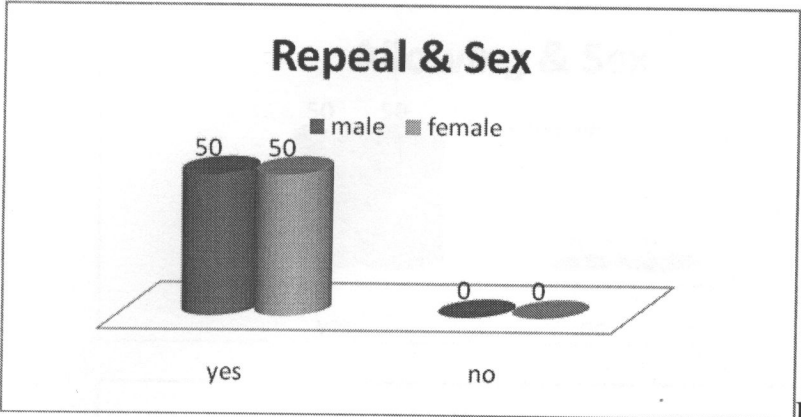


Figure 2

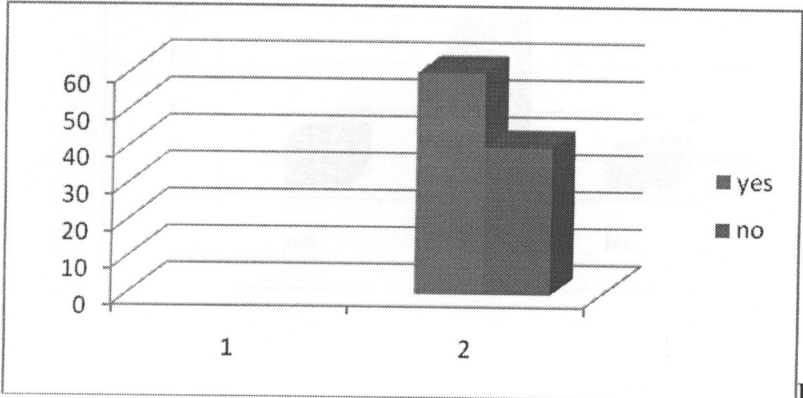


Figure 2. a

3. Do you think allowing prisoners to vote during elections will make them more responsible members of society?

To the question above, all the respondents, N= 10 in the sample of prisoners, agree that allowing prisoners to vote during elections will make them more responsible members of society. This translates to 50% females and males as shown in the Figure 5 below. In the sample N= 20 of LAZ and ECZ 20% say yes while 60% say no with another 20% not responding as shown in Figure 3 and Figure 3.a below.

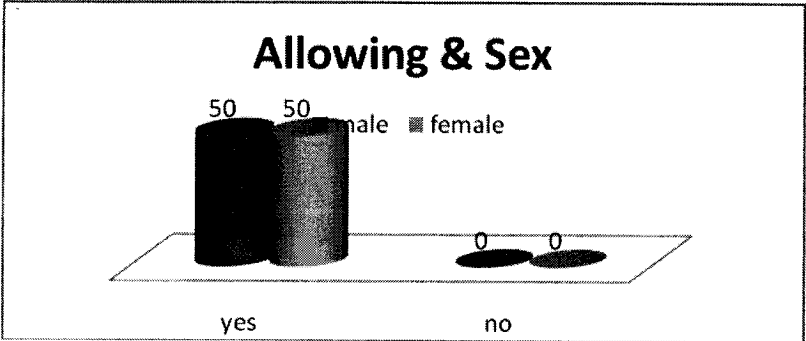


Figure 3

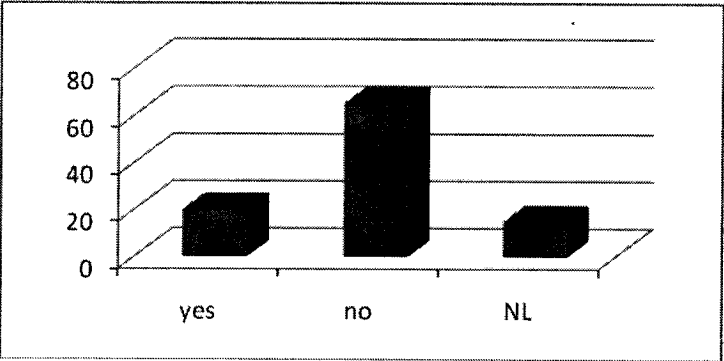


Figure 3.a

4. Would you automatically vote against the ruling party if you were given the chance to vote?

Six (6) respondents representing 60% of all respondents in sample N= 10 would not vote against the ruling party given a chance. In the sample N = 20 of ECZ and LAZ 20% say yes while 80% say no with 15% not responding as shown in figure 4. a below.

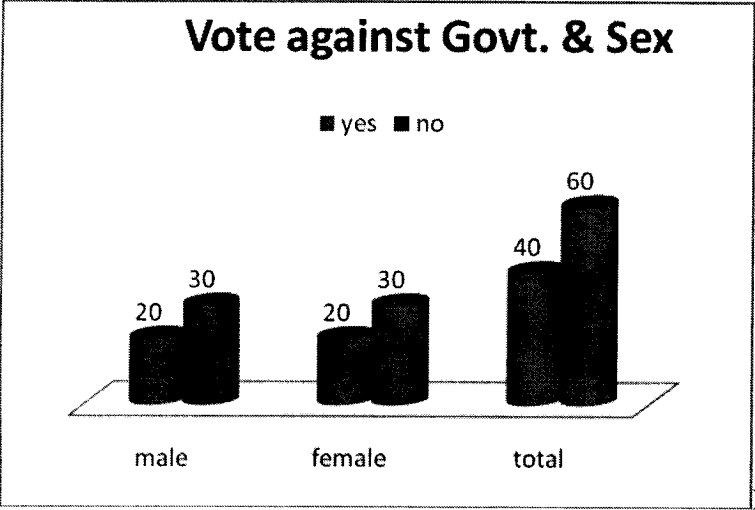


Figure 4

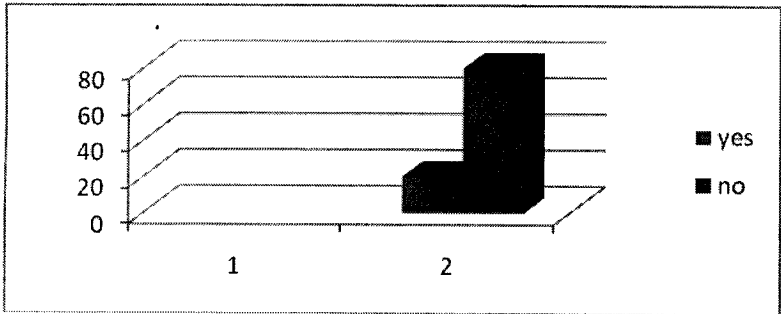


Figure 4. a

5. Do you think Zambia will advance democratically if prisoners voted?

To the question above, all the respondents, N= 10, agree that allowing prisoners to vote during elections will make them more responsible members of society. This translates to 50% females and males as shown in the Figure 5 below. In the sample N = 20 of ECZ and LAZ 35% say yes while 50% say no with 15% not responding as shown in figure 5. a.

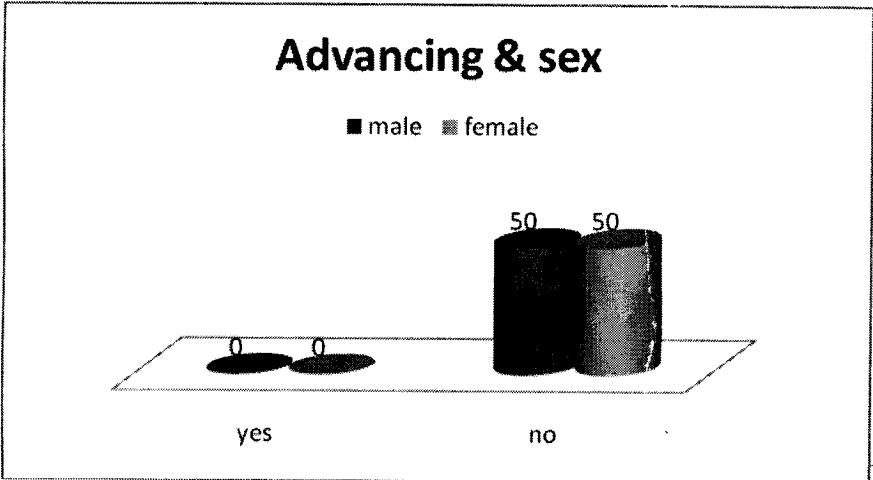


Figure 5

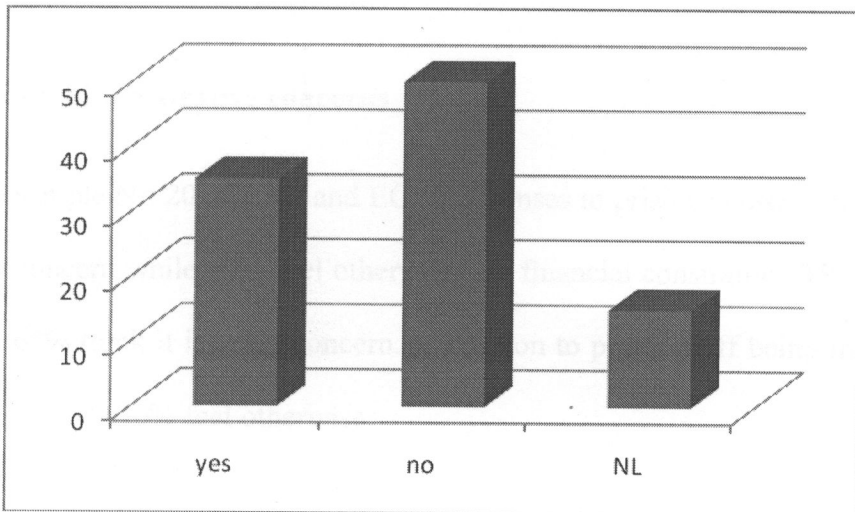


Figure 5.a

6. Why has Zambia, despite being a democratic nation passed laws that restrict prisoners from voting?

In response to the above question, 35 %of respondents say that public safety is a concern, while 45% national security and 10% say it is not a human right which is the same percentage for non responses.

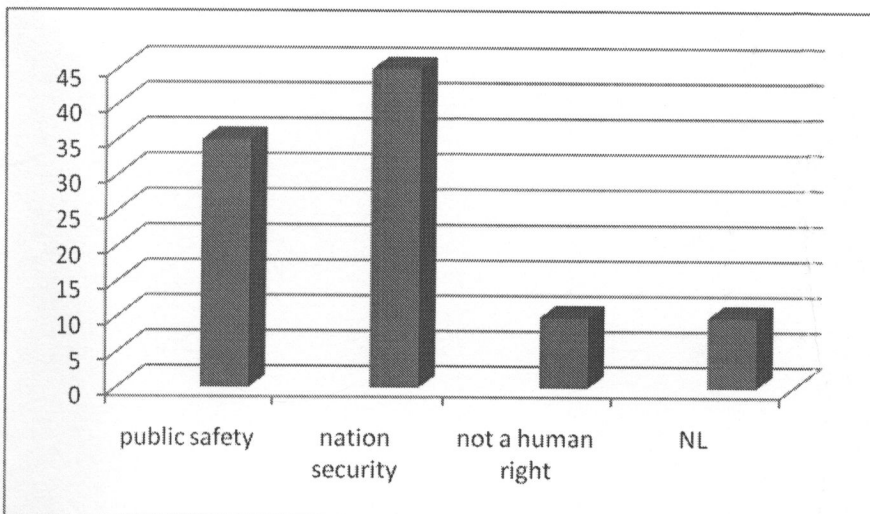
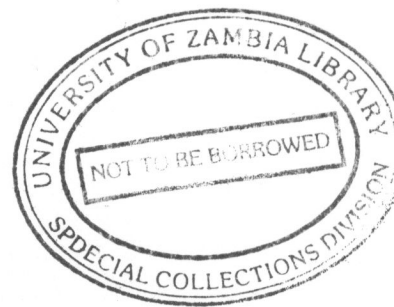


Figure 6



7. Major administrative concerns

In the sample N= 20 of LAZ and ECZ, responses to prisoners escaping show that 45% say it is a major concern while 55% feel otherwise. To financial constraints, 35% agree that it is a concern while 65% think it is not a concern. In relation to prison staff being inadequate 60% says it is a concern while 40% feel otherwise.