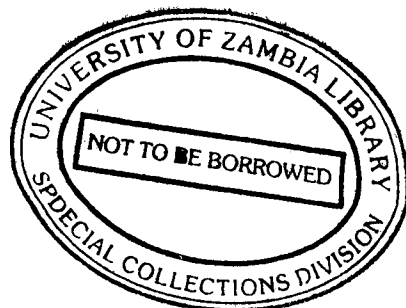


**ENSURING EQUAL PARTICIPATION IN GOVERNANCE: AN
EVALUATION OF THE ZAMBIAN ELECTORAL LAWS AND
SYSTEM**



BY

KAELA CHISHIMBA

SPR

LAW

CHI

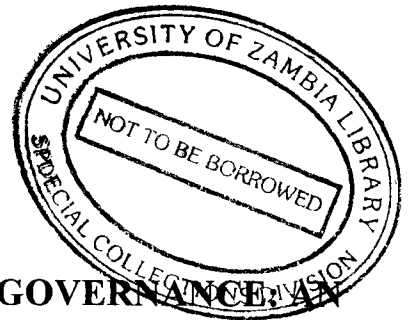
2007

C.1

UNZA

2007

TITLE



**ENSURING EQUAL PARTICIPATION IN GOVERNANCE: AN
EVALUATION OF THE ZAMBIAN ELECTORAL LAWS AND
SYSTEM**

BY

KAELA CHISHIMBA

**AN OBLIGATORY ESSAY SUBMITTED TO THE FACULTY OF
LAW OF THE UNIVERSITY OF ZAMBIA IN PARTIAL
FULFILLMENT OF THE REQUIREMENTS FOR AWARD OF THE
DEGREE OF BACHELOR OF LAWS (LL.B).**

**THE UNIVERSITY OF ZAMBIA
SCHOOL OF LAW
P. O. BOX 32379
LUSAKA
DECEMBER, 2007**

THE UNIVERSITY OF ZAMBIA

SCHOOL OF LAW

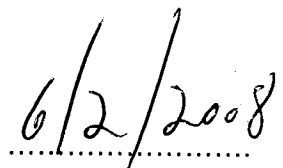
I recommend that the Directed Research prepared under my supervision by **Kaela Chishimba**

Entitled:

**ENSURING EQUAL PARTICIPATION IN GOVERNANCE: AN
EVALUATION OF THE ZAMBIAN ELECTORAL LAWS AND
SYSTEM.**

Be accepted for examinations. I have checked and I am satisfied that it fulfills the requirements relating to the format as laid down in the regulations governing Directed Research.


.....
Mr Nicholas Kahn-Fogel



.....
Date

DECLARATION

I **KAELA CHISHIMBA**, Computer Number **21034877** do hereby declare that the contents of this Directed Research Paper are entirely based on my own findings and that I have not in any manner used any persons work without acknowledging the same to be so.

I bear absolute responsibility for errors, defects or any omissions therein.

STUDENTS NAME:KAELA CHISHIMBA.....

SIGNATURE:.....

DATE:31 / 01 / 2007.....

DEDICATION

This dissertation is dedicated to my late parents, Maureen Katongo Bwali and Benardine Mulenga Kaela for having laid down a good foundation for my life so as to enable me reach this far in my education.

May their souls rest in peace.

ACKNOWLEDGEMENTS

The preparation of this dissertation has not been an easy task. It would not have been possible to complete this work without the help and encouragement of a lot of people.

My special thanks go to my supervisor, Mr Nicholas Kahn-Fogel for having guided me in the preparation of this work. It would not have been possible to complete this dissertation without his valuable suggestions which undoubtedly improved the quality of this work. I shall be indebted to him forever.

I also thank Mr Katongo Nsofu, Mr. Bines Bwali, Miss Mulenga Bwali and Mrs. Dorothy Bwali Musupila for standing by me in all my hard times through my university education. May the good Lord keep on blessing you.

I am also thankful to my step mother, Mrs. Silla Chisha Kaela, my sisters Bwalya and Mwansa Kaela and my brother Mutale Kaela for having supported me and encouraged me especially in during my university education.

I am also grateful to my friend, confidant and academic mentor Kawilila Sombo for having been there for me especially during the preparation of this dissertation.

Other thanks go to my friends and classmates particularly Kachimba Paul, Madaika Jeah, Msidi Brian, Chilembo Sokwani Peter and Kaoma Chileshe Matilda. Thank you for making me be a part of the Law school.

My thanks also goes to everyone I have not mentioned, not in any way belittling them. Thanks for being there for me, especially in times of need.

TABLE OF CONTENTS	PAGE
Declaration.....	(i)
Dedication.....	(ii)
Acknowledgements.....	(iii)
Contents.....	(iv)

CHAPTER ONE:

THE MILIEU OF THIS DISERTATION

1.0 Introduction.....	1
1.1 Statement of the problem.....	1
1.2 Study purpose.....	2
1.3 Study objectives.....	2
1.4 Hypothesis.....	3
1.5 Significance.....	3
1.6 Methodology.....	4

CHAPTER TWO:

BACKGROUND OF THE ZAMBIAN ELECTORAL SYSTEM AND THE
IMPORTANCE OF ELECTIONS

2.0 Introduction.....	5
2.1 Background.....	5
2.2 Importance of Elections.....	11
2.3 The Essence of Equal Participation in Governance.....	13

CHAPTER THREE:

A COMPARATIVE STUDY OF ELECTORAL SYSTEMS

3.0 Introduction.....16

3.1 Types of Electoral Systems.....17

3.2 Conclusion.....32

CHAPTER THREE:

**THE LEGAL AND INSTITUTIONAL FRAMEWORK OF THE ELECTORAL
PROCESS AND THEIR ROLE IN ENSURING EQUAL PARTICIPATION IN
GOVERNANCE**

4.0 Introduction.....34

4.1 The Legal Framework.....35

4.2 The Institutional Framework.....41

4.3 Conclusion.....47

CHAPTER FOUR:

GENERAL CONCLUSION

5.0 Introduction.....48

5.1 Summary.....48

5.2 Legal and Institutional Reforms.....51

5.3 Conclusion.....55

CHAPTER ONE: THE MILIEU OF THIS DISERTATION

1.0 INTRODUCTION

"In the contemporary liberal democratic nation, elections form the heart which propels the blood fueling the democratic management of public affairs in all representative institutions."¹ No modern democratic nation can be run without elections. It is through these elections that we put into office those who govern us, therefore, it is imperative that everyone's interests are represented in the representative institutions of government, be it those from marginalized or minority groups. The only way to ensure such is to make sure that each and every group is represented in the representative institutions of government and only then can we safely say that there is equal participation in the governance of this country.

1.1 STATEMENT OF THE PROBLEM

Law governs each and every aspect of life, and one of the functions of law is to protect the interests of everyone who is governed by that law. In deed it is the law which gives shape and form to every aspect of society. It is therefore imperative that the legal framework of the electoral process in Zambia, and the electoral system created therefrom, to ensure that there is equal representation in government at the end of the day, thus ensuring equal participation in governance. However, this has not been the case in the representative institutions of the Zambian government. The Electoral Reform Technical Committee(ERTC), appointed in 2003 to review the electoral system in Zambia, identified the marginalized groups as comprising women, the youth and people with special needs(for example the disabled) and small political parties. Under the current Zambian electoral system, which is the First Past The Post(FPTP) system, it is quite difficult for the marginalized and minority groups to secure representation in the representative institutions of government. This is despite the fact that the FPTP system

¹ . Banda,J.(2004) *Corruption in the electoral process and its effects on democracy: The challenges of enforcement of Electoral Laws*. Obligatory Essay (unza).

has been hailed as being the simplest of all electoral systems in the world. It has been noted to be disadvantageous in that it tends to exclude minority and socially discriminated groups.² Under the FPTP system, political parties tend to put forward the most broadly acceptable candidates or those from the local majority. It is highly risky for a political party to put forward a candidate belonging to group that is in the minority and/or belonging to a group that is socially discriminated against. Thus marginalized and minority groups have minimal or no representation in both Local government representative institutions and in parliament. Hence, their interests are not put across adequately nor heard and worked upon with promptness. It is only when they are accorded a chance to participate in governance that they can be heard. It is therefore imperative that we go back to the drawing board and re-evaluate the legal framework of the Zambian electoral process as well as the electoral system created therefrom and see why ensuring equal participation in governance has been but futile.

1.2 STUDY PURPOSE

This study seeks to evaluate the Zambian Electoral Laws and the electoral system created therefrom, thereby seeking to establish whether they do ensure that each and every group is represented in the representative institutions of government or not. Is the electoral system created by the Zambian Electoral Laws favorable to all groups in society? Or is there need for the reformation of the electoral laws and system in order to ensure equal participation in governance?

1.3 STUDY OBJECTIVES

1.3.1 General Objective

To identify the impediments in the Zambian Electoral Laws and System in ensuring equal participation in governance. Is there need for reformation?

² . Matibini,P. *The Constitutional Framework and the Legal issues related to elections in Zambia*. A paper presented to FODEP: 25-27 July 2002. Lusaka.

1.3.2 Specific Objectives

1. To find out whether the electoral system created by the electoral system created by the Zambian electoral laws ensures equal representation in the representative institutions of government.
2. To find out whether marginalized and minority groups need to be given an upper hand or priority representation in government.
3. To find out whether the provision for nominated members of parliament is serving its intended purpose of enhancing representation in the National Assembly as regards special interests or skills.
4. To find out whether the stipulated age qualification to be an eligible voter does inhibit youth participation in governance.

1.4 HYPOTHESIS

There is need for re-evaluation of the Zambian electoral laws and system so that if need be the laws can be amended, replaced and/or repealed in order to come up with laws that will bring about an electoral system and process that will ensure equal participation in governance.

1.5 SIGNIFICANCE

Realizing that it is imperative to ensure equal participation in governance the electoral laws and system need to be evaluated, thereby establishing why ensuring equal participation has been a futile endeavour in the representative institutions of government. The electoral process being the basic tenet of democracy must ensure that not only are the interests of the majority represented but also those of minorities and socially undermined groups. Hence, there is need for re-evaluation and reformation of our electoral laws so as to give the minorities and the marginalized groups preferential representation.

1.6 METHODOLOGY

The research will proceed by way of, firstly, reviewing the sources, background and basis of the current Zambian electoral laws and system. This will include a study about electoral systems and also the current Zambian electoral laws such as the Constitution and other relevant statutes. Other material to be employed includes research reports, dissertations, newspaper articles, brochures and any other relevant text and literature on the subject. With the modernization of the electronic world the internet will also be a major source of information gathering during the research.

CHAPTER TWO: BACKGROUND OF THE ZAMBIAN ELECTORAL SYSTEM AND THE IMPORTANCE OF ELECTIONS.

2.0. INTRODUCTION

Representation of everyone's interests in the representative institutions of government is supposed to be the epitome and aim of an ideal democratic society. The fact that certain sectors of society are not represented in either Parliament, Cabinet or even in local municipalities entails that their interests and needs are less likely to be adequately looked into by the governing authorities.

It is therefore imperative that everyone's interests, be it of the so called marginalized or minority groups, are met by the government. The surest way of ensuring the foregoing is by securing equal representation of all groups of society in the representative institutions of government. Evaluating and reviewing the prevailing Zambian Electoral Laws is indeed the starting point of ensuring equality in the representative institutions of government. This chapter will outline the brief background of the Zambian electoral system, it will look at the importance of elections and finally it will point out the essence of equal participation in the representative institutions of government.

2.1. BACKGROUND:

2.1.1. From 1964 - 1972 The First Republic. (Multiparty Democracy)

Zambia gained its independence on October 24th, 1964. Prior to this date, in January 1964, elections were held to elect members of the Legislative Council (National Assembly). These elections were held on Universal Adult Suffrage for all Northern Rhodesian citizens aged 21 years and above. There were two Electoral Rolls, that is, 65 seats on the Main Roll while 10 seats were for the Reserved Roll. The United National Independence Party (UNIP) led by Kenneth David Kaunda won 55 seats on the Main Roll while the African National Congress (ANC) led by the late Harry Mwaanga Nkumbula won 10 seats on the Main Roll. The National Progressive Party (NPP) won the 10 seats on the Reserved Roll.³ This is the Legislative Council which continued operating even after independence. It was provided for in the independence constitution that Kenneth David Kaunda was to be the first President and Head of State of the Republic of Zambia.⁴

2.1.1.1 The 1968 Constitutional amendments and Elections

In 1968 the Republican Constitution was amended so as to increase the number of constituencies from 75 to 105 with an additional 5 seats for nomination by the President.⁵ After attaining independence Zambia inherited the First Past the Post (FPTP) Electoral System from their former protector, Britain. It is under this Electoral system that the 1968 election were held after President Kaunda dissolved Parliament on 2nd November 1968. Zambia for the first time was to elect a President. The Kaunda led UNIP won 81

³ . Phiri Biseck Jube. (2006) *A Political History of Zambia: From the Colonial period to the 3rd Republic, 1890-2001*, p.110.

⁴ . Constitutional Law notes by A.W. Chanda UNZA: www.zamlil.ac.zm.

⁵ . The Electoral Reform Technical Committee, Final Report: August 2005.

seats while the Nkumbula led ANC scooped 23 seats and only 1 independent candidate, out of the three independent aspirants, was successful.⁶ In the Presidential Poll Kenneth David Kaunda of UNIP defeated Harry Mwaanga Nkumbula of ANC by a large margin.

2.1.1.2 The 1969 Referendum

The 1964 Independence Constitution provided for a referendum clause such that those parts of the constitution that provided for the protection fundamental human rights and freedoms of individuals, the establishment of courts, the appointment of judicial officers and the amendment clause itself could not be amended without at least 50 per cent plus one of the eligible voters consenting to the amendment in a national referendum. In 1969 it was decided by the ruling government that this referendum clause be amended. Hence in the 1969 referendum the required number of votes to change the referendum clause was attained leading to a new clause which gave parliament the power to amend the constitution by a two thirds majority of the National Assembly without going for a referendum.

2.1.2. From 1972 - 1990: The Second Republic (The One Party State)

In 1972 President Kaunda appointed the Chona led Constitutional Review Commission. The Commission was tasked to come up with recommendations on the best form the One Party state was to take. Therefore, based (at least mostly) on the Commission's findings the Republican Constitution was repealed in 1972. This led to Zambia being a one party state with UNIP as the sole political party recognized by law. Even the UNIP Constitution became part of the national law as it was annexed to the Republican

⁶. *ibid*

Constitution. Hence, by law all other political parties were no longer in existence and formulation of any political grouping was prohibited.

The One Party Constitution became effective in August 1973.⁷ Under the 1973 One Party Constitution the number of constituencies was further increased from 105 to 125 with the President having the prerogative of nominating 10 Members of Parliament. Hence, the composition of the National Assembly became 135 Members plus one elected Speaker.

The new Electoral System was based on both the 1973 One Party Republican Constitution and the UNIP Constitution. Since all other political parties were outlawed, the contest for seats of Members of Parliament were intra party with party members competing with each other for the seats. UNIP's Central Committee played a vital role in the selection of candidates such that its approval was key to both aspire and attain a seat in the National Assembly. To qualify as a candidate in the Presidential elections one had to have been elected as President of UNIP by the Party's General Conference. Then the aspirant Republican Presidential candidate was required to attain a 50 per cent plus one "yes" votes cast.

2.1.3. From 1990 to date: The Third Republic (Re-introduction of Multiparty Democracy)

Four successive Presidential and Parliamentary Elections were held under the One Party State. Dr Kenneth David Kaunda was victorious in all the four Presidential elections.

⁷. as enacted by Act No. 27 of 1973.

However, the elections during the Second Republic were characterized by low voter turn out while the sole political party became unpopular by the day.⁸ By 1990 the general public increased pressure on UNIP to change the political system. In the same year (1990) there were food riots along the line of rail such that the country's economy was collapsing. In the same year there was an attempted coup d' e'tat. It was during this same time that the Movement for Multiparty Democracy (MMD) was formed. Owing to the increased pressure from MMD and the general public at large President Kaunda's UNIP government yielded to the demands for the re-introduction of multipartism. In December 1990 Article 4 of the Republican Constitution was amended to provide for the formation of other political parties.

The Mvunga led Constitutional Review Commission was then appointed to recommend the new constitution for the Third Republic. The new constitution was enacted on 24th August 1991. Under the new constitution parliamentary seats were increased from 125 to 150 with an additional 8 for the nomination by the President. After the re-introduction of multipartism several political parties were formed but only the MMD and UNIP took part in the 1991 elections of October 31st. The MMD overwhelmingly won the both the Presidential and Parliamentary elections. The MMD obtained 125 seats, UNIP 25 while MMD's F.T.J. Chiluba won the Presidential race with about 80 per cent.

2.1.3.1 The 1996 Constitutional amendments and Elections

In 1996 the Constitution of the Republic of Zambia of 1990 was amended. The

⁸ . ibid

noteworthy changes were that firstly the 50 per cent plus 1 vote's requirement for a Presidential candidate to be declared winner was removed. Secondly, Article 34(3)(b) introduced a requirement that for a person to qualify to stand for Presidential elections both his/her parents have to be Zambian by birth or by descent. Furthermore, article 129 introduced and provided that traditional chiefs are barred from participating in partisan politics while holding the traditional title.

2.1.3.2 The 2001 Elections

The 2001 general elections were held under the 1991 Constitution as amended in 1996. In these elections the MMD won 69 seats, while the United Party for National Development (UPND) got 49 seats, UNIP scooped 13 seats, Heritage Party (HP) attained 4 seats, Zambia Republican Party (ZRP) and Patriotic Front (PF) each managed 1 seat while one independent candidate was successful. Of the 11 presidential candidates MMD's Mr Levy Patrick Mwanawasa emerged victorious with a paltry 28.61% of the votes cast.⁹

2.1.3.3 The 2006 Elections

Despite much pressure exerted on government by civil society, political parties and the general public at large to change the constitution and the electoral system of Zambia before the 2006 elections, the aforementioned elections were held under the prevailing 1991 Constitution as amended in 1996 and with minor changes made to the Electoral Act.

⁹ . www.elections.org.zm/results_index/results : Website for The Electoral Commission of Zambia. (26/12/2007).

In the Presidential polls there were 5 candidates contesting for the position of which MMD's Levy Patrick Mwanawasa emerged winner after managing to get about 42% of the votes cast. In the Parliamentary elections MMD got 73 seats while the Micheal Sata led PF scooped 43 seats. Meanwhile, the Hakainde Hichilema led United Democratic Alliance (UDA) got 26 seats, Sakwiba Sikota's United Liberal Party (ULP) got 2 seats and the National Democratic Focus led by Benjamin Yorum Mwila scooped 1 seat. Three independent candidates won parliamentary seats, meanwhile elections in two constituencies did not take place due to the deaths of Mweni, E. standing on the Reform Party ticket in Lupososhi constituency and Munenu, J. standing on the MMD ticket in Kabompo East constituency.¹⁰

2.2. IMPORTANCE OF ELECTIONS

Elections in a democratic society mean a process where people freely choose their leaders by voting for the contestants who compete for power to serve as councilors, Members of Parliament, President and other governance responsibilities. Melnik says that,

***"Elections are the bedrock of democracy and at the same time one of the core variables of democratic rule which plays a crucial role in deepening democratic ideals."**¹¹*

Elections are indeed the central pillar of democracy and a means of affording citizens an

¹⁰ . ibid

¹¹ . S. Melnik, (ed) Electoral Monitoring and Electoral Systems: A Brief Guide. (Brussels: Friedrich-Neumann Stiftung) (1994) P.3.

opportunity to elect leaders of their choice. So then, why are elections important? Fred Mmembe, at a meeting with leaders from political parties and other stakeholders on the role of the media in covering the 2006 tripartite elections held at The Post premises on 15th July 2006 answered this question by saying that,

“Elections are important to us because that is the only way citizens can express their consent to be governed by certain individuals and political parties.”¹²

Elections are an important principle in any democratic society; give the people an opportunity to choose leaders who will be their voice in the governance of the country. In short, elections are a vehicle through which leaders are chosen. Maltosa aptly puts it that,

“modern democracies rest on the principle that elections form the basis for proper administration of public affairs.”¹³

He goes on to say that elections are indispensable in a democracy as the governors must derive their mandate to rule from the voters. Banda also states that,

“Another important factor about elections is that they are chiefly a rejection of dictatorships and authoritarian forms of government. Other than that, they are important in this context because they oblige officials to justify their actions and decisions to the citizens. Added to the above, elections make political parties to be

¹² . The Post Newspaper, Monday, July 17 edition.

¹³ . K. Maltosa, *Electoral Systems, Stability and Democratic Governance in Southern Africa: A case study of Lesotho*, *South African Human Rights Review* 4 (1991) P. 20.

responsible and accountable to the people.”¹⁴

Elections also give the people a chance to contest and be elected in the elective governance positions regardless of their gender, tribe, religion or affiliation to any other grouping. Considering the vital role played by elections in any given democratic community it is imperative that they should be participatory and enable the citizens to be involved in the electoral processes at all levels.

The general purpose of elections is that they provide a platform for people to select their representatives on the basis of not only their promises, but also their ability of fulfilling those promises.

2.3. THE ESSENCE OF EQUAL PARTICIPATION IN GOVERNANCE

People from all sectors in the country can be represented in the representative institutions of government either directly or indirectly. Directly, by being elected or holding office in the representative positions of governance and indirectly, by electing into these offices or positions, through the votes people cast, leaders of their choice. Direct participation in governance has been quite difficult for the minority groups and the marginalized groups. The representative institutions of government have been meagerly filled up with women, the youth or people with disabilities. Society looks down upon these groups as being incapable of occupying governance positions. Hence, they have been denied direct representation for quite some time now. However, there has been a worldwide campaign

¹⁴ . Banda Joshua. *Corruption in the Electoral Process and its effects on Democracy: The challenges of enforcement of Electoral Laws*. Obligatory Essay in partial fulfillment of LL.B. Degree.(UNZA) (2004)p.1.

fostering empowerment of these marginalized and minority groups. The Electoral Reform Technical Committee (ERTC), appointed in 2003 to review the electoral system in Zambia, in its final report¹⁵ established that females, globally, are marginalized and excluded from economic and commercial power, as well as political power and decision making. The marginalization of women in many countries of the world has raised a lot of concern among progressive world communities and international organizations including the United Nations (UN), the African Union (AU) and the Southern Africa Development Community (SADC). Zambia being part of these organizations formulated a National Gender Policy in 2000 to foster the empowerment of women in all sectors of society including governance. This is in cognizance of the fact that women have not been adequately represented in governance positions and other decision making position as evidenced by the past. The disabled find themselves in the same peculiar situation as the Zambia National Lobby for the Disabled people has reiterated that there is need to have a representation of people with disabilities in Parliament. The executive director, Luka Samuka, was quoted by the Times of Zambia¹⁶ as having said on a Radio Phoenix programme 'Let the People Talk' that,

"It takes a blind person to understand what it means to be blind and not an able person and hence the need for the disabled to represent people with disabilities in Parliament."

The youth are also in the same predicament such that they have also failed to secure

¹⁵. ERTC Report, *Supra* note 3.

¹⁶. Wednesday, August 23rd 2006 edition

:www.time.co.zm/news/viewnews.cgi?category=6&id=1156320488 (30/01/2008).

adequate representation in the representative institutions of government due to the not so enabling environment of both the institutional and legal framework of the electoral process. For example, in the 2001 Parliamentary elections, only 3 youths managed to win seats (George Chilumanda-Nkana constituency, Levy Ngoma-Sinda constituency and Richard Kazala-Nchanga constituency). This is quite unfortunate because youths play a pivotal role in the development of any country. As Konsolo puts it,

“Youth participation is recognition throughout society that each person has the potential of judging and deciding matters that concern him/her and is aware of his opportunity, has access to the means necessary for utilizing and feels satisfied that his or her contribution has been effective and recognized.”¹⁷

The foregoing marginalized and minority groups and many others can secure adequate representation in the representative institutions of government if an enabling institutional framework and legal framework is created. Hence, the need to evaluate the electoral laws so as to ensure equal participation in governance.

¹⁷ . Konsolo Raphael. K. *Elections and Prohibition of Corruption and corrupt practices: Constitutional Framework*. Obligatory Essay in partial fulfillment of LL.B Degree (UNZA) (2004), p.8.

CHAPTER THREE: A COMPARATIVE STUDY OF ELECTORAL SYSTEMS

3.0. INTRODUCTION

Electoral systems are about voting and the translation of votes into legislative seats and executive leadership, which determines who governs, how leaders govern and how citizens hold government accountable. The electoral system establishes how political competition and governance are structured, operated and achieved. Electoral systems determine the frequency of elections and the representativeness of government.¹⁸ Strictly defined, electoral systems are the mechanisms by which the preferences of citizens are translated into seats in representative institutions. As such, their impact on a whole range of elements that make up the political character of a society is quite considerable.¹⁹ As already established in the preceding chapter, Zambia, has since independence maintained the First Past the Post electoral system which she inherited from Britain, her former protector. Suffice to say that this electoral system has failed to produce equitable results as far as representativeness in representative institutions is concerned. Since electoral systems determine the nature of representation in representative institutions of government it is imperative that a comparative study of electoral systems is carried out to see which electoral system is suitable for a particular country depending on what that country intends to achieve. Therefore, this chapter seeks to outline a comparative study of electoral systems stating the characteristics, attributes, advantages and disadvantages of each system with particular reference to countries practising them.

¹⁸ . ERTC Report, Supra note 3, p. 167.

¹⁹ . O' Neal Brian. *Electoral Systems*. Paper presented at a work shop organized by the Electoral Reform Society (a pressure group based in UK which promotes electoral reform). (1993).

3.1. TYPES OF ELECTORAL SYSTEMS

The Electoral Reform Technical Committee in its final report²⁰ established that electoral systems are categorised into four main systems:

- a) The First Past the Post (FPTP) System or Single Member Plurality.
- b) The Single Member Majoritarian (SMM) System.
- c) The Proportional Representation (PR) System and
- d) The Mixed Member Proportional (MMP) System.

3.1.1. The First Past the Post (FPTP) System.

The FPTP system or single member plurality system is the simplest of the electoral systems in the world. It is also the commonly used electoral model drawing from liberal democracies in the United Kingdom, the United States of America and Canada.²¹ Eighteen African countries, mostly former British colonies, use the FPTP system. Out of the two hundred and twelve (212) countries and related territories in the world, just one third use the FPTP system.²² First the country is divided into constituencies from which only one representative is chosen to occupy a parliamentary seat on behalf of that constituency. For example, Zambia is divided into 150 constituencies each standing for a seat for elected members of parliament elected in the respective constituencies. In short,

²⁰ . Published in August 2005.

²¹ .Konsolo Raphael Kalumba, Supra note 15.

²² . ERTC Report, Supta note 3, p. 169.

voters in each constituency retain one Member of Parliament who has received more votes than the other contestants.

Single-member-plurality systems are considered by many to be superior in their representation of constituency interests. In majoritarian and plurality systems that elect one representative per district there is a direct connection between elected representatives and the electorate. There can be no ambiguity over who is responsible for a constituency's interests, unlike the case with PR systems where districts send more than one representative to the legislature.²³

The following are the advantages and disadvantages of the FPTP system:

Advantages

The FPTP system is appreciated for its simplicity as already alluded to above. Since it retains a link between the constituents and their respective Members of Parliament the proponents of the FPTP system argue that representative accountability depends upon the voters of one area knowing who their own representatives are and having their ability to re-elect or replace them at election time.²⁴ F.T.J. Chiluba says that the FPTP system,

“establishes a firm link of accountability between the elected representatives and their constituencies, and between the government that forms and the voters. Responsibility

²³ . O’neal, Supra note 17, p.14

²⁴ . ERTC Report, Supra note 3, p.169.

*for the performance of government can easily be located.*²⁵

Secondly, the ERTC recommended that the FPTP system tends to create a more stable government because coalition governments are the exception rather than the rule under the FPTP system.²⁶ It tends to lead to a two-party system. The system tends to produce single party governments, which are strong enough to create legislation and tackle the country's problems, without relying on the support of any other party.²⁷

Since the FPTP system tends to create a single party strong government, it therefore implies that it also gives rise to a coherent parliamentary opposition, which can present itself as a realistic alternative to the government of the day.

Furthermore, this electoral system allows for independent candidates to contest the elections in their own right.²⁸ This is particularly important in developing party systems, where politics may not be firmly founded upon ideologically clear differentiation, public policy alternatives or strong political party organisations. It may also be an important consideration in political environments where there is minimum intra-party democracy and freedom to differ, or under which personality or clique may control a political party and impose candidates on the electorate.²⁹

To sum it up the FPTP system is widely acknowledged to be the least complicated of electoral systems. It is simply easy to understand and use.

²⁵ . Chiluba, F.T.J. (1995). *The challenges of change*. Multimedia. Lusaka. p. 91

²⁶ . ERTC Report, Supra note 3, p 170.

²⁷ . www.electoral-reform.org.uk/votingsystems/systems : A website for the Electoral Reform Society a pressure group which promotes electoral reform. (30/01/2008)

²⁸ . Konsolo Raphael Kalumba, Supra note 15.

²⁹ . ERTC Report, Supra note 3, p.171.

Disadvantages

Firstly, only one MP is elected in each constituency, so all the voters who did not vote for him or her are not represented. Their votes do not help elect anybody and so are wasted, they could have stayed at home and the result would not have been altered. In 2005, in Great Britain, 19 million voters cast ineffective votes - that is 70% of those who voted.³⁰ Hence, the underlying cause of danger is that, under the FPTP system, votes that go to the losing candidates, even if they form the majority, are not assessed to count towards determining representation.

Secondly, the FPTP system is known to exclude the minority and socially discriminated groups. As the ERTC noted in its final report³¹,

“Under the FPTP system, political parties tend to put forward the most broadly acceptable candidates or candidates from a local majority. It is rare and risky for a political party to put forward a candidate belonging to a group that is in the minority, or belonging to a group that is socially discriminated against.”

F.T.J. Chiluba,³² also reiterated that the FPTP system tends to under represent minority groups which are thinly spread across several constituencies.

Thirdly, the way the boundaries of constituencies are drawn can affect the results.

www.electoral-reform.org.uk/votingsystems/systems (30/01/2008)
ERTC Report, Supra note 3, p. 171.
Chiluba, F.T.J. Supra note 23, p.92.

Governments are often accused of gerrymandering, adjusting the boundaries of constituencies to influence the results.³³ In short, the single-member constituencies of the FPTP system are susceptible to manipulation. This leads to malapportionment of political power in that a single member District or constituency may have a population of say 1 million people whilst another may have say 500 people even though each constituency is represented by one member in the legislature. In the United States of America this discrepancy in the FPTP system cured by employing the doctrine of "one-person-one-vote". This doctrine requires that each district or constituency in a single-member district system contain equal number of people. It is also sometimes called the "no malapportionment" rule. In the case of *Reynolds V. Sims*, 377 U.S. 533 (1964), Chief Justice Earl Warren laid down the rationale for the one-person-one-vote as follows:

"Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests. As long as ours is a representative form of government, and legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is the bedrock of our political system"

The law applied in the foregoing case was amendment number 14 of the United States of America constitution which refers to equal protection of the Law. In pursuance to this doctrine Article 1 of the United States Constitution requires a decennial census for the purpose of assuring a fair distribution of seats in the House of Representatives as was held in the case of *White V. Weiser*, 412 U.S. 783, 790 (1973) the purpose of

³³ . www.electoral-reform.org.uk/votingsystems/systems (30/01/2008).

Article 1 of the U.S. Constitution is to ensure that congressional districts are as mathematically equal as reasonably possible.

Furthermore, the FPTP system tends to be disadvantageous for weaker or small political parties such that it tends to create a two party system between which power alternates.³⁴ Hence, the small political parties wither away after one or two elections when they fail to gain sufficient seats to enable them to be influential in parliament.³⁵

3.1.1.1 The FPTP from a Zambian perspective

As already alluded to above, Zambia has since independence employed the FPTP system. Zambia is divided into 150 constituencies or single member districts which are geographically delineated. Hence, these constituencies are not apportioned proportionately as regards to number of people in each constituency as per one-person-one-vote principle outlined above. Thus the political power is unequally divided with regards to the voting power each constituency has in the decision-making process of the legislative branch of government. Furthermore, this is worsened by the fact that it is from the same members of the legislature the president of Zambia gets to select ministers who form the executive branch of government as per article 46 of the Zambian Constitution of 1991 as amended by Act number 18 of 1996. This dilutes the efficacy of a representative legislature as required of a democratic state and defies the democratic principle of "Separation of Power". In addition, it can be noted from the aforesaid that the FPTP system does not promote participation of marginalised and minority groups in society hence, it is not a

³⁴ . Hamill Jeffrey, S. *Electoral Reform: Fact or Fiction? New Zealand and Italy's experience with new electoral system*. A paper presented for a workshop on Linking institutions April 17th -18th . (2006).

³⁵ . ERTC Report, Supra note 3, p. 172.

must have received more than 50 per cent of the total votes cast thus the application of the alternative vote or second ballot system as already stated above. Therefore, the advantages and disadvantages of the two systems are more less the same. However, there might be an exception of the fact that the SSM system may be tedious and costly in the case of the second ballot system and quite complicated if the alternative vote is employed.

3.1.2.1 The SMM system from a Zambian perspective

Before the 1996 constitutional amendments, it was a requirement under the 1991 Constitution and those preceding, for a presidential candidate to be declared duly elected only if and/or when such a candidate had polled more than 50% of the votes and the particular system which was being employed is the second ballot system. Fortunately enough at no particular point was second ballot used as the winning candidates would poll more than 50% of the votes. However, the SMM system has never been used with regards to parliamentary elections in Zambia where simple majority system has been used since independence. Furthermore, after the 1996 constitutional amendments even a presidential candidate need not poll more 50% of the votes in order to be declared winner a simple majority suffices.

However, the majority of Zambians who made submissions to the Mun'gomba Constitution Review Commission and to the ERTC, submitted that the Zambian constitution should retain the clause which provides for the 50% plus 1 as the thresh hold for a presidential candidate to be declared winner. This gives the winning candidate the legitimacy of being supported by a majority of the people. Those in opposition to the SMM system to be re-introduced in Zambia say that the second ballot system is

expensive and time consuming. However, this time around Zambia can employ the alternative vote or preferential voting system which is cheaper and faster as there is no need to start arranging for another election as is the case with the second ballot system. In this regard even the SMM system can be used in the Zambian parliamentary elections if the alternative vote or preferential voting system is used.

3.1.3. Proportional representation (PR) System.

The other category of electoral system is known as proportional representation or PR. PR systems are specifically designed to allocate seats in proportion to votes, in the hope that assemblies and governments will accurately reflect the preferences of the electorate. PR systems are now the most frequently used electoral systems in western democracies.

Under PR, political parties are assigned a number of seats in parliament corresponding to the degree of support they have received in a given electoral district. This arrangement dictates that all PR systems rely on multi-member districts. PR systems are of two basic types: party list systems and single transferable vote (STV) systems.

i) The Party List System.

Under party list systems, voters in an electoral district choose from among slates of candidates put forward by the various parties contesting an election. When the votes are tallied, each party is entitled to seat the number of members from its list that corresponds

to its share of the popular vote; for example, if a given party obtains 30% of the vote, then it would send 3 members out of a list of 10 candidates to the legislature. To discourage the emergence of splinter parties, jurisdictions using this system sometimes set a vote threshold that parties must obtain in order to qualify for seats. Thresholds vary from jurisdiction to jurisdiction. In Israel parties must receive a minimum of 1% of the popular vote in order to qualify for seats in the Knesset. In Germany, on the other hand, parties must win a minimum of 5% of the national vote or win seats in three single-member constituencies before they are given seats on a proportional basis.⁴⁰

ii). Single Transferable Vote Systems (STV)

Bogdanor⁴¹ states that, in contrast to party list systems, STV systems emphasize the individual candidate rather than the party. As is the case in all PR systems, electoral districts using STV are represented by several members in an assembly. Voters are asked to rank-order their choices among the candidates whose names appear on the ballot. When the ballots are counted, the first step is sorting them out according to the first choices. In order to be declared elected, a candidate must obtain a certain threshold of the votes cast. Those candidates who obtain the threshold during the first stage of counting are declared elected and any votes they have received in excess of the threshold are redistributed according to the second choices as marked. The second stage of counting involves the redistribution of these "surplus" ballots; once more, those candidates *achieving the threshold are declared elected and any surplus votes redistributed. This process continues until all vacant seats have been filled.*

⁴⁰ www.parl.gc.ca/information/library/PRBpubs/bp334-e (30/01/2008).

⁴¹ Bogdanor, P. (1992) *What is Proportional Representation?* P. 46

The following are the Identified advantages and disadvantages of the PR system:

Advantages:

The first and principal argument advanced in favour of PR is its ability to reflect more accurately the preferences of voters in terms of seats in parliament. Voters are said to be more willing to cast votes for smaller parties when they know that their votes will produce tangible results, than when seats are allocated on the basis of the share of the popular vote. The ability, in general, for PR systems to deliver seats to smaller parties encourages the formation of such parties, a factor which promises representation of a wider spectrum of public opinion.⁴² In short, the PR system facilitates a more representative legislature and the number of wasted votes is reduced drastically, this also encourages voters to cast their vote as it is more likely to be influential under the PR system. Suffice to say that all the foregoing can easily be achieved if the threshold is not very high.

The PR system also allows political parties to have a diverse list of candidates, more so, if the party list is employed. For example, in South Africa political parties are encouraged to put forward multi-racial and multi-ethnic lists of candidates. Furthermore, this feature of the PR system allows parties to include marginalized groups in society such as women, the youth and the disabled without jeopardizing their chances of gaining seats in the legislature.⁴³

⁴² . Taagepera and Shugart. (1989). *Seats and Votes: The Effects and Determinants of Electoral Systems*. Yale University Press. New Haven.

⁴³ . www.eisa.org.za/EISA/epp : a website for the Electoral Institute of Southern Africa a non-governmental organization which focuses on elections, electoral practices and the promotion of democratic governance. (October 2006).

In addition, the ERTC in its final report⁴⁴ establishes that it has been argued particularly in Africa, that the PR system, by including all interest groups in parliament, offers a better hope that decisions are taken in the public eye, and by a more inclusive cross-section of society.

Katotobwe Augustine⁴⁵ says that the PR system is particularly favorable to Zambia because the country can develop a culture of political tolerance much needed for a non dictatorial democracy by ensuring that no single party would initially emerge from an election with an overbearing majority as to enable it impose a tyranny of the majority upon the Zambian people.

Disadvantages:

F.T.J. Chiluba recognizes that the PR system encourages and gives an opportunity for many political parties to obtain seats in parliament thereby leading to a need of power sharing, as in what can be called consensus democracy. He goes on further to state that the effect of this arrangement is often to weaken the link between the original party manifesto and the compromised program, which has been worked out by the potentially unstable coalition of partners in government.⁴⁶

Another obvious weakness of the PR system is that since the candidates voted into the legislature are just in inclusion on the party list, there is no direct relationship between the

⁴⁴ . ERTC Report, Supra note 3. p.176

⁴⁵ . Katotobwe Augustine, B.C. The Impact of plurality voting system on Zambian politics. Msc Thesis (UNZA). (1996).

⁴⁶ . Chiluba, F.T.J. Supra note 23.

constituents and the elected representatives. Hence this makes accountability very difficult, as no member of the legislature is directly accountable for the development of a particular area.

In addition the PR system, if employed alone, does not provide for independent candidates. This is really some sort of discrimination to aspirant candidates who have no inclination to any of the doctrines or manifestos of the existing political parties. Hence, the PR system places too much power in the political parties than individuals.

2.1.3.1 The PR system from a Zambian perspective

This system has never been used in the Zambian parliamentary elections. However, as can be noted from its established advantages by countries which have been using this system, the PR system can be quite useful in Zambia especially if the primary aim is to have an all inclusive and much more representative legislature than is the result with the currently employed FPTP system which tends to disadvantage the marginalised groups as well as the minority groups. However, the PR system also has its own flaws.

3.1.4. The Mixed Member Proportional (MMP) System.

Some jurisdictions have chosen to use a mixture of majority and proportional representation systems in order to create an electoral system with the positive attributes of both. The MMP system combines the FPTP and PR systems. The system provides for some members of the legislature to be elected through the FPTP system, while others are elected through the PR system from the party lists.

Since the late 1940s in Germany, for example, one half of the seats in the Bundestag (the lower house of parliament) have been filled by plurality, using single-member constituencies, while the other half are filled using party lists system. Voters mark two choices on their ballot papers: one from among a list of parties, the other from among a slate of candidates for district representation.⁴⁷

Other countries that employ the MMP system include New Zealand, Bolivia, Mexico, Venezuela and Hungary. In Africa the MMP system was first employed in Lesotho during the 2002 parliamentary election. In May 2002 a general election was held under the Mixed Member Proportional Representation electoral model. Out of 80 constituencies the Lesotho Congress for Democracy under the Leadership of Mr. Pakalitha Mosisili won 79. One constituency was won by the Lesotho People's Congress (LPC), a break-away party from the LCD, led by Mr. Kelebone Maope. Mr Mosisili was sworn as Prime Minister. The Basotho National Party (BNP) under the leadership of Major General Justin Metsing Lekhanya became the main opposition party.⁴⁸ Thirty eight seats were based on the PR system of which the party list was employed.

The MMP system was formulated to curb the weaknesses found with the FPTP system and the PR system such that the harmonization of the two systems is supposed to blend the good attributes of both the systems, thereby creating a better electoral system which addresses the disadvantages of both the FPTP and PR systems. Although the MMP system is less familiar and might be a bit complex to manage, it is being accepted by some nations as a preferable electoral system.

⁴⁷ . O' Neal, Supra note 17.

⁴⁸ . www.afrol.com/features/10592 (30/01/2008).

3.1.4.1 The MMP from a Zambian perspective

This system has never been used in Zambia. Notwithstanding this as can be noted from above these other electoral systems have got their own pros and cons. Thus the MMP system is a hybrid of the other electoral systems as it is a combination of all the systems thereby trying to come up with a more or less flawless system. This system can be the panacea of all the problems which have been noted with these other electoral systems. In view of this it would be quite prudent if Zambia could try out this system.

3.2 CONCLUSION

While electoral systems are a vital component of any representative democracy, one should not overstate their importance. Even the best electoral system will fail if other conditions are not met. Jackson and Jackson aptly put it as follows,

“Electoral systems, do not determine the nature of party systems, nor the type of government, majority or minority, single-party or coalition, in any country. Governmental outcomes are largely a function of the balance of party forces: the party system, in turn, is largely shaped by a country's political culture and social structure and by the electoral behaviour of its citizens. However, the electoral system ... is a powerful intermediary force, modifying the competition among parties, distorting or faithfully reproducing the electoral preferences of the voters. Since elections are key institutions in modern democracies and provide the chief mechanism of political

participation for most people, the means of translating individual votes into political representation is ... an important factor in a country's political system."⁴⁹

Therefore, the importance of electoral systems must not be over emphasized because no one system can be said to be perfect, what really matters is that the electoral system works in collaboration with other factors such as social, political, and other factors.

⁴⁹ . Robert J. Jackson and Doreen Jackson, *Politics in Canada*, 2nd edition, Prentice-Hall Canada Ltd., Scarborough, Ontario, 1990, p. 501.

CHAPTER FOUR: THE LEGAL AND INSTITUTIONAL FRAMEWORK OF THE ELECTORAL PROCESS AND THEIR ROLE IN ENSURING EQUAL PARTICIPATION IN GOVERNANCE.

4.0 INTRODUCTION

The legal Framework of elections in Zambia is founded on a number of pieces of legislation which include, the Constitution of Zambia⁵⁰, the Electoral Act⁵¹ and the regulations made thereunder,⁵² and, the Local Government Elections Act⁵³. Another piece of legislation that regulates and governs elections is the Electoral Commission Act of 1996. The Electoral Commission, Political parties, the legislature, the Executive branch of government, mass media and Civil society are the paramount foundation of the institutional Framework of the electoral process especially in so far as ensuring equal participation in the representative institutions of government.

This chapter focuses on the legal Framework and institutional framework of the electoral process. In discussing the institutional framework the chapter will also highlight the role which is supposed to be played by these institutions in ensuring equal participation in governance.

⁵⁰ . Chapter 1 of the Laws of Zambia (as amended by Act No. 18 of 1996 and herein after called the Constitution).

⁵¹ . Act No. 12 of 2006.

⁵² . The Electoral (Code of Conduct) Regulations 2006.

⁵³ . Chapter 282 of the Laws of Zambia.

4.1. THE LEGAL FRAMEWORK

4.1.1. The Constitution

The Constitution is the fundamental law of the country and is superior to all other laws such that any other law that is inconsistent with the constitution is void to the extent of its inconsistency.⁵⁴ Basically, the Constitution creates the organs of government, stipulating their functions and powers of government and the interplay of these organs. It also guarantees the fundamental human rights and freedoms of individual citizens thereby defining the relationship between the government and the citizens.⁵⁵

The salient provisions of the Constitution pertaining to the electoral process include the following:

Part three of the Constitution of Zambia guarantees a number of fundamental human rights and freedoms of which the freedoms of association, assembly and speech are pertinent to a free and fair electoral process and also helps in ensuring the participation of everyone in the governance of the country.

Article 34 provides for the election of the President. The President must be elected by direct universal adult suffrage and by secret ballot and must be held whenever the National Assembly is dissolved. Furthermore, Presidential elections must be held when the incumbent President dies, resigns, is removed on the grounds of physical or mental incapacity or is impeached. Article 34(3) provides for the qualifications for presidential candidates. Some of the qualifications are that the presidential candidates must be second

⁵⁴ . Article 1 (3) of the Constitution.

⁵⁵ . Part 3 of the Constitution.

or third generation Zambians⁵⁶ and related to this is clause (f) of the same article which requires that a presidential candidate must be domiciled in Zambia for a period of at least twenty years. Another requirement is that the presidential candidate must be 35 years of age or above.⁵⁷ Article 34(8) stipulates that the returning officer for presidential elections shall declare the candidate who receives the highest number of the total votes cast to have been duly elected President. Under the 1991 Constitution, before the Constitutional amendments of 1996, for a presidential candidate to be declared winner, such a candidate was required to have received more than 50 per cent of the total votes cast. In view of the fact that it is imperative, in the modern day democracy, for the President elect to secure majority support of the people at the polls, both the Mwanakatwe Constitutional Review Commission⁵⁸ and the Mung'omba Constitutional Review Commission⁵⁹ recommended that such a clause be part of the Constitution. This ensures the ideals of the President are representative of a majority of the people.

Article 63 of the constitution stipulates that the National Assembly shall consist of one hundred and fifty members and not more than eight nominated members and the Speaker. Elections for members of the National Assembly shall be direct and by universal adult suffrage.⁶⁰ Some sectors of the Zambian society, especially the youth, were calling for the reduction of the age limit to register as a voter from 18 years to 16 years. This was with the view that youth participation in governance will be increased by virtue of the fact that more young persons will be eligible to vote. However, according to findings by the

⁵⁶ . Article 34 (b) of the Constitution.

⁵⁷ . Article 34 of the Constitution.

⁵⁸ . Appointed in 1993.

⁵⁹ . Appointed in 2003.

⁶⁰ . Article 75 of the Constitution provides that every Zambian person who has attained the age of eighteen years is entitled to be registered as voter unless otherwise.

ERTC, the majority of submissions made were that the age limit to register as a voter be maintained at 18 years as it was established that maturity was cardinal when it comes to voting.

The Constitution gives the President powers to nominate the already alluded to eight members of the National Assembly.⁶¹ The objective of this provision is to enhance the representation in the National Assembly as regards special interests or skills. Unfortunately, this objective has not been implemented satisfactorily, for example the disabled have been crying for representation in the National Assembly; however, not even one has ever been appointed. Similarly, in very few circumstances have women been nominated for the past fifteen years of multiparty democracy. The youth find themselves in the same predicament of a society dominated by the adults and old male folk.⁶²

4.1.2. The Electoral Act, 2006.

The Electoral Act, 2006 was enacted by parliament on 19th May 2006; it repealed and replaced the Electoral Act of 1991. This development came about due to the electoral reforms initiated by the government, which appointed the Electoral Reform Technical Committee to spearhead the reforms. The Act provides for a comprehensive process for elections to the office of President and to the National Assembly; it also empowers the Electoral Commission of Zambia in matters relating to elections. Furthermore, it enables the Commission to make regulations providing for the registration of voters and for the

⁶¹ . Article 68 of the Constitution.

⁶² . Recently, after the 2006 general elections the likes of Rupiah Banda, Mundia Sikatana, etc have been nominated. How has this enhanced representation as regards special interests and skills?

manner of conducting elections. In addition, it provides for offences and penalties in connection with elections. Some of these offences pertain to bribery⁶³, illegal practice of publishing false statements in respect to candidates⁶⁴, illegal practices in respect to public meetings⁶⁵ and many others. Section 89 stipulates the penalty for illegal practices and provides for the appointment of conflict management officers. It also provides for election petitions and the hearing and determination of applications relating to elections to Parliament.

The ERTC in its final Report made quite a number of recommendations for the reformation of the electoral process of which few of them were integrated in the Electoral Act of 2006⁶⁶. Notwithstanding this most of the recommendations made by the ERTC cannot be incorporated in an Act of Parliament without abrogating the provisions of the Constitution and would therefore be rendered void.⁶⁷ For example, the ERTC recommended that for a presidential candidate to be declared winner such a candidate must have obtained more than 50 per cent of the votes cast. This would definitely be inconsistent with Article 34 (8) of the constitution, which stipulates that the candidate with the highest number of votes shall be declared as winner. Therefore, the recommendations of the ERTC should be also used in the constitutional reform process, and seeing that most of the recommendations were also put forward by the Mung'omba Constitutional Review Commission the yet to be formulated next Constitution should incorporate these recommendations.⁶⁸

⁶³ . The Electoral Act, Section 79.

⁶⁴ . Ibid, Section 83.

⁶⁵ . Ibid, Section 85.

⁶⁶ . For example, the use of transparent boxes, the establishment of the conflict management committee, etc.

⁶⁷ . The Constitution, Article 1 (3).

⁶⁸ . For recommendations, made by these two bodies, in relation to enhancing equal participation of marginalized groups in representative institutions of government see Chapter four of this dissertation.

4.1.3. The Electoral Commission Act, 1996.

Article 76 of the Constitution establishes an autonomous Electoral Commission whose functions are, to supervise the registration of voters, to conduct presidential and parliamentary elections and to review the boundaries of constituencies into which Zambia is divided for purposes of elections to the National Assembly.

The Electoral Commission Act, 1996 provides for the composition and operations of the Commission, which includes among others the administration of the Commission. The members of the Commission include the Chairperson and not more than four full time commissioners.⁶⁹ These members are appointed by the President and the appointment is subject to parliamentary ratification.⁷⁰ Administration and management of the Commissions' affairs is headed by the director of the Commission who is appointed by the Commission.⁷¹ The Commission has power to make statutory instruments with regards to the appointment, disciplinary control and termination of persons holding office under the Electoral Commission Act, 1996.

There has been concern over the autonomy of the Commission in view of the fact that it is the President who appoints members of the Commission. Article 112 of the Mung'omba Draft Constitution⁷² stipulates that the commissioners are to be appointed by an Appointments Committee established under article 113 of the same draft Constitution. The latter article stipulates that the Appointments Committee shall be appointed by the

⁶⁹ . Electoral Commission Act, 1996, Section 4.

⁷⁰ . Ibid, Section 5

⁷¹ . Ibid, Section 12.

⁷² . Published in June 2005.

National Assembly and is to consist of a member of the Public Service Commission, a member of the Judicial Service Commission, a representative from the church bodies, the ombudsman and a member of the Supreme Court appointed by the Chief Justice. This will enhance the autonomy of the commission than it is in the current situation where the President appoints the commissioners.

Despite the questionable autonomy of the Commission, it plays an important role especially as to where voter sensitization and ensuring that the electoral process is free and fair are concerned.

4.1.4. The Electoral (Code of Conduct) Regulations, 2006.

The Electoral Act⁷³, 2006 empowers the Electoral Commission to formulate, by way of a Statutory Instrument, an Electoral Code of Conduct to govern the behavior of all stakeholders of the electoral process so as to promote free and fair elections. In exercise of these powers, the Commission organized a stakeholders meeting in Livingstone so as to get their in-put in the formulation of the Electoral Code of Conduct of 2006. The stakeholders include among others, political parties, the church, the media, Non-Governmental Organizations (NGOs), and civil society at large.

As already alluded to, the Code is meant to regulate the conduct of players in the electoral process before, during and after elections. It achieves this by putting in place certain rules (and sanctions, punitive or otherwise) that prohibit illegal and unfair behavior in the process of elections.

⁷³ . Section 109.

4.1.5. The Local Government Elections Act.

The Local Government Elections Act provides for the conduct of Local Government elections. The Local Government Elections (Amendment) Act No. 17 of 1997 was enacted to give authority to the Electoral Commission to supervise the conduct of local government elections.

4.2 THE INSTITUTIONAL FRAMEWORK

The Electoral Commission, political parties, the legislature, the Executive branch of government, mass media and civil society are the major institutional framework as regards ensuring equal participation in the representative institutions of government.

4.2.1. The Electoral Commission and its role in ensuring equal participation in governance.

With the re-introduction of multiparty democracy in 1991 it became imperative that an independent body be formed to supervise elections in Zambia. As Banda, J.⁷⁴ put it, when the MMD ascended to power, it was pressurized by the opposition parties to fulfill its promise of reforming electoral laws, particularly in relation to the composition and independence of the Electoral Commission.

⁷⁴ . Banda, J. Supra note 12.

The Constitution of Zambia (Amendment) Act No. 18 of 1996 provided for the creation of an autonomous Electoral Commission.⁷⁵ Banda goes on to say that following persistent pressure from the opposition parties, civil society and the international community pushed for the enactment of the Electoral Commission Act, 1996.

The Electoral Commission as an institution vested with the authority to govern the elections in Zambia, is expected to act independently and with integrity in order to uphold international standards and national requirements for democratic elections.⁷⁶

4.2.2. The Legislature and its role in ensuring equal participation in governance.

Article 62 of the Constitution stipulates that the legislative power of the Republic of Zambia shall vest in Parliament, which shall consist of the President and the National Assembly. Parliament or the Legislature is the law-making body and therefore, plays a pivotal role in determining the course that the electoral process takes through the electoral laws it puts in place. For example, parliament recently enacted the Electoral Act, 2006⁷⁷. The legislative body is under an obligation to ensure that the demands of the general populace are met. And as SACCORD Executive Director, Lee Habasonda stated, "Electoral reforms are key to enhancing democratic governance and, therefore, government and the legislature in particular, needed to ensure that the submissions of the

⁷⁵ . Article 76 of the Constitution.

⁷⁶ . FODEP, Zambia's 2006 Elections (Lusaka: FODEP National Secretary 2002), p. 52.

⁷⁷ . Act No. 19 of 2006.

ERTC were put in the Electoral Act.”⁷⁸ However, most of the pertinent recommendations that were recommended by the ERTC were thrown out and it is the view of many Zambians that if most of these recommendations were incorporated in the Electoral Act the plight of several Zambians would have been heard. And as Father Peter Henroit, observed history will show that the 2006 elections could have been better if there had not been outright rejection of the wishes of the majority of the people when partisan interests override national interests to address the comprehensive electoral reforms that were being called for. This would have made the whole electoral process more open, more logical, more democratic, more just, more “free and fair” for all concerned.⁷⁹ In so doing, the legislative body of our nation has failed to play its role of ensuring that electoral laws that encourage equal participation in government are put in place.

4.2.3. The Executive Branch of government and its role in ensuring equal participation in governance

The executive powers of the Republic of Zambia vest in the President and, are exercised by him either directly or through officers subordinate to him.⁸⁰ In Zambia the executive branch of government is the most powerful branch of government due to quite a number of reasons. For instance, the fact that the executive holds the purse of the nation or

⁷⁸ . As quoted by Times of Zambia Reporter:
www.times.co.zm/news/viewnews.cgi?category=4&id=1141621233 (30/01/2008).

⁷⁹ . The Post news paper, 03rd October 2006 edition.

⁸⁰ . Article 33 of the Constitution.

rather it controls the finances of the nation puts this branch of government in a very influential position. For example, article 81 of the Constitution restricts the National Assembly from proceeding with a Bill that makes provision for the imposition or alteration of taxation, imposition of a charge upon the revenues of the Republic, for the payment, issue or withdrawal from the Republic's revenues (in short any Bill which deals with finances of the nation), without the recommendation of the President, the Vice President or a Minister.

Furthermore, the executive branch of government spearheads most national policies and therefore, can put up policies that focus on ensuring equal participation in governance. Cabinet recently, through the Ministry of Youth, Sport, and Child development, formulated a National Youth Policy and had earlier on formulated the National Gender Policy⁸¹. President Mwanawasa in his speech for the youth day celebration reiterated that his government, through the Ministry of Youth, Sport and Child development, has revised the Youth Policy to bring it in line with global and national trends. The revised policy is also driven by the need to attain the Millennium Development Goals and is based on the principles of equity, participation, human rights, partnership and networking, among others. Furthermore, the Government of the Republic of Zambia, through the National Gender Policy, seeks to, among other things, achieve full participation of both women and men in the development process at all levels and to create a mechanism to facilitate the active participation of women at all levels of the political process including the implementation of affirmative action.

However, there has been very little implementation of these policies on the part of government. For example, President Mwanawasa only appointed four females as full

⁸¹ . Adopted in March, 2000.

cabinet ministers in pertinent ministries; Chifire Angela as Minister of Health; Masebo Sylvia as Minister of Local Government and Housing; Nyirongo Gladys as Minister of Lands and Sayifwanda Sara as Minister in-charge of Gender.⁸² As already alluded to earlier, President Mwanawasa seems not to pay attention to the plight of the marginalized and minority groups like women, the youth nor the disabled when exercising his prerogative of nominating the eight members of the National Assembly. The executive branch of government just plays lip service to most of these policies, which they formulate, let alone the international conventions that they accede to.

4.2.4 The Media and its role in ensuring equal participation in governance.

The Electoral Commission Chairperson, Justice Ireen Mambilima, in her opening speech at a media workshop held on 7th October 2005 at Intercontinental Hotel in Lusaka said that the role of the media in the electoral process cannot be over-emphasized. The media is one of the key stakeholders in the electoral process. It is the view of the Commission that the media can help in reaching the electorate in all corners of the country by conducting voter education campaigns. Both the public and private media have continuously been urged to uphold their professional ethics, namely, by ensuring that they are not biased in their reporting and that they should give an equal opportunity to all players in the electoral process before, during and after the elections. By doing so, the media can actually sensitize the public of the plight of the marginalized and minority groups thereby creating an opportunity for them to be heard by the public.

⁸² . www.statehouse.gov.zm/index.php?option=com_content&task=view&id=93&Itemid=62 (10/10/2006).

4.2.5 Political Parties and their role in ensuring equal participation in governance.

Political parties play a very pivotal role in ensuring that there is equal participation especially in the elective representative positions of government. However, the political parties have shown very little effort and this can be noted from the number of women or youths they nominate as candidates for both Parliamentary and Local government elections. For example, in the recent 2006 general elections the distribution of candidates by gender stood as follows:

For local government elections the total number of candidates from political parties was 4095 of which only 387 were female and 3708 were male representing 9 per cent and 91 per cent, of the total, respectively. As for parliamentary elections, the distribution stood as follows: 106 female candidates and 603 male candidates representing 15 per cent and 85 per cent, of the total, respectively.⁸³ MMD in particular, of its 150 parliamentary candidates nominated, only 24 were women, representing a paltry 16 percent of the total. It can be noted from the above that political parties have indeed failed to ensure that representation in the representative institutions of government is made equal.

4.2.6 Civil Society and its role in ensuring equal participation in governance.

Basically the role of the civic organisations in the electoral process is to spearhead voter education and to advocate for the voiceless and marginalized groups in society. It can be noted with satisfaction that over the years many Non-Governmental organisations, which

⁸³ . www.elections.org.zm/candi_distribution (30/01/2008).

advocate for equal representation in governance have emerged. Some of the organizations which have advocated for equal representation are the Foundation for Democratic Process (FODEP), the Zambia Federation for the Disabled (ZAFOD), the Zambia National Women's Lobby who particularly proposed to the ERTC that there should be a minimum 30 per cent women representation in every political party as a commitment to gender equity.⁸⁴ Civil society has performed quite well as there has been, notably, progressive growth in the civic education, advocacy and campaign for a fair electoral system.⁸⁵

4.3 CONCLUSION

It can be noted from the above discussion that the Legal Framework of the electoral process is quite inadequate in ensuring a balanced representation of all groups of society in the representative institutions of government. The Constitution broadly guarantees the freedoms of association assembly and speech without taking into consideration the fact that there are certain groups of society that are marginalized. The legal framework does not address this unfortunate fact. Furthermore, even though the civil society has been seen to vigorously advocate for equal representation, it is quite saddening that other institutional bodies of the electoral process do very little, for example, political parties, the legislature, the executive branch of government and so on. It would therefore, do justice to the minority and marginalized groups of society if positive legal and institutional reforms were to take place putting aside individual and partisan interests.

⁸⁴ . ERTC Report, Supra note 3, p.658.

⁸⁵ . Banda, J. Supra note 12, p.34.

CHAPTER FIVE: GENERAL CONCLUSION

5.0 INTRODUCTION

This chapter concludes the foregoing discussion. It summarizes the previous chapters, highlighting their main aspects and attributes. Furthermore, it will provide recommendations on the electoral reforms so as to strengthen the electoral laws especially with regards to ensuring equal participation in governance.

5.1. SUMMARY

The dissertation has shown that the electoral laws and the electoral system in Zambia are inadequate in ensuring equal participation in governance. The current electoral laws and system fall short of promoting participation in governance of minority and marginalized groups.

Chapter One of this study briefly outlined the historical background of the Zambian electoral system. It was noted that Zambia, since attaining its independence, has employed the First Past the Post (FPTP) system. Chapter One went on further to look at the importance of elections. Melnik says that,

“Elections are the bedrock of democracy and at the same time one of the core variables of democratic rule which plays a crucial role in deepening democratic ideals.”⁸⁶

Elections are important because that is the only way citizens in a democratic society can express their consent to be governed by certain individuals and political parties.⁸⁷ Other than stressing the importance of elections, chapter one also underscored the essence of equal participation in governance. It was noted that the representative institutions of government have been meagerly filled up with women, the youth or people with disabilities. These were discovered to be the marginalized and minority groups. Chapter One further established that it has been noted worldwide that direct representation of marginalized groups in the representative institutions of government is important as that is the only way their needs can be adequately looked into by government. As aptly put by Luka Samuka,

“It takes a blind person to understand what it means to be blind and not an able person and hence, the need for disabled people to represent people with disabilities in parliament.”⁸⁸

In Chapter Two a comparative study of electoral systems was undertaken and this was in particular reference to countries like Zambia, Lesotho, Australia, South Africa, to

⁸⁶ . Melnik,ed. Electoral monitoring and Electoral systems: A brief guide. (Brussels: Friedrich- Neumann Stiftung) (1994) p.3.

⁸⁷ . The Post Newspaper, Monday, July 17th 2006 edition.

⁸⁸ . Times of Zambia Newspaper, Wednesday 23rd 2006 edition:
www.time.co.zm/news/viewnews.cgi?category=6&id=1156320488 (30/01/2008).

mention but a few. It was discovered that electoral systems are about voting and translating the votes into legislative seats and executive leadership, which determines who governs, how leaders govern and how citizens hold government accountable. Electoral systems are important because they shape up the representative institutions of government. Electoral systems can be categorized into four main systems:

- a) The First Past the Post System;
- b) The Single Member Majoritarian System;
- c) The Proportional Representation System; and
- d) The Mixed Member Proportional System.

Chapter Two went on further to outline the attributes, features, advantages and disadvantages of the above-mentioned electoral systems. It was discovered that the Mixed Member Proportional System is more favorable. It being a hybrid of the First Past the Post System and the Proportional Representational System, it blends the good attributes of both systems thereby creating a system with lesser disadvantages.

Chapter Three focused on the legal and institutional framework of the electoral process and the role they play in ensuring equal participation in governance. It was discovered that the legal framework of elections in Zambia is founded on a number of pieces of legislation which include: the Constitution of Zambia⁸⁹; the Electoral Act⁹⁰; and the regulations made there under⁹¹ and The Local Government Elections Act⁹². Another piece of legislation that regulates and governs elections is the Electoral Commission Act

⁸⁹ . Chapter 1 of the Laws of Zambia (as amended by Act No. 18 of 1996 and herein after called the Constitution).

⁹⁰ . Act No. 12 of 2006.

⁹¹ . The Electoral (Code of Conduct) Regulations 2006.

⁹² . Chapter 282 of the Laws of Zambia.

of 1996. Furthermore, it was established that the Electoral Commission, Political parties, the legislature, the Executive branch of government, mass media and Civil society are the paramount foundation of the institutional framework of the electoral process especially in so far as ensuring equal participation in the representative institutions of government. In discussing the institutional framework chapter three also highlighted the role, which is supposed to be played by these institutions, in ensuring equal participation in governance. It was established that the legal framework of the electoral process is quite inadequate in advocating for a balanced representation of all groups of society in the representative institutions of government. The Constitution broadly guarantees the freedoms of association; assembly and speech without taking into consideration the fact that there are certain groups of society that are marginalized. The legal framework does not address this unfortunate fact. Furthermore, even though the civil society has been seen to vigorously advocate for equal representation, it is quite saddening that other institutional bodies of the electoral process do very little, for example, political parties, the legislature, the executive branch of government and so on. It would therefore, do justice to the minority and marginalized groups of society if positive legal and institutional reforms were to take place putting aside individual and partisan interests.

5.2. LEGAL AND INSTITUTIONAL REFORMS

5.2.1. The Constitution.

The constitution, being the supreme law of the land, needs to be reviewed and amended so that it contains provisions that ensure or rather promote direct participation of minority and marginalized groups in the representative institutions of government.

Hence, the following recommendations are being advanced in this dissertation:

The constitution should expressly guarantee rights of women, the youth and the disabled out rightly. The Mung'omba Constitutional Review Commission,⁹³ in its Draft Constitution⁹⁴ recognized that the youth form an integral part of society; therefore, they are entitled to enjoy certain rights and freedoms, which include, among others, the right to participate in governance.⁹⁵ The same right should be guaranteed for the disabled. Furthermore, the constitution should expressly state that women and men have the right to equal treatment, including the right to equal opportunities in cultural, political, economic and social activities⁹⁶ so as to reduce the stigma bestowed upon women and thereby elevating them to participate in governance.

Furthermore, it has been established that under the current Zambian electoral system, which is the FPTP system, it is quite difficult for the minority and marginalized groups of any society to secure adequate representation in the elective representative institutions of government due to the fact that political parties are not willing to risk nominating people from the marginalized groups like women as they are bound to lose elections. Therefore, there is need to change the electoral system to one which is more favorable to all groups of society. Article 105 of the Mung'omba draft Constitution stipulates that, the electoral system shall ensure that the representation of each gender is

⁹³ . Appointed by President L.P. Mwanawasa in April 2003.

⁹⁴ . Published in June 2005.

⁹⁵ . Article 43 of the Mung'omba Draft Constitution.

⁹⁶ . Article 40 of the Mung'omba Draft Constitution.

not less than thirty per cent of the total number of seats in the National Assembly, local authority or other elective body; and shall ensure equitable representation of persons with disabilities and the youth. Both the Mung'omba Constitutional Review Commission⁹⁷ and the Electoral Reform Technical Committee⁹⁸ recommended that Zambia should adopt the MMP system because under this system representation of marginalized groups such as women, persons with disabilities, and youths will be assured. The MMP system should be employed in both parliamentary and local government elections.

Furthermore, selection of nominated members of parliament must be seen to include a wider range of interest groups, which should include women, youths and people with disabilities. In addition, it should be stipulated in the constitution that the president be bound to nominate in the manner described above.⁹⁹

5.2.2. Other Legislation

The Electoral Act and the Local Government Elections Act, being pieces of legislation which govern elections at parliamentary and local government level respectively, should also be amended in view of the changes which might come with the change of the electoral system. Since the MMP system has been recommended there will be need to provide for guidelines to political parties on how to formulate the party list with regard to elections to be conducted under the PR system. Political parties need to put into consideration representation of the marginalized groups and in order to ensure that this is achieved rules of formulating the party lists may be included in the legislation stated above.

⁹⁷ . in its final report published in June 2005.

⁹⁸ . in its final report published in August 2005.

⁹⁹ . This was also recommended by the Mung'omba CRC in their final report.

5.2.3. The Legislature

Due to the fact that it has been proposed in this dissertation that the electoral system be changed from the current FPTP system to the MMP system it means that the composition of the National Assembly needs to be changed as well. This will of course enable the fusing in of seats from the PR system. The ERTC in its final report¹⁰⁰ recommended that if the MMP system were to be employed the current number of parliamentary seats needs to be increased so as to include seats from the PR system. It was proposed that the current 150 seats be maintained under the FPTP with an increase in the number of nominated members of parliament, from eight (8) to ten (10). Furthermore, it was proposed that forty (40) seats from the PR system be included of which 35 should be women, disabled persons and youths should be three (3) and two (2) respectively.¹⁰¹

5.2.4. Local Government

It has been recommended in this dissertation that the MMP system be adopted in the local government elections as well. Hence the composition of district councils needs to be revised so as to include seats from the elections held under the PR system. The ERTC recommended that an additional eight (8) seats be shared on the basis of proportional Representation. It is further recommended that apportionment of these seats should be done in such a way as to include women, persons with disabilities and the youth.

¹⁰⁰ . Published in August 2005.

¹⁰¹ . This was a recommendation from the Government of the Republic of Zambia to the ERTC.

BIBLIOGRAPHY

BOOKS:

Argawal, R.C. (2003) **Political Theory**. New Delhi: S. Chand & Co Ltd.

Chiluba, F.T.J. (1995) **The Challenges of Change**. Lusaka: Multimedia.

Jackson, R.J. and Jackson, D. (1990) **Politics in Canada**. 2ed. Scarborough, Ontario: Prentice-Hall Ltd.

Mahajan, V.D. (2001) **Principles of Political Science**. New Delhi: S. Chand & Co Ltd.

Melnik, S. (1994) **Electoral Monitoring and Electoral Systems: A Brief Guide**. Brussels: Fredrick Nauman Shifting.

Phiri, J.B. (2006) **A Political History of Zambia: From the colonial period to the Third Republic, 1890-2001**. Asmara: Africa World Press Inc.

Taagepera, D. and Shugart, M. (1989) **Seats and votes: The effects and Determinants of Electoral Systems**. New Haven: Yale University Press.

REPORTS AND PAPERS:

Hamil, J.S. *Electoral Reform: Fact or Fiction? New Zealand and Italy's Experience with new electoral system*. A paper presented at a workshop on Linking Institutions April 17th -18th (2006).

Maltosa, K. *Electoral Systems, Stability and Democratic Governance in Southern Africa. A case study of Lesotho*, Southern Africa Human Rights Review 4 (1999).

O' Neal, B. *Electoral Systems*. A paper presented at a workshop organized by the Electoral Reform Society (an NGO based in UK which promotes electoral reform) (1993).

The final report of the Electoral Reform Technical Committee, Published in August 2005.

The final report of the Mung'omba Constitutional Review Commission, Published in June 2005.

The National Gender Policy of the government of the Republic of Zambia. (2000).

The National Youth Policy of the government of the Republic of Zambia. (2005).

The Foundation for democratic Process (FODEP) *Zambia's 2006 Elections*. A report by the National Secretariat. (2002).

DISSERTATIONS AND THESES:

Banda, J. *Corruption in the Electoral Process and its effect on Democracy: The challenges of Enforcement of Electoral Laws*. A dissertation in partial fulfillment of LL.B Degree (UNZA). (2004).

Katotobwe, A.B.C. *The impact of plurality voting System on Zambian politics*. A thesis in fulfillment of a Masters Degree (UNZA) (1996).

Konsolo, R.K. *Elections and the prohibition of corruption and corrupt practices: Constitutional Framework*. A dissertation in partial fulfillment of LL.B Degree (UNZA) (2004).

DOMESTIC LEGISLATION:

Constitution of Zambia, Chapter 1 of the Laws of Zambia.

Electoral Act, 2006.

Electoral Commission Act, 1996.

Electoral (Code of Conduct) Regulations 2006.

Local Government Elections Act: Chapter 282 of the Laws of Zambia.

WEBSITES:

www.times.co.zm. A website for the Times of Zambia Newspaper.

www.elections.org.zm. A website for the Electoral Commission of Zambia.

www.statehouse.gov.zm. A website for the office of the President of the Republic of Zambia.

www.afrol.com . A website for afrol news network.

www.electoral-reform.org.uk. A website for the Electoral Reform Society.

www.parl.gc.ca. A website for the parliament of the Canada.

www.eisa.org.za. A website for the Electoral Institute of Southern Africa.

Www.zamlil.ac.zm. A website for Zambia Institute of Legal Information.