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2004

**THE UNIVERSITY OF ZAMBIA
SCHOOL OF LAW**

**THE CHALLENGES OF CONSTITUTIONAL DEMOCRACY IN
ZAMBIA**

BY

**ANTHONY BWEMBYA
99324911**

UNZA


2004

DECLARATION

I, Anthony Bwembya, Computer Number 99324911 HEREBY declare that I am the author of this Directed Research Paper entitled "**The Challenges of Constitutional Democracy in Zambia**" and that it is a creation of my own ingenuity. Due acknowledgement has been given where other scholars' work has been used or cited.

I therefore remain accountable for the contents, errors and omissions. I truly believe this research has not previously been presented in the School for academic work.

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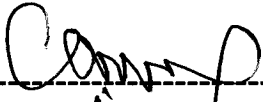
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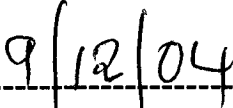
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Professor Carlson Anyangwe



Date

DEDICATION

Dedicated to:

My beloved wife Debra and my children Anthony and
Antoinette.

I will always love you!

ACKNOWLEDGEMENTS

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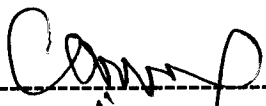
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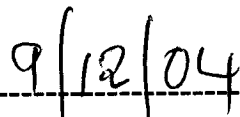
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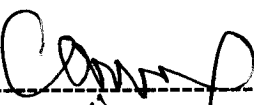
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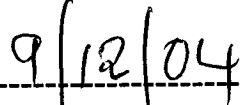
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GENERAL INTRODUCTION

When scholars speak of constitutional democracy they presuppose the existence of a constitution that espouses the basic principles of democracy. A constitutional democracy has been described as a system where the constitution establishes a framework of limited government manifested by among other things, the inclusion of the concept of separation of powers which are checked and balanced.¹ The concept is basically about a democratic system of government according to the terms of the constitution that is itself democratic in nature.

Zambia has a written constitution which declares that “Zambia is a unitary, indivisible, multi-party and democratic sovereign state.”² There is no doubt that the intention of the framers of the constitution of Zambia was to establish a constitutional democracy. Democracy as a system of government and a set of institutions must exhibit at least two essential characteristics, the first one is that it must be able to elicit as accurately as possible the opinion of as many people as possible on who shall be their representative and how the country is to be governed. This entails that there must exist a system of free and fair elections as well as independent institutions to ensure that the elections reflect the true choice of the people. Secondly, it must provide ways of ensuring that those chosen as leaders perform according to the expectations of the electorates. Thus there

¹ Carlson Anyangwe, “Parliamentary & Constitutional Democracy”, Zambia L.J. Vol. 13. P 95

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must be an effective system of checking the use of governmental power to ensure that it is used for the common good and that those in authority do not exceed the power conferred on them. The fulfillment of this requirement entails that the government should not place itself beyond the reach of ordinary citizens' supervision. Thus the constitution should establish a system of watchdog institutions to check and supervise on behalf of the people, the use of governmental power.

Thus the concept of constitutionalism comes into play as being very closely related to democracy. It means imposing limitations upon the powers of the government as well as establishing regulatory controls on the conduct of those in authority. It further means observing the rule of law. It is argued in this paper that the constitution of Zambia has not fully enshrined the principles of democracy. Even where the constitution seems to exhibit adherence to the basic tenets of democracy, the practical realities are that these safeguards are not as effective as they should be so as to guarantee true democracy.

2. RESEARCH PROBLEM

The concept of constitutional democracy has to many Zambians today become very confusing as to what it means. This problem is compounded by the fact that despite Zambia having changed her constitution four times since independence, the country is yet on another path of changing the constitution for the fifth time. As a result of this on going process there have been calls by many lawyers, other intellectuals and some politicians alike that the new constitution must enshrine principles that will reflect Zambia as a true constitutional democracy. A lot of

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people have been left to wonder as to what it is that the current constitution lacks which prompted the need for constitutional reform in the first place and the current calls for the constitution to reflect principles of democracy in the real sense. The real problem is that there is widespread misunderstanding even among intellectuals as to the true meaning of the concept 'constitutional democracy' which Zambia claims to be.

3. **RATIONALE**

The general aim of this research therefore was to highlight the true meaning that scholars have attributed to the concept 'constitutional democracy'. Once an exposition of the characteristics of a constitutional democracy has been made, these attributes would then be used as a yardstick against which to appraise the constitution of Zambia and the governance system generally and thereafter make some suggestions to this end.

This study is largely descriptive and analytical in nature.

4. **OBJECTIVES**

The objectives of the study are;

- (a) To demonstrate that the constitution of Zambia does not sufficiently embrace the basic principles of democracy

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- (a) To demonstrate that the constitution of Zambia does not sufficiently embrace the basic principles of democracy

- (b) To highlight the fact that although the constitution manifests an attempt in some cases at embracing some principles of democracy, the practical reality is that these efforts are highly diluted one way or the other.
- (c) To make recommendations as to how the constitution of Zambia can meet the challenges of creating a true constitutional democracy in Zambia.

(5) RESEARCH METHODOLOGY

This research consisted mainly of selecting and analyzing texts by various scholars who have written on the subject of democracy and related concepts. Other sources include opinion statements in the press as well as Internet publications. Some data was be collected by way of interviews.

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The following constitutes the main source of information on the underlying theoretical framework as well as defining various concepts, as different scholars have understood them;

(I) Anyangwe C, 'Parliamentary Democracy and Constitutional Democracy', 31 **Zambia L.J. (1999)**

The author in this article compares 'parliamentary democracy' to 'constitutional democracy' as well as the relationship between parliament and the judiciary in the two systems. The article explains that in a constitutional democracy, the written constitution enshrines the principles of democracy and that it establishes, defines and confines the various organs of the state. The author explains that the very term 'constitutional' implies limitation. This part is particularly important for this study as it highlights the true meaning of the term constitutional democracy. The author further discusses the concept of constitutionalism as the idea of a written statement of binding principles and rules aimed at securing limited political power. As a tool of securing the goal of limited political power through constitutionalism, the article analyses the idea of constitutional supremacy and how it has given birth to the idea of judicial review of parliamentary legislation.

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This analysis has been particularly useful in appraising Zambia's attempt at securing the goal of limited political power as a constitutional democracy.

(ii) Nwabueze. B.O, Constitutionalism in the emergent states.

London: Associated Press, 1973.

In this book, the author considers the experience of a number of newly independent African states during the period 1960 to 1973. He examines the facts of political life as well as constitutional forms which these nations have assumed. In making this analysis, the author explains the meaning and nature of the concept of constitutionalism. He highlights how the idea of supremacy of the constitution should play a role in limiting governmental power. The book further demonstrates the nature and content of the restraints on government that are considered necessary in a democratic society. Some of the restraints alluded to include the guarantee of civil liberties enforceable by an independent tribunal, the necessity of elections at regular intervals including accountability and answerability of the rulers to the governed. Other concepts the theoretical framework of which the book lucidly provides include separation of governmental power, legitimacy of the constitution, supremacy of the constitution and the rule of law. The meaning attributed to each of these concepts by the author of this book presents itself as a basis against which constitutional democracy in Zambia has been evaluated in the present study.

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This book provides a thorough analysis of the formal structure of presidential rule in Commonwealth Africa. The author analyses the relationship of the executive to the legislature on one hand and the executive to the judiciary on the other. He demonstrates that in African states, every kind of separation or division of power is in reality rejected. The legislature is de facto subordinated to the executive notwithstanding constitutional provisions, which may prescribe otherwise. Similarly, the judiciary is equally subordinated as regards appointments and sometimes even regarding dismissals.

Generally, the main thrust of the book is the centralism in the organization of state power and politics in Africa. It is contended by the author that politics in developing countries have tended increasingly to be preoccupied with how to win and retain power thus overriding the need for a due sense of balance and restraint.

The author points out that the need for constitutional development in the emergent states is thus a quest for constitutionalism – a quest for appropriate restraints upon the powers of governments in the interest of the protection of individual liberty. The book highlights a number of suggestions to this end some of which this study has adopted with modifications where necessary. These and other suggestions have been made as being necessary for Zambia's quest to attain full constitutional democracy.

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(iv) Ndulo. M “The democratic state in Africa: The challenges for institutional building”, 31 Zambia L.J. (1999)

The author of this article explains how institutions of promoting good governance can accelerate Africa’s quest for economic development. He contends that Africa being a continent richly endowed with natural resources only required to resolve her governance issues in order to become one of the fastest growing economies in the World. The article asserts that good governance would result in governments that are more likely to adopt economic policies that would resolve the constraints that hinder sustained economic development.

In suggesting ways in which African constitutions can contribute to the creation of a viable political order, the author points out that African constitutions must address the issue of temptations of arrogance, discrimination, abuse of power and corruption assailing persons in office. The constitutions must address the influence of money in the electoral process especially in economies where large percentage of voters is unemployed. He further points out that there is need to build a vibrant and free press including a viable civil society. The author then goes further to enumerate some key features of what a true democracy must have. All in all, the article provided important insights as to some of the issues that the present study needed to focus on not only in evaluating the extent to which Zambia has embraced the principles of constitutional democracy but also in making suggestions for improvement.

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The author examines whether and to what extent democracy had been consolidated in Zambia after the re-introduction of plural politics in 1991. Written in 1996, this article presents useful insights as to the state of democracy in Zambia five years after the 1991 revolution. A great deal of the facts pointed out in this article still remains visible in Zambia today.

The author argues that the new government had abandoned its original commitment to democracy and human rights. He contends that the major pointers to this were: the lack of institutional and legal reforms of the political system; a lack of respect for the rule of law and civil liberties; erosion of judicial independence; lack of accountability and transparency; lack of consensus over the constitution; lack of compromise, co-operation and meaningful dialogue among political parties; failure to agree on the voter's register and electoral procedures; lack of internal democracy in the ruling party and government's monopoly over the mass media amongst other things. The author has in each case cited examples to justify his assertion. Some of the pointers mentioned above constitute part of the features used in evaluating the extent to which constitutional democracy is entrenched in Zambia today and making suggestions for improvement.

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5. **ORGANISATION OF CHAPTERS**

This essay comprises five (5) chapters.

CHAPTER ONE

FUNDAMENTAL PRINCIPLES OF DEMOCRACY

This is devoted to discussing the concept of constitutional Democracy and Democracy in general. The basic principles of Democracy such as balancing of governmental power, protection of fundamental rights, rule of law and free and fair elections will be considered . Additionally, the closely related concept of constitutionalism has been discussed at great length. The overall objective of this chapter is to set standards against which Zambia's attempt at constitutional Democracy will be assessed in subsequent chapters.

CHAPTER TWO

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This chapter focuses on analyzing Zambia's experience in relation to constitutionalism. Thus, an appraisal of Zambia's governance system has been made on the basis of the effectiveness of the system of checks

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This essay comprises five (5) chapters.

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The objective of this chapter is to try and provide answers to questions such as the following:

- Has the legislature effectively played its role as a watchdog?
- Has the Judiciary being an independent and effective umpire in governance issues?
- To what extent are the concepts of Constitutional supremacy and Legitimacy applicable to the Zambian situation and how has this impacted on the status of the country as a Constitutional Democracy?

CHAPTER THREE

ELECTORAL SYSTEM AND INSTITUTIONS IN ZAMBIA

This chapter takes an in-depth look at the electoral process in Zambia vis-avis the institutional framework available to ensure free and fair elections. Examples have been drawn from the 2001 Presidential and General Elections. The objective is to reach a conclusion whether the electoral system in Zambia can guarantee the holding of free and fair elections. This is for the simple reason that in a constitutional democracy there must exist a system, which ensures that people freely choose their leaders and that those in leadership are popularly elected in the real

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PROTECTION OF HUMAN RIGHTS

This chapter is devoted to an assessment of the protection of fundamental Human Rights in Zambia. The chapter provides for a comparative analysis particularly with South Africa and recommendations of constitution Review commissions of Zambia. A critical analysis will be made in relation to the derogations allowed in the constitution of Zambia. Furthermore, attention has been drawn to the weaknesses and limitations of National Human Rights bodies. This analysis is key to the evaluation of the extent to which constitutional democracy thrives in Zambia. A constitution that allows for serious derogations which amount almost to the removal of guarantees in human rights cannot create a democratic environment.

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CHAPTER ONE

THE FUNDAMENTAL PRINCIPLES OF DEMOCRACY

INTRODUCTION

This chapter is a descriptive outline of what the generally accepted principles of democracy are. Since this study seeks to analyse the challenges of constitutional democracy in Zambia, it has been felt necessary that the first chapter be devoted to highlighting those principles which a constitution must espouse in order for it to pave way for a nation to be considered a 'constitutional democracy'. The principles outlined in this chapter create a basis upon which I have appraised Zambia's situation in the subsequent chapters as regards her quest in being a constitutional democracy. The first part of the discussion focuses on a brief definition of democracy. This is then followed by a detailed discussion of the related concept of constitutionalism. The chapter specifically addresses the following:

- existence of a written constitution and its implications
- judicial independence and impartiality
- constitutional legitimacy
- Rule of Law
- Election in a democracy
- Opposition in a democracy
- Devolution of power

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1. **WHAT IS DEMOCRACY?**

Although, the question “what is democracy” ‘is a difficult one, the definition with the greatest universality of acceptance is that of Abraham Lincoln who defined it as a government of the people, by the people and for the people.¹

This means that the underlying concept of democracy is the popular basis of government. In other words, a government that rests upon the consent of the governed, given by means of elections in which the franchise is universal for both men and women and one that exists for their benefit. The achievement of this status requires that certain principles are observed and some mechanisms put in place as a safeguard. We will now examine these principles in detail.

2. **CONSTITUTIONALISM AND DEMOCRACY**

Constitutionalism as a doctrine, places restraints on the exercise of power which would otherwise be arbitrary. This restraint is achieved by means of a constitution which is itself democratic in nature. The concept of constitutionalism strikes a balance between the necessity to have a government and the inevitable need to limit the arbitrariness inherent in the exercise of governmental power. This balance is absolutely essential for if government’s rights are unduly stressed, the rights of individuals are often under threat; and when individual rights are overemphasised, government becomes too weak to keep national order. Constitutionalism is paramount to the establishment of a constitutional democracy. This is because a

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constitutional democracy cannot thrive where governmental power is unrestrained. Of military governments, Nwabueze notes:

“.....a military government is certainly not a constitutional democracy. It enjoys absolute power, unlimited and unrestrained by a supreme constitution, by constitutionally laid down procedure for the exercise of power... by a constitutional guarantee of fundamental rights or by separation of legislative and executive powers. Nor is it a product of the constituent power of the people”.²

Thus, we can discern from Professor Nwabueze’s analysis that democracy expresses the idea that arbitrary power should be curtailed. It prefers a government of law and not of men, one conducted according to pre-determined rules and not according to the momentary whims and caprices of the governors. This is the essence of constitutionalism. The critical elements of this principle have been widely accepted as a necessity in democratic society. These elements are discussed in the sections that follow.

2.1 EXISTENCE OF A WRITTEN CONSTITUTION

The very idea of a written constitution is in itself a tool for restraining the exercise of governmental power. This is so because it is by the Constitution that a society organises a government for itself, and defines and limits its powers, and regulates the relations of the various organs of government with each other and with the citizens. Professor Anyangwe conceives of Constitutionalism as the idea of a written statement of binding principles and rules aimed at securing limited political power.³

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It should be added however, that the mere existence of a formal written Constitution is not conclusive evidence of constitutionalism. To achieve constitutionalism, the constitution must impose sufficient limitations upon the powers of government. One commonly accepted method by which the constitution has to perform its function of limiting the exercise of power is by providing for system of separation of powers. The doctrine of separation of powers entails that three types of governmental functions (i.e. the executive, judicial and legislative) should be kept separate to avoid oppressive government.⁴ This means that a constitution which seeks to embrace democracy must be one under which only the legislature makes rules, only judges adjudicate (on the basis of rules) and only the executive formulates and executes policy. Furthermore, each of these arms of government should be made up of entirely separate personnel – no individual should be involved in more than one branch. While it is admitted that a too strict approach to the doctrine is impractical, insistence needs to be placed on the danger of absolute union of these functions in one person or body. All that underlies the doctrine is to ensure that there exists a system of "checks and balances" so that no one governmental organ marginalizes the effective operation of the others.

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The learned author T.M. Franck has said:

"One of the purposes a constitution serves is to provide a new nation with supreme law, or 'law above law'. This often is accomplished by

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making a constitution more difficult to amend than ordinary legislation".⁷

Thus supremacy of the constitution should be manifested not just by declaratory statements but also by the provisions that deal with amending the constitution. The supremacy of the constitution entails that the courts should hold void any exercise of power, which does not conform to its provisions, or is otherwise not according to constitutional precepts. Anyangwe put it thus; "Judicial review of parliamentary legislation is predicated on the notion of 'higher law' or, in more political terms, constitutionalism."⁸ It follows therefore that the constitution being higher law, should not be modifiable or replaceable by ordinary legislative means, it should only be modified or replaced through a mechanism that entails people's widespread participation. The supremacy of the constitution arises from the fact that it is a direct expression of the people's will. In a constitutional democracy, sovereignty lies in the people and so the constitution (the expression of their will) is an expression of that sovereignty.⁹

The limitation therefore lies in the fact that all decisions and actions of government organs and officials ought to comply with constitutional provisions.

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For a constitution to be one that facilitates constitutionalism, it must be able to command wide respect by the public. The people must feel a part of the

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“A constitution....must be an emanation of the popular will and choice. Its substantive contents, particularly the system of government and the relations of its organs with the individual, must be agreed by the people. The aim is to generate public interest in the constitution and an acceptance of it as the common property of all, an attitude that everybody has a stake in it. A sense of identification, of acceptance and attachment is necessary to bestow some legitimacy on the constitution, and to ensure it's longevity”.¹⁰

It should be noted that closely related to the constitutional legitimacy is its authority. A constitution that is imposed on the people by a party that is in government can only command the respect, loyalty and support that the party commands, no more. If the regime is despised, so will the constitution; when there is a change of government, changes to the constitution become inevitable. As Ndulo and Kent suggest, for the sake of legitimacy, no constitutional changes should be effected without widespread participation of the people. A constitution is not, and should never be used as a political tool for manipulation in the hands of those in power. It should not be utilised to serve short-range political interests of those in power.¹¹ It follows therefore that constitutional legitimacy requires that any processes that have to do with constitutional reforms, enactment and related issues must be people driven.

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A.V. Dicey's analysis of the principles which he considered to constitute the proper standards of behaviour in a democratic society in order to ensure the rule of law still provides a useful criterion by which to judge a democratic form of government. His firm requirement was the absence of arbitrariness. The executive ought not to be free to interfere with the law, to apply it differently to different individuals, or to decide at its discretion to apply it at times and not at others. Not only must the exercise of executive power be authorised by law, it must also keep strictly within the scope of that authority.¹² This means that, when there is a law upon a particular matter, the executive, just like any private person, cannot defy it or refuse to be bound by it.

The second principle is that of equality before the law. This essentially means that the law must be applied equally to all the people irrespective of their status in society. The government and its officers ought to enjoy no special dispensation or immunity from the ordinary laws of the land.

The third and last principle is that of recognition of personal rights. This recognition of personal rights must lie not merely in the declarations that they exist, such as those frequently made in constitutions, but in the extent to which the actual legal machinery ensures that they are respected and that they are enforceable. It follows therefore that suitable institutions must be created to deal with grievances and supply redress where possible. Democracy requires that efforts are made to enhance the enforceability of

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human rights by for example loosening the grip of the rules of locus standi which inter alia, restrict the significance of justiciable rights, so that civil organisations are allowed to plead cases for the poor whose rights may have been violated, notwithstanding the absence of locus standi. It is gratifying to note that from the early 1990s, the task that has faced reformers in Africa, has been the push for a new social contract, one that establishes a new political society, which can contain state power by focusing on civil and political rights. This has given rise to a new opposing force – the civil society.¹³ The growth of a vibrant civil society should be encouraged if democracy is to thrive in any society. The role that an unsuppressed civil society plays in championing civil and political rights cannot be overemphasised.

2.6 ELECTION IN A DEMOCRACY

The election process being the method by which the electorate is given their right to choose which representative will represent their interests for the purpose of transmitting them into governmental programmes is an important aspect of democracy. The system should be one that ensures equality between voters and equal freedom for would-be candidates to present themselves to the electors. Free and fair elections are an indispensable element of democracy. It is by them that accountability is ensured, and an institutional framework for peaceful resolution of political conflicts is provided. They must therefore, be organised in a manner that ensures the maximisation of the participation of all stakeholders in the political system.¹⁴ In a

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democratic society, the fairness of elections will always be judged by the extent to which the process creates conditions which are as nearly equal for all contestants as is reasonably possible. It has been suggested that four conditions must be met to ensure their.¹⁵

The first is that no sane and law abiding citizen should be debarred from being a candidate, if there is any reasonable chance of his obtaining significant support. The criteria adopted is usually to require prospective candidates to furnish some evidence of public support in the form of a prescribed number of signatures supporting their nomination as well as some evidence of their seriousness of purpose in the form of the deposit of a sum of money.

The second condition is that the ballot must be secret so that no pressures can be exerted to induce an elector to vote for, or abstain from voting for a particular candidate. The third condition is that there must be equality of basic electoral facilities including such things as basic relevant information regarding times, and places of voting.

The forth condition which is the most difficult to fulfil is that there must be equality of campaigning conditions. In some systems, the criteria used include, the limitation on candidates' expenditure on an election campaign, the existence of effective legal provisions making bribery and corruption both very difficult and punishable in the courts, and the provision of equal facilities

¹⁵ Supra note 5, pp. 123 – 125.

democratic society, the fairness of elections will always be judged by the extent to which the process creates conditions which are as nearly equal for all contestants as is reasonably possible. It has been suggested that four conditions must be met to ensure their.¹⁵

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for parties to appeal to the general public through the mass media of radio and television.¹⁶ In Germany for example, political parties are subsidised but candidates' expenditure is strictly controlled.¹⁷

Other ancillary matters that would enhance the contribution of the election system to the overall democratic process include the criteria of choosing a winner at different levels of positions as well as the answerability of the winner to the electors. It is submitted that the criteria used to determine who is winner should be different at different levels of responsibility. For instance, at the level of choosing a representative to the legislature, a simple majority win would suffice to decide the winner. On the other hand, the criteria for choosing a head of state should be slightly more elaborate than a simple majority. This should be so in order that the winner should be one who would command legitimacy for the simple reason that he/she was supported by the majority of eligible voters. This suggestion arises from the fact that the head of state wields power over a diverse and wider society and it is therefore only prudent society and it is therefore only prudent that such a person must be the choice of the majority of the people. It is submitted that this objective can hardly be achieved where a presidential winner can be declared so on a simple majority basis.

In terms of answerability of the elected to the electors, in a democracy, the election system should provide for the possibility of a representative to be recalled by his constituents if they are dissatisfied with his performance. It is

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only through such an arrangement that representatives would be truly answerable to the electors.

2.7 THE OPPOSITION

The existence of political opposition is one of the most significant yardsticks of appraising democracy. An election cannot be a choice in any real sense of the term unless two positive possibilities are available to the electors. Democracy requires that opposition parties should generally be accepted as an integral part of the political system. "There should be sufficient toleration of rival groups, with different attitudes, to allow one to foresee – if not with equanimity, at least without fundamental despair – their coming to power or otherwise influencing the governmental process".¹⁸

The basis of the opposition should, ideally, be a permanent party organisation, whose aim is to achieve power and whose principles and policies can be presented to the electorate as future government policies. The opposition's contribution to the democratic process is simply that it provides the electorate with an alternative and also encourages those in power to work hard and meet the expectations of the people.

It is therefore inevitable that the spirit of pluralism must be promoted especially through constitutional provisions which ensure that the opposition is protected from possible manipulation or even suppression by those in power. By manipulation in this case is meant any actions which have the resultant

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effect of weakening the opposition. Any society with a weak and ineffective opposition cannot claim to be a true democracy.

The other forms of opposition that need to be encouraged in a democracy is a free press. The emergence of a free press is an essential part of the democratisation process. This is so because the press provides free flow of information necessary for the proper functioning of a democracy. A democratic society should consist of people who are well informed about issues affecting them. It is only with accurate information disseminated by an independent and free press that people can make correct choices.

A free press is existent where the legal framework as well as practice allows for "freedom to disseminate any information and ideas through the press without unjustified government restriction".¹⁹ The achievement of free press requires the encouragement of press pluralism. This pluralism could consist of a mix of both public and private media. In this way the public's need for full and detailed information will be better served if they can read a range of publications with the different perspectives and orientations. This calls for some antimonopoly laws relating to the press to prevent all or most of the major private newspapers from being taken over by some large press baron for if this happened, there would no longer be the desired diversity of view points. While it is agreed that some reasonable restrictions may by law be imposed as to what the press may publish, it is important that there must be constitutional guarantees to safeguard a free press. In fact, even the grounds

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upon which this freedom may be curtailed should be set by the supreme law. This is the only way in which an assurance can be given that these freedoms cannot easily be tempered with.

2.8 **DEVOLUTION OF POWER**

A key consideration in an attempt to create a constitutional democracy is whether government should take the form of a centralised authority or that power should evolve to the regions or provinces so that they can manage their own affairs. Constitutionalism as a key concept to democracy which requires limiting governmental power would definitely flourish in a situation where power is not concentrated in a few individuals. The unitary form of government as opposed to the federal system arises from the colonial legacy which created regimes of subjugation, resting upon superior force for the maintenance and enforcement of its authority. Arthur Lewis has stated that, “a society which has very wide geographical differences can live together at peace only in a federal framework. Such a society needs to give its provinces the opportunity to look after their own affairs, if they are to feel content with the political union”.²⁰

Similarly, Nwabueze commenting on post independence African states, says that, “a federal arrangement would unquestionably operate to limit presidential power, and that is why federation has proved an effective cornerstone of American constitutionalism”.²¹ Federalism involves a division of power that is both functional and territorial. Instead of one national government exercising

²⁰ Arthur Lewis, ‘Politics in West Africa’, Greenwood Publishing Group, (1965) p.55.

²¹ B.O. Nwabueze, ‘Presidentialism in Commonwealth Africa’, St. Martin’s Press, New York (1974), p.140.

the entirety of governmental functions and powers over the whole territory and its inhabitants, into two or more territorial the country is divided units co-existing with the national government, with which they share functions and powers of government in a manner that allows to each an exclusive jurisdiction over certain fields of governmental activity wide and significant enough to give it a meaningful independent existence. A regional government owes its powers, not to the national government, but to the constitution, and exercises it over persons and property within its territory. The national government also operates directly on persons and property within all regions, but, unlike in a unitary state, its operation is limited to the extent of its constitutional powers and functions.²² The essence of federalism in the quest for democracy can thus be stated as being two fold. Firstly, it creates the much needed limitation in the exercise of governmental power by merely granting certain powers and functions exclusively to the regional governments. Secondly, federalism ensures that the powers lodged at the centre be exercised with the willing co-operation of the component regions. This at once operates as a limitation on the manner in which that government is conducted. Such a system no doubt fosters the spirit of the people identifying with government actions and programmes as their own.

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CONCLUSION

From the foregoing, we have noted that the essence of democracy is the creation of mechanisms through which the people will readily identify government as their own creation and existing to serve their interests. A government that can be rightly described as one that is of the people, for the people and by the people is one whose powers are limited and can only act according to the powers conferred by the people through the supreme law. Thus constitutionalism is indispensable in any democratic society. The concept needs to be manifested through the existence of a written constitution which in number of aspects must limit governmental power. The constitution itself in order to command respect must be legitimate i.e. people must identify it as their own and not an imposition. Other key features include free and fair elections, an independent and impartial judiciary, an effective and unsuppressed opposition, free press and a vibrant civil society. Equally important is the concept of devolution of power whereby, power should not be centralised and exercisable by a few individuals. But that is should be transferred and shared both in terms of function and location. Thus federalism becomes a preferable system in fostering democracy. All these activities must be carried out within the precincts of the law, thus the rule of law becomes corner stone of democratic governance.

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CONSTITUTIONALISM IN ZAMBIA

INTRODUCTION

The first chapter focused primarily on outlining the basic principles of democracy and establishing the meaning and key components of a constitutional democracy. One key element identified as being necessary for the establishment of a constitutional democracy was constitutionalism. In this chapter, we will examine Zambia's experience in relation to constitutionalism. The discussion will be devoted to appraising the effectiveness of the system of checks and balances (separation of powers) as a tool of limiting governmental power. Additionally, the Constitution of Zambia will be examined in relation to the concepts of constitutional legitimacy and supremacy. Finally, Zambia's situation is analysed in terms of the extent to which devolution of power is observed. It should be acknowledged that the existence of appropriate frameworks and institutions for the promotion and protection of fundamental human rights as well as the management of free and fair elections constitute part of the mechanisms for ensuring constitutionalism. However, these issues will be deferred to subsequent chapters where they will be dealt with exclusively.

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means of a legislature acting as a watchdog and a judiciary acting as an independent and impartial umpire. For the system of checks and balances to be effective, no arm of the government should marginalise the effective operation of the other(s). When analysing the effectiveness of the system of checks and balances, it is imperative that the operations of the legislature and the judiciary are scrutinised.

(a) **THE LEGISLATURE**

The legislature being the organ of government vested with power to enact laws has to carry out this function without interference or influence from any other organ of government if the concept of separation of powers is to be attained.

Although it is not intended that this discussion should delve so much into history, suffice it to say that the legislature in Zambia has since independence been victim of manipulation by the executive branch of government. One can validly assert that it is not possible within the history of Zambia to point at any generation of legislators that can be said to have provided checks and balances against the executive branch in a manner free from the patronage of the latter. A brief examination of some manoeuvres by the three Presidents Zambia has had so far had will confirm this assertion.

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referendum was intended to obtain public approval that the provisions of parts III and IV including sections 71, 72 and 73 of the 1964 constitution which required that these sections could be amended by parliament only after obtaining approval of the majority of the electorate through a referendum be abolished so that parliament could now easily amend these sections like any other part of an ordinary statute.

One of the fundamental rights which was protected in the above mentioned provisions was the freedom of assembly and association by which right people were free to join or belong to a political party of their own choice. Having obtained public approval to abolish the referendum requirement when amending sections that protected fundamental rights and freedoms, the executive branch of government then began to move swiftly in manipulating the legislature to entrench themselves in positions of power. The hidden motive of the 1969 referendum was not to strengthen the institution of parliament as advocated by the ruling party (UNIP) but to manipulate it and use it to fulfil the political programmes of the party in government and the perpetuation of its stay in power. Thus, three years down the line, using the arrogance of numbers, UNIP members of parliament passed a bill to introduce a one party state. The bill was assented to and published as Act No. 29 of 1972. From that date, the Zambian parliament without any opposition member of parliament became a rubber stamp to be used by the executive to endorse and legalise all the decisions of the party and its government.

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One of the most prominent events of manipulating the legislature by the executive in the third Republic relates to the 1996 constitutional amendments. Prior to the 1996 elections, the ruling party, MMD, decided to use the legislature to prevent former President Dr K D Kaunda, from contesting for the post of Republican President by passing a discriminatory citizenship clause in the constitution. Professor Bizeck Phiri in a report submitted to the Commonwealth Parliamentary Association cites the above incident as one of the major contributing factors to many Zambians' loss of confidence in the integrity of their members of parliament and the institution itself.¹ It can only be correct for one to assert that an institution which is so prone to manipulation cannot be said to be an effective watchdog at the same time. This ineffectiveness posed a great challenge to the establishment of constitutional democracy. It is unfortunate that this challenge has carried on up today as we shall soon see.

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After the 2001 elections, most people breathed a sigh of relief on seeing the distribution of the seats in parliament. The ruling MMD only managed to scoop a paltry 69 seats out of 150 seats. The rest were shared among six opposition parties as follows; UPND (49) , UNIP (13, FDD (12), HP (4), RP (1), PF (1) and one (1) independent member.² The comfort arose from the conviction that with such a combination whereby opposition members of parliament were in majority, it would not be possible for the executive to manipulate the legislature anymore. It was generally felt that parliament would now assume it's role and provide the much needed checks and balances against the executive. Unfortunately, this comfort was to be short lived as the executive through the President began to take moves aimed at weakening the dissenting voice in the house. The President without even consulting opposition leaders began appointing opposition members of parliament to lucrative ministerial positions. Despite the outcry from the opposition leaders including the civil society that the President was destroying the spirit of multi-partism by appointing opposition members to government positions, he carried on the scheme with great impunity. The result has been that the effectiveness of the opposition in parliament has been eroded. A number of vibrant opposition members of parliament have either crossed the floor and joined the ruling party which has been more than willing to re-adopt them as candidates or they have accepted ministerial positions without necessarily relinquishing their party membership. Whichever way one looks at it, the result is the weakening of the opposition. A person once appointed

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The development is so sad that some opposition parties which had representation in parliament have none to talk about today. For example, the Heritage Party which had four (4) members of parliament immediately after the elections is only left with two members as the other two have crossed the floor. What is worse is that even the remaining two(2) have both being offered ministerial positions. Additionally, the ZRP has only one member of parliament who is now a Cabinet minister. Other parties such as UNIP and UPND have had their share of members being appointed to ministerial positions.

It is my strong contention that such manipulation by the executive is an indication of the lack of political will to foster the development of constitutional democracy in Zambia. Constitutional democracy requires the existence of a legislature that is an effective watchdog over the executive branch. For as long as our constitution retains loopholes which shrewd politicians can take advantage of to weaken and undermine other institutions, democracy shall forever remain a pipedream. The challenge for Zambians lies in first of all developing an attitude change and be able to stand up and refuse that institutions which are meant to protect and promote their rights must not be manipulated so as to become subservient to those in positions of power.

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Secondly, the challenge is for Zambians to enact a constitution which seals all such loopholes as may be manipulated easily. It is very unfortunate that an individual elected on an opposition platform can at the slightest dangling of a carrot in their face betray the people who elected them. In a constitutional democracy, the constitution must seal all loopholes which may present an opportunity for such unprincipled acts of betrayal of the electorate not just by their representatives but also by the executive. The key provision in the constitution that needs to be addressed is article 46(2) which provides that;

“appointment to the office of minister shall be made from amongst members of the National Assembly”.³

This constitutional provision has rendered many members of parliament ineffective as their loyalty shifts from the people who elected them to the one who appoints them as ministers. Instead of being the voice of the people in parliament, they become the voice of the president. The end result is that there is a serious compromise on the principle of separation of powers. The legislature being a body comprising men and women the majority of whom are looking up to the President for favours becomes a toothless watchdog. With this breakdown in the system of checks and balances, constitutional democracy simply becomes unattainable. One strongly agrees with the contention that we need a structure that will deter opposition MPs from crossing over to the ruling party, with the hope of getting a job, and consequently causing unnecessary by-elections.⁴ It must however be added that in order for the legislature to assume its rightful role, the focus on

³ 1996 Constitution of Zambia.

⁴ The Post, Issue No. 2856. Wednesday August 18, 2004. p.11.

Secondly, the challenge is for Zambians to enact a constitution which seals all such loopholes as may be manipulated easily. It is very unfortunate that an individual elected on an opposition platform can at the slightest dangling of a carrot in their face betray the people who elected them. In a constitutional democracy, the constitution must seal all loopholes which may present an opportunity for such unprincipled acts of betrayal of the electorate not just by their representatives but also by the executive. The key provision in the constitution that needs to be addressed is article 46(2) which provides that;

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This constitutional provision has rendered many members of parliament ineffective as their loyalty shifts from the people who elected them to the one who appoints them as ministers. Instead of being the voice of the people in parliament, they become the voice of the president. The end result is that there is a serious compromise on the principle of separation of powers. The legislature being a body comprising men and women the majority of whom are looking up to the President for favours becomes a toothless watchdog. With this breakdown in the system of checks and balances, constitutional democracy simply becomes unattainable. One strongly agrees with the contention that we need a structure that will deter opposition MPs from crossing over to the ruling party, with the hope of getting a job, and consequently causing unnecessary by-elections.⁴ It must however be added that in order for the legislature to assume its rightful role, the focus on

³ 1996 Constitution of Zambia.

⁴ The Post, Issue No. 2856. Wednesday August 18, 2004. p.11.

constitutional changes should not just be on oppositions members of parliament but everybody including those from the ruling party. Members of parliament as representatives of the people in their constituencies should remain so throughout the life span of a particular parliament. It is therefore submitted that article 46(2) should be amended so that appointment of ministers should be done from outside the National Assembly. An elected representative of the people must not change that status to become a mouthpiece of the executive branch.

(b) **THE JUDICIARY**

An independent and impartial judiciary is one of the pillars of any democratic society. The constitution of Zambia in article 91 provides for an independent, impartial and autonomous judiciary. This constitutional provision has however not been fully realised in practice. The compromise on judicial autonomy is quite evident in relation to the determination of judges' conditions of service, including emoluments and pensions. The piece of legislation which deals with these matters vests power in the Republican President to prescribe judges' emoluments through a statutory instrument.⁵ What this provision entails is that judges have to rely on the good sense of the President for better emoluments. One may argue strongly that this provision is anathema to the existence of an impartial and autonomous judiciary. For what can prevent a shrewd President from using this power to influence the course of justice when such matters as the Presidential election petition are before the courts? Such a provision only promotes the patronage position of the executive over

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the judiciary. The ideal position should be for the judicial service commission to determine emoluments for judges and not the President.

The seventh United National Congress on the prevention of crime and treatment of offenders came up with a set of basic principles formulated to assist member states in their task of securing and promoting the independence of the judiciary.⁶ Amongst these was the principle that;

“The judiciary shall decide matters before it impartially, on the basis and facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interference, direct or indirect, from any quarter, or for any reason”.

In Zambia, a departure from this basic principle is not uncommon. A good example relates to the cases of plunder of national resources which are before the courts. The President has been widely quoted making comments about the cases. In many instances these comments point to the fact that the accused persons are guilty of the offences they are arraigned for. Recently, defence lawyers for former President Fredrick Chiluba one of the people facing charges, were compelled to make an application to court to cite the President for contempt. Though the application was unsuccessful on the basis that the President enjoys constitutional immunity against criminal charges of that nature, the trial magistrate nevertheless acknowledged that repeated comments by the executive on matters before court could erode the purpose of justice. He further stated that the fact that the President was protected by article 43 of the Constitution should not be used to make a mockery of the judicial system and continue commenting on matters in court.⁷

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The incident cited above is just one of the many that point to the fact that the judiciary in Zambia in reality occupies a subservient position to the executive and as such may not operate free from the interference of the latter. The continued contemptuous behaviour by members of the executive goes to show the view they hold that they are above all organs of government. Real judicial independence may only be attained if the legislature is also free from the patronage of the executive. An effective legislature capable of invoking its impeachment powers will be the only true restraint on the executive particularly the President from engaging in blatant breach of the law so as to undermine the functioning of other organs of government. Thus, it is submitted that the independence of the judiciary is to a very large extent dependant upon how effective the legislature is in playing it's role as a watchdog.

(ii) **CONSTITUTIONAL SUPREMACY**

As we noted earlier, the supremacy of the constitution arises from the fact that the constitution is an original and direct act of the sovereign people. Ndulo and Kent contend that a constitution should be seen as a higher law, authorising and governing ordinary law and commanding adherence to constitutional precepts.⁸ In a constitutional democracy, constitutional supremacy provides limitation in that all decisions and actions of government organs and officials ought to comply with the spirit of the constitution. Article 1 of the Constitution of Zambia provides that Zambia is a multi-party and democratic sovereign state. Thus, any decision or action by any official or

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governmental body which does not comply with the express will of the people is null and void. One is therefore left to wonder whether the machinations by the executive branch of government to weaken the opposition in parliament as earlier pointed out do not amount to a failure to comply with the sovereign will of the people that Zambia should be a multi-party democracy. If multi partyism be the system that the Zambia people want for their political life, it is unacceptable for the executive to make decisions which deter the full realisation of the people's desires as expressly stated in the constitution. It is submitted that this is a big challenge to Zambia's constitutional democracy which needs to be addressed as suggested earlier when we dealt with the legislature.

(iii) **CONSTITUTIONAL LEGITIMACY**

As we noted in the first chapter, for a constitution to command respect and loyalty of the people, it must be one that the people can easily identify as an expression of their will. Thus both its content and choice of the method of its adoption should be by means of a system that ensures this widest participation of the people. Zambia's experience at attempting to make a constitution that would stand the test of time has not been quite pleasant. Forty years after independence, the nation is struggling for the fifth time to make a constitution that will truly reflect the express will of the people and thus be able to stand the test of time. The problem in Zambia has been the politicians' failure to understand the fact that a constitution should never be regarded as a gift of a particular government to the people. The constitution is a document that the people give to themselves. The government's only role

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is to facilitate the process of constitution making. During the 1995 constitution review process, it was widely submitted by people that the people's desire to develop and give to themselves a constitution that commands the respect and obedience of everyone could only be achieved if the constitution was adopted by means of a constituent assembly. The commission made this recommendation to government in its report but government rejected it altogether.⁹ Government went ahead and enacted the new constitution of 1996 into law using parliament. The result was that this constitution has always been perceived as an MMD document which is not reflective of the broad views of the people. The constitution has been criticised for its provisions on the electoral processes, human rights protection including the width of presidential powers. It was for this reason therefore that the Mwanawasa government immediately after assuming office pledged to the people of Zambia that they would ensure that democracy is strengthened in Zambia by facilitating the making of a new constitution which should be ready before the next elections slated for the year 2006. However, this position seems to have changed as government has stated that it is not possible that the constitution review and making process can be completed before the election of 2006. This has angered many people including the civil society and the opposition political parties who perceive the government's new position as having been prompted by the desire to conduct elections under the flawed provisions of the current constitution so as to give the government an upper hand during the elections. Further criticism has been that the President and his government cannot direct the process of constitution

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making. Government derives its existence and power from the constitution and therefore cannot make itself. Additionally, it is undemocratic and presumptuous for a regime to make plans for programmes that go beyond its mandate except with the explicit agreement of all stakeholders, especially on matters relating to constitutional developments.¹⁰ The greatest challenge on the matters surrounding the current constitutional debate is that if the current government managed to have its way of deferring the completion of the process to go beyond 2006, the constitution which will be produced will equally lack legitimacy. This will be more so if the current regime won the 2006 elections under the current constitution and carried on spearheading constitutional reforms after the elections. I submit that the roadmap to constitutional making being suggested by the government will make us produce yet another constitution that lacks the respect and loyalty of the people. Such constitution would definitely be the subject of another review immediately the government's term of office comes to an end. For the purposes of enhancing constitutional democracy which presuppose the existence of a constitution supreme and legitimate, the new constitution should be adopted by a constituent assembly before the elections of 2006.

(iv). **DEVOLUTION OF POWER IN ZAMBIA**

The Constitution of Zambia by providing that Zambia shall be a unitary state may be said to be self limiting in its quest to establish constitutional democracy. As can be noted from the comments of scholars cited in the first chapter, federalism as a system of governing a nation provides more

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opportunities for limiting governmental power. It allows a greater diversity of opinion in public policy and above all it decreases the number of decisions at the national level. Constitutional provisions which vest all executive power in a few individuals need to be revisited so that certain powers are reserved for provincial governments. This devolution of power should not just be limited to the executive functions but also to the legislative ones. The creation of provincial legislative bodies with certain powers to enact territorial laws over particular issues that directly affect the regions will enable people identify more with government. A federal system of government in Zambia will ensure that politics and policy making are truly decentralised. It is only through such a system that one can assert that real power resides in the people.

The challenge for Zambia to increase its prospects of establishing a constitutional democracy lies in the extent to which the majority of her people can be made to feel part of the decisions affecting their lives. This can only be achieved by the constitution transferring certain powers right to the provinces as opposed to the current system of having all decisions being made in Lusaka.

CONCLUSION

From the foregoing, it is clear that Zambia faces many challenges in order to attain constitutionalism which is a key component of a constitutional democracy. The system of checks and balances remains ineffective due to the fact that legislature is in many respects still under the patronage of the executive. Similarly, the independence and autonomy of the judiciary is yet to

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CHAPTER THREE

ELECTIONS IN ZAMBIA

INTRODUCTION

The electoral system of a nation is one of the fundamental determinants of whether that society is democratic or not. In a constitutional democracy, elections are the central institution of democratic representative government as they reflect governments legitimacy based on the consent of the governed. Thus government is said to have authority because the governed have consented to that rule through the holding of free and fair elections. In chapter one, we identified the widely accepted standards of an electoral system of a democratic society. This chapter therefore focuses on appraising the electoral system in Zambia. It should however be noted right from the onset that although government has constituted an Electoral Reform Technical Committee (ERTC) with the objective of gathering submissions from the public on how to reform the electoral system, government is still studying the recommendations of the committee. It is not yet certain as to which recommendations government will accept or reject. Thus the evaluation in this chapter is based on the electoral system as it stands prior to any reforms that may be effected after the whole reform process is completed.

(i) THE ELECTORAL COMMISSION

The electoral commission in Zambia has the task of conducting free and fair elections and thereby placing a stamp of legitimacy on the government that emerges therefrom. Established under article 76 of the constitution, the commission is supposed to be an autonomous body for supervising the

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registration of voters and conducting elections. Considering that elections in a democracy are an indispensable engine by which accountability is ensured and an institutional framework for peaceful resolution of conflicts, an ineffective commission may well fuel instability and conflict, instead of resolving them. For the commission to be effective, the public and all stakeholders in the electoral process must have confidence in its autonomy and impartiality. This is however not possible in Zambia currently considering that the law provides for the appointment of the commission by the President.¹ The President as an individual is an interested party in the outcome of elections and hence the vesting of power to appoint the commission contributes to a very large extent to the public and other players developing a sense of distrust in the commission. For an institution with such important duties in the democratic process, the commission should not be exposed to political interference by being placed under Executive control. The commission's claim of autonomy has been the subject of criticism by many commentators. It should be noted that Africa's experience has been that electoral irregularities have been at the centre of instability. As Ndulo observes,

"the utility of elections is further undermined by the fact that the electoral process is usually unaccompanied by the creation of institutions that foster accountability and transparency in government".²

It is therefore submitted that the process of appointing the commission should be more transparent and completely detached from the Executive. All stakeholders should have an opportunity to participate to ensure transparency

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(ii) **THE ELECTORAL SYSTEM**

The electoral systems are about voting and translation of votes into legislative seats and executive leadership, which determines who governs, how rulers govern and how citizens hold government accountable. The electoral system establishes how political competition and governance are structured, operated and achieved.³

(a) **PARLIAMENTARY ELECTIONS**

The current practice in Zambia is that the winner in a parliamentary election is one who polls more votes than others in a constituency. Thus each constituency retains one member of parliament. This system has been criticised as being effectively exclusive and does not easily render itself to including special interests. The system is said to be undesirable in that apart from excluding minority parties, it fails to equitably provide social and democratic representation. Critics of the system have asserted that under this arrangement, minority communities and the historically or socially

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It should be pointed out that this weakness arises from the fact that in any election, political parties tend to put forward most broadly acceptable candidates from the local majority. It would obviously be suicidal for any party to put forward a candidate belonging to a group that is in the minority or belonging to a group that is traditionally discriminated against. However, in a constitutional democracy, representation in the legislature should be all inclusive. There must exist a system that ensures that the electoral process does not result into further marginalisation of the socially disadvantaged and minority groups. The system must provide safeguards to ensure that the ability of women and other disadvantaged groups to be elected to parliamentary office is not adversely affected. This writer submits that a deliberate legal framework which provides for a systematic inclusion of minority groups in the legislature would enhance its effectiveness in providing checks and balances against the executive. It has been observed that an effective democratic government has to ensure that minorities are adequately protected and that government is conducted in way that takes into account the wishes of the population in various interest groups.⁵

It is for the reasons mentioned above that one would strongly agree with the recommendation made by the electoral reform technical committee that

⁴ Ibid at p.27.

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Zambia should adopt a mixed member proportional system.⁶ Under the system, a proportion of the National Assembly would be elected by plurality – majority methods, while the remainder is constituted by a proportional representation system. The number of seats obtained by a political party under the proportional representation system would depend on the percentage of the total votes obtained in an election. The rationale underpinning the proportional representation system is the desire to reduce the disparity between a party's share of the national vote and party's share of parliamentary seats. To further foster the capacity of disadvantaged groups such as women to be effectively represented, the legal framework should prescribe how parties are to distribute seats obtained under the proportional representation system. For example, the electoral reform technical committee recommends that out of a 200 member National Assembly, 160 should be constituency based members elected through the usual plurality – majority methods. The remaining 40 members should be nominated by various political parties based on the proportion of votes received. Further, of the 40 members, 35 should be women, 3 should be differently abled persons and the other 2 should represent youths.⁷

The mixed member proportional system would ensure two cardinal things; firstly, the accountability experienced over the members of parliament by the constituencies would be retained. Secondly, the system would ensure inclusivity in the electoral process. Above all, this system would widen the political complexion of the legislature as varied interests would be catered for

⁶ Supra Note 3, p.42.

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Zambia should adopt a mixed member proportional system.⁶ Under the system, a proportion of the National Assembly would be elected by plurality – majority methods, while the remainder is constituted by a proportional representation system. The number of seats obtained by a political party under the proportional representation system would depend on the percentage of the total votes obtained in an election. The rationale underpinning the proportional representation system is the desire to reduce the disparity between a party's share of the national vote and party's share of parliamentary seats. To further foster the capacity of disadvantaged groups such as women to be effectively represented, the legal framework should prescribe how parties are to distribute seats obtained under the proportional representation system. For example, the electoral reform technical committee recommends that out of a 200 member National Assembly, 160 should be constituency based members elected through the usual plurality – majority methods. The remaining 40 members should be nominated by various political parties based on the proportion of votes received. Further, of the 40 members, 35 should be women, 3 should be differently abled persons and the other 2 should represent youths.⁷

The mixed member proportional system would ensure two cardinal things; firstly, the accountability experienced over the members of parliament by the constituencies would be retained. Secondly, the system would ensure inclusivity in the electoral process. Above all, this system would widen the political complexion of the legislature as varied interests would be catered for

⁶ Supra Note 3, p.42.

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at the highest level of the legislative process. It would also inculcate a greater sense of belonging in a broader section of the population. The only dilemma at the moment is whether government will share this vision and accept the recommendation by the electoral reform technical committee.

(b) **PRESIDENTIAL ELECTIONS**

The constitutional provision that relates to the determination of the winning candidates in a Presidential election poses a great challenge to fostering constitutional democracy in Zambia. Article 34(8) of the constitution provides that;

“The returning officer shall declare the candidate who receives the highest number of votes cast to have been duly elected”.

This provision means that a Presidential candidate who wins elections even by the smallest margin shall be declared winner. However, it is a fundamental principle of any democracy that an election for President must produce a government that is supported by the majority of the eligible voters. A president who has not been elected by the majority of the eligible voters is incapable of forming a legitimate government in the true sense. The main preoccupation of a minority President will always be scheming to entrench himself in the position of power at the expense of national development. As was illustrated in the 2001 elections, in which Levy Mwanawasa was declared President with less than 30% of the valid votes cast, the Constitution literally imposed a minority President on the people. Knowing that he had no mandate of the majority of people over whom he wielded so much power, the new President was quick to take steps however unpopular to entrench his

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position. Among these schemes was the desire to weaken the opposition in Parliament by appointing their members to lucrative ministerial positions. This problem will continue for as long as the constitution allows for the declaration of a President who clearly lacks the support of the majority of the voters. It is therefore submitted that a candidate for the office of President should only be declared winner if such candidate scored 50% plus 1 of the total of the votes cast. Failure to attain the above score should automatically lead to a re-run by the two candidates who receive the highest results. This has always been the desire of the people of Zambia.⁸ The position as it existed prior to the 1996 constitution amendments needs to be restored.

The other challenge to constitutional democracy with respect to Presidential elections relates to the use of the Chief Justice as returning officer. The constitution provides that;

“the chief justice shall be the returning officer for the purpose of elections to the office of President”⁹

This provision is ironical in the sense that the Chief Justice as head of the Judiciary, the organ of government responsible for settlement of disputes including those relating to elections is the one charged with the responsibility of declaring a winner in an election. Presidential petitions are heard by the full bench of the Supreme Court of which the Chief Justice is part. This provision is therefore a serious compromise on the delivery of justice and needs to be

⁸ Article 41 the Constitution of Zambia.

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Finally, article 34(3) of the Constitution which requires that to qualify to be eligible for election a candidate's parents should be Zambians by birth or decent is anathema to democratic principles. This provision has been the subject of criticism by many commentators as being not only discriminatory but also impossible to satisfy in practice. Even the Supreme Court has made similar observations.¹⁰

It is therefore submitted that this discriminatory clause be removed from the constitution so that any Zambian who has attained the appropriate age and meets other acceptable requirements such as having no criminal record should be eligible for election to the office of President.

(iii) **ELECTION DISPUTES**

One of the key ingredients of an effective system of elections is the assurance that an independent and impartial body exists to ensure that any dispute arising from elections are promptly dealt with. Petitions relating to Presidential elections in Zambia are heard by the Supreme Court while those relating to the election of members of Parliament are heard by the High Court.¹¹ However, the Electoral Act does not provide the procedure for Presidential petitions or what remedies aggrieved petitioners can be awarded by the court in the event of a successful petition. What is worse is that there

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- the petition be heard by a tribunal presided over by the Chief Justice, sitting with six other members who hold, have held, or are qualified to hold judicial office.
- the decision of the tribunal be final
- members of the tribunal other than the Chief Justice be appointed by the judicial service commission.

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- the petition be disposed of within 45 days from the date of filing the notice of intention to petition.
- the President elect should not be sworn in before the petition is disposed of, etc,

As regards Parliamentary elections, the committee's recommendations include the following,¹³

- the Parliamentary election petitions be heard by a tribunal presided over by a High Court judge sitting with members drawn from retired judges or legal practitioners who qualify to hold high judicial office appointed by the Chief Justice.
- the election petition should be disposed of within 30 days.
- the decision of the tribunal be final, etc.

It should however be pointed out that care should be taken to ensure that appropriate mechanisms are put in place to determine that sufficient grounds exist to dispute election results before any petition can be entertained. This will prevent tribunals being inundated with frivolous and vexatious petitions. Without putting in place mechanisms to sieve the applications, no Presidential or parliamentary candidate would be sworn in without first being subjected to an enquiry. Nevertheless, the most effective way of reducing election disputes lies in establishing an electoral system in which the people will have confidence.

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(iv) **THE MEDIA**

It is a widely recognised fact that the media plays an importance role of informing and educating the public during elections. However, it has been observed in Zambia that the public media is not evenly accessed and enjoyed by all political parties. The consequence has been that the citizenry is denied vital information which is critical for making informed decisions when electing representatives. The main causes of this imbalance in accessing the public media by political players has largely been attributed to the following.

- (a) the fact that the public media does not enjoy editorial independence thus rendering it incapable of being balanced in terms of coverage of political contestants during election periods.
- (b) the public media has been used by successive governments as a propaganda tool. This undermines a free and fair electoral process.
- (c) the public media provides unfair and negative coverage of opposition political parties and other organisations with opposing views to those of the government.

It is therefore submitted that to resolve this imbalance in access to the media, public media institutions should be governed by independently constituted boards which will not owe their allegiance to the party in government. It is only when the public media is equitably accessed by all political parties that Zambia can be guaranteed of a well informed electorate. Democracy demands that people should have access to information in order for them to make well informed decisions on matters relating to the choice of their

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representatives. Additionally, the long awaited freedom of information bill should be enacted into law sooner than later by which means people can demand for information as of right from those in government.

(v) **CONCLUSION**

From the foregoing, it is apparent that the system of elections in Zambia faces many challenges. These pitfalls can be traced not just to the legal framework that governs the electoral processes but also to the conduct of those who hold governmental power. The following recommendations are therefore made as to how the situation may be improved;

- members of the electoral commission should be nominated by the judicial service commission subject to parliamentary ratification. These should be non-partisan professionals.
- to improve on the inclusivity of the legislature the electoral system should be a mixed member proportional system.
- The discriminatory clause in the constitution that for a citizen to be eligible for election to the office of President, both his parents must be Zambians either by birth or descent should be repealed.
- the Chief justice should not be the returning officer with respect to the election of the President. This role should rightfully be played by the chairperson of the Electoral Commission.
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CHAPTER FOUR

HUMAN RIGHTS IN THE CONSTITUTION OF ZAMBIA

INTRODUCTION

Human rights are rights that one has as a result of being human. No other qualifications are required for one to be entitled to human rights. Human rights serve a number of purposes;

- (i) they protect human dignity
- (ii) they are essential for individual well-being and fulfilment;
and
- (iii) they are necessary for the preservation of peace and
justice.¹

The observance and protection of human rights is a key component of a democratic society. In a Constitutional democracy, human rights ought not just to be provided for but also to be effectively protected in the Supreme law of the land, the constitution. This chapter therefore, examines the extent to which the constitution of Zambia effectively protects human rights so as to enable Zambia qualify to be considered constitutional democracy.

1. DEROGATIONS IN THE BILL OF RIGHTS

(a) The bill of rights is the most important constitutional provision for the promotion and protection of human rights. This is achieved by providing for guaranteed rights. By guaranteed is meant the special protection that certain

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provisions of the constitution enjoy. For instance, the procedure for their amendment “ousts parliamentary authority by requiring something more than a parliamentary majority, such as the consent of the people at a national referendum”.²

The guaranteed rights are in this way beyond the manipulative reach of the politicians and thus guaranteed to every person. This is therefore the reason why article 79(3) provides that no alteration to part III (Bill of Rights) and article 79 itself may be made without holding a national referendum for that purpose. This provision is an acknowledgement within the constitution of the superior position of the Bill of rights and the fundamental importance of human rights generally.

However, the Zambian Bill of Rights is not without flaws. One characteristic feature of the provisions for human rights is that every brief statement of the right is accompanied by a long list of instances when the right is held not to be guaranteed. Generally, the constitution permits derogations where there is a law requiring such derogation, and the derogation is for the purposes of the protection of such interests as defence, public safety, public order, public morality or public health. The only requirement that the constitution makes is that the provision resulting in the derogation be “reasonably required” for the purposes of protecting any of the interests such as those mentioned above.³ Alfred Chanda writes that these interests are stated in very broad and vague

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terms. He contends that a timid judge will uphold all restrictions imposed by the state by giving a broad interpretation to this clause.⁴ Indeed this has happened in Zambia before.⁵

It is not the contention of this writer that fundamental liberties should be guaranteed absolutely, without any restriction whatsoever. No right can be enjoyed absolutely. Society has a right to place legitimate restrictions on the enjoyment of rights to prevent their abuse. What is here argued is that the restrictions allowed in the Zambian Bill of Rights are broad and vague to the effect that they render the rights non-existent.

A look at the Constitutional provision for the freedom of expression will confirm this assertion. Article 20 of the Constitution of Zambia provides for the freedom of expression and of the press in the following terms;

“(1) Except with his own consent, a person shall not be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to impart and communicate ideas and information without interference, whether the communication be to the public in general or to any person or class of persons, and freedom from interference with his correspondence.

(2) Subject to the provisions of this constitution, a law shall not make any provision that derogates from freedom of the press”.

Interference has been said to connote two things, namely: legislative restraints and controlling hand of the Executive.⁶ Under article 20(3) of the constitution, restrictions are permitted on the enjoyment of the freedom of expression provided such restriction is provided for by law; is reasonably

⁴ Alfred Chanda, 'Freedom of Expression and the Law in Zambia's', *Zambia Law Journal* Vol 30 p.127.

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- (a) the law should provide for adequate safeguards against abuse, including prompt, full and effective judicial scrapping of the restriction by an independent court or tribunal.⁷

A look at the restrictions prescribed by law in Zambia indicates that Zambia does not conform to this set of standards. Anti-sedition laws (Sections 57 and 60 of the Penal Code), presidential powers to ban publications (Section 53 of the Penal Code) and criminal defamation of the President (Section 191 of the Penal Code) all of which provide for stiff punishment, are neither precise nor narrowly drawn. They are prone to abuse especially that most of them lie in the discretion of the executive. For example, the offence of defamation of the President is couched in such a way that it is no defence that one was telling the truth. Similarly, the offence of sedition is one which can lead to serious infringement of fundamental rights. An example of this infringement can be seen in the case of **Queen v Chona**,⁸ where the accused who was National Secretary of UNIP, the leading nationalist party issued a statement describing the evils of colonialism. The statement alleged that there was no justice whatever under the colonial rule anywhere in the world. The accused argued

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that the words were not seditious and were published merely to identify the errors or defects in the government constitution of the territory. However, the High Court held that the statement was a seditious publication as it intended to bring into hatred or contempt and to excite disaffection against the administration of justice in the territory.

Chief Justice Conroy stated *inter alia*,

“Even if the accused was telling the truth in the matter, I consider that under the Sections of Penal code he would have been guilty of the offence charged.

It should however be noted that decisions from other commonwealth jurisdictions clearly show that the provisions on sedition in the Zambia Penal code are outdated and inconsistent with the quest to the promotion and protection of fundamental rights. The Nigerian court of Appeal (Enugu Division) invalidated the provisions of the criminal code concerning seditious publications in the case of **Chief Arthur Nwanko v The State**.⁹ The court unanimously held that the pertinent sections of the criminal code, which were similar to those of Zambia, were invalid because they violated the right to freedom of expression guaranteed by the Constitution and were not saved by the constitution provision which permitted derogation from the right to freedom of expression in the interest of public order and safety.

Another interesting provision, is the President’s absolute discretion to prohibit any publication or series of publications published within or outside Zambia, that he considers to be contrary to the public interest. What constitutes the

⁹ FCA/E/111/883, (1985) 6 NCLR 228.

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It should however be noted that decisions from other commonwealth jurisdictions clearly show that the provisions on sedition in the Zambia Penal code are outdated and inconsistent with the quest to the promotion and protection of fundamental rights. The Nigerian court of Appeal (Enugu Division) invalidated the provisions of the criminal code concerning seditious publications in the case of **Chief Arthur Nwanko v The State**.⁹ The court unanimously held that the pertinent sections of the criminal code, which were similar to those of Zambia, were invalid because they violated the right to freedom of expression guaranteed by the Constitution and were not saved by the constitution provision which permitted derogation from the right to freedom of expression in the interest of public order and safety.

Another interesting provision, is the President's absolute discretion to prohibit any publication or series of publications published within or outside Zambia, that he considers to be contrary to the public interest. What constitutes the

⁹ FCA/E/111/883, (1985) 6 NCLR 228.

public interest is within his sole discretion.¹⁰ An attempt to challenge the President's power failed in the case of **Shamwana v Attorney-General**.¹¹ The court stated that when the President acts within the powers conferred on him by Section 53 of the Penal Code, his opinion is not open to question and that his decision following upon such an opinion cannot be impugned. However, this decision has been criticised for lack of merit as there is no such thing as unchallengeable discretionary power.¹² The cases referred to above all go to show that much reform is required in order for these laws to meet the demands for the entrenchment of fundamental liberties.

b. **HOW DO DEROGATIONS IN THE ZAMBIAN CONSTITUTION COMPARE WITH THOSE PERMITTED IN OTHER INTERNATIONAL INSTRUMENTS?**

In only requiring the restriction to be “reasonably required” to protect the listed interests, and not “necessary” as is provided for by article 10 of the European Convention or article 19 of the International Covenant on Civil and Political Rights (ICCPR) and the Universal Declaration of Human Rights (UDHR), the Zambian standard is less stringent than that demanded in international instruments. Under the Zambian constitution, all that has to be shown is that the restriction is “reasonable” or “desirable”. It is not necessary as Chanda observes, to demonstrate a “pressing social need” or to give relevant and sufficient reasons for the restriction.¹³ There is therefore an urgent need to both narrow the scope of derogations allowed in the Constitution of Zambia and to review some laws. Maintaining the status quo will mean that individual

¹⁰ Section 53 (1) of the Penal Code.

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rights will continue to be under threat of wilful violation through abuse of law. The Bill of rights must enhance the value of rights and place a heavier burden on the government of proving the necessity to restrict them. A leaf must be taken from the Constitution of South Africa. Though this particular constitution also uses the word "reasonable", it gives guidelines and obliges the government to consider certain specific issues before placing a limitation on the enjoyment of a fundamental right.

Section 36 of the Constitution of South Africa is couched as follows:-

"36(1) The rights in the Bill of Rights may only be limited in terms of a 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.

It is therefore submitted that Zambia's constitutional reforms should address the issue of derogations by including a provision such as the one cited above.

2. PERMANENT HUMAN RIGHTS COMMISSION

The establishment of the Permanent Human Rights Commission (PHRC) is provided for by the constitution as follows:

**"125(1) There is hereby established a Human Rights Commission
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The constitution further provides that the functions, powers, composition, procedures, inter alia relating to the commission shall be prescribed under an Act of Parliament.¹⁴ Although the commission is tasked with the responsibility of investigating human rights violations and maladministration of justice, its powers are restricted to investigation.¹⁵ The Commission may not act on its findings to enforce rights, but merely propose effective measures to prevent abuse of human rights.¹⁶ It may for instance, recommend the punishment of officers who perpetrate abuse of human rights. Clearly this is a weakness. Mere recommendation is too inadequate a power for the commission to be effective. What is worse is that the commission is required to make recommendations to the same arm of government whose officials it would have found blameworthy.

The other compromise on the effectiveness of the commission relates to its financing. The Act provides, among other things, that the commission may accept donations subject to the approval the President¹⁷. The commission must be allowed independence to source funding to supplement government grants. There are many international organisations with an interest in the advancement of promotion and protection of human rights who could be willing to support the commission in some of its projects. The undertaking of such projects may be hindered if the President does not give his consent. The possibility of such interference occurring is very real especially in circumstances where the government is apprehensive that such a project is likely to expose gross human rights violations at the hands of the government

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CONCLUSION

From the foregoing, it should be clear that the Constitution of Zambia's human rights protection mechanism are inappropriate to render Zambia a true constitutional democracy. The broad derogations allowed in the Bill of Rights have rendered the entrenched rights almost non-existent. Many laws such as those relating to sedition, defamation of the President and power of the President to ban publications, all of which are undemocratic in nature can only find justification in the derogations allowed in the Bill of Rights by the use of broad and vague terms. Additionally, the institution responsible for the promotion of human rights lacks the capacity to do so due to its lack of autonomy and power to prosecute cases of gross human rights violations.

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CHAPTER FIVE

GENERAL CONCLUSION

The foregoing discussion has shown that Zambia faces a multifaceted set of challenges in order for constitutional democracy to thrive. The pitfalls include an ineffective system of checks and balances as well as a judiciary that cannot be said to be fully independent and autonomous. Additionally, the electoral system lacks the capacity to force the production of not only an all inclusive legislature but also a government that is legitimate in the true sense. This problem is compounded by the fact that the institution tasked with the responsibility of managing and overseeing elections does not enjoy the necessary independence and autonomy for it to be effective. Furthermore, the system of addressing election disputes through the courts has proved to be counter-productive in that court processes result in undue delays thus rendering the whole process of petitions meaningless. The quest for free and fair elections has also been negated by a public media that is biased towards the party in government thereby depriving the electorate of accurate information upon which to base their decision. Finally, the constitutional safeguards for human rights are almost non existent due to wide derogations allowed in the Bill of Rights as a result of which many oppressive and undemocratic laws still sit on the statute books. What aggravates the problem is that the Permanent Human Rights Commission is only limited to investigating cases of human rights abuse and making recommendations without prosecuting the cases. What is even worse is the Human Rights Commission's inability to undertake an effective sensitisation program aimed

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