

**A CRITICAL ANALYSIS OF A BLIND PERSON'S RIGHT TO A SECRET VOTE IN  
ZAMBIA**

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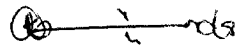
**BY**

**BANDA KAREN**

A paper presented in partial fulfilment of the requirements for the Award of the Degree of Bachelor of Laws of the University of Zambia.

# DECLARATION

I, BANDA KAREN, do hereby declare that this Directed Research Essay is my authentic work and to the best of my knowledge, information and belief, no similar piece of work has previously been produced at the University of Zambia or any other Institution for the award of Bachelor of Laws Degree. All other works in this essay have been duly acknowledged. No part of this work may be reproduced or copied in any manner without the prior authorization in writing of the author. All errors and other shortcomings are my own.



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## **ABSTRACT**

At both domestic and international level, Zambia has assumed obligations to protect the right of disabled persons. One such right is the right of blind voters to a secret ballot. Despite the fact that the legal framework in Zambia provides for the conduct of elections by means of a secret ballot, the practice has been that blind voters are being deprived of this right. During elections, blind voters are subjected to the assistance of a third party that is required to mark the ballot paper on their behalf. By both international and domestic standards, Zambia is in breach of its obligation to ensure that blind persons take part in the political affairs of the country on an equal basis with others.

Both international and domestic law permits a certain level of limitation or derogation from constitutionally guaranteed rights. However, a law that restricts fundamental human rights must be shown to be reasonably justified in a democratic society and must also not be discriminatory in its effect or application. The secret vote is the foundation of every democratic election and its violations undermines the very principles of democracy. Further, depriving blind voters of the secret ballot is discrimination on the grounds of class. Therefore, depriving blind voters of their right to a secret ballot is unlawful and not justified in a democratic state. In this regard, there is need to adopt alternative voting mechanisms that will allow blind voters to vote independently and exercise the right to a secret ballot.

## **DEDICATION**

This dissertation is dedicated to Mr Colin McFarlane and my family, whose many financial sacrifices and encouragement have enabled me to complete my undergraduate studies. It has not been easy. To my God, who has led me wonderfully throughout my life and has enabled me to reach this far in my stay at the University of Zambia, I will always wait upon your promises. Thank you for your abundant blessings.

## **ACKNOWLEDGEMENTS**

My sincere gratitude goes to Ms F. Mandhu for her supervision, guidance and for helping me stay on track throughout the research. God bless you.

I also wish to extend my gratitude to Mrs and Mrs Siame, for giving me a home and for their support, both financial and spiritual, during the four years that they welcomed me in their home. May the Lord Almighty richly bless you.

Special thanks go to all the people that helped me in my data collection: Mr Muyenga from ZAPD and Mr Chella from ECZ.

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

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**TABLE OF ACRONYMS**

ADD	Action for Disability and Development
CRPD	Convention on the Rights of Persons with Disabilities
ECZ	Electoral Commission of Zambia

ICCPR	International Covenant on Civil and political Rights
IFES	International Foundation for Electoral Systems
NEC	National Election Commission
NGO	Non-Governmental Organisation
NRC	National Registration Card
SLAB	Sierra Leone Association of the Blind
UDHR	Universal declaration of Human Rights
ZAPD	Zambia Agency for Persons with disabilities



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# CHAPTER ONE

## INTRODUCTION

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### 1.0 INTRODUCTION

The right of every citizen to vote is the foundation of every democratic state and a basic human right. It is a right which enshrines the principle of political and civil equality in the law<sup>1</sup> and often referred to as the right to political choice or the franchise. Article 75(2) of the Zambian Constitution guarantees every person's right to vote while section 18(2) of the Electoral Act makes it mandatory for all voters to cast their votes by way of a secret ballot. However, the conduct of elections in Zambia has shown that blind voters, for example, are being denied the opportunity to vote by way of a secret ballot.

This study will critically analyse the right of blind persons to vote in Zambia. Firstly, it will discuss human rights and general and highlight the extent to which the right to a secret vote is exercised in Zambia. From the foregoing, the paper will show whether it is reasonably justified, in a democratic society, to subject the exercise of the secret vote to limitations when it concerns blind voters. The paper will also discuss alternative voting mechanisms that ensure the secret vote for the blind. A conclusion will therefore be drawn and recommendations will be made based on the above discussions.

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<sup>1</sup> R. Blackburn. *Rights of Citizenship in a Democratic State*. (London: Mansell Publishing Ltd, 1993) p75.

## 1.1 THE IDEA OF HUMAN RIGHTS

Human rights set out an internationally accepted moral code by which the intrinsic humanity of every individual<sup>1</sup> is recognised and protected. They are the fundamental, universal and indivisible principles by which every human being can claim justice and equality.<sup>2</sup> Human rights are the foundations of every society and the basis for the co-existence of human beings. Professor Anyangwe notes that “human rights are rights inherent in mankind’s nature and without them mankind cannot live as human beings. They are the foundation of human existence and co-existence and constitute the most cherished of all rights; the right to be human.”<sup>3</sup>

The idea of human worth and dignity has always existed in all human societies. However, the expression ‘human rights’ is relatively new. The term came into everyday use only after the Second World War and the founding of the United Nations in 1945. It replaced the idea of ‘natural rights’, a notion developed by classical Greek philosophers including John Locke under the theory of natural law. According to this theory, man as an individual is autonomous, sovereign and possessed of a whole bundle of rights and liberties in the state of nature. These rights are devoid of intervention or support of society because he brings them with him into society.<sup>4</sup>

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<sup>2</sup> Micheline R. Ishay. *The History of Human Rights: From Ancient Times to the Globalization Era*. (California;University of California Press,2004) p9

<sup>3</sup> Carlson Anyangwe. *Introduction to Human Rights and International Humanitarian Law*. (Lusaka: Unza Press, 2004) p11

<sup>4</sup> Carlson Anyangwe. *Introduction to Human Rights and International Humanitarian Law*. (Lusaka: Unza Press, 2004) p 12

Natural law proponents argued that man's basic rights derive from (human) nature and not from the state, law, politics or tradition.<sup>5</sup> However, in order to enable society to function, man surrendered some of his rights to the state, but other rights remained protected by natural law, such as the right to life, liberty and property. According to Locke, under the social contract, men made a pact (*pactum unionis*) to form a society and, by means of a second pact (*pactum subjectionis*) instituted a government with political power to protect their respective rights.<sup>6</sup> Thus a state is only legitimate if it respects, enforces and permits the fuller realisation of natural rights.<sup>7</sup> Consequently, if the state fails to fulfil its end of the bargain under the social contract, for instance, through gross and systematic violations of human rights, citizens are entitled to revolt, thereby terminating the social contract.

Suffice to mention that the Social contract theory has influenced the modern day understanding of human rights as evidenced in a various human rights instruments such as the American Declaration of Independence whose preamble declares that:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights that among these are Life, Liberty and the pursuit of Happiness.<sup>8</sup>

Similarly, the Zambian Constitution has, under Part III also known as the Bill of Rights, guaranteed the fundamental rights and freedoms that one cannot be divested of in an arbitrary manner. It must be noted that the Constitution deems these rights to be natural and inalienable as is evidenced in the preamble which provides that, "we the people of Zambia... determined

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<sup>5</sup> J. Donnelly and R. Howard. *International Handbook on Human Rights*. (New York: Greenwood Press, 1987) p3

<sup>6</sup> B. David. "The Insoluble Problem of the Social Contract." *The American Journal of Philosophy* 115 (2002): 3-37. (Accessed on 13/10/2012)

<sup>7</sup> C. Welch. *Protecting Human Rights in Africa: Roles and Strategies of Non-governmental Organizations*. (Pennsylvania: University of Pennsylvania Press, 2006) at Page 46

<sup>8</sup> United States of America's Declaration of Independence of (1776)

to uphold and exercise our inherent and inviolable right as a people to decide, appoint and proclaim the means and style to govern ourselves”

The contemporary understanding of human rights still questions whether human rights are creations of the state or whether they emanate from human nature. Where the former is the position, the implication is that the state, being the giver of rights, can easily divest individuals of their rights without regard to human worth and dignity. On the other hand, where the latter is the case, then human rights cannot be taken away unless by nature itself or under special circumstances prescribed under the law.

Today, human rights are considered as emanating from human nature as opposed from the state. They derive from the inherent dignity of the human person.<sup>9</sup> Learned authors Donnelly and Howard posit that “the idea that all humans possess human rights simply by existing and that these rights cannot be taken away from them are direct descendants of human rights.”<sup>10</sup> Further, the learned author August Schau adds that “human rights denote those rights that are due to mankind in the absence of the state, even preceding the existence of the state. These are inherent rights, born with man and therefore, they must be unconditional and granted in any case.”<sup>11</sup>

Human rights are about the dignity and worth of the individual. According to Professor Anyangwe, the struggle for human rights is about the need to protect the individual against abuse of power by the monarch, tyrant or the state.<sup>12</sup> Therefore, the recognition of the inherent

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<sup>9</sup> Preamble to the International Covenant on Civil and Political Rights (1966)

<sup>10</sup> J. Donnelly and R Howard. *International Handbook on Human Rights*. (New York: Greenwood Press, 1987) p1

<sup>11</sup> August Schau (ed). *International Protection of Human Rights*. (London: John Wiley & Sons, 1967)p39

<sup>12</sup> Carlson Anyangwe. *Introduction to Human rights and International Humanitarian Law*. (Lusaka: Unza Press, 2004) p24

and the equal and inalienable human rights of all members of the human family is the foundation of freedom, justice and peace in the world.<sup>13</sup>

Clearly, human rights arise essentially because one is born a human being. The state is not the source of human rights as man possessed rights in the state of nature even before the existence of the state. The law, (the Constitution and other Human Rights Instruments) does not seek to create or give the rights and freedoms that human beings have by virtue of organising the various rights into formal documents. However, the law recognises the existence of human rights and facilitates their enforcement through the creation of procedures and institutions such as the Courts and Tribunals.

Human rights are classified in three groups, namely, Civil and Political rights; Economic, Social and Cultural rights and Collective rights. Civil and Political rights are rights which emphasise the freedoms of the individual and normally require the State to abstain from interfering in their enjoyment (duty of abstention). In that sense, civil and political rights impose what is termed a “negative” obligation on the State.<sup>14</sup> Zambia is a state party to various International Human Rights Instruments that seek to protect and ensure effective realisation of civil and political rights, such as the International Covenant on Civil and Political Rights (ICCPR). Civil and Political rights include the right to life, liberty and security of the person and the right to vote.

## **1.2 THE RIGHT TO VOTE AS A CIVIL AND POLITICAL HUMAN RIGHT.**

The right to vote is a fundamental human right enshrined in the Zambian Constitution. A vote is defined as “an expression of individual autonomy and an act of internal political

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<sup>13</sup> Preamble to the Universal Declaration of Human Rights (1948)

<sup>14</sup> [http://www.humanrights.gov.au/hr\\_explained.html](http://www.humanrights.gov.au/hr_explained.html). (Accessed on 20/12/2012).



determination.”<sup>15</sup> The vote is therefore the voice of the governed in a democratic state and elections are a mechanism through which this voice is heard. In this regard, professor Anyangwe notes that “elections are the basis of the authority of government, the cornerstone of representative democracy and an act of legitimating a government.”<sup>16</sup>

The right to vote is often referred to as the right to political choice or the franchise and is the entitlement of a person to freely make political choices by casting a vote either in favour of a political candidate (through the process of elections) or political matter at hand.<sup>17</sup> It is a formal expression of preference for a candidate for office or for a proposed resolution of an issue.<sup>18</sup> It is a citizen’s right which is of immense symbolic as well as practical importance, for it enshrines the principle of political and civil equality in the law and therefore underpins most other contemporary rights of citizenship.<sup>19</sup>

The right to vote is indispensable in a democratic state as the governors must derive their power to govern from the voters. Therefore, a government that restricts the franchise to its citizens, or a selected portion thereof, is a government that jeopardises its claim to a representative democracy.<sup>20</sup> According to Moyo<sup>21</sup>, “the right to vote is the principle means through which citizens can influence their leaders, selecting and deposing them routinely. It is an important mechanism through which individuals can influence government’s decision making.” To this effect, the right to vote allows citizens to control power as well as assert their individual rights.

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<sup>15</sup> Carlson Anyangwe. Law journal.(Lusaka: UNZA Press, 1998) p6

<sup>16</sup> Carlson Anyangwe. Law Journal.(Lusaka: UNZA Press, 1998) p7

<sup>17</sup> <http://www.cartercenter.org/peace/democracy/des.html> (Accessed on 09/01/2013)

<sup>18</sup> <http://www.umn.edu/humanrts/instree.html> (Accessed on 20/12/2012)

<sup>19</sup> C. Hartman. “*Presidential and Parliamentary Elections in Africa.*” Journal of African Elections.103 ELSA(2000) p21

<sup>20</sup> R. Blackburn. *Rights of Citizens.*( London: Mansell Publishing Ltd, 1993) p83

<sup>21</sup> J.N.Moyo. *Voting and Democracy. A study of the Electoral Politics in Zimbabwe.* (Harare: University of Zimbabwe Publications,1992) p 7

### 1.3 THE SECRET BALLOT AND ITS IMPLICATIONS ON HUMAN RIGHTS AND VOTING BEHAVIOUR.

The secret ballot is an important component of a fair electoral process. It is a voting method in which a voter's choices in an election or a referendum are anonymous.<sup>22</sup> While each person's vote is kept a secret, the totalled votes cast are public. The earliest form of the secret ballot was introduced in France in 1795 and later in the Roman assemblies in the second century as a way of lessening the control of the upper classes over the electorate and enhancing the voters' effective freedom of choice.<sup>23</sup> Ballot secrecy is now a common and unquestioned component of virtually all legitimate democratic contests.<sup>24</sup>

Secret ballots vary from one voting system to another. In Zambia today, the system consists of pre-printed ballot papers with a list of candidates on one side with corresponding checkboxes and the voter places an 'X' in the box corresponding to the name or symbol of the candidate's choice. Without revealing their votes to anyone, the electors place the ballots into a sealed box, which is emptied later for counting.

Article 25 of the International Covenant on Civil and Political Rights (ICCPR) lists the secret ballot as a crucial component of a fair electoral process and asserts that states must also provide their citizens with the opportunity to participate in the conduct of public affairs either directly or through chosen representatives. This means, for example, that states should adopt positive measures to allow marginalised groups like detainees or physically disabled people to vote, and this vote is to be held by way of secret ballot.

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<sup>22</sup> Alexander Yakobson. *Secret Ballot and Its Effects in the Late Roman Republic*. (1995) P. 426.

<sup>23</sup> F. Morgan. *Negative Vote Buying and the Secret Ballot* (IMF working papers series, 9<sup>th</sup> November, 2010). University of California, Berkeley: International Monetary Fund.

<sup>24</sup> Thomas M. Franck. *'The Emerging Right to Democratic Governance'*. *American Journal of International Law*, 86 (1992), 46-91, p. 64

The key aim of the secret ballot is to ensure the voter records a sincere choice by forestalling attempts to influence the voter by intimidation or bribery. The system is one means of achieving the goal of political privacy.<sup>25</sup> If a citizen believes that there is even a very slight chance of his or her choices being disclosed and that this disclosure may have personal repercussions, concerns about secrecy can affect his or her voting behaviour in a way that easily overwhelms his or her own preferences over which candidate should hold office.<sup>26</sup>

It also guarantees the free expression of the will of the voters. This proposition has been asserted by the authors Atkeson and Saunders<sup>27</sup> who have noted that if people do not believe that the confidentiality of their choices is well protected, the potential benefits of the secret ballot are undermined. Consequently, choices in the voting booth may reflect not just personal preferences, but also fears about going against the wishes of people who may learn of one's vote choices.

The secret ballot is also important because it is one way of enfranchising blind voters. Generally, elections in most developing countries, Zambia inclusive, are characterised by voter apathy. Where the secret ballot is not guaranteed, people may shun elections for fear of reprisals and victimisation if they voted against a party or individual that later wins the election. In the same manner, blind voters may refrain from taking part in an election because they feel that their will is not respected and also for fear of victimisation.<sup>28</sup>

Most importantly, the secret ballot promotes human rights of the blind and the visually impaired. Since human rights are interdependent and interrelated, one cannot talk about guaranteeing the right to vote and political privacy while disregarding the secret ballot as the

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<sup>25</sup> F. Morgan. *Negative Vote Buying and the Secret Ballot* (IMF working papers series, 9<sup>th</sup> November, 2010). University of California, Berkeley: International Monetary Fund.

<sup>26</sup> Alexander Yakobson. "Secret Ballot and Its Effects in the Late Roman Republic." *Hermes*, 123 (1995), 426-42, p. 426.

<sup>27</sup> Lonna Rae Atkeson and Kyle L. Saunders. "Voter Confidence: A Local Matter?" *Political Science & Politics*, 40 (2007), 655-660;

<sup>28</sup> Interview with Mr Patrick Muyenga. Rehabilitation Officer at the Zambia Agency for Persons with Disabilities. On 28/06/13 at 09:00 hrs at the ZAPD Offices in Lusaka

two are intertwined. Further, the Convention on the Rights of Persons with Disabilities (CRPD) has, in its preamble, recognised the independence and individual autonomy of persons with disabilities. The state parties to the Convention have “recognised the importance for persons with disabilities of their individual autonomy and independence, including the freedom to make their own choices.”<sup>29</sup> Therefore, subjecting blind and virtually impaired voters to assistance undermines both their right to vote and their ability to an autonomous and independent living. According to William C. Poole,<sup>30</sup> a blind voter, “the right to vote is a fundamental right enshrined in the Constitution. Casting an independent, secret ballot is a hallmark of democracy that has been discarded because I am legally blind. This is discrimination against the blind and visually impaired.”

#### **1.4 THE EXERCISE OF CONSTITUTIONALLY GUARANTEED RIGHTS IN ZAMBIA**

Human rights are not absolute and under the Zambian Constitution, rights can be restricted or curtailed lawfully in certain circumstances. The legal recourse available is the use of limitation and derogation clauses as provided for in Articles 11 and 25 of the Constitution respectively. The two Articles provide that:

11. It is recognised and declared that every person in Zambia has been and shall continue to be entitled to the fundamental rights and freedoms of the individual... but subject to the limitations contained in this Part...and the provisions of this Part shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in this Part, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.

25. Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of Articles 13, 16, 17, 19, 20, 21, 22, 23 or 24 to the extent that it is shown that the law in question

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<sup>29</sup> Paragraph n to the Convention on the Rights of Persons with Disabilities of 2008

<sup>30</sup> <http://www.aclu-md.org> (Accessed on 29/11/2012)

authorises the taking, during any period when the Republic is at war or when a declaration under Article 30 is in force, of measures for the purpose of dealing with any situation existing or arising during that period; and nothing done by any person under the authority of any such law shall be held to be in contravention of any of the said provisions if it is shown that the measures taken were, having due regard to the circumstances prevailing at the time, reasonably required for the purpose of dealing with the situation in question.

A limitation clause is a set of formalities, conditions, restrictions and penalties that a claim may be based upon.<sup>31</sup> Limitation clauses are deemed necessary in the interests of national security, territorial integrity or public safety, the prevention of disorder or crime, the protection of public health or morals, or the protection of the reputation or rights and freedoms of others.<sup>32</sup> Thus a right accompanied by a limitation clause will only be enforced to the extent that it does not conflict with the limitations that it is subjected to.

The rationale limitation clauses is that in as much as man is born with certain rights, man is obliged to enjoy such rights in a way that does not infringe on the rights of another. Since individuals have obligations to each other and the community, the state may impose certain limitations and derogations in order to strike a balance between the conflicting needs of various members of society.

Derogation clauses on the other hand, suspend the legal rights and obligations of the party to a particular claim for the period that the derogation lasts. This may occur in times of war, rioting, natural disasters or other public emergencies that pose a serious threat to the life of a nation.<sup>33</sup>

It must be noted that derogations were designed to be applicable only in the exceptional case of a grave threat to the survival and security of a nation. The implication is that derogations were intended to be invoked only as a temporary measure. In contrast, limitation clauses

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<sup>31</sup> Nickel, James. "*Human Rights*." The Stanford Encyclopaedia of Philosophy (fall 2010 Edition) Available at <http://www.plato.stanford.edu/archives/fall2010/entries/rights-human.html>. (accessed on 22/09/12)

<sup>32</sup> Article 11 of the Constitution of Zambia.

<sup>33</sup> Article 25 of the Constitution of Zambia

apply across the spectrum, from everyday public order maintenance and policing strategies to national security and large-scale military actions.

From the above discussion, it is evident that despite the fact that an individual's rights have been guaranteed in the ~~the~~ <sup>the</sup> ~~Zambian~~ <sup>Zambian</sup> Constitution, an individual may nonetheless be lawfully deprived of his or her rights under circumstances stipulated by law. Thus, the right to a secret vote and any other right under the Constitution will be exercised and enforced only to the extent that the said right is not derogated from or restricted under the limitation and derogation clauses.

It must be noted that right to vote and the secret ballot are not contained in the Bill of Rights. They are contained in Article 57 of the Constitution and section 18(2) of the Electoral Act respectively. This therefore entails that the right to a secret ballot does not fall within the ambit of both Articles 11 and 25 above. It is not amenable to neither derogation nor limitation clauses.

## **1.5 STATEMENT OF THE PROBLEM**

The right to vote is of great practical importance as it enshrines the principle of political and civil equality in the law and is enshrined under article 75(2) of the Constitution of Zambia<sup>34</sup>.

The secret ballot is an important aspect of the right to vote and section 18(2) of the Electoral Act<sup>35</sup> makes it mandatory for all votes cast to be by way of secret ballot.

The practice of elections in Zambia has shown that disabled persons such as blind voters have to submit to the assistance of another person who marks the ballot paper on their behalf. This does not assure secrecy of the ballot and is a breach of s18(2) of the Electoral Act. This

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<sup>34</sup> Chapter 1 of the Laws of Zambia

<sup>35</sup> Act No.12 of 2006

position is fortified by the finding of the Supreme Court in the Case of Sela Brotherton v Electoral Commission of Zambia.<sup>36</sup>

## **1.6 RATIONALE AND JUSTIFICATION**

Over the years, disabled persons were treated as objects of charity that need care and special assistance as they are unable or incapable of leading independent lives. However, today, the focus has shifted towards on the inherent human rights of persons with disabilities and the responsibility of government and society to ensure access, inclusion and participation of disabled persons on an equal footing with others. Thus, disabled persons are holders of rights as opposed to objects of welfare.

At the domestic level, the Constitution of Zambia<sup>37</sup> provides that Zambia is a democratic sovereign state and the people will exercise their sovereign power through democratic institutions of the state. The electoral system is one of the democratic institutions of the state. Implicit in the Constitution are the country's commitments in upholding both human rights under Part III, and the fundamental principles of democracy under article 75 of the Constitution as read together with section 18 (2) of the Electoral Act. Additionally, Zambia has committed itself to ensure that disabled persons participate in political life by protecting the right of persons with disabilities to vote by secret ballot.

This research is therefore relevant to the authorities that are tasked with the role of ensuring that blind voters are integrated in the mainstream and cast an independent and secret vote. For instance, the paper will propose alternative mechanisms that secure the secret ballot for blind voters.

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<sup>36</sup> 2011/HP/0818

<sup>37</sup> Article 1 of the Constitution of Zambia. Cap 1

## **1.7 OBJECTIVES OF THE STUDY**

The main objective of the study is to critically analyse the right of a blind person cast a secret vote in Zambia. Regard will also be had to the essence of preserving the secret ballot as it concerns voters who are blind.

### **1.7.1 SPECIFIC OBJECTIVES**

1. Discuss the right to vote in a democratic state.
2. Critically analyse the legal framework guaranteeing that guarantees the secret ballot for blind voters.
3. Discuss whether it is reasonably justifiable in a democratic society to subject the right to a secret vote to limitations and/ or derogations.
4. Critically analyse alternative voting mechanisms for the blind to ensure that their vote is secret.

## **1.8 RESEARCH QUESTIONS**

1. To what extent is the right to vote exercised in Zambia?
2. How does the secret ballot impact the voting behaviour of blind voters?
3. Is there justification for limiting the secret ballot when it concerns blind voters?
4. What alternative mechanisms can enable blind voters to vote by secret ballot?

## **1.9 METHODOLOGY**

The study will be based on an analysis of both primary and secondary information. Primary data will include the Constitution and other statutes, interviews with the Electoral Commission of Zambia (ECZ) and the Zambia Agency for Persons with Disabilities (ZAPD) to ascertain the practical and administrative challenges of ensuring that disabled persons vote



in secret and how these challenges can be mitigated. Secondary sources will be in the form of books, dissertations, articles, reports and cases. Reference will also be made to websites and International Conventions.



## **1.10 OUTLINE OF CHAPTERS**

This paper contains four Chapters, the introduction being the first chapter. Chapter two discusses the status of disabled persons under both domestic and international law. It will further discuss Zambia's international obligations to ensure that disabled persons exercise their right to vote by way of a secret ballot. Additionally, the Chapter will also discuss whether the legal framework governing the secret vote provides for any limitations or derogation clauses on the exercise of the secret vote.

Chapter three will propose alternative voting mechanisms for the blind. It will also discuss the challenges that may be posed by ensuring that disabled persons cast their vote in secret. Chapter four will render a conclusion and give recommendations based on the findings.

## **1.11 CONCLUSION**

This chapter has introduced the research by giving the aim and general overview of important aspects of the study. The chapter has highlighted that the right to a secret vote is a fundamental human right that originates from humanity as opposed to the state. Additionally, the chapter has discussed that human rights are not absolute. Thus, in Zambia, constitutionally guaranteed rights are exercised only to an extent that they are not excluded or restricted under the derogation and limitation clauses. Finally, the paper has shown that the secret ballot has an impact on voting behaviour and its violation may lead to voter apathy on the part of the blind.

## CHAPTER TWO

### THE STATUS OF DISABLED PERSONS UNDER DOMESTIC AND INTERNATIONAL LAW

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#### 2.0 INTRODUCTION

The basic idea of human rights is premised on the fact that human beings possess rights simply because they are humans. In the words of the learned author, Margaret McDonald, “the way the arms and legs are attached to the body, is similar to the way human rights attach to a human being.”<sup>38</sup> At the 1993 Vienna Convention on human rights, the then secretary general of the UN, Boutros Boutros Ghali, declared that human rights are a matter of power relations. He said:

if we acknowledge, as we must if the term is to retain any meaning, that one is entitled to human rights by virtue of his membership of humanity, that human rights inhere in the person and are not bestowed by the state, the government or any other person, then our denial of human rights is to be seen as nothing other than an abuse of power.

In the past, persons with disabilities were relatively invisible and tended to be viewed as objects of protection, treatment and assistance rather than subjects of rights. This approach towards persons with disabilities, commonly referred to as medical or welfare model of disability, viewed disabled persons as objects for clinical or welfare interventions. Persons with disabilities were excluded from mainstream society on the assumption that they were incapable of coping with either society at large or all or most major life activities.

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<sup>38</sup> Boutros Boutros Ghali, former UN Secretary General (1992-1996). (Available at [Http://www.humanrights.gov.au](http://www.humanrights.gov.au)) Accessed on 30/04/2013

However, in the last two decades, the approach towards persons with disabilities has changed, and disabled persons are now viewed as holders of rights. The shift to a rights-based approach has been authoritatively endorsed by the United Nations, and is reflected in several developments which have taken place at the international and national level since the proclamation by the General Assembly of the year 1981 as the “International Year of the Disabled” under the slogan “Full Participation and Equality.”<sup>39</sup> At the international level, the most recent development has been the adoption of the Convention on the Rights of persons with Disabilities in 2008. The adoption of the Persons with Disabilities Act<sup>40</sup> indicates the recent development at the national level in Zambia.

## **2.1 A HUMAN RIGHTS PERCEPTION TO A BLIND PERSON’S RIGHT TO VOTE.**

Over the years, disability was treated as a social welfare issue and this was reflected in the widely held belief that people with disabilities needed care and assistance as they are unable or incapable of living their own lives. Consequently, disabled persons were seen as objects of social welfare and not subjects in their own right.<sup>41</sup> According to Leandro Despouy,<sup>42</sup> “the status of ‘being disabled’ has been viewed as the natural cause. When disability is perceived in this way, society’s responses are restricted to only one of two paths: individuals can be ‘fixed’ through medicine or rehabilitation; or they can be cared for, through charity or welfare programmes.”

However, in the past two decades, the approach towards persons with disabilities has changed as they are now being viewed as holders of rights as opposed to objects of welfare. This new

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<sup>39</sup> G. Quinn and T. Degener. *A Survey of International, Comparative and Regional Disability Law Reform*, in *Disability Rights Law and Policy - International and National Perspectives*,

<sup>40</sup> No 6 of 2011

<sup>41</sup> International Labour Organisation. *Guidelines on Achieving Equal Employment Opportunities for People with Disabilities through Legislation* (Switzerland: ILO, 2007), p7

<sup>42</sup> Leandro Despouy. “Human rights and Disabled Persons.” Adopted by ECOSOC Resolution 1992/48 of March 1992

development has changed the manner in which society views the concept of disability in that the focus is no longer on what is wrong with the person but rather, disability is recognized as “the consequence of the interaction of the individual with an environment that does not accommodate that individual’s differences and limits or impedes the individual’s participation in society.”<sup>43</sup> This approach is referred to as the social model of disability as endorsed under The CRPD which explicitly recognises that disability is a human rights issue.

The United Nations Human Rights Commission has noted that,

viewing disability from a human rights perspective involves an evolution in thinking and acting by States and all sectors of society so that persons with disabilities are no longer considered as recipients of charity but holders of rights. Protecting and promoting their rights is not only about providing disability-related services but about adopting measures to change attitudes and behaviours that stigmatize and marginalize persons with disabilities. It is also about putting in place the policies, laws and programmes that remove barriers and guarantee the exercise of civil, cultural, economic, political and social rights by persons with disabilities. To achieve this, the policies, laws and programmes that limit rights need to be replaced.

The rights-based approach to disability means viewing persons with disabilities as subjects of the law. Its final aim is to empower disabled persons, and to ensure their active participation in political, economic, social, and cultural life in a way that is respectful and accommodating of their difference. Also known as the social model of disability, the right based approach focuses on the inherent human rights of persons with disability and the responsibility of governments and society to ensure access, inclusion and participation of disabled persons on an equal footing with others. This approach:<sup>44</sup>

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<sup>43</sup> United Nations. *Monitoring the Convention on the Rights of Persons with Disabilities: Guidelines for Human Rights Monitors* (New York and Geneva, 2010), p12

<sup>44</sup> Albert, B. & Hurst, R. *Disability and a human rights approach to disability*. (Briefing Paper.) Available at <http://www.disabilitykar.net/index.html> (Accessed 5 November, 2012)

- i. Identifies that persons with disabilities as right holders and subjects of human rights law on an equal basis with all people
- ii. Recognises and respects a person's disability as an element of natural human diversity on the same basis as race or gender and addresses the disability-specific prejudices, attitudes and other barriers to the enjoyment of human rights.
- iii. Places the responsibility on society and governments for ensuring that political, legal, social and physical environments support the human rights and full inclusion and participation of people with disability.

This approach is based on international human rights standards directed at enhancing the promotion and protection of the human rights of persons with disabilities. One such right is the right to a secret vote.

## **2.2 INTERNATIONAL INSTRUMENTS RECOGNISING THE SECRET BALLOT.**

Zambia is a state party to a number of international human rights instruments that provide and protects the sanctity of the secret ballot. These include the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and its two optional Protocols and the Convention on the Rights of Persons with Disabilities (CRPD). These instruments will be discussed in detail to outline the provisions protecting the sanctity of the secret ballot.

### **2.3.1 The Universal Declaration of Human Rights (UDHR)**

The UDHR is a declaration adopted by the UN General Assembly in December, 1948. It is proclaimed as a common standard of achievement for all peoples and all nations in promoting respect for human rights and freedoms.<sup>45</sup> It must be noted that although the UDHR was not

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<sup>45</sup> Paragraph 8 of the preamble to the Universal Declaration of Human Rights

intended to have any legal force, the principles proclaimed therein have crystallised into international customary law and thus binding. This was rightly stated by Sohn to the effect that:



The Declaration ...is now considered to be an authoritative interpretation of the UN Charter, spelling out in considerable detail the meaning of the phrase 'human rights and fundamental freedoms,' which member states agreed in the charter to promote and observe. The Declaration, as an authoritative listing of human rights, has become a basic component of international customary law, binding all states, not only members of the United Nations.<sup>46</sup>

The Preamble begins by recognising that the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world. The right to vote and the secret ballot are encapsulated under article 21 of the declaration. Article 21(3) provides that:

the will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

It is important to note the according to the above provisions, elections should be either by way of a secret ballot or by equivalent free voting procedure. The equivalent voting procedures may include assistance as is the case in Zambia. However, the voter must consent to or request for such assistance. Thus in the absence of such request or consent, any measures that undermine the sanctity of the secret ballot violates Article 21(3) above.

It is important to note that the UDHR does not restrict the secret ballot to a selected group in society neither does it provide for any restriction clauses that would warrant a state to derogate from its obligations to ensure that all voters express their will by way of a secret

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<sup>46</sup> M. Sohn. *The New International Law: Protection of the Rights of Individuals Rather than States*. (London: Butterworths, 1982) p 16-17

ballot. This can be seen from Article 2 of the declaration which makes provision to the effect that:

Everyone ~~is~~ entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Further, Article 7 provides that “all persons are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.”

From the above citations, it is therefore trite to state that violating the sanctity of the secret ballot by compelling blind voters to communicate their choice to a third person who later marks the ballot paper on their behalf is discrimination based on their status. This flies in the teeth of Articles 2 and 7 of the UDHR above and a violation of human rights.

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

The ICCPR, adopted on 16<sup>th</sup> December, 1966, is the most comprehensive international treaty on civil and political rights, also known as first generation rights. The preamble starts by recognising that the rights contained therein derive from the inherent dignity of the human person.<sup>47</sup> Further, Paragraph 3 acknowledges that the ideal of free human beings enjoying civil and political freedom can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights.

The right to vote and the secret ballot are couched in similar terms as under the UDHR and enshrined under Article 25 which provides that:

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<sup>47</sup> Paragraph 2 of the International Covenant on Civil and Political Rights (1966)

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the elector;

Part II of the Covenant (Articles 2-5) governs the State obligations regarding the implementation of the rights guaranteed therein. In particular, Article 2(1) provides that:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.

State obligation in Article 2(1) is to respect and to ensure. The obligation to respect indicates the negative character of civil and political rights. State parties are required to refrain from restricting the exercise of rights and freedoms where such is not allowed. A duty of forbearance is thus imposed on States parties and its extent depends on the formulation of the particular right.

The obligation to ensure brings out the positive character of civil and political rights. It means State parties must take positive steps to give effect to the rights and freedoms in the Covenant. The learned author Nickel<sup>48</sup> notes that the obligation to ensure is a duty of performance and requires States parties to adopt necessary legislative and other measures and to provide an effective remedy to victims of human rights violations. Another important aspect of the duty to perform is to safeguard certain rights institutionally by way of procedural guarantees or the establishment of relevant legal institutions.

The exercise of the right to vote and other rights contained in the ICCPR are not absolute and states may sometimes derogate or subject the exercise of such rights to limitations. Thus, Article 4 allows States parties to take measures derogating from their obligations under the

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<sup>48</sup> Nickel, James. "Human Rights." The Stanford Encyclopaedia of Philosophy (fall 2010 Edition), Available at <http://www.plato.stanford.edu/archives/fall2010/entries/rights-human.html>. (accessed on 22/09/12)



Covenant in times of public emergency which threatens the life of the nation. However, the public emergency must be officially proclaimed and the measures taken should be to the extent strictly required by the exigencies of the situation and must not be inconsistent with other obligations under international law.

Where a state party invokes the provisions of Article 4:

- i. The scope of a limitation referred to in the Covenant should not be interpreted so as to jeopardize the essence of the right concerned.
- ii. All limitation clauses should be interpreted strictly and in favour of the rights at issue.
- iii. No limitation on a right recognized by the Covenant shall discriminate contrary to article 2, paragraph 1.
- iv. All limitations on a right recognized by the Covenant shall be provided for by law and be compatible with the objects and purposes of the Covenant.<sup>49</sup>

The ICCPR prohibits discrimination in the enjoyment of the rights contained therein under Article 26. This recognises that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The grounds for discrimination as envisaged under Article 26 are non-exhaustive<sup>50</sup> and should thus be interpreted broadly to include categories that are not included in the Article such as disability. Therefore, in light of the provisions of the ICCPR, Zambia is in breach of its international obligations for failing to ensure that all persons taking part in an election cast

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<sup>49</sup> The Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR.

<sup>50</sup> Toonen v Australia U.N DOC.CCPR/C/50/D/488/1992 (1994), Communication No.288/1992

their vote in secret. The further limitation placed on blind voters only is discriminatory and against the spirit of the ICCPR.

### **2.3.3 The Convention on the Rights of Persons with Disabilities (CRPD)**

The Convention on the Rights of Persons with Disabilities is the first convention that specifically addresses the human rights of persons with disabilities. It entered into force in 2008 and assures the secret ballot for disabled voters. The preamble recognises that discrimination against any person on the basis of disability is a violation of the inherent dignity and worth of the human person.<sup>51</sup>

An important feature of the CRPD is the inclusion of an Article that sets forth the general principles. The principles are a core set of concepts that underlie disability rights issues and thus the rights expressed in the Convention are to be interpreted through the lens of these principles. The general principles begin by recognising the respect for the human dignity and the inherent equality of all persons as the basis for human rights and fundamental freedoms.<sup>52</sup> They also include a number of concepts that are particularly important to persons with disabilities such as, non-discrimination, equality of opportunity and acceptance of persons with disabilities as part of human diversity and humanity.

Article 29 of the Convention requires that all contracting states protect the right of persons with disabilities to vote by secret ballot in elections and public referendums without intimidation.<sup>53</sup> According to this provision, each contracting state should provide for voting equipment which would enable disabled voters to vote independently and secretly. Article 29

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<sup>51</sup> Paragraph h of the preamble to the Convention on the Rights of Persons with Disabilities

<sup>52</sup> Article 3 of the Convention on the Rights of Persons with Disabilities

<sup>53</sup> Article 29(a)(ii) of the Convention on the Rights of Persons with Disabilities

also requires that contracting states ensure that voting procedures, facilities and materials are appropriate, accessible and easy to understand and use.<sup>54</sup>

From the various Conventions discussed above, it is evident that the CRPD does not create any new rights or impose new obligations on states. However, the Convention highlights areas of human rights in which persons with disabilities either have specific requirements that may not apply in other contexts, or in which persons with disabilities have traditionally experienced unique types of discrimination and human rights violations. As the learned author Halender<sup>55</sup> puts it:

While these articles do not create any new rights, they explain rights in the level of detail required for states to understand their responsibilities and in many cases do articulate new specific obligations or measures not previously included in international law.

From the above discussion, it is evident that by failing to put in place mechanisms to ensure that blind voters cast a secret vote, Zambia is in breach of Article 29 of the CRPD.

## **2.4 ZAMBIA'S INTERNATIONAL OBLIGATIONS VIS-A-VIS DOMESTIC LAW**

Zambia is a state party to the various international instruments discussed above by virtue of having signed or ratified the various Conventions. To this effect, the Conventions are binding and Zambia is bound by the duty of *pacta sunt servanda* which is the duty to perform the obligations under the Convention in good faith.<sup>56</sup> The learned author, Anyangwe notes that, “by signing a treaty or ratifying it, a country assumes an obligation at the international level to amend its laws so as to make them conform to the provisions of the particular treaty signed.”

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<sup>54</sup> Article 29 (a)(i) of the Convention on the Rights of Persons with Disabilities

<sup>55</sup> E. Helander. *Prejudice and Dignity; An Introduction to Community-Based Rehabilitation* ( NewYork: UNDP, 1999) page 8.

<sup>56</sup> Article 26 of the Vienna Convention on the Law of Treaties.

However, Zambia is a dualist state and as the author Mulenga<sup>57</sup> has noted, all the international treaties that it ratifies do not apply automatically as part of national law unless domesticated or internalized by an Act of Parliament. This position stems from the fact that under article 62 of the Constitution, legislative power is vested in Parliament which is composed of the President and National Assembly. Therefore, allowing international law to apply automatically without domestication would amount to giving the executive legislative powers and therefore usurping the powers of Parliament.

To meet its obligations under international law at national level, Zambia has domesticated the provisions of the various instruments that secure the secret ballot for voters generally and blind voters in specific instances. Firstly, the Zambian Constitution under the preamble has acknowledged the equality of all human beings and the country has pledged to protect the human rights of all persons. Paragraphs 3 and 4 of the preamble to the Constitution provide that:

we the people of Zambia.....recognise the equal worth of men and women in their rights to participate, and freely determine and build a political and economic system of their own free choice...pledge to ourselves that we shall ensure that the state shall respect the rights and dignity of the human family...

Secondly, Article 75 guarantees every person's right to vote while Articles 34 and 63(2) provide for the conduct of elections by way of a secret ballot for Presidential and Parliamentary elections respectively. Additionally, the Draft Constitution, which is currently being debated, under Article 76 makes provision to the effect that the electoral system is based on universal adult suffrage and secret ballot while Article 77 of the said Draft goes further to provide not only for a Constitutional right to vote, but a Constitutional right to vote

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<sup>57</sup> Judith Mulenga. *Human Rights in Zambia: Implementation of the Convention against Torture*. (An Obligatory Essay submitted to the School of Law in partial fulfilment of the award of the Bachelor of Laws Degree, 2008) p 11.

by way of a secret ballot. The Article provides that “a citizen who has attained the age of eighteen years is entitled to be registered as a voter and vote in any election by secret ballot.”

Most importantly, Zambia domesticated the Convention on the Rights of Persons with Disabilities under the Persons with Disabilities Act<sup>58</sup>. This Act repealed and replaced the Persons with Disabilities Act.<sup>59</sup> The 1996 Act was highly criticised for having failed to adequately provide for the plight of disabled persons.

The Persons with Disabilities Act<sup>60</sup> has adopted the human rights approach towards disability and focuses on the inherent human rights of persons with disability and the responsibility of governments and society to ensure access, inclusion and participation of disabled persons on an equal footing with others. Section 51 of the Act makes provision for the secret ballot and provides that:

The Minister shall take measures to ensure that persons with disabilities effectively and fully participate in political and public life on an equal basis with others... by—

(b) Protecting the right of persons with disabilities to vote by secret ballot in elections and public referenda without intimidation...

Further, the secret ballot is provided for under the Electoral Act.<sup>61</sup> The Electoral Act is the principle Act that governs the conduct of elections in Zambia. Under section 18(2), the Act provides that:

Every poll shall be taken by means of a secret ballot in accordance with this Act and as may be prescribed.

Section 60 of the Electoral Act provides for assistance to certain voters who are unable to read. Such assistance may be provided by either the presiding officer or any person above the age of 18 years if:

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<sup>58</sup> No 6 of 2012

<sup>59</sup> No 33 of 1996

<sup>60</sup> No 6 of 2012

<sup>61</sup> No. 12 of 2006

- a) The voter requires assistance due to a physical disability;
- b) The voter has requested to be assisted by that person;

(3) The secrecy of voting as stipulated in the Constitution shall be preserved in the application of this section.<sup>62</sup>

It must be noted that notwithstanding the said assistance, the section still emphasises the need to preserve the secret ballot as stipulated in the Constitution. The meaning of section 60(2)(a) and (b) is worth considering. In the case of Sela Brotherton V Electoral Commission Of Zambia,<sup>63</sup> a dispute which arose from the respondent's alleged failure to initiate legislative reforms to ensure equitable participation by persons with disabilities in the electoral process in Zambia. Having considered section 60(2) above, the court held that:

“the provisions of section 60(2)(b) do not make it mandatory for assistance to be given but rather it is the choice of the person seeking assistance. To this extent, by insisting that persons with disabilities cast an assisted vote, the Respondant is limiting their right to exercise the franchise in accordance with the provisions of the law.”

It is important to note that there is little jurisprudence relating to the right of blind persons to vote by way of a secret ballot, at both domestic and international level. However, the American courts in the case of Raymond v Boulder County<sup>64</sup> had occasion to rule on the electorate's right to a secret ballot. The District Judge Christine Arguello, in her judgment held that “the Constitution provides no fundamental right to a secret ballot.” In this case, an advocacy group, Citizen Centre, sued to prevent Boulder County from putting bar codes on ballots. The group, claimed that the bar codes could theoretically be used to track how an individual voted, thus violating the sanctity of the vote.

While the position in the USA is that there is no fundamental human right to a secret vote under the American Constitution, the position both in Zambia and at international level is

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<sup>62</sup> Section 60 (2) and (3) of the Electoral Act No. 12 of 2006

<sup>63</sup> 2011/HP/0818

<sup>64</sup> civil action No M-94 at p 205

quite different. Under international law, there exists a fundamental human right to a secret ballot as evidenced in the International Instruments discussed above. At domestic level, it is a Constitutional requirement that all Presidential and Parliamentary elections be conducted by secret vote, thus giving rise to a Constitutional right to a secret vote. Just like any other right in the Constitution, the right to a secret vote should be exercised indiscriminately by all voters.

## **2.5 IS THERE JUSTIFICATION FOR LIMITING THE BLIND VOTER'S RIGHT TO A SECRET BALLOT?**

It will be recalled from chapter one that the right to a secret vote and any other right in Zambia is exercise only to the extent that such a right is not subjected to limitation and derogation clauses. Therefore, considering the above legal framework governing the right to a secret ballot both at the domestic and international level, it is imperative at this point to consider whether there is justification for subjecting the right to a secret vote to limitations in relation to blind voters.

The law provides adequate guidelines on the use of derogation and limitation clauses. A law that seeks to limit or derogate from the basic human rights of an individual must fulfil two essential elements: Firstly, such a law must be lawful in the sense that it must be provided for by law and must not be arbitrary. Secondly, the limitation imposed by such law must not be more than is reasonably necessary to achieve the legitimate object.<sup>65</sup> When applying the test, it is important to remember that it is the right which is fundamental and not the limitation.<sup>66</sup> On the first test, the learned author, Alfred Chanda submits that, to be prescribed by law means that:

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<sup>65</sup> Christine Mulundika and 7 Others v The People (1995) SCJ No 25

<sup>66</sup> William Steven Banda v The Attorney General HP/1005/1992

- a) The law must be accessible, unambiguous, drawn narrowly and with precision so as to enable individuals to foresee whether a particular action is unlawful: and
- b) The law should provide for adequate safeguards against abuse, including prompt, full and effective judicial scrutiny of the restriction by an independent court or tribunal.<sup>67</sup>

At this point, it is imperative to consider whether the limitation placed on section 18 (2), as it relates to blind voters, is prescribed by law. According to article 75(2):

Every person who is registered in any constituency as a voter for the purposes of elections to the National Assembly shall....be entitled so to vote in that constituency in accordance with the provisions made by or under an Act of Parliament, and no other person may so vote.

The Electoral Act, under section 18(2) provides for the secret vote and makes provision to the effect that:

Every poll shall be taken by means of a secret ballot in accordance with this Act and as may be prescribed.

Section 60 of the Electoral Act provides for assistance to certain voters who are unable to read. Section 60 (3) provides that:

The secrecy of voting as stipulated in the Constitution shall be preserved in the application of this section.

From the above Constitutional and statutory provisions, it is evident that the secret vote is subject to neither limitation nor derogatory clauses at domestic level. The limitations on grounds of disability are not provided for by law and it is therefore submitted that they do not satisfy the first test.

On the test of reasonableness, the above author posits that it must be shown, *inter alia*, that the restriction is compatible with democratic principles.<sup>68</sup> The case of Pumbum v Attorney

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<sup>67</sup> Alfred Chanda. "The State Security Act v an Open Society: Does an Open society require Secrets? Zambia Law Journal Vol 29 (Lusaka: Unza Press, 1997) p 42

<sup>68</sup> Alfred Chanda. "The State Security Act v an Open Society: Does an Open society require Secrets?" Zambia Law Journal Vol 29 (Lusaka: Unza Press, 1997)p44



General<sup>69</sup> enunciated that one of the attributes of a democratic society is the holding of elections and the secret ballot is a key component of genuine elections. Thus, disability as a ground for derogating from upholding the secret vote does not pass the second test either.



At the international level, the Convention on the Rights of Persons with Disabilities does not provide for limitations or derogations from the right to secret vote or any of the rights under the Convention. However, the ICCPR, which recognises the right to a secret vote under Article 25(b), allows for derogations and limitations as provided for under Article 4. However, the Siracus Principles provides for guidelines on the application of derogation and limitation clauses under international law. The principles provide, *inter alia*, that:

- v. No limitation on a right recognized by the Covenant shall discriminate contrary to article 2, paragraph 1.
- vi. No limitation on the exercise of human rights shall be made unless provided for by national law of general application which is consistent with the Covenant and is in force at the time the limitation is applied.<sup>70</sup>

Therefore, from an international point of view, it is unjustifiable to limit the right of blind voters to a secret vote. Even though domestic legislation in Zambia allows for assistance to be rendered to persons that are unable to read, the practice is discriminatory as it is only the blind voters that are mandated to rely on the assistance of a third party to mark the ballot on their behalf. This discriminates against the blind based on class and vitiates against Article 8 of the CRPD, Article 2(1) of the ICCPR and Article 23 of the Zambian Constitution.

If the law which infringes a basic right does not meet both requirements, such law is null and void.<sup>71</sup> From the above discussion, there is no justification, both at domestic and international level, for limiting for limiting the secret ballot when it concerns blind voters. Thus the action

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<sup>69</sup> (1993) 2 L.R.C 317

<sup>70</sup> The Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR.

<sup>71</sup> *Pumbum v The Attorney General* (1993) 2 L.R.C 317

by Election officials of insisting that blind persons should cast an assisted vote is unlawful and as such, not reasonably justified in a democratic state. The election officials are discriminating against people with disabilities and this discrimination contravenes Article 23 of the Constitution and Article 8 of the CRPD.

## **2.6 CONCLUSION**

In summary, the Chapter has highlighted that Zambia has assumed obligations both at international and domestic level to ensure that blind persons vote by way of a secret ballot. The chapter has also discussed that there is no justification, both at domestic and international level to subject the secret vote to limitations as it concerns blind voters. The right to vote being a Civil and Political Right, Zambia is therefore mandated to put in place effective measures to ensure that blind voters are not subjected to casting an assisted vote and ensure that the secrecy of the secret ballot is preserved.

## CHAPTER 3:

# INDEPENDENT VOTING SYSTEMS FOR THE BLIND AND VISUALLY IMPAIRED

### 3.0 INTRODUCTION

The United Nations Convention on the Rights of Persons with Disabilities (CRPD) which entered into force in 2008 assures the right to a secret vote for disabled voters. Article 29 of the Convention requires that all Contracting States protect “the right of persons with disabilities to vote by secret ballot in elections and public referendums.” According to this provision, each Contracting State should provide for voting equipment which would enable disabled voters to vote independently and secretly. Article 29 further requires that Contracting States ensure “that voting procedures, facilities and materials are appropriate, accessible and easy to understand and use.”

At domestic level, the obligation to provide equipment that would enable votes to vote independently and secretly is contained in section 51 of the Persons with Disabilities Act.<sup>72</sup> According to this section, the Minister shall take measures to ensure that persons with disabilities effectively and fully participate in political and public life on an equal basis with others by protecting the right of persons with disabilities to vote by secret ballot in elections and public referenda without intimidation.

In Sela Brotherton v Electoral Commission of Zambia,<sup>73</sup> the High Court directed the Electoral Commission to invoke its statutory provisions and provide tactile ballot guide for voters who are blind or partially sighted but do not wish to assisted in casting a secret vote. The

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<sup>72</sup> No 6 of 2012

<sup>73</sup> 2011/HP/0818 at p27

judgement highlighted two voting methods for the visually impaired, namely, assisted voting and voting using a tactile ballot guide. This chapter will therefore discuss the two and other voting methods which enable visually impaired voters to cast a secret vote.



**3.1 PROPOSED VOTING SYSTEMS FOR THE BLIND AND VISUALLY IMPAIRED**

A voting system is an aid, benefit and service that permits blind voters to cast a secret vote.<sup>74</sup>

Visually impaired is a broad term that refers to both blind people as well as those people who are partially sighted. Blind people use Braille and in the absence of Braille, they use audio materials while partially sighted people use large print.<sup>75</sup>

The right to vote in secret is a cornerstone of democracy, and the secret ballot is a feature of every election law in the world. However, the practice of elections in nearly every nation results in the blind citizen being dependent on another to cast his or her ballot. If all citizens are to have equal access to the election process, then the election process must include procedures to enable blind citizens to cast a secret ballot.<sup>76</sup>

In this regard, various countries have implemented diverse voting methods for the visually impaired. The voting mechanisms include assisted voting, the use of audio devices, Braille ballot papers or tactile ballot guide or electronic voting through the use of Automarks. This chapter will discuss the four optional voting mechanisms which can be adopted in Zambia and also the factors that would hinder effective implementation of independent voting mechanisms.

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<sup>74</sup> James C. Harrington. *Making the Secret Ballot Accessible to Voters who are Blind or have Other Physical Disabilities*. (Pdf) P97  
<sup>75</sup> Submissions by the Consortium of persons with Disabilities Organisations to the National Constitutional Committee on the First Draft Constitution on 13<sup>th</sup> July, 2010 at p4  
<sup>76</sup> International Foundation for Electoral Systems Publication files. (2002) p2

### 3.1.1 Assisted Voting

This is the most common method and is currently used in Zambia. It arises where a person who is unable to read is aided by a third party. Under this method, visually impaired voters will dictate the name of their preferred candidate to a third party who will then mark the ballot paper on their behalf. The third party may be the presiding officer, an election officer or any person of the voter's choice. Assisted voting is currently practiced in Zambia and it is provided for under Section 60 (2) of the Electoral Act.<sup>77</sup> According to the Act, assistance may be provided by either the presiding officer or any person above the age of 18 years if:

- a) The voter requires assistance due to a physical disability;
- b) The voter has requested to be assisted by that person;
- (3) The secrecy of voting as stipulated in the Constitution shall be preserved in the application of this section.<sup>78</sup>

It is imperative to note that an assisted vote is not mandatory. Therefore, it can only be effected if and when the voter requests that they be assisted. This position of the law was affirmed in the case of Sela Brotherton V Electoral Commission Of Zambia,<sup>79</sup> where the High Court held that “the provisions of section 60(2)(b) of the Electoral Act do not make it mandatory for assistance to be given but rather it is the choice of the person seeking assistance.”

In the case of Lighbourn v Garza,<sup>80</sup> five blind voters brought an action against the Texas Secretary of State in an effort to enforce the Americans with Disabilities Act. The voters complained against the lack of a secret ballot for blind citizens who wished to cast their vote without the assistance of a third person. The United States District Judge David Briones found

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<sup>77</sup> No 12 of 2006

<sup>78</sup> Section 60 (2) and (3) of the Electoral Act No.12 of 2006

<sup>79</sup> 2011/HP/0818

<sup>80</sup> (1997) 5<sup>th</sup> Circuit 118F.3d at 285

the Secretary of State liable and directed the County to provide mechanisms to allow blind voters to cast a secret ballot. The Court further gave four reasons as to why assisted voting is not a preferred method for blind voters. The Court held that:

often times blind voters have great difficulty finding someone who will read the ballot paper to them, then asking that it be re-read so that they could satisfactorily understand it before voting. Sometimes, experiences are bad that they could discourage people to vote. Secondly, polling officials are sometimes confused about how to deal with blind voters. Sometimes they talk to each other about helping a blind person as if the person was not present. Thirdly, when blind voters are asked to tell a third person their choice for the ballot, it is virtually impossible for the others not to overhear. Most importantly, there is always the fear that due to political preference, the third party may not mark the ballot as the blind voter desired.

The above citation is particularly true in the Zambian situation. According to Jocelyn Mubita,<sup>81</sup> the Deputy Legal Director at the Electoral Commission of Zambia conceded in her testimony that “election officers are not always experts or conversant with the use of Braille and would consult with each other on the same.” It is therefore true that due to such consultations, other people can overhear and therefore become privy to the voter’s choice in the election.

### **3.1.2 Audio ballot**

This is voting that is based on pre-recorded commands which are facilitated by the use of a touch screen, headphones and a number keyboard. In the voting booth, the voter will insert headphones in their ears and a pre-recorded message will give instructions and state the names of the candidates which are heard through the headphones. Then the voter responds to prompts by touching the keypad similar to an automated phone service.<sup>82</sup> Once the selection is completed, an encoded ballot paper is printed out and this is what goes into the ballot box.

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<sup>81</sup> Witness testimony in *Sela Brotherton v Electoral Commission of Zambia* 2011/HP/ 0818 at p17

<sup>82</sup> James C. Harrington. *Making the Secret Ballot Accessible to Voters who are Blind or have Other Physical Disabilities*. (Pdf) P 91

It must be noted that the Audio ballot is not only suitable for blind voters but also for voters that are partially sighted. This is because the touch screen may have a magnifying feature that allows the voter to magnify the print on the ballot.

The Audio ballot is used in many developed countries including Australia. Andre Devenish, a blind voter that had successfully used the Audio ballot and cast a secret vote for the first time acclaimed that, “2011 was the first time I’d been able to cast an independent, secret ballot since losing most of my vision in 1997. It was a great thing to be able to do this myself again.”<sup>83</sup>

### **3.2.3 Automark Voting Machine**

This method requires voters to firstly collect the ballot paper which is later inserted into the machine. This is done before the ballot paper is marked and thus visually impaired voters can be assisted in inserting the paper into the machine. The machine optically scans the ballot and the voter can then use Braille, headphones or an enlarged image on the touch screen to vote. The headphones allow the voter to hear a voice that reads each section of the ballot, including instructions, the contested office and the names of the candidates. The voter then uses the enlarged touch screen or the Braille component to mark the ballot.

At the end of the process, the machine will tell the voter if they have under-voted and who they have voted for in each category. Where one wants to make changes on the candidates voted for, the machine will allow the voter to select the category where such changes are to be effected. Once the voter is satisfied with their selected candidates, the machine automatically marks each oval on the paper ballot scanned into the machine at the onset of voting. After the

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<sup>83</sup>[http://www.ghostpostingelections\\_media.access.australia.html](http://www.ghostpostingelections_media.access.australia.html) (Accessed on 1/07/13)

vote is marked by the machine, the ballot is printed out and placed in a special ballot box.<sup>84</sup>

This system has been use in over 100 states in the United States of America.

### **3.1.4 Braille ballot paper or tactile ballot guide**

Braille is writing system which enables blind and partially sighted people to read and write through touch.<sup>85</sup> Each cell represents a letter, numeral or punctuation mark. Some frequently used words and letter combinations also have their own single cell patterns. Currently, Zambian legislation does not make specific provisions for the use of Braille in the conduct of elections. However, the Draft Constitutional Bill, which is currently under discussion, has recognised, under Article 53(4) (c ) Braille as a means of communication. The Article provides that “Parliament shall enact legislation to provide for the use of sign language, Braille or other appropriate means of communication.”

Braille ballot templates are in different forms. Generally, the guide works like the ordinary ballot papers only the names of the candidates and instructions are written in punched marks. In most instances, the guide is a folder in which the regular ballot is inserted. The folder contains holes which correspond to the boxes on the ballot paper. On the folder are markers which are either in Braille or raised bumps or lines that help the voter navigate up and down the folder.<sup>86</sup> The blind voter reads through the instructions and marks the name of the preferred candidate in Braille, using punch marks. The most common form of Braille ballot is the tactile ballot guide.

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<sup>84</sup> Keith Emmer. *Securing the secret ballot, Blind and Visually Impaired Voters Sue to Overturn Discrimination at the Polling Place; Voters Challenge Election System That Prevents Blind and Visually Impaired Voters from Independently Casting a Secret Ballot*. (Baltimore: PR Newswire,2003) p30

<sup>85</sup> <http://www.braillerc.com/braillehx.html> (Accessed on 01/07/13)

<sup>86</sup> Sara Gudsruk. *Guide to Voting Equipment Usability and Accessibility for People with Disabilities*. (London: Butterworths, 2003) p 68



In Zambia, efforts to implement the use of tactile ballot guide are under way. In the 2011 General Elections, the Electoral Commission of Zambia, for the first time introduced a blind template or tactile ballot guide. However, this was only provided for in respect of Presidential elections. While the Electoral Commission has shown political will in ensuring that blind persons participate in elections on an equal basis with others, there is greater need to ensure that the tactile ballot is made available in respect of Parliamentary and Local Government seats as well.

It must be noted that despite the introduction of the tactile ballot guide, there had been no voter sensitization on the same. This was due to lack of funds as the template was acquired after the election budget had been prepared.<sup>87</sup> As a result, the effectiveness of the guide was greatly impaired. In this regard, the Commission should engage in a progressive implementation of the use of the blind template to ensure that the template is made available in respect of all contested positions during elections. Additionally, the Commission should also embark on a progressive sensitization campaign to ensure that both the blind voters and election officers are conversant with the use of the template.

The tactile ballot guide was first used in Africa in Sierra Leone in 2002 Presidential and Parliamentary Elections. The guide was used by 438 blind voters and the voting system was implemented with the help of the International Foundation for Electoral Systems (IFES).<sup>88</sup> The tactile guide in Sierra Leone was a folder into which the ballot paper could be inserted. Bumps were affixed to the folder so that the blind voter could "read" the ballot guide with his/her finger tips and, by the number of bumps, be able to identify the candidate. The voter would then place his/her thumbprint through the cut out in the guide so that it would mark the

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<sup>87</sup> Sela Brotherton v Electoral Commission of Zambia 2011/HP/0818

<sup>88</sup> [http://www.electionaccess.org/BP/tactileballotguide/Sierra Leone](http://www.electionaccess.org/BP/tactileballotguide/Sierra%20Leone) (Accessed on 02/07/13)

ballot paper next to the photo of the presidential candidate or the symbol of the political party. The guide would be reusable, with the election officials retrieving the guide from the voter after the voter had cast his/her ballot.<sup>89</sup>



The Tactile Ballot Guide did not use Braille, given the high rate of Braille illiteracy among Sierra Leone's blind citizens. Instead, it used bumps, which were made by glue on the ballot folder. Each political party was allocated a fixed number of bumps, which would be used for identification by the voter. The number of bumps was the same for the party's candidate in the presidential elections as for the political parties standing in the parliamentary races. The bumps were allocated in alphabetical order, as the parties appeared on the ballots in alphabetical order.

### **3.2 FACTORS THAT MAY HINDER THE IMPLEMENTATION OF THE PROPOSED INDEPENDENT VOTING SYSTEMS IN ZAMBIA**

The factors outlined below are based on the experiences of various jurisdictions that have put in place independent voting systems and on information obtained through interviews conducted with the Electoral Commission of Zambia.

#### **3.2.1 High Cost**

The cost of establishing electronic voting systems, namely Audio voting and Automarks is very high. According to Conny McCormack,<sup>90</sup> “the initial hardware and software equipment purchase for a countywide system is estimated at \$100 million. On-going hardware and software maintenance, including future upgrades or equipment replacement, is unknown but

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<sup>89</sup> Jerry Mindes. *Tactile Ballot Guide: Inclusion of persons with Disabilities in Elections*. ( New York: International Foundation for Electoral Systems, 2002)

<sup>90</sup> Conny B McCormack. *Report on Plans to Implement a state-of-the-art temper proof voting system in County of Los Angeles USA on January 1<sup>st</sup>, 2001*

anticipated to be significant.” Thus, assuming that inflation and other factors remained constant, the cost of implementing electronic voting systems is approximately KR 54 Million. Considering that the 2013 budget allocations, the Commission was allocated KR 52 million<sup>91</sup> for all its activities, it would be impossible for the Commission to implement the systems without external assistance.

During an interview<sup>92</sup> with the Electoral Commission of Zambia Deputy Director for Elections, Mr Chella confirmed that the Commission is impeded in its functions due to lack of steady financial support. Mr Chella stated that “the delay in implementing effective mechanisms for blind voters has not been due to the reluctance of the Commission but it is an issue of lack of steady finances from the treasury. We do not have the kind of funding that will enable us to perform our functions effectively.” Therefore, the high cost of installations coupled with the lack of funding may pose a challenge in implementing electronic voting systems in Zambia.

### **3.2.2 High illiteracy levels**

This is also concerned with both electronic voting systems and tactile ballot guide. The vast majority of Zambians are computer illiterate while only a portion of blind people are able to read and write in Braille. This may pose a huge drawback on the use of independent voting systems because the system will be of no use if the people that the systems are meant for are unable to effectively use them.

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<sup>91</sup> 2013 National Budget for Housing and Planning.

<sup>92</sup> Interview with the Electoral Commission on Zambia’s Deputy Director for Elections MR Chomaba Chella on 28/06/2013 at 14:35 hrs at the Electoral Commission of Zambia Offices.

### 3.2.3 Wary Voters

Generally, people are ethnocentric and some voters are suspicious of technology due to unfamiliarity with computers or desire to possess a tangible ballot. Advanced Audio and Automark systems like the ones used in the USA do not produce ballot papers and the votes are electronically counted by the machines.<sup>93</sup> In a survey conducted in 1996 in Los Angeles County in the USA, 20% of visually impaired voters expressed suspicion over the use of an Audio voting device with a touch screen and constantly requested for a printed ballot paper. However, with voter sensitization and education the numbers reduced to only 1% in 2000.<sup>94</sup>

USA is a developed country, with computer literacy levels of around 96%. If such computer literate people were initially reluctant to embrace the use of electronic voting devices, statistics are likely to be higher in Zambia where computer literacy levels are as low as 30%.<sup>95</sup>

### 3.2.4 Training

The implementation of the above systems will require training of both the election officers and the voters on the use of the systems. The exercise should start with conducting training workshops with election officers, Disability organisations and Political Party representatives on the use of the Audio, Automark and tactile ballot guide. During this period, the stakeholders are taught how the systems work and how the system can be used to help blind voters to vote independently. The workshops are to be followed by extensive voter education through the print, mass media or press conferences. To ensure that the blind voters and election officers understand the use of the systems, the Commission can organise mock or trial elections to demonstrate the use of the systems.

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<sup>93</sup> [http://www.electionaccess.org/BP/USA/Baltimore county local elections.html](http://www.electionaccess.org/BP/USA/Baltimore%20county%20local%20elections.html).

<sup>94</sup> Conny B McCormack. *Report on Plans to Implement a state-of-the-art temper proof voting system in County of Los Angeles USA on January 1<sup>st</sup>, 2001*.

<sup>95</sup> [http://www.unicef\\_zambia\\_statistics.html](http://www.unicef_zambia_statistics.html). (accessed on 02/07/13)

This process is costly and requires huge amounts of both human and financial resources. As already noted above, the Commission lacks the financial muscle to effectively carry out its mandate. Additionally, collaboration with various stakeholders may be problematic in that generally, stakeholders in Zambia do not have confidence in the Electoral Commission of Zambia and doubt the credibility of the Commission to effectively carry out its mandate.<sup>96</sup> However, engaging stake holders in the electoral process can help build confidence in the system.

### **3.2.5 Lack of statistical data on the blind and visually impaired**

Generally in Zambia, statistical information on the blind is difficult to find. Sadly, even the organisations that advocate for the rights of disabled persons do not have statistical data on the blind.<sup>97</sup> Recent statistics are found in the 2000 Census of Population and Housing in Zambia which indicates that out of a total population of 9,337,425, a total of 282,684 people are disabled. However, the report does not indicate what proportion of the latter figure is blind. The statistics available at the Zambia Agency for Persons with Disabilities (ZAPD), only mentions partial sightedness and records that “partial sightedness is most common in Lusaka Province and least in North-Western Province.”<sup>98</sup>

The above information is very vague as it does state where the blind voters are located and in what numbers. This makes planning difficult as the Commission may not know, for instance, how many ballot papers should be printed in Braille and also the quantities that will be required at each polling point. According to Mr Chella,<sup>99</sup> “if information on where the blind

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<sup>96</sup> Interview conducted by Chipso Masenke with Mr Edward Kamwi, the then ECZ Legal Council on 07/11/09

<sup>97</sup> Interview with Mr Muchenga. Representative from the Zambia Agency for Persons with Disabilities (ZAPD) on 28/06/13 at 09:00hrs.

<sup>98</sup> ZAPD National Plan of Action for 2003-2008 at p8.

<sup>99</sup> Interview with the Electoral Commission on Zambia’s Deputy Director for Elections MR Chomaba Chella on 28/06/2013 at 14:35 hrs at the Electoral Commission of Zambia Offices.

voters are located and in what numbers they are is not there, it becomes difficult for the Commission to plan as we would not know which polling points require ballot papers in Braille and the quantities to deliver. Working on vague information may lead to other polling points being under supplied with voting material.”

In light of the above obstacles, it is imperative that the ECZ engages with the various stakeholders to plan on how best the Commission can circumvent the impeding factors. While it is evident that the Commission has a huge task as far as effecting independent voting for the blind is concerned, the Commission should not relent in its efforts but strive to accord blind voters an opportunity to vote on an equal basis with others.

### **3.4 PROPOSED SYSTEM MOST APPROPRIATE FOR ZAMBIA**

From the above considerations, the paper proposes that the Braille ballot paper or tactile guide will be most appropriate for Zambia. This is because the system is cheaper to implement in comparison to the other systems. Also, the level of expertise and technology required is not too advanced for a developing country like Zambia. Considering that the tactile guide has successfully been used in many countries since 2000,<sup>100</sup> the successful use of the guide in Zambia is almost guaranteed.

The tactile guide should be implemented in phases. Firstly, the ECZ should engage with various stakeholders and agree on the design of the template. The stakeholders can agree on a template that uses Braille or raised bumps or a combination of both. Considering that the vast majority of blind Zambians are not conversant with Braille, the first implementation should use raised bumps and subsequently introduce Braille when circumstances change.

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<sup>100</sup> Sierra Leone, South Africa, Ghana, Tanzania, Namibia and Malawi

The second phase should be training and voter education. The election officers, political party representatives and voters must be taught on how the guide works. This can be done through workshops, seminars, press conferences and publication in both the print and mass media. The role of political parties in the voter education exercise is very important. Thus, each political party must take an active part to educate their voters and candidates on the use of the guide whenever they hold rallies and conferences.

The practical implementation should be done systematically taking advantage of the frequent by-elections that are held during the five years before the general elections. Therefore, as they prepare for by-elections in a particular constituency and in light of the continuous voter registration process, the ECZ should ascertain the number of the blind voters in that constituency and prepare tactile guides for the blind along with the ordinary ballot papers.

At the end of the by- election, the effectiveness of the guide should be evaluated, highlighting any shortcomings that need to be worked on. An assessment can be done by inquiring from the blind voters on how effective the use of the guide had been or whether they had experienced any challenges when using the guide. The shortcomings should then be worked on during subsequent by-elections. The process should be repeated for each by-election until the use of the guide is finally implemented at a national level during the general elections.

It is important that the various stakeholders, especially the ECZ, ZAPD and political parties work together throughout the implementation process in order to achieve effective results.

### **3.5 CONCLUSION**

The Chapter has highlighted alternative voting systems for the blind and visually impaired voters and concluded that the Braille ballot or tactile guide is most appropriate for Zambia. The chapter has also discussed the challenges that may frustrate the efforts of the Commission in implementing alternative voting mechanisms. Such challenges include, *inter alia*, high cost

and lack of statistical data on blind voters. The Chapter therefore concludes that the above challenges should not be an excuse for the Commission to relent on its mandate. However, the Commission and the stakeholders concerned should work together and find ways of circumventing the above challenges.



## CHAPTER 4

### RECOMMENDATIONS AND CONCLUSIONS

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#### 4.0 SUMMARY OF FINDINGS

The study has shown that the right to vote is a fundamental human right and a basic tenet of every democratic society. The secret ballot is an essential element of the fair electoral process whose key aim is to ensure that the voter records a sincere choice by preventing attempts to influence the voter by intimidation or bribery. The secret ballot is one means of achieving the goal of political privacy. The concept of human rights was discussed in Chapter One. A conceptual analysis of Human Rights highlighted the fact that Human Rights in Zambia and also at International level are not absolute but that they may be subjected to certain derogations and limitations. In Zambia, the limitation and derogation clauses are provided for under Articles 11 and 25 respectively of the Constitution.<sup>101</sup> The implication of such clauses is that constitutionally guaranteed rights in Zambia are only enforceable to the extent that such rights are not excluded or restricted under the limitation and derogation clauses.

However, as the author, Alfred Chanda noted, any law that purports to derogate from fundamental Human Rights must not be arbitrary; it must be proportional and also reasonably justified in a democratic society.<sup>102</sup> The Chapter therefore concluded that the practice of limiting the exercise of the secret ballot in relation to blind voters is not justifiable in a democratic society. This is because there are various options that the state can employ to ensure that blind voters cast a secret vote.

The paper established under Chapter Two that, at both domestic and International level, Zambia has assumed obligations to ensure that blind voters cast a secret vote. At the

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<sup>101</sup> Chapter 1 of the Laws of Zambia.

<sup>102</sup> Alfred Chanda. "*The State Security Act v an Open Society: Does an Open society require Secrets?*" Zambia Law Journal Vol 29 (Lusaka: Unza Press, 1997) p 42

International Level, such obligation has been assumed by the signing and ratification of the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Rights of Persons with Disabilities. By virtue of being a signatory to such Conventions, Zambia is bound by the duty of *pacta sunt servanda*,<sup>103</sup> the obligation to perform the duty under the Convention in good faith and also the obligation to refrain from acts that would defeat the object and purpose of the treaty.<sup>104</sup>

At domestic level, Articles 34 and 63(2)<sup>105</sup> provide for the conduct of elections by way of a secret ballot for Presidential and Parliamentary elections respectively. Additionally, the Persons with Disabilities Act<sup>106</sup> mandates the Minister to make provisions to ensure the blind voters vote by secret ballot in elections and public referenda. The Chapter therefore concluded that the secret vote is both a fundamental and Constitutional right and should thus be exercised indiscriminately by all.

The preceding Chapter Three proposed optional voting systems for the blind and visually impaired voters that may enable blind voters to cast a secret vote. The voting systems proposed where the use of Audio devices, Braille or Tactile ballot Guide and Electronic systems such as the use of Automarks. It identified the advantages and disadvantages of the proposed systems and thus identified technological challenges and costs, *inter alia*, as factors that would impede the implementation of the systems. The Chapter concluded that Zambia should adopt the use of Braille or tactile ballot guide because it is cheaper and easier to implement considering that the guide has worked successfully in the African countries that have implemented them. Such Countries include Sierra Leone, Ghana and most recently, South Africa.

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<sup>103</sup> Article 26 of the Vienna Convention on The Law of Treaties

<sup>104</sup> Article 18 of the Vienna Convention on The Law of Treaties

<sup>105</sup> of the Constitution of Zambia, cap 1

<sup>106</sup> Section 51 of Act No 6 of 2012

## **4.1 GENERAL CONCLUSION**

This research has critically analysed the right of blind voters to secret ballot. Through an analysis of the legal framework both at level and International level, the paper has established that the right to a secret ballot for blind voters is adequately provided for. The research has however found that the conduct of elections in Zambia does not enable blind voters to cast a secret ballot. It is trite that the secret vote is a fundamental aspect of genuine elections. The paper therefore concludes that the Electoral Commission of Zambia, together with the concerned stakeholders must work together and put in place mechanisms that will allow blind voters to cast a secret vote.

## **4.2 RECOMMENDATIONS**

The recommendations in this chapter are based on the methods adopted by other African countries in implementing independent voting systems for the blind and also on information obtained through interviews conducted with the Zambia Agency for persons with Disabilities.

### **4.2.1 Strengthening the capacity of the ECZ**

The Electoral Commission of Zambia plays a cardinal role in the conduct of Elections in Zambia. However, it will be recalled from Chapter Three that lack of financial resources is a major drawback to the operations of the Commission. The paper recommends that the ECZ be provided with adequate funding by the state to enable the Commission to effectively carry out its operations. The capacity of the Commission can also be strengthened through the training and retraining of personnel and providing adequate office equipment, plant and equipment necessary to carry out its mandate.

#### **4.2.2 The Electoral Commission of Zambia to collaborate with the International Foundation for Electoral Systems (IFES).**

The IFES is an international organization that was established in 1997. The aim of the organization is to promote the electoral and political enfranchisement of people with disabilities. Its mandate, among others, is to ensure that voters with disabilities are afforded their full rights as citizens, including their rights to vote in secret. This is done through collaborative work with individuals, organizations and governments.<sup>107</sup> Since 1997, the IFES has worked in more than thirty (30) countries and has successfully funded programs that promote the participation of disabled persons in the electoral process.

In Ghana, during the Presidential and Parliamentary elections in 2002, IFES worked with the Ghanaian Electoral Commission and provided funding for workshops, production of the tactile ballot guide and other related voter education campaigns. Since the Ghanaian initiative, other countries like Sierra Leone, Namibia and Tanzania have successfully implemented the tactile ballot guide with the help of the IFES.<sup>108</sup>

Therefore, since the ECZ is not financial capacity to implement the Braille or tactile ballot guide given its budgetary allocations, the paper recommends that the ECZ should emulate Ghana and Sierra Leone and collaborate with the IFES in the planning, development and implementation of the use of Braille ballot papers or the tactile ballot guide.

#### **4.2.3 The Electoral Commission of Zambia to work with ZAPD and other Stakeholders**

The efforts to address the needs of blind voters should not be done by the ECZ alone. The Commission should work with ZAPD, Non-Governmental Organisations (NGOs) like Sight Savers Zambia and other stakeholders in addressing the plight of blind voters. In Sierra

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<sup>107</sup> <http://www.electionaccess.org/rs/Discussionpaper.html> (Accessed on 07/07/13)

<sup>108</sup> <http://www.electionaccess.org/BP/Ghana.html> (Accessed on 07/07/13)

Leone, the Sierra Leone National Electoral Commission (NEC) worked with the Action on Disability and Development (ADD) and Sierra Leone Association of the Blind (SLAB) in the project that saw the successful implementation of the use of tactile ballot guide during the 2002 elections. The various groups worked together in evaluating the design of the guide, conducting voter education and fielding members to monitor the guide's effectiveness.<sup>109</sup> In this regard, the paper recommends that the various stakeholders should team their resources and work together in order to achieve more successful results as was the case in Sierra Leone.

#### **4.2.4 Election monitoring by citizens with disabilities**

It has been the practice that disabled persons are usually left out in the decision making process concerning elections. During the recruitment and training program for voter education and election monitoring, the ECZ should include Blind persons in such programs. This is because the implementation of the tactile guide need to be inclusive and the blind should take an active part in matters that concern them. For instance, when implementing the tactile guide in Ghana, the Ghanaian Electoral Commission worked with the Ghana Association for the Blind. Thus during the Presidential and Parliamentary elections, seventy-seven Ghanaian citizens with disabilities were trained and recruited as fully credentialed election observers.<sup>110</sup> This approach can be emulated in Zambia and could result in the creation of a society that accords blind persons an opportunity to effectively and actively participate in political and public life on an equal basis with others.

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<sup>109</sup> [http://www.electionaccess.org/BP/Sierra Leone local election.html](http://www.electionaccess.org/BP/Sierra%20Leone%20local%20election.html) (Accessed on 07/07/13)

<sup>110</sup> <http://www.electionaccess.org/BP/Ghana.html> (Accessed on 07/07/13)

#### 4.2.5 Making Braille an integral part of learning institutions

The majority of blind people in Zambia are not conversant with the use of Braille. This is because Braille is only offered in selected schools for the Blind.<sup>111</sup> However, the majority of blind Zambians cannot afford to attend such schools. The Education Act<sup>112</sup> only recognizes the use of English and Sign language as languages of instruction at any level of the education system in Zambia.<sup>113</sup> However, the Persons with Disabilities Act<sup>114</sup> provides that the “Minister shall put in place measures to ensure the facilitation of learning of Braille, alternative scripts, augmentative and alternative modes, means and formats of communication.”<sup>115</sup> To increase literacy levels among the blind, Braille should be made an imperative and integral part of learning institutions and the two Acts should be harmonised. Thus Braille should be made available in the Public, Private and Community Educational Institutions.

#### 4.2.6 Refine ways of capturing data

The current voter registration process does not provide a mechanism of capturing information on any form of Disability. During voter registration, a voter is required to furnish only information as provided for on the National Registration Card (NRC) and also the name of the polling station that they wish to vote from. As a result, the ECZ does not have statistical data concerning blind voters and this lack of information hinders effective planning for the needs of blind voters. Therefore, the paper recommends that the ECZ should include a provision where one will be required to indicate whether they have any form of disability and also specify the kind of disability that they have. In this way, the Commission will have accurate information concerning the number and location of blind voters.

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<sup>111</sup> For instance, the Lions School for the Blind

<sup>112</sup> Act No 23 of 2011

<sup>113</sup> Sections 98 and 99 respectively of No 23 of 2011

<sup>114</sup> Act No 6 of 2012

<sup>115</sup> Section 22(2)(f) of Act No 6 of 2012

This method of capturing data is currently used by the Examinations Council of Zambia where an exam candidate is required to state whether he/ she has any form of disability and also specify the disability.

### **4.3 CONCLUSION**

In summary, the chapter concludes human rights accrue to every person by virtues of being human. Therefore, disability should not be used an excuse to deprive blind voters of their right to a secret vote. It is therefore imperative that the recommendations in this chapter be taken into consideration so as to ensure that blind voters participate in political affairs of the country on an equal basis with others.

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