

**THE CONCEPT OF PRESIDENTIAL IMMUNITY AND ITS**  
**IMPACT ON DEMOCRACY:**  
**A GLOBAL COMPARATIVE PERSPECTIVE**

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**BY**

**BENJAMIN MUTALE**

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**BY**

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**THE UNIVERSITY OF ZAMBIA**

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I recommend that the directed research essay prepared under my supervision by

**BENJAMIN MUTALE**

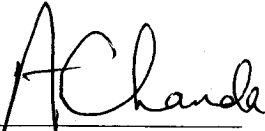
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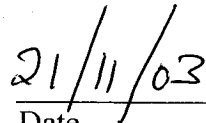
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Be accepted for examination. I have checked it carefully and I am satisfied it fulfils the requirements pertaining to format as laid down in the regulations governing directed research essays.

  
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Alfred W. Chanda (Dr)

  
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Date

## **DEDICATION**

To my Parents, my Dearest Dad, Mr Michael Chanda Mutale(deceased) you very much wanted me to have the highest level of education hence your insistence on my working hard at school,My Mum, Mrs Felistas Bwalya Mulenga Mutale, whose unconditional love is immeasurable. My sisters Sr Elizabeth, Rose, Ruth, Catherine, Harriet, Mercy Mary and Charity. My Brothers, Lawrence and Patrick.

My Sisters Matildah and Aggie, their Husbands Mr John Sakala, and Mr Webby Chilindi for their selfless sacrifices made to educate me. My Sweetheart Yunike Zulu for being there for me and supporting me through and through from time I met you especially during the time I was working on this study.

Truly I owe you.

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You have sown the seed and I pray that sooner or later you will realise the fruit of your labour.

God Bless.

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## **CHAPTER ONE**

### **GENERAL INTRODUCTION**

*"A leader has to submit to a stricter discipline and develop a more exemplary moral character than is expected of his followers" - Haile Selassie I of Ethiopia (1967)*

Presidential immunity, a phenomenon whose exact meaning, scope, basis and rationale is still a serious matter of controversy between developing and developed nations, has for many decades been looked at as a distant problem by most people in the world.

There is growing international acceptance and redefinition of the concept of presidential immunity and how it is supposed to help the incumbent chief executive of a country to exercise his powers and duties without fear of being prosecuted.

Some people have considered the concept of presidential immunity to be an absolute privilege that makes the president untouchable, unindictable, above the law even for the offences committed outside the official scope of his duties as head of state. They have argued, further, that a president cannot be prosecuted even for the crimes committed after he has left office and they have interpreted this kind of prosecution as victimization of a former president.

In recent years there have been calls to have former presidents have their immunities stripped in order to have them answer charges of abuse of office, corruption, economic mismanagement and gross abuse of human rights. These have been made in countries throughout the world, and the most prominent ones are, Albania, Chile, Italy, France and Philippines and Zambia and many other countries.<sup>1</sup>

The concept of presidential immunity has been subject to various interpretations by different scholars and courts. The most interesting ones are those of the Supreme Court of

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<sup>1</sup> Fredrick Pasual, Presidential Immunity: A Mere Myth (London: Hub Nest Publishers, 1999)p23.

the United States of America in the case of Nixon v Fdzgerald<sup>2</sup> and Clinton v Jones.<sup>3</sup>

In the Nixon case the court interpreted presidential immunity as being:

*"A functionally mandated incident of the president's unique office, rooted in the constitutional tradition of separation of powers and supported by the nation's history."*<sup>4</sup>

The court furthermore, held that:

*"The president's absolute immunity extends to all acts within the outer perimeter of his duties of his office."*<sup>5</sup>

In Clinton v Jones the Supreme Court held that:

*"The constitution does not afford the president temporary immunity from civil damages arising out of the events that occurred prior to his taking office absent the most unusual circumstances."*<sup>6</sup>

The doctrine of presidential immunity is deeply rooted and traces its origin from the English common law; it was originally applied to the judges to protect them from civil suit and indictment based upon acts or omissions committed in fulfilment of their judicial duties. Jennifer Motos in her of the Clinton case asserts that:

*"English common law was found on the principle that it is in the best interest to secure the independence of the judges and prevent them from being harassed by vexatious actions."*<sup>7</sup>

It must be noted that immunity was not meant for the protection or benefit of a corrupt judge. The court noted that:

*"Immunity was for the benefit of public and that the judge should be at liberty to exercise their functions with independence and without fear of consequences. In its genesis, official immunity rested on two rationales: (i) injustice of holding an officer, required by legal obligation to exercise discretion, liable for his good faith and; (ii) the danger that liability would discourage an officer from exercising his discretion necessary to his office."*<sup>8</sup>

<sup>2</sup> Nixon v Fdzgerald 457 U.S. 731 [1982].

<sup>3</sup> Clinton v Jones, 520 U.S. 681 [1997].

<sup>4</sup> Supra note 2 at 743.

<sup>5</sup> Supra note 2 at 736.

<sup>6</sup> Supra note 2 at 754.

<sup>7</sup> Jennifer Motos, "Failing to Score: Clinton v Jones", 36 Harvard Law Journal Vol. 93, 154 (1998).

<sup>8</sup> Ibid. at p.3.

Some scholars like Nido Madu have argued that:

*"To grant any leaders immunity from prosecution defies the principles of transparency and accountability and that the exclusion from prosecution will allow the sitting president or head of state to commit both financial and human rights abuse and therefore, should be rejected in its entirety."*<sup>9</sup>

Presidents the world over must be held accountable for the injustices they inflict on their people and people of other nations.

It is an acceptable principle that presidents should enjoy absolute immunity from lawsuits having to do with their official actions. Many people throughout the world assume some degree of criminality as being inherent in the job. But for all the known and suggested offences of these chief executives, from corruption, to election frauds, presidents and former presidents for a long time have been treated like sacred cows.<sup>10</sup>

However, the basis for many of the charges levelled against various presidents lack facts and focus instead upon political expediency. Still, nobody can deny that presidents have taken part in illegal activities.

Despite the generally understood notion that many systems of justice of various countries rest upon the ideal- though not always the reality of equal and impartial treatment of the accused, there is a history of exception of the head of state. Most of the frequently aired defence of presidential immunity offers that legal action against a president interferes with the pursuit of his official duties and hence runs counter to the needs and wants of the people.<sup>11</sup>

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<sup>9</sup> Mido Nidu. Should Africans Presidents Lose Immunity from Prosecution? A commentary. (Lancaster; Nijorff Pulishers, 2002) p124.

<sup>10</sup> Breger R, "Executive Privilege: A Presidential Pillar Without Constitutional Support." 26 Vill. Rev. 405, (1981).

<sup>11</sup> Howard Ball, Executive Privilege: A Constitutional Myth (Cambridge :Harvard University Press, 1989) p49.

This debate of presidential immunity centres on the question of how a president best serves the public interest. A president beholden to the legal system that he heads takes not only a moral but also a practical obligation. For if a system can tolerate one exception, it can tolerate many exceptions. According to Catayano, a renowned constitutional lawyer in Philippines:

*“When made to accommodate the powerful, it threatens the basis of democratic ideals. Thus a president who subordinates himself to the law acts in the best interest of the people because the action reaffirms the system.”<sup>12</sup>*

The rest of the study is arranged in the following manner. Chapter two tries to define the concept of presidential immunity. The chapter furthermore will analyse the basis of the concept and in doing so will look at both the constitutional and legal basis. The third chapter of the study shall endeavour to give a comparative approach of how the concept has been interpreted, and this will be done by looking at how some countries like the United States of America, China, Israel, Philippines and Zambia have understood and interpreted the concept either through their courts or in their constitutions.

The fourth chapter will spell out and analyse the effect of this concept of presidential immunity on democracy and its principles. This chapter will critically, and with examples analyse how the principles of rule of law, respect for human rights, transparency and accountability, free and fair elections, the operation of the doctrine of separation of powers and the independence of the judiciary, have been undermined because of the said concept.

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<sup>12</sup> H. Cateyano, “Presidential Immunity: A Critique of the Concept”, Filipino Law Journal, Vol 78, 123, (1995).

The fifth chapter entitled, The Weaknesses of the Concept of Presidential Immunity in the Zambian context will spell out the weaknesses of how the concept is applied in Zambia.

In the second part of the chapter the study will analyse and discuss the removal of immunity of the former president. This will also lead to the discussion of the cardinal issue of making presidents immune for life even for the crimes committed after they have left office. In discussing this issue the study will endeavour to clear the misunderstanding that once a person has held office as president, he cannot be indicted or charged for any offence committed even for the acts done after he or she has left office.

Finally chapter six of the study will make a summary of the analysis of the concept and recommendations on what should be done to make the concept fulfil its intended purpose and to prevent abuse of this well meant privilege by the presidents.

## **CHAPTER II**

### **THE NATURE, DEFINITION, SCOPE, BASIS AND RATIONALE OF THE CONCEPT OF PRESIDENTIAL IMMUNITY**

#### **2.1 INTRODUCTION**

Presidential immunity is a principle that has received international acceptance. The law on the concept of presidential immunity was initially based on the absolute principle of separation of powers and the respect of the principle that the king can do no wrong. However, this principle created complications because it has been difficult to distinguish clearly between the official and non-official acts to which the president is immune. This, therefore, forms the premise of this chapter. In this chapter we shall endeavor to define the concept of presidential immunity, its scope, basis and rationale. This will be followed by a brief conclusion of the chapter.

#### **2.2 THE CONCEPT OF PRESIDENTIAL IMMUNITY DEFINED:**

It must be acknowledged from the onset that it is hard to come up with an all-embracing and universally accepted definition of presidential immunity.

Before going into any substance, it is best to begin with an explanation of 'presidential immunity'. On a preliminary note, presidency is an attribute of the chief executive of a particular country, more especially in a presidential system of government.

Black's Law Dictionary (Sixth Edition) supplies the following definition of immunity:

*"Exemption, as from serving in an office, or performing duties which the law generally requires other citizens to perform; for example, the exemption from paying taxes, freedom or exemption from penalty, burden, or duty. Special privilege."*<sup>1</sup>

The Oxford Companion to Law (International Edition, 1993) puts its definition thus:

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<sup>1</sup> Black's Law Dictionary (6<sup>th</sup> Ed)( Oxford: Oxford University,1992)p164.

*"A state of freedom from certain legal consequences or the operation of certain legal rules. In municipal law particular categories of persons are immune from civil or criminal liability in particular cases."*<sup>2</sup>

It is an exemption that a person (individual or corporate) enjoys from the normal operation of the law, such as a legal duty or liability, either criminal or civil. For example, diplomats enjoy "diplomatic immunity" which means that they cannot be prosecuted for crimes committed during their tenure as diplomats.<sup>3</sup> Another example of immunity is where a witness agrees to testify only if the testimony cannot be used at some later date during a hearing against the witness.<sup>4</sup>

The above definitions elucidate the most fundamental characteristic of immunity: that persons enjoying such "exemption" or 'freedom", whether absolute or qualified, enjoy a "special privilege" over and above other citizens. Thus, laws conferring immunity operate as exemptions to the general rule of equality of all men before the law.

Thus, the absolute protection from liability arises out of the discharge of purely presidential functions carried out by the head of state in his official capacity. Under the doctrine of presidential immunity, a president is not subject to liability for any act committed within the exercise of his official function; the immunity is absolute in that it is applicable to all the acts done by the president in his official capacity.

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<sup>2</sup> The Oxford companion to law (International Edition),(Oxford: Oxford University Press, 1993)p356.

<sup>3</sup> J. Browlie, Essential Principles of International Law ( New Delhi: Cavendesh Publishers,1996)p56.

### **2.3 HISTORICAL BACKGROUND.**

It is generally agreed that the doctrine of presidential immunity developed from the English doctrine, which grew out of the concept that, the "King can do no wrong."<sup>5</sup>

In fact, recent events have demonstrated dramatically that the "king can do wrong" in many countries and when he does, he must pay the penalty for such wrongdoings.

The concept of presidential immunity is deeply rooted and traces its origin from English common law. It was originally applied to judges to protect them from civil suits and indictments based on the acts or omissions committed in the fulfillment of their judicial duties.

Jennifer Motos in her analysis of the of the **Clinton v Jones** case asserts that:

*"English common law immunity was founded on the principle that it is in the best public interest to secure the independence of judges, and prevent them from being harassed by vexatious actions."*<sup>6</sup>

She notes furthermore, that:

*"Immunity was not for the protection of a malicious or corrupt judge, but for the benefit of the public whose interest it is that judges should be at liberty to exercise their functions with independence and without fear of consequences."*<sup>7</sup>

It is against this background that the concept has, today now been extended to the executive branch of government, especially to the head of state who is the chief executive.

Thus, today, the concept of immunity generally applies to people who, due to the nature of their offices, the law has come in to protect, to give them exceptional protection. In

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<sup>4</sup> Ibid. p56.

<sup>5</sup> Shane Peter, "The Case of Executive Privilege Claims Against the Congress", 71 MINN.LS. REV.461(1987)

<sup>6</sup> Jannifer Motos.(*Failing to Score : Clinton v Jones* ) 36 Harvard Law Journal Vol. 93. 154

<sup>7</sup> Ibid. at p6.



line with the above assertion, the concept recognizes that presidents and other government officials' immunity from suits should be limited to situations in which the exercise of discretion was in good faith.

The office of the president, who is the head of the executive branch of government, is occupied by an individual making it unique from the other two branches of the government. While serving his term, the president is primarily an aspect of government, his character as a private citizen is fully secondary.

#### **2.4 THE SCOPE OF THE CONCEPT OF PRESIDENTIAL IMMUNITY**

On May 27<sup>th</sup> 1997, a unanimous United States Supreme Court decision held in Clinton v Jones<sup>8</sup> that the constitution does not protect a sitting president from a lawsuit predicated on private, pre- presidential conduct. Basically what the court stated was that " an incumbent president was liable to a suit for damages, based on the actions taken before term began."<sup>7</sup> The court, furthermore, stated that, " an official's absolute immunity should only extend to acts in performance of particular functions of his office because immunities are grounded in the nature of the functions performed, not the identity of the actor who performed it."<sup>9</sup>

Therefore, the doctrine of immunity finds no application and cannot be invoked in cases where public officials are sued in their personal (private) capacity as ordinary citizens. The mantle of protection afforded to public officials is removed the moment they are sued in their individual capacity. This generally arises where the government official acts

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<sup>8</sup> Clinton v Jones, 520 U.S. 681 (1997)

<sup>9</sup> Ibid. at p34

without authority or in excess of the powers vested in him or his office such as when he has acted with malice or in bad faith, or beyond the scope of his authority or jurisdiction. Presidents' immunity extends only to actions undertaken in their official capacity.<sup>10</sup> For civil actions done entirely in their private capacity, they do not enjoy any immunity. It is widely accepted and acknowledged that presidents as leaders are liable to mistakes like any body else, however, offences such as corruption, human right abuses do not qualify to be labelled as mistakes at all. Sofaer, in his article "Executive Privilege: An historical note" gives the following illustration;

*"When the president approves a controversial foreign loan agreement, or signs an unpopular treaty, or appoints a movie stuntman as a diplomat, vetoes an essential budget item, or pardons a convicted criminal, he should be granted good faith and immunity from suit for those official acts. But on the other hand, the chief executive rapes or commits adultery with a palace household, he cannot claim immunity just because he is president. Raping or committing adultery with a housemaid is not part of his official duties. Or if the president swindles a business associate, extorts or accepts bribes and hides the dirty million in secret bank accounts under fictitious names, he is not exempted from prosecution."<sup>11</sup>*

Since presidents only enjoy absolute immunity for official actions, it is right to state that the immunity that is enjoyed by them, is only supposed to be invoked for actions that are within the scope of their duties. Thus, in the case of Nixon v Fitzgerald, Justice White stated that;

*" Presidents, like members of the congress, judges, prosecutors or congressional aides - all having absolute immunity, are not immune from prosecution for acts outside official duties. Even the broad immunity of the speech and debate clause has its limits."<sup>12</sup>*

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<sup>10</sup> Berger Raul Executive privilege: a Constitutional Myth.(Cambridge: Harvard University Press,1987)P121

<sup>11</sup> Sofaer J. "Executive Privilege: An historical note" 75 Colum. L.REV.1318(1975)

<sup>12</sup> Nixon v Fitzgerald 457 U.S. 731 (1982)

In the case of Joseph Estrada's prosecution for the plunder of Philippine's national resources the Supreme Court stated that;

*" it will be analogous to hold that immunity is an inoculation from liability for unlawful acts and omissions. The rule is that unlawful acts of the state and the officer who acts illegally is not acting as such but stands in the same footing as any other trespasser. Indeed, a critical reading of the current literature on executive immunity will review a judicial disinclination to expand the privilege especially when it impedes the search for truths or impairs the vindication of a right."*<sup>14</sup>

One leading African scholar has asserted that:

*"Presidents the world over not only in Africa, must be held accountable for the injustices that they inflict on their people as they act with impunity and blatant disregard of the law largely because they know that they are virtually untouchable, the corruption, the mismanagement and victimisation of political opponents is done in the firm belief that they are immune from prosecution."*<sup>15</sup>

## **2.5 WHO SHOULD ENJOY PRESIDENTIAL IMMUNITY?**

### **2.51 INCUMBENT PRESIDENTS**

An incumbent president's absolute immunity is a functionally mandated incident of his unique office, rooted in the constitutional tradition of separation of powers. Because of the singular importance of the president's duties, diversion of his energies by concern of private and criminal law suits would raise unique risks to the effective functioning of the government.

In the case of **Re Bermudez**(1986) the Supreme Court of Philippines held that;

*" incumbent presidents are immune from suits or from being brought to court during their incumbency and tenure."*<sup>16</sup>

<sup>14</sup> D. Foukona , "Presidential Immunity and Accountability", Journal of South Pacific Law; Vol 5.39 (2001)

<sup>15</sup> Mido Nidu. Should African Presidents Lose Immunity from Prosecution? A commentary.(Lancaster; Nijorff Pulishers,2002)p136

<sup>16</sup> Re Bermudez 234 SCRA 163(1986)

It is recognised that while a person is sitting as a president, no suit criminal or civil may be brought against him. This, however, differs from country to country as will be discussed in the next chapter. This recognition of the concept of presidential immunity in many countries is found in their supreme law of the land, which is their constitution.<sup>17</sup> These provisions of the constitutions confer extra legal benefits on presidents rightly according to their important role they play in the smooth running of the country. It is the effective administration of their duties that demands this. However, it should be noted with caution these special accommodations hardly make the holders of such an office "kings".

## **2.52 FORMER PRESIDENTS**

There is a lot of misunderstanding among the people as to what extent former presidents can enjoy immunity from prosecution. An example of this misunderstanding was the arrest of a former president of Zambia, in 1997 in connection with the foiled coup attempt masterminded by Captains Steven Lungu (alias captain Solo) and Jack Chiti.<sup>18</sup> In this case he was arrested, charged, incarcerated, and tried for offences of treason and later to a lesser charge of misprison of treason. These charges were later dropped when the state entered a nolle prosequere against him due to insufficient evidence.<sup>19</sup> This, to many Zambians, was seen and interpreted as the unofficial stripping of Dr Kaunda's immunity. What was misunderstood in the above scenario was whether the arrest of this Former president of Zambia on a charge of treason was an act he was immune from and on the other hand whether the former president continues to enjoy immunity from prosecution even for the crimes committed after leaving office.

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<sup>17</sup> Article 43 of the Constitution of Zambia Chapter 1 of the Laws of Zambia

<sup>18</sup> The Post News paper of October 27<sup>th</sup> 1997

<sup>19</sup> The people V Kenneth Kaunda High Court case Unreported(1998)

The limitation pertaining to the former president is that immunity applies only to incumbent presidents as laid down in the cases of Bermudez<sup>20</sup> and Clinton v. Jones<sup>21</sup>. Therefore, when a crime has been committed by a former head of state, that person is supposed to meet the consequences of the law without any excuse of being immune from prosecution. The suspect is no longer president and he will be sued in his individual capacity.

Former presidents are only exempted from prosecution for those acts they did while they were occupying the high office and within the parameter of their official duties. The law protects the former president for those acts because his actions at that particular time were done for the benefits of the citizens of that country, and it was the presidency as an institution that committed those acts and not the individual, as the acts were within the confines of the law.

Public officials like presidents are given immunity from arrest or prosecution, but these privileges terminate when they leave office and are designed to allow them to carry out their legitimate public responsibilities. No country offers immunity to former heads of state. "It goes against the increasingly widely accepted principle that heads of state must answer for human rights violations before the courts. Immunity cannot be handed out as a prize to former rulers, even good ones."<sup>22</sup>

There were proposed constitutional reforms in Chile that would give permanent immunity from prosecution to all former heads of state.<sup>23</sup>

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<sup>20</sup> Re Bermudez 234 SCRA 163(1986)

<sup>21</sup> Clinton v Jones 520 U.S. 681 (1997)

<sup>22</sup> J.Sullivan *Immunity Versus Human Rights: The Pinochet*, NYU Law Journal, Vol 2.(2002) p23

<sup>23</sup> Ibid. at p23

Gen. Pinochet arranged "senator-for-life" status for himself, when he left power in 1990, thereby ensuring his immunity from prosecution.<sup>24</sup> But since the former dictator was arrested in London, the Chilean judiciary has proved more willing to consider lawsuits against him. Most countries in Latin America grant their legislators and/or public officials immunity from criminal prosecution, but in most cases it ends when they retire, and it covers only the period when the person is actually in office. Chile's new law would have given its public officials the most extensive immunity in the world.

*"The proposal would have given blanket immunity not only to Pinochet, but to any other dictator who might come after him," said Vivanco. "It would set them completely above the law, no matter how brutal or corrupt their regimes may be."*<sup>25</sup>

On the other hand, Russian president Vladmar Putin signed a decree immediately after Yeltsin's departure guaranteeing total criminal immunity for former presidents, but legislative house prevented the decree from becoming law when they opposed it as the original Kremlin-proposed version that would have offered former presidents unlimited immunity.<sup>26</sup>

Many presidents and former presidents at least face accusations now instead of dying of old age or retiring at some beach resort. They include Carlos Menem (Argentina), Bettino Craxi (Italy), Benazir Bhutto (Pakistan), Fernando Collor De Mello (Brazil), Luis González Macchi (Paraguay), Vicente Fox (Mexico), Ernesto Samper (Colombia), Fabián

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<sup>24</sup> Ibid. at p24.

<sup>25</sup> Ibid. at p26.

<sup>26</sup> F.Prezertiavick, Protection of Official of Sovereign States According to International

Law, (Santiago: Clarendon 1994) p48

Alarcón (Ecuador), Carlos Andrés Perez (Venezuela), and Kim Young Sam, Chun Doo Hwan and Roh Tae Woo (South Korea)<sup>27</sup>.

As stated above, some countries have been trying to shield their former presidents by granting them unlimited immunity for life. For example one Human rights activist commented that:" the main obstacle to bringing former Nicaraguan president Arnoldo Alemán to justice was that he enjoyed immunity from prosecution; he was appointed president of the Nicaraguan Assembly after he stepped down as President."<sup>28</sup> Alemán faces charges of misappropriating at least 100 million dollars in one of the poorest countries of Latin America.

However, some countries have led the way in the prosecuting of former presidents for the crimes they committed while serving as presidents. In South Korea two former presidents were charged and faced a trial together for alleged wrongdoing in office. In addition, the two separately face bribery charges for amassing hundreds of millions of dollars while in office.<sup>29</sup>

Chun Doo-hwan and Roh Tae-Woo are charged with masterminding a military coup in 1979 that allowed them to control the presidency for 13 years from 1980 to 1993.

The former military generals also face charges of sedition in connection with the army's role in crushing a 1980 pro-democracy uprising in the city of Kwangju that killed more than 200 people.<sup>30</sup>

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<sup>28</sup> Editorial of The Honolulu News Paper of April 24<sup>th</sup>. 2002.

<sup>29</sup> Xianthu News paper Vol 197 of 12<sup>th</sup> July 2000.

## 2.6 THE RATIONALE OF THE CONCEPT OF PRESIDENTIAL IMMUNITY.

The principal rationale for affording certain public servants immunity from suits for any criminal and civil liability arising out of their official acts is inapplicable to unofficial conduct. In cases involving prosecutors, legislators, and judges it has been explained that the immunity serves the public interest in enabling such officials to perform their designated functions effectively without fear that a particular decision may give rise to personal liability.

Given the enormous responsibilities of a president, particularly in a pure presidential system, it is cardinal to extend certain privileges and immunities to the president in the performance of his duties. It is because of the potential indictment that threatens the functioning of an entire executive branch that has been pointed out to be the rationale of presidential immunity.

*"As public servants, the prosecutor and the judge represent the interest of society as a whole. The conduct of their official duties may adversely affect a wide variety of different individuals, each of whom may be a potential source of future controversy. The societal interest in providing such public officials with the maximum ability to deal fearlessly and impartially with the public at large has long been recognized as an acceptable justification for official immunity. The point of immunity for such officials is to forestall an atmosphere of intimidation that would conflict with their resolve to perform their designated functions in a principled fashion."<sup>31</sup>*

In the case of Clinton v Jones the court stressed that rationale provided the principal basis for holding that a former President of the United States was "entitled to absolute immunity from damages liability predicated on his official acts. The court stated that; "Our central concern is to avoid rendering the President "unduly cautious in the discharge

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<sup>30</sup> Ibid at p 23.

<sup>31</sup> Nixon V Fitzgerald 457U.S. 751 (1982).



of his official duties.<sup>32</sup>

This reasoning provides no support for an immunity for unofficial conduct. As explained in **Fitzgerald**, that:

*"the sphere of protected action must be related closely to the immunity's justifying purposes." Because of the President's broad responsibilities, This court recognises in that immunity from damages claims arising out of official acts extending to the "outer perimeter of his authority." But it (court) has never suggested that the President, or any other official, has an immunity that extends beyond the scope of any action taken in an official capacity. (Noting that "a President, like Members of Congress, judges, prosecutors, or congressional aides--all having absolute immunity--are not immune for acts outside official duties").<sup>33</sup>*

In the Filipino case of **Solien v Mukasiar** the court ruled that:

*"the rationale for granting the president this privilege of immunity from suits is to assure the exercise of presidential duties and functions free from any hindrance considering that being the chief executive of the government is a job that aside from requiring all the officeholder's time, also demands undivided attention."<sup>34</sup>*

After leaving office he should be answerable for the wrongs he committed that were outside his official capacity as head of state. This argument is grounded on the principle of the rule of law that "no one is above the law."

It is because he occupies a unique office with powers and responsibilities so vast and important that the public interest demands that he devote his undivided time and attention to his public duties.

## **2.7 CONCLUSION**

It is worth to note that president all over the world enjoy immunity from prosecution while serving as presidents, however the application of this principle has notable

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<sup>32</sup> Clinton V Jones 520 U.S. 681 (1997)

<sup>33</sup> Nixon V Fdzgerald 457U.S. 751 (1982)

<sup>34</sup> Solien v Mukasiar 167SCRA 393(1988)

limitations and these are that; immunity must apply only to an incumbent president and that it should only apply to legal acts.

The immunity that presidents enjoy is absolute on condition that their acts are done in the best interest of the people and in their official capacity.

Immunity ceases to be enjoyed by the former president the moment he leaves office but he is still immune from prosecution for the acts done while sitting as president as long they were not committed outside the official parameter of their powers.

It is for this reason that presidential immunity is and should have a scope and must not be granted on a blanket basis; it should preclude protection of a president who has committed personal crimes against another person or the state in circumstances that have nothing to do with national interest.

It is therefore, submitted that immunity should only apply where the head of state made genuine mistakes in the course of their duties, and in case of corrupt leaders who abuse their offices by plundering the nation's merger resources, they should not enjoy that immunity.

The draft of laws giving immunity to former presidents would perpetuate their feeling of invincibility.

An example of these laws is a proposal of Article 53 of the tiny state of Kyrgyzstan that would grant former presidents of Kyrgyzstan immunity from prosecution and from any responsibility for actions taken or statements made in that capacity. Some countries have even a package of constitutional changes that gives former presidents five years of

immunity after leaving office.<sup>35</sup> This is very unfortunate for countries that call themselves democratic nations and they claim to uphold the principles of transparency and accountability.

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<sup>35</sup> Aloyz M.S A Critical analysis of Constitutional Amendment of Kyrgyzstan , (Kosovo Refugee Information Network Website, 1999)

## CHAPTER III

### THE INTERPRETATION OF THE CONCEPT OF PRESIDENTIAL IMMUNITY

#### 3.1 INTRODUCTION

This chapter will endeavour to give a comparative approach of the interpretation of the concept of presidential immunity of various countries. This will be done with the aid of decided cases from the United States of America, and Philippines, and also from what various scholars have stated.

#### 3.2 INTERPRETATION

The interpretation of the concept of presidential has been a source of great controversy between many scholars and also how the concept has been provided for in the constitution of various countries. In some countries such as the United States of America the concept is not even provided for in the constitution.

#### 3.3 THE UNITED STATES OF AMERICA

The basis of the doctrine of presidential immunity in the United States of America does not emanate from the Constitution, but from the concept of separation of powers and from the common law history. Santiago, has noted:

*"The constitution does not provide for presidential immunity from suit. What the constitution provides for is congressional immunity, which has textual roots in speech and debate clause."*<sup>1</sup>

In the case of **Nixon v Fitzgerald**, the Supreme Court of the United States explained that absolute presidential immunity is a:

*"functionally mandated incident of the president's unique office, rooted in the constitutional tradition of separation of powers and supported by our history."*<sup>2</sup>

The court further raised the following arguments in favour of presidential immunity:

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<sup>1</sup> Miriam Santiago, Presidential Liability for P 7 Billion Fund Juggling: A Performance Report of the President of Phillipine(Privilege Speech) 16<sup>th</sup> April 1999.

<sup>2</sup> Nixon v Fdzgerald 457 U.S.751(1982).

*" (a) The visibility and influence of the office of the president, which makes its occupant an easy and tempting target for lawsuits;*

*(b) The importance of insulating presidential judgement and energy from distractions and pressures that potential liability for damages would create; and*

*(c) The availability of alternative checks on presidential actions, such as media scrutiny, congressional oversight' and the threat of impeachment."*<sup>3</sup>

The question of whether or not a sitting president should be forced to stand trial while in office for acts allegedly committed before his or her election was examined in the case of **Jones v Clinton**<sup>4</sup>. The Supreme Court allowed a lower court to proceed with the case brought by Paula Jones against President Clinton on the presumption that such a trial would not hamper the president's ability to carry out his duties. They stated that a president is not immune from the acts done before he was elected president.

Professor Laurence Tribe argues that :

*"the notion that the president would be like a king was implicitly rejected in our founding documents." This position, which seems to reject any notion of immunity, disregards the fact that kings did not have set terms after which action against them could have been brought (assuming the clock on the statute of limitations would be frozen for those in office)*<sup>5</sup>.

In contrast, Walter Dellinger argues in favor of executive privilege. He points out that:

*"When [the United States] adopted the 25th Amendment governing presidential disability, it was a recognition by Congress and the courts that the President's office was singular."*<sup>6</sup>

Dellinger further notes that:

*"The nation cannot permit the office of the President to be vacant even for a moment."*<sup>7</sup>

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<sup>3</sup> Ibid. at 745.

<sup>4</sup> Clinton v Jones 520 US.681(1997)

<sup>6</sup> Walter Dellinger. Fundamental Perspectives of Presidential Immunity, (New York: West Publishing Co,1993)p67

<sup>7</sup> Ibid. at p69.

The implication is that the large-scale distraction caused by a prolonged trial would amount to disabling the president.

Akhil Reed Amar writes that :

*"Admittedly, the Constitution does not create executive privilege in so many words. But it does create a system of federalism and separation of powers. As a matter of federalism, state and local prosecutors cannot be allowed to disrupt the proper performance of national executive functions."*<sup>8</sup>

He recommends the enactment by Congress of:

*"An omnibus presidential privilege bill" to include rules for when (if ever) a sitting president can be sued in civil cases; providing for tolling of statutes of limitation in the event of temporary presidential immunity... The statute should also reaffirm the historically sound and structurally sensible rule that a sitting president cannot be forced to stand trial against his will in an ordinary criminal court."*<sup>9</sup>

However, in the American set up the rule of absolute immunity for the President does not leave the Nation without sufficient protection against misconduct on the part of the chief executive. The President is subjected to constant scrutiny by the press. Vigilant oversight by Congress also may serve to deter Presidential abuses of office, as well as to make credible the threat of impeachment. Other incentives to avoid misconduct may include a desire to earn re-election, the need to maintain prestige as an element of Presidential influence, and a President's traditional concern for his historical stature. The existence of alternative remedies and deterrents establishes that absolute immunity will not place the President "above the law." For the President, as for judges and prosecutors, absolute immunity merely precludes a particular private remedy for alleged misconduct in order to advance compelling public ends.

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<sup>8</sup> Akil Reed Amar " *The Unimperial Presidency*", The New Republic Newspaper, of March ,8, 1999.

<sup>9</sup> Ibid.

### **3.4 REPUBLIC OF ISRAEL**

The doctrine of presidential immunity in the Republic of Israel is provided for under the Article 32 of the Constitution. The President will not have to account to any court for any action relating to presidential duties or powers and is immune from any legal proceeding for such actions.

The President of the State is not obligated to divulge in testimony any information that has become known to the President in the fulfilment of duties as President of the State.

The presidential immunity under the clause, according to Abraham Zwingili,

*"continues to be in effect even after the President leaves office."*<sup>10</sup>

The state President cannot be brought before a criminal court and the period during which the President may not be brought before a court for a crime under immunity clause is not be calculated into the statute of limitations for that offense.

Zwingili has further noted that:

*"In the event that the President of the State is required to give testimony, it will be taken in a place and at a time to be fixed with the consent of the President."*<sup>11</sup>

It seems that the president of Israel enjoys absolute immunity for all his actions as long as they are done in his official capacity and not personal capacity.

### **3.5 THE REPUBLIC OF CHINA**

The principle of presidential immunity in China is expressly provided for in the Republican Constitution under Article 52 which states that:

*"The president is immune from criminal prosecution, unless he is charged with the crime of treason or rebellion or otherwise recalled or relieved from his presidential functions."*<sup>12</sup>

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<sup>10</sup> A.Zwingilli, "Presidential privilege and its Limitations in Israel", The Gerizim Herald, of 23<sup>rd</sup> June 1992.

<sup>11</sup> Ibid.

The constitution of China only protects the president from criminal prosecution, and does not give him immunity from civil law suits. As argued by Chen Huing that:

*"While this establishes presidential immunity from criminal prosecution, the constitution does not provide for the immunity from civil suits. However, there is a strong argument that a president is immune from civil law suits over official actions."*<sup>13</sup>

The implication of this is that the president is only immune from civil lawsuits over actions taken by him entirely in his official capacity. Huing has further argued that;

*" it seems in purely private matters the president does not enjoy absolute immunity"*<sup>14</sup>.

The debate on the issue of immunity of the president in China was heightened when the China Times claimed that the president in 1994 had received a donation of NT \$4.5 million from Hui chen, a majority shareholder of Zanadou Development Corporation, for his Taipei mayoral campaign election.<sup>15</sup>

A day after this allegation was published, the president announced his intention to file a private libel suit against the Newspaper Company, and the row came to a quick halt. The paper diffused the situation with a front-page apology.

The aftermath of the controversy raised a question among legal scholars in China of *"can a president sue the newspaper in his private capacity?"*<sup>16</sup>

The above question was answered systematically by one legal scholar who asserted that:

*"With respect to the question, it seems hard to give reasons why the president should not sue. Presumably the right to sue and to be sued are inseparable. Since a right necessarily come with a corresponding obligation. So, the president 's legal immunity or lack of it gives the other citizens rights to sue him."*<sup>17</sup>

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<sup>12</sup> Article 52 of the Constitution of the Republic of China.

<sup>13</sup> Chen Huing , *"The President's Right to Sue and to be Sued"*, Honolulu Newspaper, of 14<sup>th</sup> June 1994.

<sup>14</sup> Ibid.

<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

<sup>17</sup> Ibid.



The alleged donation was unrelated to Chen's presidential duties, since the whole transaction happened before he became president and as such has no immunity.

The most important and peculiar understanding of this concept in China is based on the constitutional provision of Article 52 which states that "..... unless he is charged with the crime of treason or relieved or recalled from his presidential functions."

From the above quotation it is right to assert that the president can be charged criminally only after he has resigned, impeached and under such circumstances he can be sued and be prosecuted.

However, on matters done in his personal capacity he is liable to be sued.

Thus, if a president can sue in his private capacity then he is also liable and amenable to be sued in that capacity by fellow citizens. Unless it is the presidency as an institution which sues people who have defamed the president and in such circumstances, the alleged defamation sentiments must directly or indirectly affect the president's discharge of his duties, and if they are not related in any way then the person should not be sued by the presidency.

### **3.6 THE REPUBLIC OF PHILIPPINES**

The concept of presidential immunity dates back to the Malolos constitution signed in 1899, at the Barasain Church under the Philippine Revolutionary Government. Its Article 71 provided that "The president of Philippine is only responsible in the case of high treason."<sup>18</sup>

The 1899 constitution gave the president an almost absolute immunity as it did not give the president any limitations.

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<sup>18</sup> Article 71 of the Malolos Constitution of 1899

However, in the succeeding constitution of 1935 adopted under the commonwealth and carried over with amendments to the 1946 Republic, there was no section or provision whatsoever granting immunity.

Then in the 1972 Constitution, Marcos changed the 1935 constitution and wrote entirely a new charter inserting into it section seven in Article 7 granting himself and his close associates absolute immunity from prosecution. This provision read:

*The president shall be immune from prosecution during his tenure. "By decree he also sought to extend this immunity to subordinates acting on his behalf."*<sup>19</sup>

In 1987 when the Revolutionary Government that sent the dictator Marcos fleeing into exile scrapped the 1972 constitution and caused the writing of an entirely new charter, the provision on presidential immunity was removed.

The position of the concept of presidential immunity is that the constitution of Philippine does not provide for it. A constitutional lawyer Rene Sansuisag commenting on the invocation of the principle of presidential immunity by the former leader Estrada who was facing criminal charges of abuse of office, graft and corruption had this to say:

*"It (presidential immunity) may not be in the constitution, but presidential immunity is with us by tradition."*

He further argues that:

*"This privilege (not right) is not absolute, we could grant that a president must be allowed reasonable executive discretion so his official decision made in good faith are not influenced by threats of lawsuits. A president to be effective must have certain guarantees that he would not be harassed by court action for official acts."*<sup>20</sup>

The basis for immunity is only found in the jurisprudence of Philippines and the United States which by virtue of Article 8 that forms part of the legal system of Philippines.

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<sup>19</sup> Article 7(7) of the Philippine Constitution of 1972.

In the case of **Re Bermudez** the Supreme Court expressly held that:

*" Incumbent presidents are immune from prosecution or being brought before court during the period of incumbency and tenure. " <sup>21</sup>*

In other words the court simply stated that the person who is supposed to enjoy this immunity is a sitting president, and after leaving office they no longer have to enjoy this privilege.

The purpose of immunity was discussed in the case of **Solivien V Makasiar** where it was held that:

*"The rationale to grant the president the privilege of immunity from suit is to assure exercise of presidential duties and functions free from any hindrance or distraction, considering that being the chief executive of the government is a job that, aside from requiring all the officeholder's time demands undivided attention. " <sup>22</sup>*

However, according to the Supreme Court of Philippine, the doctrine of presidential immunity has at least two limitations:

- "1.The limitation is, that immunity applies only to an incumbent president as laid down in the Bermudez case;*
- 2.The second limitation is, that immunity applies only to legal acts. " <sup>23</sup>*

Thus, under the existing law consisting of the Supreme Court decisions, and the committee Report Number 30 of 2000 recommends that a former president must be prosecuted because:

*"The criminal suspect is no longer an incumbent president ; and he will be sued in his individual capacity , because he allegedly acted in excess of the powers vested in him as a public official. " <sup>24</sup>*

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<sup>20</sup>Rene Suinsag The Lifting of Immunity of the E.J Estrada: An Overview Analysis., Pinoylaw: The Law professor Website,1999.

<sup>21</sup> Re Bermudez 136.SCRA. 621(1983)

<sup>22</sup> Solivien v Makasier 167 SCRA.393(1988)

<sup>23</sup> Ibid.

<sup>24</sup> Supra note 20.

### **3.7 THE REPUBLIC OF ZAMBIA**

It is interesting to note that in Zambia, the concept of presidential immunity is expressly provided for in the Republican Constitution under Article 43.

Under the Zambian constitution it has been taken that the president enjoys immunity from all civil and criminal proceedings while serving as president. This means that it does not mean that the president can never be charged even for crimes committed in his personal capacity. He could not be sued while serving as a president.

Article 43 of the Zambian constitution states that:

*“(1) Civil proceedings shall not be instituted or continued against the person holding the office of president or performing the functions of that office in respect of which relief is claimed against him in respect of anything done or omitted to be done or omitted to be done in his private capacity.*

*(2) A person holding the office of president or performing the functions of that office shall not be charged with any criminal offence or be amenable to the criminal jurisdiction of any court in respect of any act done or omitted to be done during his tenure of that office, or as the case may be, during his performance of that office.*

*(3) A person who has held, but no longer holds, the office of president shall not be charged with a criminal offence or be amenable to the criminal jurisdiction of any court, in respect of any acts done or omitted to be done by him in his personal capacity while he held office of president, unless the National Assembly has, by resolution, determined that such proceedings would not be contrary to the interest of the state.”<sup>25</sup>*

From the above provision of the constitution it is clear that the protection that is afforded to the person holding the presidency is almost absolute even for crimes and other actions done in his private capacity.

The only remedy that is there is where the president leaves office and the National Assembly finds it appropriate to lift the former president's immunity. That is when criminal proceedings or civil proceedings can be instituted against him. If parliament opts

not to remove the immunity of the former president, then the former head of state cannot be brought to court to answer for any charges no matter how serious the allegations are.

Thus, prior to the lifting of the immunity of the former president of Zambia, Dr Fredrick Chiluba there were calls from the people of Zambia to have his immunity lifted by the incumbent president Levy Mwanawasa to answer charges of corruption and abuse of office. After Mr Mwanawasa's special address to parliament on 11<sup>th</sup> July 2002, where he made serious revelations of corruption and abuse of office alleged to have been committed by his predecessor.<sup>26</sup> He left it to parliament to either lift or not, the immunity of his predecessor. Parliament then swiftly removed the immunity of Dr Chiluba to pave way for his prosecution.<sup>27</sup> Thus the case of the lifting of Dr Chiluba 's immunity will be discussed in chapter five of this paper.

### **3.8 CONCLUSION**

From the above analysis it is clear that the interpretation of the doctrine of presidential immunity is different and is affected some how by the history of a particular country. Furthermore, it is also affected by the level of development of a particular country in terms of its political and legal development, thus the concept of presidential immunity in the USA although it is not provided for in the constitution is the best. And it is easy to note that countries like Philippine that have followed the American interpretation of the concept have a better way of understanding the concept.

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<sup>25</sup> Article 43 of the Constitution of the Republic of Zambia.

<sup>26</sup> Presidential Special Address to Parliament of 11<sup>th</sup> July 2002,(Lusaka: Government).

<sup>27</sup> The Post Newspaper of 17<sup>th</sup> July 2002.

## CHAPTER IV

### THE EFFECTS OF PRESIDENTIAL IMMUNITY ON DEMOCRACY

#### 4.1 INTRODUCTION

We live in a time when the call for freedom and democracy echoes across the globe. Eastern Europe has cast off the totalitarian governments of almost half a century; North and South America are now virtually a hemisphere of democracy; Africa is experiencing an unprecedented era of democratic reform; and new, dynamic democracies have taken root in Africa.<sup>1</sup> This chapter shall endeavor to analyse the effects of the concept of presidential immunity on democracy and its principles of the rule of law, separation of power and independence of the judiciary, the respect for human rights and the principles of accountability and transparency. The paper shall analyse how these principles are affected by the concept.

#### 4.2 DEFINITION OF DEMOCRACY

Democracy may be a word familiar to most, but it is a concept still misunderstood and misused in a time when totalitarian regimes and military dictatorships alike have attempted to claim popular support by pinning democratic labels upon themselves.

In the dictionary definition, democracy:

*"Is government by the people in which the supreme power is vested in the people and exercised directly by them or by their elected agents under a free electoral system."*<sup>2</sup>

In the phrase of Abraham Lincoln, democracy is a government "of the people, by the people, and for the people."<sup>3</sup> Democracy is indeed a set of ideas and principles about freedom, but it also consists of a set of practices and procedures that have been moulded

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<sup>1</sup> R.Duguit, Democracy and its challenges in the 20<sup>th</sup> Century, (New York: Newman Publishers, 2000) p13

<sup>2</sup> Ibid at p13.

through a long history. In short, democracy is the institutionalisation of freedom. For this reason, it is possible to identify the time-tested fundamentals of constitutional government, human rights, and equality before the law that any society must possess to be properly called democratic.

### **4.3 THE RULE OF LAW**

The right to equality before the law, or equal protection of the law as it is often phrased, is fundamental to any just and democratic society. Whether rich or poor, ethnic majority or religious minorities, political ally of the state or opponent-all are entitled to equal protection before the law.

In a democracy no one is above the law, not even a king or an elected President.<sup>4</sup> This is called the rule of law. It means that everyone must obey the law and be held accountable if they violate it. Democracy also insists that the law be equally, fairly and consistently enforced. This is sometimes referred to as "due process of law."<sup>5</sup>

The democratic state cannot guarantee that life will treat everyone equally, and it has no responsibility to do so. However, writes constitutional law expert John P. Frank,

*"Under no circumstances should the state impose additional inequalities; it should be required to deal evenly and equally with all of its people."*<sup>6</sup>

No one is above the law, which is, after all, the creation of the people; not something imposed upon them. The citizens of a democracy submit to the law because they recognise that, however indirectly, they are submitting to themselves as makers of the law. When laws are established by the people who then have to obey them, both law and

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<sup>3</sup> Ibid. at p14.

<sup>4</sup> Beenham, D, Introducing Democracy(Cambridge: Polity Press,1995)p.34

<sup>5</sup> Ibid. at p.23.

<sup>6</sup> Frank J.P, The Rule of Law and its Implications in the United States of America,(New York: Longman, 1994)p.187.

democracy are served.

In every society throughout history, Frank points out that:

*"Those who administer the criminal justice system hold power with the potential for abuse and tyranny".<sup>7</sup>*

In the name of the state, individuals have been imprisoned, had their property seized, and been tortured, exiled and executed without legal justification by government agencies with directives from the presidents--and often without any formal charges ever being brought. No democratic society should tolerate such abuses.

The rule of law precept of equality before the law and equal protection of the law is not adhered to. For example, in Zambia MMD members who commit criminal offences are often not arrested or prosecuted. However, opposition party members and MMD defectors accused of committing crimes are pursued with vigour, even if the evidence against them is flimsy.<sup>8</sup>

A common tactic of tyranny is to charge opponents of the government with treason. For this reason, the crime of treason must be carefully limited in definition so that it cannot be used as a weapon to stifle criticism of the government. In Zambia after the abortive coup attempt of 1997 opposition leaders were implicated and detained in connection with the coup, and these leaders were Dean Mun'gomba of ZAP and Dr Kenneth Kaunda who were later released after spending several months in prison.<sup>9</sup> The Afronet Human Rights Report of 1998 reports that;

*"There have been a good number of cases where innocent people, including former President Kaunda, have been arrested and detained for months on trumped up charges"<sup>10</sup>*

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<sup>7</sup> Ibid. at p.123.

<sup>8</sup> Interview with Mr Ngande Mwanajiti at Afronet offices on 12<sup>th</sup> September 2003.

<sup>9</sup> The Post Newspaper of April 16<sup>th</sup>, 1998.

<sup>10</sup> Afronet Human Rights Report, (Luaska:Afronet;1999),p.28



The rule of law is affected by the concept of presidential immunity in the sense that the president seems to be above the law and he in turn begins to shield those that are loyal to him, by influencing the investigating agencies, and the courts. Selective justice is another malady that threatens constitutionalism in some countries in the region. State police and prosecutors have shown remarkable bias in the manner they handle politically sensitive cases.

#### **4.4 FREE AND FAIR ELECTIONS**

Elections are the central institution of democratic representative governments. This is because, in a democracy, the authority of the government derives solely from the consent of the governed. The principal mechanism for translating that consent into governmental authority is the holding of free and fair elections.

All modern democracies hold elections, but not all elections are democratic. Right-wing dictatorships and single-party governments also stage elections to give their rule the aura of legitimacy. In such elections, there may be only one candidate or a list of candidates, with no alternative choices. Such elections may offer several candidates for each office, but ensure through intimidation or rigging that only the government-approved candidate is chosen. Other elections may offer genuine choices--but only within the incumbent party. These are not democratic elections.

Jeane Kirkpatrick, scholar and former U.S. ambassador to the United Nations, has offered this definition:

*"Democratic elections are not merely symbolic....They are competitive, periodic, inclusive, definitive elections in which the chief decision-makers in a government are selected by citizens who enjoy broad freedom to criticise government, to publish their criticism and to present alternatives."*<sup>11</sup>

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<sup>11</sup> J.Kirk, Elections in a Democratic Nation,(Washington D.C: Longman,1987)p.23

Democratic elections need to be competitive. Opposition parties and candidates must enjoy the freedoms of speech, assembly, and movement necessary to voice their criticisms of the government openly and to bring alternative policies and candidates to the voters. Simply permitting the opposition access to the ballot is not enough. Elections in which the opposition is barred from the airwaves, has its rallies harassed or its newspapers censored, are not democratic. The party in power may enjoy the advantages of incumbency, but the rules and conduct of the election contest must be fair.

Democratic elections are *periodic*. Democracies do not elect dictators or presidents-for-life. Elected officials are accountable to the people, and they must return to the voters at prescribed intervals to seek their mandate to continue in office. This means that officials in a democracy must accept the risk of being voted out of office. Democratic elections are *inclusive*. The definition of citizen and voter must be large enough to include a large proportion of the adult population.

The use of government resources is also another problem that affects free and fair elections in a democratic nation. The question of incumbency has given more advantages to those in power than those in the opposition. There is need to develop a system where limits must be set on the amount of public resources being used during campaigns. The taxpayers money is being used for political expediency.

Presidents in various countries have an upper hand in the way an election is supposed to be conducted; they always want their loyal followers to become members of parliament.

A good example of this was in Kenya under the rule of Mr Daniel Arap Moi, as observed by Enyango that;

*"The structures of representation both within KANU and parliament were obscured. The provincial administration now had the power to*

*prevent an elected Member of Parliament from addressing his or her own constituents. Second, patronage and loyalty to the President became mandatory for one's political survival. In the 1988 general elections most members of parliament were not elected but selected by the party. One of the first victims to fail the loyalty test was the man behind Moi's smooth ascendancy to the Presidency, Charles Njonjo, then attorney general and minister for constitutional affairs, who was accused of plotting to overthrow Moi's government. Third, those perceived to be against the President and KANU policies were denied the right to contest electoral seats.*

*President Moi's control of parliament thereafter was extended to elections. The "Queue" voting system introduced by KANU in 1986 replaced the secret ballot with a system where voters lined up behind candidates. Those parliamentary candidates who secured more than 70 percent of the votes did not have to go through the process of the secret ballot in the general elections. This system encouraged rigging and paved the way for what has been described elsewhere as "selection within an election". In a situation where there was a dispute over head-count, a repeat of the same process was not possible at the end of the exercise. The provincial administrators, who were the election officers, were only answerable to the presidency and they declared as winners only those candidates favoured by the regime. Disputes arising out of nominations were often refereed to the president personally as the final arbiter over matters pertaining to the only political party in the country.<sup>12</sup>*

Another illustration of how the presidents interfere with the elections is where the announcement for the date of any election entirely rests in the hands of the president. In Zambia it has remained the privilege for the president and not the Electoral Commission. For example, in the year 2001 the then president of Zambia Fredrick Chiluba was asked to give the date for the general election by journalists and the response to this question was that, "they would be held when they will be held."<sup>13</sup> This statement was purely coupled with malice and the president knew very well that since the timing of elections was at his discretion there was nothing that the people of Zambia could do because his actions could not be challenged in the courts of law. This renders the Electoral

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<sup>12</sup> E.Enyang, Democracy Under the Rule of Daniel Arap Moi, (London: Sweet & Maxwell, 2002) p.32.

<sup>13</sup> The Post Newspaper of 12<sup>th</sup> October 2001.

Commissions hopeless, as it can not decide when the elections should be held. The power to announce the date for any election should be vested absolutely in the Commission to help create confidence in the electoral system. The Position where the incumbent President has all powers makes the playing field uneven.

#### **4.5 SEPARATION OF POWERS**

One of the most important contributions to democratic practice has been the development of a system of checks and balances to ensure that political power is dispersed and decentralised. It is a system founded on the deeply held belief that government is best when its potential for abuse is curbed and when it is held as close to the people as possible.

Checks and balances refer to the separation of powers of the three arms of government that are so painstakingly established to ensure that political power would not be concentrated within a single branch of the national government. James Madison, perhaps the central figure in the drafting of the American Constitution and later fourth president of the United States, wrote:

*"The accumulation of all powers, legislative, executive, and judiciary, in the same hands...may justly be pronounced the very definition of tyranny."*<sup>14</sup>

In Zambia, the principle of Separation of Powers does not fully operate due to the fact that Members of parliament owe their allegiance to the president than to the electorate whenever, there is a pertinent issue in parliament that requires parliamentarians to vote, the president would call for a caucus meeting, where the chief whip warns the members of parliament not to undermine and disregard the president's directives of whether to support such a motion or not. Even members of the opposition have been victims of this,

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<sup>14</sup> The Federalist(New York: Federal Publishers,1981)P.134

in 1996 when the then Member of Parliament of the Agenda for Zambia party Akashambatwa Mbikusita Lewanika disassociated himself from the decision to imprison Fred M'membe, writer Bright Mwape, and columnist Lucy Sichone were found guilty in absentia by the Zambian National Assembly of criminal libel and "contempt of Parliament." These charges were brought in response to an article in *The Post* which criticised then Vice President Godfrey Miyanda for a speech in which he condemned the Supreme Court's recent decision in support of freedom of assembly.<sup>15</sup>

The three *Post* journalists initially went into hiding, refusing to recognise the National Assembly's power to arrest and detain them. After a few days, M'membe and Mwape surrendered to the National Assembly and were imprisoned; Lucy Sichone remained in hiding. The Assembly Speaker ordered them held until they showed "contrition" or until the Assembly approved their release. Because of this decision and right Mr Lewanika was expelled from parliament.<sup>16</sup>

In Kenya, as well there was no separation under the rule of former president Daniel Arap Moi as commented by Howard Esodiapi that:

*"To ensure his grip on power, Moi systematically usurped the functions of the other institutions of governance to the extent that the principle of the separation of powers was rendered ineffectual. Moi associated insecurity and instability with open criticisms and challenge to his policies and style of leadership. Patronage and loyalty therefore had remained characteristic of Moi's leadership style which has enabled him to centralise and personalise his rule."*<sup>17</sup>

It is very possible to see that presidents knowingly stifle the principle of separation of power because of the immunity that they enjoy. Even in instances where it is clear

<sup>15</sup> The Post Newspaper of April 14<sup>th</sup>, 1996.

<sup>16</sup> Akashambatwa Mbikusita Lewanika The v Attorney-General (1998)S.C.Z JudgementNO.14.

<sup>17</sup> H.Esodiapi, The Application of the Concept of Separation of Powers and the Presidency, (Nairobi: Eduna Publishing House,1998)p.167.

that he is undermining it, it is difficult to curb his actions, as in many countries especially in third world countries where presidents enjoy absolute immunity that is almost synonymous to being above the law.

#### **4.6 INDEPENDENCE OF THE JUDICIARY**

The judiciary occupies a unique position in a democratic society. It is called upon to decide disputes that cannot or should not be left to the political branches (which includes the legislative and executive branches as well as the civil service, which is professional rather than political, but whose senior management is politically appointed) and private individuals. It upholds the law for all - and in doing so, it also safeguards the rights of individuals and minority groups of all types against the excesses of majoritarianism. This sometimes requires judges to confront the interests of the political branches or powerful individuals, but because judges are not democratically elected, they must derive their authority and legitimacy from different sources than do the political branches; one of judges' most important sources of legitimacy and authority is their independence.

Meaningful independence (and public perception of that independence) is essential to the judiciary's legitimacy as a guarantor of right and freedoms. If the judiciary is not independent of the executive and the legislature, it can not properly restrain those branches. If courts are not seen as independent (and impartial), citizens will not turn to them to resolve their problems, but may seek recourse through political or extralegal means.

The legislature and the executive themselves have a direct interest in judicial independence; they often need the judiciary to resolve problems which do not have easy political solution - but the judiciary can do this only if all parties see it as a neutral

arbitrator, independent of the branches and parties which have turned to it in the first place. This holds particular truth with regard to the resolution of election disputes where judges' interference may be decisive and thus subject to high pressure.

The importance of judicial independence extends beyond the political; economists have noted the importance of an independent and impartial judiciary to a stable and prosperous economy. Individuals and institutions must be able to rely on predictable justice - free of the vagaries of political interference or economic influence by either party - in the adjudication of their claims. In societies struggling to reform their economies, judicial independence contributes to the confidence, security and predictability of economic transactions.<sup>18</sup>

Democracy demands that the judiciary must be independent from the other two branches of government, the legislature and the executive. The judiciary has a sacred duty in the area of protecting the constitution and that is why it is called the guardian of the law.

Thus, there should be no threats that tend to intimidate or undermine the independence of the judiciary by anyone, especially from the executive branch of government. An independent judiciary is one that is not threatened by special interest groups, ministers or government. Also, judges must not feel personally threatened. Hope Ndhlovu has noted that:

*"Judges are special people. Those who do their work well and sincerely give a lot of hope for men and women. People have faith in good judges because they appreciate that justice can only be done to them if the judiciary is free and independent. In Africa people have seen judges who have sold their souls to dictatorships and abandoned the hope of their people."*<sup>19</sup>

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<sup>18</sup> H. Ndhlovu, "The Judiciary and the Protection Of Human Rights in Southern Africa", Southern Africa Human Rights Review, (Lusaka: New Horizon Press, 2002) p. 12.

<sup>19</sup> Ibid. at p. 12

There must be no threats to the members of the judiciary and society must ensure that one branch of government does not interfere with the judicial branch.

Judges must be impartial. Biased judges or judges who are perceived as biased threaten the independence of the judiciary.

Judges are expected to act under the law and without fear, favour, affection or ill will.

This has to be done without selecting whether it is the president's associates or members of his family. Most developing countries have experienced situations where presidents have directly come in the open, intimidating and inciting judges to rule in their favour, either for their ruling party or for the person who is their right hand man.

In order to have a truly independent judiciary, the orders and judgements of courts must be enforced. But in other countries like Zimbabwe, the president has so much power to even blatantly refuse to respect a court order. At the height of the Land wrangle in Zimbabwe, the Supreme Court ordered that the war veterans vacate the farms they were occupying. Zimbabwe's president Mugabe openly said that:

*"He cannot comply with a court order, made by a judge he himself appointed and encouraged the people who had occupied the farms to stay on the farms and seize more farms there by creating anarchy and break down of the order."*<sup>20</sup>

Justice must be dispensed in a timely manner and must operate under the assumption that "justice delayed is justice denied." However, where the matter concerns a direct involvement of the president or his right hand men most cases will keep on being adjourned with a malicious view of frustrating the person seeking a remedy from the court.

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<sup>20</sup> The Daily Newspaper of Zimbabwe of 11<sup>th</sup> January 2000.



Independence of the judiciary is directly related to whether the society has the rule of law-to protect the liberties of the people. It is key to public confidence in the judiciary. It is important as a check on the excesses of the other branches of government.

It is also recognised as important that the other branches have a mechanism to check on excesses of the judiciary. This was even expressed openly by some judges ;

*"Former British expatriate judge in Kenya, Eugene Cotran, openly stated that in cases in which the president has direct interest, the government applied pressure on the expatriate judges to make rulings in favour of the state. It was as a result of similar circumstances, that two expatriate judges, Justices Derek Schofield and Patrick O'Connor, resigned because of what they called a judicial system "blatantly contravened by those who are supposed to be its Supreme protectors." <sup>21</sup>*

In most instances a case becomes political when the president makes a direct statement regarding the case in question even when it has subjudice implications. In Zambia on the on going cases of corruption , abuse of power and the 2001 election petition cases, the president, himself a lawyer has continued making comments that are prejudicial and mainly bordering on contempt of court.<sup>22</sup>

For example in Kenya:

*" Judges who made rulings in favor of human rights victims exposed themselves to punitive transfers. Furthermore, the appointment of Bernard Chunga (formerly the chief state Prosecutor) as Chief Justice by Moi in September 1999, was widely criticised by the human rights lawyers as an attempt to further reduce the independence of the judiciary. Chunga was seen as personally loyal to the President." <sup>23</sup>*

In Zambia some independent minded judges have been criticised by the president and some have been forced to resign. Recently Justice Anthony Nyangulu was openly criticised by President Mwanawasa for having granted the opposition Heritage Party

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<sup>21</sup> Supra note 17 at 167

<sup>22</sup> The Post Newspaper of 12<sup>th</sup> May 2003

President an injunction restraining the president from appointing opposition Members of parliament as cabinet ministers, the judge was intimidated and for the first time in Zambia. The judge was forced to apologise to the president for his decision.<sup>24</sup>

It is clear that the judiciary, which is supposed to be a bulwark of defence for human rights, has not, in many States, escaped the tentacles of the Head of State. In many countries, judges are appointed by the Head of State, who also has power to dismiss them. The executive also determines their conditions of service, and the judiciary lacks financial autonomy. Often, judges are subjected to intimidation from politicians or cadres of ruling parties. For example in Zambia, when the former Chief Justice Mathew Ngulube ruled that Section 5(4) of the Public Order Act was unconstitutional, he was subjected to intimidation of the worst kind, even from the then Vice president Brigadier-General Godfrey Miyanda and he was even subsequently relieved of his post as the chairman of the Zambia Institute of Advanced Legal Education.<sup>25</sup> Some courts, such as those in Zimbabwe, have shown rare courage in standing up to the executive. Their limitations, however, have been cruelly exposed. As is well known the Zimbabwe government has wilfully ignored court orders and refused to protect judges whose lives have been threatened by the so-called war veterans. Chief Justice Gubbay was forced to resign and was replaced by a judge who is thought to be sympathetic to the regime.<sup>26</sup> The government's deliberate attempt to undermine judicial independence in Zimbabwe and other countries is, needless to say, a serious erosion of constitutionalism.

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<sup>23</sup> supra note 22 at p.10.

<sup>24</sup> The Post Newspaper of 6<sup>th</sup> February 2003.

<sup>25</sup> *Ruedisili, S. Zambia 's Elusive Search for a Valid Public Order Act: An Appraisal.* 28 ZLJ (1993-1996) 53.

<sup>26</sup> The Daily Newspaper of Zimbabwe of 9<sup>th</sup> January 2000.

It is disheartening to see how presidents have continued influencing decisions of the courts through their conduct.

#### **4.7 RESPECT FOR HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS**

*We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are life, liberty and the pursuit of happiness. That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed.*<sup>27</sup>

In these memorable words of the American Declaration of Independence, Thomas Jefferson set forth a fundamental principle upon which democratic government is founded. Governments in a democracy do not grant the fundamental freedoms enumerated by Jefferson; governments are created to protect those freedoms that every individual possesses by virtue of his or her existence.

Inalienable rights include freedom of speech and expression, freedom of religion and conscience, freedom of assembly, and the right to equal protection before the law. This is by no means an exhaustive list of the rights that citizens enjoy in a democracy--democratic societies also assert such civil rights as the right to a fair trial--but it does constitute the core rights that any democratic government must uphold.

However, most of these rights that are guaranteed in the constitutions and various international instruments such as the Universal Declaration of Human Rights have been affected by the concept of presidential immunity. Most of the rights that are affected by

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<sup>27</sup> J.O'Connor, This is Democracy: An American Perspective, (New York: Penguin Publishers, 1980) p.14.

the concept are freedom of assembly, freedom of association, freedom from torture and freedom of expression.

In most cases the people whose rights are infringed are those of the members of the opposition parties. The principle behind the stifling on this group of people 's rights is to prevent them from being critical of the government's policies. In many countries most politicians have been targets of assassinations by government sponsored agents. A good example of this was in Chile under the leadership of dictator Augusto Pinochet who is believed to have been responsible for the death of more twelve thousand people who were opposed to his rule.<sup>28</sup>

In Zambia under the Chiluba government, politicians like Dean Mun'gomba and other coup suspects of the October 27<sup>th</sup> 1997 coup attempts were tortured and degraded even though it was clear that they had nothing to do with the coup attempt.<sup>29</sup> In Zambia again in August 1997, Dr Kenneth Kaunda the then president of opposition UNIP and Dr Rodger Chongwe were shot at and wounded in Kabwe by police officers and on arrival from Israel, Dr Chiluba openly supported police actions by saying that: "if you do not behave well the police will do their job".<sup>30</sup> These sentiments were interpreted by many people as being a directive from the president to arbitrarily kill and torture opposition party members.

In the Philippines, the former president, the late Ferdinand Marcos during his twenty one years rule committed grave atrocious political and civil human rights violations. He is believed to have killed 3,227, tortured 35,000, and incarcerated 70,000 people; his victims included members of the opposition political groups, journalists, publishers, student

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<sup>28</sup> P.Giovossi, "*Human Rights v Presidential Immunity: The Pinochet Case*", 23 N.Y.U.J(2000)67.

<sup>29</sup> Afronet, Zambia Human Rights Report of 1998, (Lusaka: Afronet, 1999)p.28

leaders, activists and academicians who protested against injustices perpetrated by his regime.<sup>31</sup>

Modern democracy cannot function without guarantees that people are free to come together to discuss public affairs and to form other associations, to press their interests with government and participate in political parties. These two freedoms play a vital role in a democracy. According to Chanda and Liswaniso,

“Freedom of expression serves four broad purposes:

*“1.it helps an individual to attain self fulfilment. The rational individual requires information and opportunity to express his or her ideas to grow.*

*2.it assists in the discovering of the truth.*

*3. It enhances the capacity of an individual to participate in a democratic society,*

*4.it provides a mechanism by which to establish a reasonable balance between stability and social change.”<sup>32</sup>*

The corollary to freedom of speech is the right of the people to assemble and peacefully demand that the government hears their grievances. Without this right to gather and be heard, freedom of speech would be devalued. For this reason, freedom of speech is considered closely linked to, if not inseparable from, the right to gather, protest, and demand change.

Another part of the freedom of expression is press freedom. The function of the media is to serve as a watchdog over government and other powerful institutions in the society. By holding to a standard of independence and objectivity, however imperfectly, the news

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<sup>30</sup> Supra note 29 at 78.

<sup>31</sup> Supra note 28 at 43.

<sup>32</sup> A. Chanda and M. Liswaniso, Handbook of Media Laws in Zambia, (Lusaka: ZIMA, 1999) p. 1

media can expose the truth behind the claims of governments and hold public officials accountable for their actions.

If they choose, the media can also take a more active role in public debate. Through editorials or investigative reporting, the media can campaign for specific policies or reforms that they feel should be enacted.

However, these rights are affected in some way by the concept of presidential immunity in various ways and these are, where the government has put in place archaic laws which affect the guaranteed freedoms of expression and assembly. Some of these laws relate to the regulations of holding meetings and in Zambia there is the Public Order Act, that affects only members of opposition parties and civil society that is critical of the government's policies. For the ruling party and the president, they can hold a meeting or rally without securing the police permit or notifying them of their intention to hold such a meeting. Moreover, if it is the president or any government minister they are exempted from securing a permit before holding a rally, this in itself is unjust as the president in most cases does not discharge his presidential powers when holding such meetings and in most cases they hold them in their capacity as party officials and not as government officials.<sup>33</sup>

In Zambia just like in many countries, the office of the president is protected from being brought into disrepute by making any derogatory statement made against him a criminal offence. Section 69 of the Penal Code, that was intended to protect the dignity and

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<sup>33</sup> M.P.Mvunga, "*Constitutionalism: Prospects for Change and Reform in the Region*", Zango Vol 21(1997)21.

reputation of the Presidency, is increasingly being used to stifle legitimate and reasonably justifiable criticisms of the President.<sup>34</sup>

In South Korea President Roh Moo-hyun had launched a \$2.55 million defamation suit against four newspapers and an opposition lawmaker over allegations he profited from improper land deals.

Opposition parties in many countries have not had much impact on governance. They operate under difficult conditions and often lack the numbers to make a difference in the legislature. Although elections are held at regular intervals in the majority of countries in the region, they often do not result in a change of ruling parties. A major reason for this is that ruling parties have entrenched themselves in power by making it difficult for the opposition to operate. Governments use public security or public order legislation in order to stifle the activities of opposition parties. The police act as some kind of militia for the ruling party. Moreover, opposition parties in many countries are denied coverage by the State owned media. A typical example is Zambia, where the MMD government has routinely used the Public Order Act to restrict meetings of the opposition. Detentions and political trials, torture, arbitrary arrests and police brutality in most countries are sanctioned, promoted and perpetuated by the presidents of various countries. In Kenya Former President Daniel Arap Moi detained a number of Kenyans critical of his government. Moi accused advocates of multiparty politics of subversion, and thereby got a fresh excuse for detaining a new generation of his critics. A number of the champions of multiparty politics--John Khaminwa, Raila Odinga, Mohammed Ibrahim, Gitobu

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<sup>34</sup> Supra note 32 at p68

Imanyara, Kenneth Matiba and Charles Rubia--among others, were detained under inhuman conditions and without trial.<sup>35</sup>

The independent media that allow opposition to issue statements critical of the presidents and their governments also face victimization and threats of closure of their offices. In 2001 a privately run radio station, Radio Phoenix was closed down on the pretext that it had failed to comply with the regulations pertaining to the renewal of the license but in reality it was closed because it gave people who were opposed to the failed third term bid of former republican president Dr Fredrick Chiluba.<sup>36</sup> Recently in Zimbabwe an independent newspaper the Daily mail was closed and its machinery confiscated for being critical of Mr. Robert Mugabe's policies and for giving the Movement for Democratic Change a platform to discredit and criticise the presidents actions.<sup>37</sup> The government of Zimbabwe through the Minister of information gave a vague reason for the closure of the newspaper offices that they were a threat to national security.

## **4.8 ACCOUNTABILITY AND TRANSPARENCY**

### **4.81 ACCOUNTABILITY**

In a democracy, elected and appointed officials have to be accountable to the people. They are responsible for their actions. Officials must make decisions and perform their duties according to the will and wishes of the people, not for themselves.

Article XI of the Constitution of Philippines states that:

*"Public office is a public trust. Public officers and employees must at all times be accountable to the people, serve them with utmost responsibility, integrity, loyalty, and efficiency, act with patriotism and justice, and lead modest lives."*<sup>38</sup>

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<sup>35</sup> Supra note 21 at p49.

<sup>36</sup> The Post of 23<sup>rd</sup> August 2001.

<sup>37</sup> The Daily Mail of Zimbabwe of 23<sup>rd</sup> September 2003.

<sup>38</sup> Article 11 of the Constitution of Philippines.



This provision is found in many constitutions and other pieces of legislation of various countries although not in a similar fashion. In countries like Zambia, the constitution commands the president to serve the country with honour and dignity.

By this it means the president is supposed to be accountable for his actions. It is because of this immunity that presidents enjoy which brings about corruption. The vice of corruption has thrived in many countries because the president is shielded from any prosecution in many instances and he in turn protects his associates. Corruption has been defined by Dr Chanda as: “ *The misuse of public power or office for private gain*”.

*Grand corruption involves embezzlement of huge amounts of funds.*<sup>40</sup>

Corruption has been attributed to the lack of accountability and transparency. Most presidents have been involved in massive embezzlement of funds, like Joseph Estrada of Philippines, Fredrick Chiluba is facing charges of corruption and abuse of office.

#### **4.82 TRANSPARENCY**

For government to be accountable the people must be aware of what is happening in the country. This is referred to as transparency in government. A transparent government holds public meetings and allows citizens to attend. In a democracy, the press and the people are able to get information about what decisions are being made, by whom and why.

The principle of transparency, has as well not been spared by the concept of presidential immunity in that the president's actions are not normally scrutinised and he is not accountable to any institution in practice. For example, in Zambia, there was an introduction of the presidential discretionary fund (popularly known as slush fund) which was allocated to the president to be given to any organisation of his choice and normally

those that were supporting his policies. The last budget that was allocated to him for such purposes in 2001 was K120 billion.<sup>41</sup>

However, the president was not accountable to anyone on how he used this money; and no one questioned how much was spent in a year and how much remained and he was not obliged to declare how much had remained before approving a new budget for him.

The president did not care how he spent this money, as he knew that there were no institutions to ensure that there was transparency in how the money was spent.

Furthermore, in most cases the presidents interfere even in the awarding of contracts and public procurements and tenders as they are only awarded to their associates as was evidenced in the allegation by the president of Zambia in 2002 in his special address to parliament that his predecessor Dr Chiluba had influenced the awarding of the contract to his friend Mr Katebe Katoto to supply the army uniforms worth \$20.5 million to the Ministry of Defence, and these goods up to date have not been supplied.<sup>42</sup>

Thus the norms of accountability and transparency are essential in a democratic nation as they promote economic development. These two norms appear to be the most widely practiced principle of democracy. Democracies thrive on openness and accountability.

#### **4.9 CONCLUSION**

From the above analysis it right to state that the concept of presidential immunity affects the principles of democracy in that the president is shielded from any action done while serving as president, and in the process they abuse this privilege.

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<sup>40</sup> Supra note 33 at p 23

<sup>41</sup> Interview with Mr Ngande Mwanajiti at Afronet Offices on 23<sup>rd</sup> September 2003

<sup>42</sup> Presidential Address to Parliament of 11<sup>th</sup> July 2002,(Lusaka: Government Printers)

The vesting of enormous powers in the Head of State makes it difficult to make him accountable for his actions. There is not a single national institution that is outside his influence.

As a principle, the protection of basic human rights is accepted widely: It is embodied in written constitutions throughout the world.

Governments protect inalienable rights, such as freedom of speech, through restraint, by limiting their own actions.

A sad consequence of the weak controls on executive power is the growth of corruption among public officials. Institutions created to combat corruption have proved ineffective in their operations because they lack autonomy. There is simply no political will for them to succeed in their task.

It is because of the abuse of this concept by head of states that these principles of democracy have been affected.

## **CHAPTER V**

### **WEAKNESSES OF THE CONCEPT OF PRESIDENTIAL IMMUNITY IN ZAMBIA**

#### **5.1 INTRODUCTION**

This chapter shall discuss and analyse the weaknesses of the concept of presidential immunity in Zambia. Part two of the chapter shall, furthermore, endeavour to discuss the issue of removal of presidential immunity of a former president. This part will also discuss the issue of making a former president immune for life. In discussing this issue the paper will clear the misunderstanding that a person who has once held the office of president cannot be indicted or charged or for any offence even for the acts or crimes committed after he has left office.

#### **5.2 THE WEAKNESSES OF THE ONCEPT OF PRESIDENTIAL IMMUNITY IN ZAMBIA**

The concept of presidential immunity in Zambia traces its origin from the British understanding of immunity of public officials who are exempted from liability in the performance of their official duties. When Zambia got its independence on 24<sup>th</sup> October 1964, she had a constitution drafted in Britain, and it provided for the immunity of the president from crimes and civil liability that may arise due to the nature of his office. In the subsequent constitutions of 1973, 1991 and the one amended in 1996, the concept of presidential immunity has been exaggerated in that it has put the president above every other citizen. The provision in the constitution according Mr John Sangwa:

*"Have been exaggerated are fashioned in such a way that they have absolutely insulated the office of the president such that he can never be prosecuted even for the crimes and civil liabilities committed in their personal capacity."*<sup>1</sup>

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<sup>1</sup> Interview with Mr J.P. Sangwa at Simeza, Sangwa and Associates on 9<sup>th</sup> October 2003.

Article 43(1), and (2) of the Constitution of Zambia states that :

*“(1) Civil proceedings shall not be instituted or continued against the person holding the office of president or performing the functions of that office in respect of which relief is claimed against him in respect of anything done or omitted to be done in his private capacity.*

*(2) A person holding the office of the president or performing the functions of that office shall not be charged with any criminal offence or amenable to the jurisdiction of any court in respect of any act done or omitted to be done during his tenure of that office, or as the case may be, during his performance.”<sup>2</sup>*

Justice Phillip Musonda argues forcefully that :

*“The problem that is there in Zambia as regards the concept of presidential immunity is that there is no distinction between sovereign acts and personal acts “*

*He further adds that: “ what we have in Zambia is a provision that holistically protects the president even for acts that are not sovereign and such acts in most cases are injurious to the country and its citizens”.”<sup>3</sup>*

It is because of this insulation that presidents in Zambia act with impunity because they have seen the weakness of this concept and have studied its far-reaching implications that they are protected fully without any fear of being protected for any act done outside the ambit of their powers.

The concept is further weakened by the fact that the realities of checking the presidential powers are stifled by legislation such as the Penal Code, Chapter 87 of the Laws of Zambia. Section 69 criminalises defamation of the president . This particular provision is aimed at protecting the dignity of the office of the president but it has in Zambia been used as weapon to silence the people ‘s right to scrutinise and criticise the actions of the president. It was in this vain that some details of the Zamtrop account were revealed when Edith Nawakwi, Dipak Patel and Fred Mmembe were sued for defaming the then

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<sup>2</sup> Article 43 of the Constitution of Zambia.

<sup>3</sup> Interview with Hon. Justice Philip Musonda at the High Court in his Chambers on 13<sup>th</sup> October 2003.

president of the republic of Zambia Dr Fredrick Chiluba by calling him a thief.<sup>4</sup> It is appalling to discover that such valid criticisms of the president are criminalised on the basis that the president's office is an office of dignity and the person holding that office should not be defamed. On the other hand, he goes around defaming people without any fear of being sued as he is not amenable to any jurisdiction during his tenure.

Mr John Sangwa further stressed the point that:

*" the constitutional provision regarding the lifting of immunity of the former president does not state whether the lifting of immunity of the president paves way for prosecution for investigation. He expressed concern that Article 43(3) of the constitution must be amended to state whether the lifting of immunity of the former president is aimed at paving way for his prosecution or investigation. "*<sup>5</sup>

He expressed concern that Article 43(3) of the Constitution must be amended to state whether the lifting of immunity of a former president is aimed at paving way for his prosecution or investigation and he further stated that is difficult under Article 43(3) to lift the immunity because the former president is protected even for acts done in his personal capacity. He suggests that:

"The provision should only entitle Members of Parliament to make a consideration of whether to lift the immunity only for the acts done in his official capacity and he should be answerable and liable for all the acts done in his personal capacity without invoking Article 43(3) of the Constitution."<sup>6</sup>

Prominent Lusaka Lawyer , who is also Livingstone Member of Parliament, Sakwiba Sikota, saw the weakness of the constitutional provision regarding the lifting of immunity of a former president when he said:

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<sup>4</sup> Chiluba v The Attorney-General(2003)S.C.Z Judgement NO. 125.

<sup>5</sup> Supra note 1.

<sup>6</sup> Ibid.

*"The weakness that we have as regards the concept of presidential immunity is lack of a formal and strict procedure to be followed when lifting the immunity of a former president. the constitution does not give parliamentarians guidelines or procedure as to how the immunity is supposed to be lifted."*<sup>7</sup>

He went on to cite the controversy surrounding the lifting of immunity of Zambia's former president Dr Fredrick Chiluba. He observed that;

*"It was because of this lack of an outlined procedure that led to Dr Chiluba's contention through the process of judicial review that there was procedural impropriety and that parliament acted ultra vires."*<sup>8</sup>

In the case of **Chiluba v The Attorney General**,<sup>9</sup> the appellant sought judicial review of the action of parliament which removed his presidential immunity, alleging parliament acted ultra vires and that there was procedural impropriety in the manner his immunity was lifted and that rules of natural justice were not followed as he was not given the right to be heard.

The Supreme Court held inter alia, that :

*"There was no procedural impropriety because the National Assembly is obliged to follow religiously its rules of procedure. Parliament may regulate its own procedure(Article 86. We furthermore , address the ground of the former president's right to be heard by parliament; we state that the power to determine the guilty or innocence of a person in a criminal matter is assigned to the courts by the constitution. Thus, we are satisfied that the framers of the constitution never intended that on removal of immunity , a former president should be heard."*<sup>10</sup>

It is these weaknesses stated above that have made it difficult to correctly apply and appreciate this well meant privilege conferred on the president by the constitution under Article 43.

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<sup>7</sup> Interview with Honourable Sakwiba Sikota at Chipeso village at Katuba Constituency on 19<sup>th</sup> October 2003.

<sup>8</sup> Ibid.

<sup>9</sup> **Chiluba v The Attorney-General**(2003)S.C.Z Judgement NO. 125.

<sup>10</sup> Ibid.

### **5.3 REMOVAL OF IMMUNITY OF A FORMER PRESIDENT**

The lifting of immunity of a president, judge, or any public official throughout the world is vested in parliament, or congress. This has been the trend especially in countries that have followed the American system of government.

The lifting of the presidential immunity is one of the hottest and contentious challenges faced by many countries immediately after the election of a new president. Various sections of people will often call for the removal of immunity of a former president. This was also experienced in Zambia after the December 27<sup>th</sup> 2001 elections which saw the ascendancy of a Chiba backed candidate Levy Mwanawasa to presidency. People started calling for the removal of Dr Chiluba's immunity to answer charges of corruption, theft of public funds and abuse of state resources.<sup>11</sup> This subsequently saw the removal of Dr Chiluba's immunity by parliament to pave way for prosecution of the alleged crimes.<sup>12</sup>

A renowned Zambian lawyer Wynter Kabimba, has noted that there are various schools of thought about whether or not a former president can be prosecuted for criminal offences committed while in office. He quotes Article 43(3) of the constitution of Zambia which provides that:

*"A person who has held, but no longer holds, the office of the president shall not be charged with criminal offences or be amenable to any criminal jurisdiction of any court, in respect of any act done or omitted to be done by him in his personal capacity while he held office of president, unless the National Assembly has, by resolution, determined that such proceedings would not be contrary to the interest of the state."*<sup>13</sup>

There should be lifting of immunity of a former president in a case where there is overwhelming evidence that while the person held the office of president he committed

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<sup>11</sup> "Arrest Chiluba", The Editotrial of the Today Newssperr of 11<sup>th</sup> March 2002.

<sup>12</sup> "Chiluba Loses Immunity", The Post Newssperr of 17<sup>th</sup> July 2002.



crimes unrelated to the official performance of the that office as this is the only way he will be answerable for charges such as corruption and abuse of human rights. However, this as is always the case his immunity has to be lifted, and the lifting of such an immunity is not aimed at embarrassing the former head of state, but for him to be accountable to the people who voted for him. As long as there is evidence that the former president was involved in corrupt practices, abuse of government resources and abuse of human rights , parliaments must move in swiftly to lift that immunity, since the world over it is parliament or congress that is mandated to lift the immunity of a former president. This action by parliament will deter the would be plunderers and human rights abusers who take advantage of the well meant privilege of presidential immunity.

#### **5.4 IMMUNITY OF A FORMER PRESIDENT FOR ACTS DONE AFTER LEAVING OFFICE.**

There has been a lot of misunderstanding as to the immunity of a person who once held office; the position of the law is that a person who once held an office of president and is no longer president is not immunised from all acts that are done after they have left office.

An example of this misunderstanding was the incarceration of Dr Kenneth Kaunda who was Zambia's first president in connection with the failed coup detat of October 27<sup>th</sup> 1997.<sup>14</sup> This, to many people, was interpreted as the lifting of immunity of a former head of state. However, it must be stated clearly that once a president leaves office he has no immunity for acts done thereafter and thus the arrest and prosecution of Dr Kaunda which ended with the government entering into a nolle proseque was not as a result of having

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<sup>13</sup> "Kabimba Challenges Levy Over Chiluba 's Immunity", The Post Newspaper of 29<sup>th</sup> April 2003.

<sup>14</sup> "Kaunda Arrested", The Post Newspaper of 26<sup>th</sup> December 1997.

his immunity removed. After leaving office the president becomes amenable to the law like any other citizen.

It must however be submitted that countries in Latin America and South America have developed a tendency of making former presidents immune for life by making them life members of the senate or congress. This was the problem that surrounded the immunity of Chile 's Augusto Pinochet and Nicaragua's Aleman who are alleged to have been involved in corrupt activities, plunder of national resources and gross abuse of power.<sup>15</sup> This immunity that is granted to former presidents in these countries is based on the principle that they will not be prosecuted for the alleged crimes.

However, the people are now open minded and have in recent years protested and advocated for the removal of life immunity granted to the former presidents.

Mr. Sakwiba Sikota has also commented on the practice of South and Latin American countries of making former presidents life members of parliament, entitling them to an enjoyment of life immunity. He said that such a practice would give the serving president an overwhelming reason to think he is above the law.<sup>16</sup>

Thus presidential immunity is only meant for the serving presidents and once one has left that office he becomes an ordinary citizen.

## **5.5 CONCLUSION**

From the above analysis of the weakness of the concept of presidential immunity in the Zambian context, it is noted that the biggest weakness of its application is with the constitution as it has not put a limit as to what acts entitle the president to this protection.

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<sup>15</sup> [www.America.online.com](http://www.America.online.com)

<sup>16</sup> Supra note 7.

As noted by Mr Sakwiba Sikota that the in Zambian Constitution there is no definite procedure to be followed when lifting the immunity.

On the issue of lifting immunity of a former president, there is no need to be debating about it as long as there is sufficient information and evidence to believe that the former president while occupying that office had engaged himself in acts of plunder, corruption, graft, and heinous acts of abuse of human rights then they should be brought before court by way of having their immunities lifted by parliaments, senate or congress of their countries.

Furthermore, it must be clearly stated that former presidents are not immune from prosecution for acts committed after they have left office, because the immunity that is conferred on them is to allow them to serve the people that elected them to that office without fear nor threats of liability as they discharge their presidential duties.

It is in this vain that the granting of congressional immunity for life to former presidents in South and Latin America should be abolished as the presidents of those countries will continue to commit crimes against their people blatantly and with impunity knowing that they are protected from prosecution for life.

## **CHAPTER VI**

### **GENERAL CONCLUSION**

#### **6.1 INTRODUCTION**

This chapter shall give a summary of the analysis of the concept of presidential immunity. It will furthermore, provide recommendations as to how the concept of presidential immunity is supposed to be applied so as to prevent the abuse of this well meant privilege.

#### **6.2 SUMMARY**

This dissertation has analysed and demonstrated that the concept of presidential immunity is a well meant principle that helps the president of a country to run the affairs of the state without fear of being sued or being amenable to any court in his country.

Chapter one of this study made a general overview, the problems and myths surrounding the concept of presidential immunity.

In chapter two the problems attached to defining the concept of presidential immunity have been discussed at length. A historical background of the concept of presidential immunity has also been given, tracing its origin from the English Common Law that offered protection to the judges in the discharge of their official duties. It was noted that protection that was given to judges did not extend to acts of corruption or those that were coupled with malice. This chapter, furthermore, discussed and analysed the scope of protection that is given to the president, with the aid of two leading American cases of **Nixon v Fdzgerald**<sup>1</sup> and **Clinton v Jones**<sup>2</sup> The analysis of the said cases led to the conclusion that the scope of protection accorded to a president only extends to actions

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<sup>1</sup> Nixon v Fdzgerald 457 U.S. 761(1982).

<sup>2</sup> Clinton v Jones, 520 U.S. 681(1997)

undertaken in his official capacity, and that for civil actions done in his personal capacity, he is liable.

This chapter further analysed and discussed the issue of who should enjoy this immunity, and it was concluded that it is only sitting presidents and former presidents for acts they had done in their official capacity while serving in that office.

The chapter also analysed the rationale behind this protection. He enjoys this privilege of immunity from suits to assure the exercise of his duties and functions free from any hindrance or any fear of being prosecuted.

The chapter concluded that, the concept of presidential immunity should not be granted on a blanket basis and that it should preclude protection of a president who has committed personal crimes that have nothing to do with national interest.

Chapter three of this study endeavoured to give a comparative approach when analysing and discussing the interpretation of the concept. A comparative approach was taken using the United States of America, the Republic of Israel, the People's Republic of China, the Republic of Philippines and the Republic of Zambia. In this chapter decided cases had used to illustrate the difference in the application and interpretation of the concept. The difference in the application of the concept was furthermore drawn from the constitutions of some of the countries mentioned above. It drew a clear distinction in the application of the concept in countries where the constitutions do not provide for such immunity. Three leading countries in this area, the USA and Philippines were referred to, the American

cases of Clinton and Nixon<sup>3</sup> and the Filipino cases of Re Bermudez<sup>4</sup> and Solivien v Makasiar<sup>5</sup> were used to illustrate the interpretation of the concept.

In the conclusion of this chapter it came out clearly that the interpretation of the concept of presidential immunity differs from country to country and is affected by the history of that particular country, and furthermore, by the level of development politically and legally. Thus, the Republic of Philippines has one of the best interpretation and understanding of the concept notwithstanding the fact that it has no provision in the constitution that provides for this immunity.

Chapter four, which was the lifeblood of this study, endeavoured to analyse and illustrate the impact of the concept on democracy and its principles. It has laboured to show how this concept has in practice affected the democratic principles of rule of law, free and fair elections, independence of the judiciary, respect for human rights, and concepts of transparency and accountability. It analysed how each of the said principles of democracy has been affected by the concept of presidential immunity.

Various countries where presidents have misused their immunity to gain political power or to prolong their stay in power have been used to illustrate the effects that this concept has on democracy. The chapter concluded that the concept of presidential immunity has been abused by sitting presidents, which in turn has affected the core principles of democracy.

Chapter five of the paper discussed the weaknesses of the concept of presidential immunity in the Zambian context. In this chapter it was noted that the principle in Zambia has been weakened due to the fact the provisions of the constitution do not

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<sup>3</sup> Supra note 2

<sup>4</sup> Re Bermudez 136.S.C.R.A. 621(1986)

provide for what acts are official and non-official. It was further observed that the procedures for removal of immunity are vague and unclear to the extent that it was even challenged in the case of Dr Chiluba.

The study furthermore, discussed the issue of lifting of immunity of a president, and the myth that a former president will enjoy immunity from prosecution after he has left office even for the crimes he commits after leaving office. This led to the conclusion where it came out clearly that there are a lot of weaknesses in the way the concept of presidential immunity is applied in Zambia. It was furthermore stated that the myth that a president will enjoy immunity from prosecution even for crimes he commits after leaving office are not compatible with democratic values and that they should be done away with in countries that have adopted the policy of making of former president immune from prosecution for life.

### **6.3 RECOMMENDATIONS**

It is true to state that tradition and jurisprudence have been liberal in granting president immunity from suit while in office. The starting point to safeguard the concept of presidential immunity from abuse is to state that for a president to enjoy this privilege the alleged acts should be done in his official capacity. As it was held in the case of Clinton v Jones<sup>6</sup> that:

*"The official's absolute immunity extends only to acts in performance of particular functions of his office because immunities are grounded in the nature of the function performed, not the identity of the actor who performed it."*

It is therefore submitted that a president's absolute immunity should only extend to acts in performance of particular functions of his office. Thus the doctrine of immunity finds

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<sup>5</sup> Solivien v Makasiar, 167. S.C.R.A.393 (1988).

<sup>6</sup> Supra note 2.

no application and cannot be invoked where the president's alleged acts were unlawful, ultra vires or he acted with malice, bad faith and beyond the scope of his authority.

Thus in the case of Clinton v Jones, the Supreme Court held stated that:

*“when defining the scope of an immunity for acts clearly within an official capacity, we have to apply a functional approach, we thus hold that a president's absolute immunity should extend only to acts in performance of particular functions of his office.”<sup>7</sup>*

An example of a functional approach is the immunity that is enjoyed by the judge, “his absolute immunity does not extend to actions performed in a purely administrative capacity.” He enjoys absolute immunity for all matters that have to do with his duties as a judge in a strict sense, and thus excluding any acts outside that scope even though they may be claimed to have been related to the performance of such duties.

It is very surprising that many former presidents who have had their immunities removed and subsequently prosecuted have made arguments that they are immune from such suits because the alleged crimes were committed while they were in office.

Thus in the consolidated Filipino cases of Estrada v Desierto and Estrada v Macapagal where the ex- president raised the issue of presidential immunity, the Supreme Court of Philippine boldly and unanimously held on March 2, 2001, that:

*“ The cases filed against him “involve perjury, bribery, graft and corruption” which by no stretch of imagination can be covered by the alleged mantle of immunity by a non sitting president.” The court furthermore, held that: “unlawful acts of public officials are not acts of the state and an officer who acts illegally is not acting as such but stands on the same footing as any other trespasser.”<sup>8</sup>*

From the above reasoning of the Supreme Court of Philippines in the Estrada it is cardinal to state and recommend that courts world over must not entertain any defence of

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<sup>7</sup> Supra note 2.

<sup>8</sup> Estrada v Desierto and Macapagal 567. S.CR.A.392(2001).



presidential immunity where the alleged acts were criminal in nature because it was not the intention of the legislature to grant this immunity to the president to even acts of corruption abuse of power, gross abuse of human rights. Courts the world all over must prevent the abuse of this well-meant privilege by interpreting the law of immunity strictly according to the intention of parliament. Besides, presidents are sworn to protect the constitution of their countries. It is in the same constitutions where we find provisions stating that the president is supposed to carry out his duties with dignity and honour, utmost responsibility, integrity, loyalty efficiency and with patriotism.” They are therefore expected to perform their duties with due care and excellence.

It is, furthermore, recommended that the scope of presidential immunity must be well spelt out in the constitutions of various countries so as to prevent vexous claim of this privilege by former presidents even for crimes committed in their personal capacity. What should be done in this instance is that the constitution must give clear instances where the privilege must be claimed successfully. For example, common sense would dictate that the immunity clause in the constitutions does not extend to matters of abuse of office, corruption and abuse of human rights.

It is furthermore, submitted and suggested that the processes leading to the lifting of the immunity must be provided for clearly in the constitution, to prevent matters from dragging on in the courts of law where the former president challenges the removal of his immunity. A clear example of this is in the Zambian experience where the former president of Zambia Dr F. Chiluba challenged the lifting of his immunity. This gives the would be plunderers time to hide and destroy evidence of the alleged crimes, since these

matters take long to be resolved in the courts of law. In the case of Dr Chiluba 's challenge it took almost a year to have this matter resolved.

It is furthermore, recommended that in cases where it is clear that the president has involved himself in corrupt practices, abuse of human rights such as arbitrary detention of politicians opposed to their rule, or where it is clear that they have abused these fundamental principles that are laid down in the constitution then they must be impeached on grounds of violating the constitutions. If the impeachment process is used effectively it can prevent abuse of the concept of presidential immunity as the sitting presidents will execute their duties diligently and in good faith for fear of being impeached on the grounds set above. By impeaching the sitting president, it will entail that he will be amenable to the courts of justice without any delay, in short, it paves way for a quick prosecution of the sitting president who has violated the constitution, that requires to hold that post with dignity, honour and integrity. In the impeachment process of a president the legislature that acts as a watchdog of the actions of the executive must be very active and more vigilant. Politics of manipulation and personal loyalty to the president must be done away with. The Members of parliament or congressmen need to be patriotic, they must have the heart for the people that voted them and not to offer allegiance to the president. Members of Parliament even those from the ruling party must work with opposition Members of Parliament in ensuring that there is transparency and democratic values are adhered to by the president, and when an impeachment motion that has to with the abuse of presidential immunity is brought before parliament, where there the grounds of impeachment are genuine they (members of parliament from the ruling party) must vote with those from the opposition to impeach him.

Commenting on criminal prosecution of a sitting president Professor Lawrence Tribe of Harvard University argues that:

*"A sitting president should face criminal prosecution on prima facie evidence of wrong doing, after impeachment, the president must stand trial for all the illegal acts that carried out, as this will bring about transparency in the way the president runs the affairs of the country."*<sup>9</sup>

It is also recommended that the granting of former presidents' immunity for life should be done away with in countries where it has been provided for in the constitutions. This is because the idea of having ex- presidents maintain their immunity from prosecution is the main reason corruption still thrives today. These former leaders while in office act with blatant disregard of the law because they are virtually untouchable. The corruption, the mismanagement, the victimisation and torture of opponents is perpetual in these countries because they know that when they leave office they will still enjoy immunity for life. In a real democratic state these people must be held accountable for the injustices they inflict on the people. They should therefore, be answerable to the people when it comes to light that they have abused their office.

#### **6.4 CONCLUSION**

Finally it must be emphasised that there is absolutely nothing wrong with presidential immunity because it is meant to help the serving president freely to discharge his duties without any interference. However, offences such as corruption, human right abuses are not covered by immunity.

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<sup>9</sup> L. Tribe, The American Constitution and the Executive Powers: A Critique.(New York: West ,1998)p.14.

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