"CONSTITUTIONALISM AND DEMOCRACY: A CRITICAL ANALYSIS OF EVENTS IN DEMOCRATIC ZAMBIA SINCE 1996 TO THE PRESENT AND HOW THE EVENTS FIT INTO CONSTITUTIONALISM"

BY

MUMBA LEVIS

UNZA 2003
I RECOMMEND THAT THIS DIRECTED RESEARCH UNDER MY SUPERVISION

BY

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“CONSTITUTIONALISM AND DEMOCRACY: A CRITICAL ANALYSIS OF EVENTS IN DEMOCRATIC ZAMBIA SINCE 1996 TO THE PRESENT AND HOW THE EVENTS FIT INTO CONSTITUTIONALISM”

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S E KULUSIKA
CONSTITUTIONALISM AND DEMOCRACY: A CRITICAL ANALYSIS OF EVENTS IN DEMOCRATIC ZAMBIA SINCE 1996 TO THE PRESENT AND HOW THE EVENTS FIT INTO CONSTITUTIONALISM

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BEING A PAPER SUBMITTED IN PARTIAL FULFILLMENT OF THE DEGREE OF BACHELOR OF LAWS OF THE UNIVERSITY OF ZAMBIA

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DECLARATION

I, MUMBA LEVIS – COMPUTER NO. 97275573 DO DECLARE THAT I AM THE AUTHOR OF THIS DIRECTED RESEARCH PAPER ENTITLED: “CONSTITUTIONALISM AND DEMOCRACY: A CRITICAL ANALYSIS OF EVENTS IN DEMOCRATIC ZAMBIA SINCE 1996 TO THE PRESENT AND HOW THE EVENTS FIT INTO CONSTITUTIONALISM”, AND THAT IT IS A PRODUCT OF MY OWN INGENUITY DUE ACKNOWLEDGEMENT HAS BEEN GIVEN WHERE OTHER SCHOLARS WORK HAVE BEEN USED OR CITED. I TRULY BELIEVE THAT THIS RESEARCH HAS NOT BEEN PREVIOUSLY PRESENTED IN THE SCHOOL FOR ACADEMIC WORK.

STUDENT’S NAME AND SIGNATURE ................................................................. MUMBA LEVIS

DATE: .................................................................................................................. 19. 11. 2003
DEDICATION

To mum and dad, I know you believe in me and I hope I will live to your expectations of me.

To my brothers and sisters who have lived and shared with me in that world of colours.

To Evelyn and Musenge, you are the reason I hope and laugh every day.
ABSTRACT

For a long time now, constitutionalism has not always been associated with democracy for many, constitutionalists are rarely democrats. However, by looking at the values that constitutionalism and democracy uphold, this author has shown that there are some commonalities. Therefore the scope of this essay is to show that the values upheld in a democratic state are similar to the values in a state practicing constitutionalism and that to say that a state is democratic is necessary to say it upholds constitutionalism.

The significant of the study lies in the fact that constitutionalism as espoused by professor SA De-Smith has similar values with democracy. Therefore there are enough evidence, facts, information and data to marry constitutionalism and democracy.

There are practices by government officials and agents, which have serious supervision on whether or not a state upholds democracy and for constitutionalism.

This essay has explored such questions as what should be done to correct the situation. Why should state agents only allow the party in government to carry out political activities while denying the same to the opposition? It has been shown that in order to adhere to democracy and/or constitutionalism, there is need to reform laws both in the primary legislation and subsidiary, which laws are undemocratic and because they are undemocratic they [laws] do not fit into constitutionalism as espoused by professor S A De-Smith. Further the essay has exposed undemocratic practices which hinder fair play in the political and economic arena and has recommended possible remedies.
PREFACE

This obligatory essay is composed of five chapters. Chapter one discusses the origin and concept of constitutionalism. Since the term was originally used in the Greek city-states, I made an attempt to discuss the historical equivalence of the term. However, in modern times, discussion of constitutionalism without referring to professor S A De-Smith is inadequate because it is his modern usage of the term that forced me to undertake this study and come up with the conclusion that despite the differences constitutionalism and democracy are related in that both systems uphold similar values.

Chapter two discusses the origin and concept of democracy and constitutionalism. The values each system upholds are similar. Thus, I also looked at the values of democracy and that of constitutionalism and compared them.

Chapter three is unique in that, I moved from the general conception to the specific situation in Zambia. I reviewed the democratic history of Zambia beginning at independence to the present. I have shown that Zambia as a nation has gone through three phases of governance systems namely; multiparty form 1964 to 1972, single party state from 1973 to 1991; and multipartism from 1991 to the present.

Chapter four is concerned with how constitutionalism relates to democracy. By looking at the values upheld in the two system of governance, I have come to the conclusion that constitutionalism and democracy are similar despite the differences that might exist especially the conception that most constitutionalists are rarely democrats in that constitutionalism is much more narrower, I have shown that in order for laws whether primary or secondary legislations, to be constitutional, they (laws) first must be democratic before they are constitutional. I have cited examples from various aspects of Zambian life based on my own personal reflections on the events that have taken place in Zambia and how those events fits into constitutionalism. I have concluded this chapter by stating that the only difference there is, is the definition as both system uphold the same values.
I have concluded my essay with recommendations on how we, the people of Zambia can enhance constitutionalism and democracy.

The justification for the study is that this work will be of great help to citizens who wish to explore this new subject, non-governmental organizations concerned with constitutionalism and democracy, lawyers and students who wish to explore further this subject.

This work is not exhaustive and the author still believes that it is open for further research and insights.
ACKNOWLEDGEMENT

Research work has never been the product of one individual and indeed this work is a product of such help.

Unreserved thanks go to my supervisor, S E Kulusika.

I further extend my gratitude to Peter Chileshe, Noel Simwanza, Sukwana Lukangaba, Milner J. Katolo and Bernard Mwanandiwa for criticizing my essay.

Further still, I extend my thanks to the entire staff of the school of law for according me an opportunity to reach this far in my studies.

My acknowledge will not be complete if I do not Grace the secretary who typed this obligatory essay. I know and believe that without my creator, God, I can do nothing. Thus, praise be to him alone.

All the shortcomings, in terms of errors, misstatement and mistakes are mine alone to bear and I am wholly responsible for it.
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INTRODUCTION

To be in a democratic state entails upholding certain values such as free and fair elections held at periodical intervals, freedom of the press and expression, freedom of assembly and association, protection and promotion of human rights, accountability of the governors to the governed, transparency, rule according to law, separation of powers and independence of the civil service.

Professor De Smith in his book, The Commonwealth and its Constitution, speaks of minimum standards that must be observed in a country upholding constitutionalism. For De Smith in order for a country to qualify it must have regular and transparent elections held at periodical times, it must allow its citizens to freely mobilize themselves in political parties and civil associations, and trade unions. It must allow freedom of the press and expression without any internal legislative and executive restraints. Its leaders must be accountable to the people and be transparent in the manner in which they govern the general citizenry. It must promote the rule of law and separation of powers and the civil service must be free from executive control.

It is interesting to note that the values upheld in a democratic society or country are the same values envisioned by Professor de Smith in his idea of Constitutionalism. This essay therefore aims at showing that the values that are upheld in a democratic state are also upheld in a state practising Constitutionalism and that to say that a state is democratic is necessary to say that it upholds Constitutionalism.

The author's hypothesis is that constitutionalism and democracy are one and the same thing and that evidence of undemocratic practices constitute a serious breach to Constitutionalism. The author has seen that the MMD government has succeeded initially in laying an early foundation for democracy and constitutionalism, and spoke of policies if adhered to, which would have seen significant positive developments in the democratic governance of this country.

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However, the author observes that the virtues of good governance, democracy, rule of law separation of powers, free press and expression, freedom of association and assembly, constitution guarantees of human rights, transparency and accountability have over the years been gradually eroded by the same government that advocated for them.

It is in the author's view that the institutional framework for democratic governance that would have enhanced constitutionalism in Zambia is weakened by too much political interference by the executive branch of government to the extent that civil servant who are supposed to be independent literally asks for the government leader's opinion on matters of technicality before making a decision at times leaving an ugly mark on constitutionalism and democracy.

This essay is divided into five chapters. Chapter one discusses the origin and concept of constitutionalism. It also discusses what the concept entails according to professor de Smith. Chapter two discusses the origin and concept of democracy and its development in general. It also looks at the values of democracy while chapter three looks at the development of Democracy in Zambia. Chapter four shows how Constitutionalism is related to democracy and that the absence of constitutionalism entails the absence of democracy. Finally chapter five concludes the study and recommends ways on how best to foster constitutionalism and hence adhere to democratic governance.

I will now move into chapter one and discuss the origin and concept of Constitutionalism.
CHAPTER ONE

Definition and origin of the Concept of

Constitutionalism

a. Ancient Conception of Constitutionalism
The word constitutionalism comes from the word Constitution. The word Constitution in the Roman Empire in its Latin Form became the technical term for Acts of legislation by the Emperor. However, it was never used in the modern sense as it was generally applied. It has been agreed upon by commentators that of all the various meanings of which Constitutionalism is used, the Greek “Politeia” conformed to one of the most ancient.

b. Modern Conception of Constitutionalism
‘Constitutionalism’ is the idea of a written statement of binding principles and rules aimed at securing a limited political power; such a goal appears eminently desirable because absolute powers, unenframed and unchecked, all too quickly become arbitrary and oppressive. The implication is that Constitutionalism has essential qualities: It is a legal limitation on government; it is the anti-thesis of arbitrary; its opposite is despotic government; the government of will instead of law. It therefore follows that the modern conception of Constitutionalism unlike the ancient conception is based on the idea of having a limited government. The limitation placed on Government powers has to be balanced with the ability of government to maintain law and order as clearly stated by Mcilwain that when the rights of the government are unduly emphasised the rights of citizens suffer; when the rights of citizens are also over emphasise, government becomes too weak to keep order.

4 Ibid, p. 136
The idea of Constitutionalism is to strike a balance between these two competing interests. How do we arrive at the modern conception?

The modern conception of constitutionalism can be traced to the changing policies of Multilateral leading Institutions and Donor agencies. Today, the United Nations and Multilateral lending Institutions in their dealing equate Constitutionalism with good Governance. The UPND has defined “Good Governance” as an exercise of political, economic and administrative authority in the management of a country’s affairs at all levels. These institutions all agree that countries that promote Constitutionalism have many attributes. They include being effective, participatory, transparent, accountable, equitable, promotion of the rule of law, separation of power, respect for human rights, creation of a favourable policy, seeking to work with the Civil Society acceptance of the role of the opposition and competitive politics. These have also being recognised by the General Assembly of the United Nations.

Thus for good governance to prevail, the rule of law must prevail. Political Pluralism cannot prosper until effective legal institutions are established. This means that the solution to all these dilemma affecting least developing countries economies lies in Constitutionalism.

Further, the conception of human rights as being universal and the ideal that human rights are not only the concern of a particular state but the whole global community has enhanced the ideal of constitutionalism to be widespread. This brings to the fore that policies that prohibited any interference in the political affairs of the country have been discarded by the multilateral institutions and donor countries.

Why should multilateral lending institutions and donor agencies insist on constitutionalism and good governance as the basis for donor aid? The Multilateral Institutions have recognised that African Countries in general and Zambia in

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7 Resolution 50/225 of 19th April, 1996
particular are dependent upon donor aid and international development institutions support. Thus the ruling elite can be forced to adhere to Constitutionalism in order to govern their people well. Further that, the ruling elite want to associate themselves with internationally acceptable standard and image failure to which they would be marginalized.

Because of the link of between good Governance embedded on Constitutionalism and development, there are indication today that only countries with good human rights records and whose values are based on democratic principles can receive financial support and debt relief.

Thus we see that Constitutionalism origin is in the change of attitude by Multilateral and Donor Agencies to development in Africa in general and Zambia in particular. In order for a country to qualify for donor support in financial aid and debt relief, it must show strict adherence to the rule of law, separation of powers, Freedom of the Press, assembly and association, protection and promotion of human rights, accountability and transparency and an independent and professional civil service. In sum, its governance must be based on constitutionalism.

I will now tackle part B of this chapter dealing with how Professor de Smith conceives of Constitutionalism.

**WHAT PROFESSOR DE SMITH CONCEIVES OF**

**CONSTITUTIONALISM**

Professor de Smith has prescribed what he considered to be the minimum conditions necessary to achieve constitutionalism. He lies down the conditions as follows:

A contemporary liberal democrat, if asked to lay down the minimum standards may be very willing to concede that Constitutionalism is practiced in a country where the government is genuinely accountable to an entity or organ distinct from itself where elections are freely held on wide franchise at frequent intervals, where political groups are freely organised in opposition to government in office and where there are effective legal guarantees of fundamental
civil liberties enforced by an Independent Judiciary, and he may not easily be persuaded to identify Constitutionalism in a country where any of these conditions is lacking. To begin with governments are necessary for an orderly society in which individuals will maximise and attain their goals. Since power in the hands of the government is bound to be abused, then the question that De Smith was concerned with is how to limit the powers of the government. It is important to regulate and limit power inherent in government hence his conception of the idea of constitutionalism.

Constitutionalism recognises the need for government but insists upon a limitation being placed upon government powers as Francis D. Wormuth thus comments "The hallmark of modern thinking on constitutionalism is the notion of a limited government where ultimate authority is the cement of the governed."

Thus Constitutionalism was conceived by De Smith as an idea of binding principles and rules aimed at securing a limited government. This is very desirable and necessary because absolute powers, unprescribed and unchecked became arbitrary and oppressive. Liberty demands that limits be placed on the exercise of all political powers. This includes the range and scope of all public authority, the time and modes of elections, the reserved rights of all citizens and many liberties must be removed from public tampering. The case of Board of Education v. Jackson affords us a further explanation on this. Political rights in countries like the United States of America do not depend upon individuals but the rule of law. This is one of the safeguards to civil liberties enshrined in the Constitution. The Judiciary is entrusted with ensuring that human rights are respected and not necessarily tempered with by the state.

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1 Supra Note 1 at 106
3 Supra Note No. 2.
4 (1954) 347 U.S.A. 483 [T] here was a problem of inequality in our midst and we the people had to remedy it if the nation was to live up to the pre-amble’s promise of equal justice for all . . . if the pre-amble’s compact was with the people was to be honoured then that practice had to end.
This is what professor De Smith conceives of Constitutionalism and I will elaborate the minimum conditions as conceived by De Smith by way of sub headings when I tackle how Constitutionalism relates to democracy in Chapter four of this essay.

CHAPTER TWO

THE CONCEPT AND ORIGIN OF DEMOCRACY

Democracy like many central terms of politics is in origin a Greek word, combing two shorter words ‘demos’ and ‘Krators’. Both these terms have had more than one meaning. The ‘demos’ could mean on the one hand the whole citizen body living within a particular polis, or city-state, but might also be used to mean the ‘mob’ or the rabble or the ‘lower orders’.

Krators on the other hand could mean either ‘power’ or ‘rules’. Therefore democracy meant rule by the people or massa; but because the many were poor, it was often taken to mean rule by the ‘poor’ or by the rabble13.

However, despite stating this, democracy is an intangible concept that cannot easily be defined or verified. It has had many different meanings and connotations in its long history, and is understood differently today in the context of different social and economic systems. It therefore follows that the major challenges of democracy is that of its definition. Democracy as we have already pointed out is still faced with disagreements over its meaning. T S. Elliot wrote that “when a term has become so universally sanctified as “democracy” now is, I begin to wonder whether it means anything, in meaning....”14 Samuel Huntingdon writes that as a form of government,

14 T S Elliot, as quoted by Samuel P Huntingdon, The modest meaning of Democracy, (Brooklyn: Brooklyn Stepping Pendulum, 1969) p 11
democracy can be defined in terms of who rules for what ends, and by what means. Thus democracy can be understood in terms of source, purposes or institutions\(^{15}\).

The most quoted meaning of ‘democracy’ is that by Abraham Lincoln: “Democracy is a government of the people by the people and for the people.”\(^{16}\)

According to the above understanding democracy cannitates the vesting of supreme power in the people. A system whereby people determine how they want to be ruled. However, practice dictates that this rule is by the majority over the minority. Even it it is so, democracy in its western sense also has to take into consideration the views of the minority.\(^{17}\)

In order for democracy to flourish, rulers must politically be responsible to the ruled. There is also political responsibility where two conditions hold:

1. where citizen are free to criticise their rules, come together to make demands on them and to win support for the policies they favour and beliefs they hold;
2. where the supreme makers of law and policy are elected to their offices at periodical intervals at free and fair elections.\(^{18}\)

In sum, we have made no attempts to define democracy and have preferred a working definition as democracy could have so many meanings depending upon the context in which it has been used.

We have also noted that democracy is founded on the principles of liberty and equality, participation of the whole population in important social decisions, free access by all members of society to social and public offices and the availability to all

\(^{15}\) Supra Note No. 14 at p 12
\(^{16}\) Supra p 12
members of society of the mean: necessary to fulfil physical and intellectual property.¹⁹

Today, democratic governance is said to encompass four dimensions viz

(i) participatory development
(ii) democratisation
(iii) human rights
(iv) good governance

Democracy is therefore difficult to define but for the purposes of this essay we shall endeavour to take Arblaster’s definition:

Democracy is the idea identified with popular power of a situation in which popular power and perhaps authority too, rests with the people.²⁰

DEVELOPMENT OF DEMOCRACY

Democracy as we know it developed from the city-states of Greece. It was commonly referred to as the rule of the people and it is this nature of democracy that is, making people the reservoir of power that made democracy unpopular for most parts of the 19th century as democracy was seen or reflected opposition to aristocracy.

The central features of the Greek democracies which arouse opposition by the aristocracies was the direct personal participation of the general citizen body in the government of the city-states or polis. Some philosophers such as Plato and to some

¹⁹ A Zain Democracy and Human Rights in Developing Countries. (London: Lynne Rienner Publishers Inc. 1991) p 1
extent Socrates viewed governance as a specialised skill like so many other forms of professional work and did not so well favour government by amateurs.

It was this idea of Plato and Socrates that John Locke is said to have borrowed and made democracy to be the rule of the propertied.\(^{21}\)

However, John Locke is identified with the development of democracy. The reason for this is that for him, civil government as opposed to despotism is founded on contract and consent. This contract and consent was to be given by the propertied and not the 'mob' or the 'rabble' as in the original Greek concept.

Even the liberal minded eluminaries of the French Enlightenment who championed tolerance and freedom of opinion had this propertied view of democracy.\(^{22}\)

As years went by and with the eventual eruption of the French Revolution of 1789 that was when this propertied view of democracy was discarded.

Today democracy is no longer direct but representative due to difficulties that would be faced in making the whole populace to take part in decision making today the large population of nations which run into millions as well as the giving of franchise to women and the reduction of voting age to 18 years in many nations have made it not possible to operate the type of direct democracy that was obtained in Athens. The millions of citizens today have to be governed by representatives as the nearest arrangement to the Greek style: these representatives are chosen in elections through


\(^{22}\) Ibid No. 21 p 36-37.
majority decision of qualified voters. Hence direct democracy is not convenient for our situation in the world.

In order for a country to qualify to be a democracy, there are certain characteristics and principles that go with it. They include popular consultation, popular sovereign, political equality, regular free and fair elections, protection of minority interests, respect for human rights, competition for power by more than one candidate or party, universal adult suffrage (one man one vote), popular participation, separation of powers, independence and impartial judiciary, rule of law, free press, public accountability, representative government and majority rule.

Though democracy is practically a majoritarian rule minority interest are taken into consideration and the party in power can never attempt to restrict political activity of any citizen or party as long as they do not make attempt to overthrow government by force. Thus, restriction on political activism is undemocratic.
CHAPTER THREE

HISTORICAL EVOLUTION OF DEMOCRACY IN ZAMBIA

On the 24th October, 1964, Northern Rhodesia ceased to be a protectorate and became an Independent Republic under the name of Zambia. At Independence, Zambia was a multiparty democratic state.

The change from multiparty to a single party state a few years after Independence could be attributed to the enormous powers that the President inherited at independence and the colonial institutions of government, including repressive legislation, that were adopted with only minor modifications.\(^2\)

The pieces of legislation that stifle on fundamental rights and freedoms include some sections of the Penal Code, the Societies Act, the Public Order Act and the contempt of Court Act. Because of these pieces of legislations, it remains indisputable that the

Colonial era did little to develop a political culture in Zambia, which placed a high value on limited government and respect for fundamental rights.\textsuperscript{24}

This situation was clearly shown in the case of Mubako v The Zambia's Single Party Constitution.\textsuperscript{25} It was further shown in Nkumbula v The Attorney-General\textsuperscript{26} when Baron J.P. made some remarks which had a chilling effect on individual liberties,

\begin{quote}
It is unthinkable to suggest that the government of a country elected to run an ordered society is not to be permitted to impose whatever constitutional restrictions on individual liberties it regards as necessary to enable it to govern to the best advantage for the benefit of the society as a whole.
\end{quote}

In order to deny citizens fundamental rights and freedoms, the state used a number of legislations. The Societies Act was used in the crusade to ban political parties that were seen as a threat to the continuation of UNIP, the ruling party, in power. Section 8 of the Societies Act gives discretionary powers to the registrar of societies to deny registration of any society. Dr. Alfred Chanda argues that in denying registration to such societies, he must act fairly.\textsuperscript{27} The same Act empowers the Minister of Home Affairs to declare any society unlawful in his opinion if he considered it (a) being used for any purpose prejudicial to or incompatible with the maintenance of peace, order, and good governance.\textsuperscript{28} (1) is used for any purposes at variance with its

\textsuperscript{24} William Tordoff (editor), \textit{Administration in Zambia} (Manchester University Press, Manchester, 1980) p8.
\textsuperscript{26} (1972) ZR 204.
\textsuperscript{28} Recently by means of s 8 of the Societies Act the Ministry of Home Affairs de-registered U.T.T.A., BDMTAZ, and PTA as they were seen as inciting violence and disorder at stations and has since given Local Authorities to run stations.
declared objects. Dr. A. W. Chanda again points out that the wording of this provision makes it hard to challenge the Minister’s action in Court.²⁹

In the case of Zimba v The Attorney General³⁰ the applicant applied for the registration of a society, the Mutendere branch of the Jerusalem Church. The registrar refused the application on the grounds that the interest of the peace, welfare or good order in Zambia would likely to suffer prejudice. The said refusal was upheld on appeal to the Minister. The applicant applied for an order of certiorari to remove into the High Court for the purpose of quashing the decision of the registrar. The applicant submitted that he was not afforded an opportunity to be heard when the application and the appeal were considered and that the reason for the refusal was without merit, as there was no evidence to show that, any of the grounds set out in s8 applied. Justice Hadden held that provided that the registrar properly refused the application on grounds set out in s8, such a refusal would not be a violation of the applicant’s constitutional rights. He held further that the registrar was under a statutory duty to have regard to certain criteria, he had to determine whether the interest of peace, welfare or good order in Zambia would likely to suffer prejudice. There was a duty on the registrar to act fairly and this required him, in considering the statutory grounds upon which he could refuse registration to give the applicant a sufficient indication of any relevant objection raised against him to enable him meet such objection with out necessarily disclosing his source of information as the applicant was not provided with this information or opportunity Justice Hadden quashed both the decision of the registrar to refuse registration and subsequent decision of the minister to sustain the refusal.

²⁹ Supra, p 176.
³⁰ (1979) ZR 83.
Dr. A.W Chanda further points out that the Kaunda regime availed itself of these provisions (ie ss 8 and 23 of the Societies Act) to ban opposition political parties. He cites the United Party (UP) led by the late Nalumino Mundia as one party that was banned in 1968 and United Progressive Party (UPP) led by the late Simon Kapwepwe which was banned in February 1972.31

The prohibition of these political parties was followed by mass arrests and detention of the leaders without trial. The clampdown of opposition leaders led to the introduction of the one party “democracy”. The second Republic or one party state was formally established on 13th December, 1972 when the constitution Amendment Act implementing the decision received a presidential assent.32

By Article 4 of the 1973 Constitution only one political party, UNIP could exist and it was unlawful for any one to form or belong to or assemble with another party. One of the reasons advanced for this change was that one party state was a necessary counter to the rising tide of political violence.33

MULTIPARTISM

On 24th September, 1990 Dr. K. O Kaunda, informed the nation in his address to the 25th National Council of UNIP that the country should revert to a multiparty political

31 A W Chanda, Supra p 177 Citing the Zambia Daily Mail, August, 20, 1968 at page 1 see Note No. 30
32 Act No. 29 of 1972
system and a referendum was to be held on whether or not the nation was to revert to the multi-party political system.

However, this was cancelled because of the overwhelming support from the people of Zambia. Accordingly, Article 4 of the Constitution was amended and this amendment permitted the existence of plurality of political parties. This amendment of the Constitution of Zambia paved way for the third republic.

The first multiparty elections under the third Republic were held on 31st October, 1991 and were won by the Movement for Multiparty Democracy (MMD). On 2nd November, 1991 Mr. Frederick Chiluba was inaugurated as Zambia’s second President and since then the Movement for the Multiparty Democracy (MMD) has remained in power.

Dr. Alfred Chanda, a renowned Academic described the peaceful transfer of power in Zambia as a “landmark event on a continent where electoral transfers of power are rare.” He further described Dr. K. D. Kaunda as having displayed high leadership qualities because he went against the advice from hard liners within his part and acceded to the opposition’s demands for a referendum on multi-partism, competitive elections, international observers and constitutional limits.  

In sum, Zambia was a multiparty state at independence. The country changed from multiparty democracy to a single party state in 1973 on grounds of plurality of parties.

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being the source of violence and later in 1991, Zambia reverted to multiparty democracy.
CHAPTER FOUR

CONSTITUTIONALISM AND DEMOCRACY A CRITICAL ANALYSIS OF EVENT IN DEMOCRATIC ZAMBIA AND HOW THEY FIT INTO CONSTITUTIONALISM

Professor De Smith speaks of certain values that must be found in a country where there is constitutionalism. Free and fair elections held at periodical intervals, political and civil organisations being free to mobilise themselves without much interference, where rule of Law is upheld where legal guarantees of civil liberties and enforced by an independent judiciary and ensures checks and balances, professional civil service, accountability and transparency of the governors to the governed are some of the values, which De Smith said, are compatible with constitutionalism.

It is the thesis of this essay that though constitutionalism adheres mainly to rule according to the constitution and thus presents a narrower view, it is submitted that constitutionalism and democracy have similar values.

For democracy to thrive, there must be certain minimum values. Professor Muna Ndulo classifies them as follows 38:-

1. System wide pluralism -- there should be no hindrance to alternative ideas, institutions and leaders competing for public support.

2. Freedom of expression and association and protection of human rights.

3. An independent judiciary which has the power to rule on the constitutionality of legislation.

4. Accountability of the political leadership to the governed on the basis of openness, probity and honesty;

5. A non partisan, ethically diverse, and professional civil service and one that is accountable to the governed; in a young democracy, an independent civil service could act as a wedge against anarchy when there are unavoidable clashes among political leaders; and

38The Democratic state in Africa; The challenges for Institutional building 31 Zambia law Journal 22 (1999).
6. Periodic elections for the leaders to obtain the consent of the citizens and to allow the voters to decide whether to renew the mandate of the existing leaders or to elect new ones.

In this essay we argue that though Zambia is a constitutional democracy the practices of the governors and their political parties are unconstitutional hence undemocratic.

HOW CONSTITUTIONALISM RELATES TO DEMOCRACY

A. FREE AND FAIR ELECTIONS

Free and fair elections are a very important determinate of a democratic society. Through elections, rulers derive their mandate to govern from the voters and hence legitimising their government both locally and internationally. It therefore follows that in order to be called democratic, a country like Zambia needs to have elections that are held periodically in a transparent manner. Elections in a democratic society are said to be free and fair if all matters pertaining to the elections and campaigns are administered justly and fairly for the equal benefits of the stakeholders. There are certain minimum standards that go to show whether elections are free and fair. Theversman provides seven internationally recognised principles which should be complied with as regards what constitutes free and fair elections, these are: 39

1. No unreasonable restriction imposed on parties or voters;
2. Participants respect for the right of free expression, free association and assembly for a period adequate enough to allow political organisation and campaigning and to inform citizens about candidates and the issues;
3. The adequate guarantees of a secret vote and freedom from intimidation;
4. The integrity of the balloting and counting process is secured;
5. Non-discrimination in the treatment of political contestants, voter eligibility and other political rights;

39 E. THEVERSMAN, ELECTION monitoring and election assistance in peace building A paper presented at a seminar on elections monitoring and assistance Vienna 16-18 September 1992 pp 6-8
6. Due process including legislative, regulatory hearing and appeals that protected against arbitrary or biased ruling and that provided an effective remedy for abridgement of protected rights.

7. Good faith efforts to ensure the integrity and credibility of this electoral process.

The first internationally recognised principle is that there must not be unreasonable restriction on parties or voters. In Akashambatwa Mbikusita Lewanika and 4 others V Frederick Jacob Titius Chiluba40, in the Constitutional Amendment Act no. 18 of 1996, the Movement for Multiparty Democracy (MMD) Government Introduce in Article 34 (3) (b) a provision that required that a presidential Candidate must have both parents Zambian by birth or descent. This eliminated Dr. Kenneth Kaunda, a leader of a major political party from the Presidential race. The main contention of the President Petitioner was to,

(a) Determine and declare that the provisions of Article 34 (3) (a) (b) and (e), have not been satisfied by the respondent.

(b) That the Electoral Commission neglected its statutory duty to superintend the election process thereby allowing fraudulent exercise favouring the respondent.

It was held that the various accounts on paternal parentage were irreconcilable in consequence of which an affirmaative case had not been proved to the necessary degree of convincing charity. Further the court conceded with the petitioners, that elections were rigged but the court was satisfied that elections although not perfect were not free from flaws and irregularity. Thus, where the executive introduces unreasonable law which knocks out both presidential candidates for UNIP, Dr. Kaunda by Articles 34 (3) (a) (b)41 and 35 (2) which provided for the following: “No person who has twice been elected as President shall be eligible for re-election to that office.”

Inyambo Yeta III who could have stood for election was equally barred by Article 65 (3) and (4) which provides that a chief cannot stand for election and if he does so he must first relinquish his seat as chief. These provisions severely restricted the choice of candidates available to the voters and contributed to UNIP and other opposition

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parties boycotting the November 18th 1996 elections. It is submitted that this was unreasonable restrictions on parties and voters and hence undemocratic. Since laws though constitutional must themselves be democratic. Thus, any law that is constitutional but undemocratic is unreasonable.

Zambia having been the host country for "immigrant cannot afford to ignore this."

Most people in this country are migrants. It is therefore submitted that the 1964 constitution as read with the Supreme Court decision on citizenship be adopted as the most fair criteria for defining a citizen from a non citizen. The criteria which the Supreme Court used and which is reasonably fair is that all persons who were British protected person in Northern Rhodesia and all persons who were born in Northern Rhodesia and where in Northern Rhodesia at independence are citizens of Zambia. The implication of that decision is that Kaunda is a citizen of Zambia and therefore was wrongfully barred from contesting the Presidency.

Secondly if there is to be free and fair elections, then all civil servants with the mandate to implement election regulations must be free from external interference. Among the most contentious pieces of legislation is the Public order Act\textsuperscript{42}. It is submitted that this piece of legislation has been used to block any political dissent Dr. Alfred Chanda, in his paper "A critique of the Electoral process in Zambia", had this to say\textsuperscript{43}:

\begin{quote}
It is crucial that political parties and candidates have freedom to hold meetings and rallies during election period. The current Public Order Act, which requires organisers of Public meetings to give the police at least 7 days notice before the event, is a serious hindrance to Political activity. This law is unrealistic and often abused by authorities.
\end{quote}

Therefore the Public Order Act poses a great challenge to both constitutionalism and democracy.

\textsuperscript{41} CAP 1 of the laws of Zambia
\textsuperscript{42} CAP 113 of the laws of Zambia
\textsuperscript{43} Paper presented to a National Workshop on the Role of Civil Society in the Promotion of democracy in Zambia at Mulungushi International Conference Centre from 25\textsuperscript{th} to 26 March 1999,p82
It poses a challenge to constitutionalism in that the constitution of Zambia provides that:

Except with his own consent no person shall be hindered in the enjoyment of his freedom of assembly and association, that is to say, his right to assemble freely and associate with other persons and in particular to form or belong to a political party, trade union or other association for the protection of his interests.

This protection seems to be broad enough however, the challenge lies in the Public Order Act. The latest case was *Christine Mulundika and 7 others v the people* in this case; the chief justice posed a question "what are the responsibilities of a democracy?" "Is it justifiable that the citizens of this country can only assemble and speak in public with prior permission which permission is not guaranteed and whether the law under attack is consistent with guaranteed freedoms of assembly and speech?" "The court reviewed the initial colonial purpose of the ordinance and posed a further questions as to whether these elderly provision born in 1953 are consistent with freedoms of speech and assembly enshrined in the constitution?" The court was satisfied that s 5 (4) went too far in giving unlimited powers to the regulating officer reducing the fundamental freedoms to a mere licence to be granted or denied on the subjective determination of a regulating officer. Then the court turned to the question whether such a provision will be reasonably justifiable in a Democratic Society. Though the court acknowledged that some form of control is necessary, the court concluded that the weight of judicial authority argued against such a provision and found it unconstitutional.

The implication is that in order for the law to be sound, and acceptable it must be in conformity with the constitution which is the expression of the sovereign in a constitutional democracy but the constitution itself must also be democratic. Hence the justifying the relationship that constitutionalism and democracy are related in a fundamental way.

The Mulundika case goes to show that given the lack of professionalism in the police service, officers can be used as agents of oppression by the government in power in

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44 Article 21 (1) of the Constitution of Zambia
45 Supreme Court Judgement No. 25 of 1995
46 Ibid p6
order to block dissenting views. The Public Order Act has been used successfully by successive governments to bar dissents. UNIP used it on United Party (UP) of the late Nalumino Mundia, United Pogressive Party (UPP) of the late Simon Kapwepwe and the Movement for Multiparty Democracy (MMD) of Chiluba then. Secondly, the MMD used the same Act first on UNIP, then on other political parties since they have been in power\textsuperscript{48}. It is submitted that laws need to be constitutional if they are to stand the test of time.

Despite the "land mark" decision in the Mulundika case, the Zambian Parliament moved swiftly and watered down the achievement of the Zambian Judiciary by making the Public Order Act even more undemocratic than before. The latest Act though different from the previous Act in wording is similar in content. Thus, where there was permissions it is now notice and where there was 14 days it has been replaced by 7 days. Thus, this freedom which is guaranteed by the constitution is still subjected to the availability of the police officers and in case of demonstration police officers and width of the road and the said Act has been further amended in order to criminalize conducts that were not criminal\textsuperscript{49}.

This wording of the current Public Order Act is just as unconstitutional and undemocratic as its predecessor. Thus, it has been very difficult for political parties to campaign freely in that the administration of this Act has been partial in favour of the ruling party\textsuperscript{50}.

Further if elections are to be free and fair, then monitoring of elections is an important aspect of transparency. It is submitted that monitors should be seen as partners in elections in ensuring free and fair elections. But a few months before the tripartite elections in December, 2001, coalition 2001’s accreditation letter was withdrawn by the Zambia Electoral Commission. It is not enough to have electoral laws but do those laws conform to the international standards of a free and fair elections? This means

\textsuperscript{47} Ibid p8
\textsuperscript{48} A W Chanda OP Cit p 177 and Chiluba used it on UNIP see generally Christine Mulundika and 7 others v the people and William Steven Handa v the Attorney General, 92/HP/1005.
\textsuperscript{49} Sections 74 – 76 of the Penal Code CAP 87 of the laws of Zambia.
\textsuperscript{50} ZNBC News "MISA Zambian Chapter, finds the Zambian police partial in the administration of the Public Order Act”, Thursday, September 25\textsuperscript{th} 2003.
that the President upon whom it is encumbered to announce the election date, must do so without keeping his announcement in suspense.

Zambia’s general election dates have not been consistent. For example in 1991, the first multiparty elections were held on 31st October, in 1996, elections were held on 18th November, and in 2001 on 27th December. Why all these fluctuations. It is submitted that the President would want to keep his opponent waiting until his party is ready and thus announce the election date there by catching his opponents “napping”.

In order to overcome this problem, there is need to adhere to constitutionalism and democratic principles. By constitutionalism, we mean that there is need to constitutionalise the election date: and by democracy we mean that there should be fair play by all in the political arena. Thus the oasis forum has made two important suggestions51.

(i) that the election date be constitutionalised and the general elections be held on the last Friday of September of each election year.

(ii) that October be the month of handing over power.

It is submitted that elections dates should not be left to subjective determination of the President because the President’s party can have an advantage over other parties as he will only announce the election date when his party is ready. The other parties may not be ready at the time and this is not democratic as the other stakeholders are treated unfairly.

Voting is a very fundamental aspect of elections. In Zambia, this right is enshrined in the constitution. The constitution provides that every citizen who has attained the age of eighteen (18) must vote52. In order to exercise this right one must have registered as a voter in a constituency in which one lives. In a real democratic state, all citizens unless otherwise they choose not to, who have attained the voting age must be allowed to vote. Non issuance of national Registration cards (NRCs) and omissions of names on the voters’ roll should not be used as excuses. To deny qualified citizens the right to vote is to do violence to the principles of freedom and equality said a

51 The Post News Paper, Oasis Declarat on September,12 2001p10

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U.S.A. Presidential Committee On Civil Rights.53

Though statutory instrument No. 55 of August, 2001, was passed which would have enabled the continuance compilation of the voters’ roll, this law has not been utilized. Because the law is first a dream, the radical decision is to do away with the voters’ card all together and starting to use NRCs for voting instead.

We have alluded to the fact that voters sometimes are de-franchised because they are omitted on the register of voters. In order to cure this mischief, government decided in 1996 to engage a private firm to conduct the voter Registration exercise.

Through the National Tender Board of Zambia (NTBZ), the government invited all companies, local and abroad interested in conducting the voter registration exercise to submit their bids. The following companies submitted their bids: NIKUV was chosen as the company to register voters. Political parties such as UNIP questioned the rational and the motive of the choice. Because NIKUV was condemned as being linked to Israel’s Intelligence Wing Mosad, rumours were that the registration exercise will be rigged in favour of the Movement for Multiparty Democracy (MMD); it is therefore impossible to hold free and fair election. The allegation of the possible rigging were worsen by Post Newspaper report that NIKUV computers carried out a similar exercise in Zimbabwe and allegedly, ensured that the ruling, ZANU-PF had an in-build majority voters. Zambia Democratic Congress (ZDC), United National Independence Party (UNIP) and Liberal Progressive Front (LPF) challenged the legality of the NIKUV contract in court. This challenge was futile even though the judge conceded that NIKUV was operating in Zambia illegally but ruled in favour of government, because it could be a worst of tax payer’s money to cancel the contract. The unsettled controversy goes to show that the Movement for Multiparty Democracy (MMD) government had interest in the involvement of NIKUV. Thus, one would infer that polls were rigged want only without regards to the international standards of

52 Article 75 CAP 1 of the laws of Zambia
53 (1947) “to secure these rights” Government Printing Office Washington DC, p2
54 Swedish Tax Administration Denel Informatics (SA) Q. Data Consulting (SA) VWL International (SA) Polaroid (SA), Big Bang Tracels (USA), De La Rue Identity (France), Zambia Postal Services (Zam Post), Ernest and Young, Nikuv Computer (Israel).
free and fair elections such as secret ballot, universal adult suffrage, people’s will to put in power a government of their choice.

It is submitted that it goes to the root of the fundamental law of the land the constitution which has given unwarranted powers to the executive while reserving the little that is left to the judiciary and the legislature. Thus free and fair elections need not only be a requirement of constitutionalism but of a democratic government as well.

Finally, any attempt to talk about elections cannot be complete without talking about the media coverage. Basically there are two types of media namely electronic and print media. The electronic and print media are owned either by the state or private investors. However, most big media houses are in the state hands, Zambia National Broadcasting Corporation (ZNBC) Times of Zambia, Zambia Daily Mail and the Zambia Information Service (ZIS).

It has been observed that newspapers do not count as the best form of communications in Zambia so as to permeate almost all individual life. This is because to the majority of Zambians print media are concentrated along the line of railway thereby depriving the rest of the voters’ valuable information on which to base their choice. The second reason is that most people in Zambia cannot simply afford the luxury of a newspaper due to declining economic standards in Zambia. According to the GRZ Information and Media Policy Document56, only about 92,000 of the total populations of about 11 millions are accessed by mass media. A large number of the Zambian population has better access to Zambia Broadcasting Corporation (ZNBC) radio and television.

State owned print media that is the Times of Zambia and the Zambia Daily Mail are more in favour of the ruling MMD party while the Post Newspaper is sympathetic to the opposition. Similarly the pattern is repeated with electronic media despite being

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56 Lusaka, March, 1996

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the means of reaching the 11 million plus Zambians in the urban and peripheral areas.\textsuperscript{57}

The statistics go to show that, the large Public media the source of information for the majority of Zambians are seen, to be promoting only the interests of the party in government. Being the case, it is submitted that people do not base their choice of a candidate on his or her strength or manifesto of his party but on his or her access to the media, This is spiced with corrupts practices such as vote buying and bribing of voters. This is not only unconstitutional but also undemocratic as free and fair elections are a pre-requisite to constitutionalism as envisioned by Professor De–Smith and similarly one of the requirement of a democratic society. If this is seriously lacking then it is hard even to determine whether the party in government is legitimately there as we earlier on alluded to above that the primary purpose of elections is to give a fresh mandate to the government. However, if this mandate is obtained through sharp practice then we will found it easy to say the government is illegitimate there hence the just fication for so many election petitions including the Presidential Petitions.\textsuperscript{58}

CONCLUSION

It is submitted that elections are the only means of determining a legitimate government in power. If elections are held at periodic intervals and are necessary free and fair, then one aspect of democratic governance is fulfilled.

POLITICAL PARTIES AND CIVIL SOCIETIES

Essential to the success of democratic governance in a Multi-Party system is a successful party system in which political parties offering alternative policies,

\textsuperscript{57} ZNBC gives three times of more coverage of what Mwanawasa MMD’s Presidential Candidate is doing than all the oppositions Presidential Candidates put together, Manifesto of Human Rights December 2001. The Post News Paper 12\textsuperscript{th} September,2001 showed that “Bribery in Kabwata Bye–elections” Corruption Percentages during Kabwata Bye-Elections as Compiled by Election Monitors MMD 65\%, FDD 28.75% UNIP 6.25

\textsuperscript{58} FDD, UPND and Heritage Party have Petitioned the elections of Levy. P Mwanawasa to the Presidency. Mabenga and Victor Mwinda lost their seat due to malpractices in elections on Wednesday, Sept, 24\textsuperscript{th}, 2003.
programmes and leadership effectively compete for state power at elections that are held periodically. Alongside political parties, are the civil organisations who though give pressure to government by wanting to influence governments decision, have no intention what so ever to form the next government.

In the Zambian constitution, political participation is one of the rights enshrined in the bill of Rights Article 21 (1) expressly provides that:

Except with his own consent, no person shall be hindered in the enjoyment of his freedom of assembly and association with other people and in particular to form or belong to any political party, trade unions or other associations for the protection of his interest.

This therefore means that political parties and the civil society are guaranteed by the constitution and hence must be given the opportunity to operate freely. Political parties play a pivotal role in a democratic society as S. Newman rightly points out:

In fact, the basic assumption of democracy is the inevitability of differing views and free operation of competing opinions. The true democrat has a suspicion that he may not always be 'right'... Thus the opposition becomes the most important part of parliament... it's fruitful ideas are accepted and indeed, this is a wise course for the party in power to follow if it wants to remain there. Its political alternative represents not only the looming 'shadow cabinet' but also active participant in actual control.

An effective party system allows for effective competition for political power. However, in Zambia what we have observed is the restraint of political parties and civil societies. The ruling party's hostilities towards the opposition has been seen in a number of ways. Among them is the Black Mamba saga in which the vice President of UNIP and the abortive coup d' état in which a number of opposition leaders were arrested only to be released or discharged for lack of evidence. The ruling MMD is alleged to finance the weakening of the opposition parties through the illegitimate use of state agencies. While business organisations are expected to contribute in some way to the MMD in fund raising ventures such as "The meet the President" dinners but they are not expected to assist or associate themselves with the opposition political parties in any way if they did they will be looked at with extreme disfavour.

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59 CAP 1 of the laws of Zambia
61 Sebastian Sive Zulu was exposed in the Post News Paper as being among the beneficiaries of the Zamtrope account. He was allegedly given K200 Million in order to destabilize UNIP.
Fund raising activities in Multiparty system is one central activity of political parties in their preparations for elections. If all political parties have funds this levels the political playing field, However, because the ruling party has a tendency to restrain opposition political parties, a good number of opposition parties have collapsed for lack of resources, and in most cases, particularly in bye – elections the opposition parties do not offer meaningful competition to the ruling party but because the latter has access not only to donations from business houses but also unlimited access to state resources. Opposition parties on the other hand do not have any access whatsoever to state resources. It is therefore submitted that in a country like Zambia where there is no law that allows government to fund opposition political parties or to compel the ruling party to declare their sources of income, funding of political parties by genuine donor agencies should be well come as it enhances democratic governance and constitutionalism as political parties are creature of the constitution.

The attitude of the opposition parties suggest non – acceptance of the Multiparty Political system. The major opposition has never accepted the legitimacy of the ruling party. In 1996, the Zambia Democratic Congress Party (ZADECO) demonstrated such a behaviour. Having participated in the 1996 election and having lost the elections, the party declared that the election were flawed and refused to accept the results of the elections and the legitimacy of the government that emerged after 1996. The Presidential petition cited above is an attempt by the opposition to discredit the 1996 elections results. Though the elections were flawed, the opposition leadership’s main concern is to be in power irrespective of how power is acquired and refused to accept the results of the election and the legitimacy of the government that emerged after 1996. Thus, the opposition parties do not see themselves as playing any meaningful role as loyal opposition.

Political parties structures themselves have not worked to promote democratic principles and hence constitutionalism. The political parties themselves have internal conflict including the ruling MMD party. Among other major splits was bouding out of the party of two senior National Executive Committee (NEC) members that is the deputy national secretary and treasurer. The duo led the formation of the Democratic

TST (Trans-Saharan Transport) is alleged to have donated K500 millions to the MMD.
Congress Party in early 1996. These internal problems in the MMD, rose from the fact that the party was held together by the common “enemy” Kaunda. Once that was done the struggle for power began in the preceding years.

It may appear as though those problems were only in the ruling party the opposition parties have their own share of internal conflicts. The former ruling party has suffered a lot of in fighting and the result was that a party President was suspended for allegedly supporting the ruling party\textsuperscript{64}. Nkoma was elected President at the 2001 National Congress of UNIP. In his place, the central committee appointed Tilyenji Kaunda as Acting President. This is not all, UNIP suffered much defections and retirements by senior members of the party among them Levison Mumba, Muzazala Member of Parliament, Dingisivayo Banda and Njekwa Anamela who retired from active politics.

The defection of Baldwin Nkumbula to the ruling MMD left the National Party divided with Akashambatwa Mbikusita Lewanika forming the now disfunct Agenda for Zambian Party and the rest of the senior leadership returning to the ruling MMD\textsuperscript{65}.

The expulsion of Anderson Mazoka from the ruling MMD resulted in the formation of the United Party for National Development (UPND). It attracted people of good standing in society. They included Sakwiba Sikota its first Vice President, Robert Sichinga its 2\textsuperscript{nd} Vice President, Lavu Mutesa, Dr. John Mulwila and other prominent personalities.

The party has displayed the intolerance to dissenting views. Any person who does not want to toll the party line like the MMD is expelled from the party. A good number of UPND MPs who were seen to have a soft spot for the ruling party were expelled\textsuperscript{66}.

\textsuperscript{63} Article 21 (1) of Op. Cit.
\textsuperscript{64} Times of Zambia Friday October, 5\textsuperscript{th} 2001 “UNIP YOUTH ATTACK NKHOMA”
\textsuperscript{65} The people that returned to the MMD are Emmanuel Kasonde, Chilufya Kapwepwe, Baldwin Nkumbula and Charity Mwansa.
\textsuperscript{66} Dr. Kabaghe Sipula was the first one to be expelled for allegedly voting for the ruling candidate speaker Amusaa Mwanamwambwa. Then followed by Kenedy Shepande, Bennie Tetemahimiba, and Austin Liato. In all the bye-elections that issued, the ruling party fielded the ejected MPs and each time the ruling party won the elections. It is submitted that such a pattern is dangerous for a young democracy.
Another feature that permeates the Zambian political parties is the frequent movement of party leaders, particularly middle class, and ordinary party supporters from one party to another. Some people have been members of literally any party on the scene that seem to form the next government. Others have moved from the ruling party to several opposition and back to the ruling party. The result has been the proliferation of political parties most of which exists largely on paper. Though political participation is created by the constitution, mushrooming of political parties are not a test of how a state adheres to constitutionalism or to democratic principles but a draw back to attaining genuine Constitutionalism and democracy. The law governing the registration of political parties be amended in such a way that it be biased to a party with a particular memberships and represented through out the country 67.

Finally political parties themselves lack internal adherence to constitutionalism and to democracy. For some of the political parties, no election for the national leadership was done even when they have existed for some years. The Patriotic Front, the Heritage Party and even UNIP. Even those that held election merely went to rubber stamp their leadership.

The ruling MMD held a convention in Kabwe. A good number of persons who wanted to challenge Chiluba for the Presidency were dejected from the party convention among them General Christon Tembo, Vincent Malambo, Edith Nawakwi, Godfrey Miyanda and Ackson Sijane.

The opposition UPND was also with its rejects, Dr. John Mulwila was forced out of the party. Similarly though the Foundation for Democratic Development (FDD) was more democratic it too did not adopt the losing party Presidential Candidate Vincent Malambo, Austin Chewe withdraw from the Presidential race for allegedly sharp practices. Thus it is submitted that how can a leader who is coming from undemocratic background be democratic overnight? Internal democracy is lacking in most political parties and this lack of democracy manifests itself in parliamentary candidate selection. Robert Musiota in his study cites the MMD as been a party with

such high incidences of undemocratic tendencies. The example of such unpopular choices by National Executive Committee (NEC) of MMD were those of Kabwe central and Lusaka Central. The results of lack of internal democracy are:

(i) Mass expulsion
(ii) Mass defections
(iii) Elections of independents
(iv) Uncalled for by elections

In sum political parties play an important role in democratic governance and help to enhance constitutionalism. Thus political parties need to be helped in order for them to make their meaningful contribution to democracy. It therefore follows that the radical decision is to fund political parties or allow donors to fund them.

RULE OF LAW AND SEPARATION OF POWERS

The democratic principle of the rule of law implies according to Dicey:

(i) Principle of equality before the law.
(ii) Equal individual legal responsibility
(iii) Rule according to the law

The principle of equality before the law excludes autocratic and totalitarian principle, which in the name of divine right, of inspired leadership or of power pure and simple, exempts certain individuals and groups from the law of the land. Though the Presidential immunity clause is well intended, it in a way tries to achieve the same purpose that is to exclude a president from civil suits and criminal sanctions in order to enable him rule the country without fear of being sued or criminalised. It is the author’s contention that it has given the Zambian President licence to insult or do...
certain unbecoming behaviour. Thus the creation of a privileged class is repugnant to the rule of law, democracy and constitutionalism. It is the contention of the author that we cannot discuss the rule of law without talking about separation of powers especially of the judiciary and the executive in that in the abrogation of the rule according to law, a person can have recourse for redress in the courts of law and the principle “Nemo judex in Causa Sua” applies that is no one can be judge in his own case. Thus where the executive abrogates a citizen’s right the executive should not be judge but the judiciary which should be independent. This was envisioned by Montesquieu when the said: “It is necessary as in the nature of all things to make one power to check on another power.”

Thus in the Law Association of Zambia (LAZ) Zambia Episcopal Conference (ZEC) Christian Council of Zambia (CCZ) Evangelical Fellowship of Zambia (EFZ) and Non Governmental Organisation Co-ordinating Conference (Ngocc) V The Attorney-General and Lusaka Commanding Officer if the executive was an arbiter, the citizen’s rights would have been abrogated. Thus the High Court ruled that the state police should police the event and the meeting should not be cancelled.

Secondly, equal individual legal responsibility is what is envisioned by the rule of law. The democratic conception of the rule of law balances individual rights with individual legal responsibility. Thus, rules must be made concerning such things as who is responsible for damages done by official acts on private citizens in the course of his duty. Is it the state or the individual? In Zambia, the practice has been to make the state liable.

Individual legal responsibility also calls for rules to make a person criminally liable. This is based on individual wrong doing by the person responsible for the action. In political offences, it is very easy to arrest a leader of an opposition party for

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70 President, Mwanawasa calls Kavindele foolish and Miyanda a finished Politician. Chiluba wanted to go for a third term bid not with standing the limitation of terms of office Art 35 (2) and the clause requiring the President to rule with dignity in Art 44.
71 2001 / HP/ 0382
72 Boniface Kawimbe v The Attorney-General (1974) ZR 244 The applicant was detained on Presidential orders for 16 days without being furnished with grounds of detention. It was held that the rights to liberty is a fundamental human right and must not be taken from the man without lawful cause. The detained was compensated by the state for unlawful detention.
abrogation of the law but not so easy with the leaders of the ruling party no matter how illegal their meeting or their act is.73

Thus, the laws of unlawful assembly riotously assembled apply more to the oppositions and civil society than the ruling party and its memberships. Though control is necessary to enhance human rights, in Zambia, it seems to be that control is discriminatory hence the assertion that control is necessary does not make sense74:

There is no true opposition between liberty as such and control as such, for every liberty rests on a corresponding act of control. The true opposition is between the control that cramps the personal life and the spiritual order, and the control that is aimed at securing the external and material conditions of their free an unimpeded development.

If rule according to the law is to be enhanced then equality before the law should be the guiding principle by the police officers and other civil servants involved in law agency such as the Anti Computation Commission and the Drug Enforcement Commission. A minister or a chief executive of a government department must be investigated while in office not when he leaves office75.

Thirdly the principle that rule according to the law implies that no person is above the law. All persons in Zambia are subject to the law of the land. Cadres in Zambia have taken over the role of the police and declare certain areas as "no go areas" for politicians and individuals with dissenting views. Kulima Tower bus station is one such areas where thieves masquerading as cadres of the ruling party beat citizens with dissenting views. This was worse during the third term bid and it was repeated when Michael Sata resigned from the MMD and from Chiluba’s government Sata and Venon Mwanga are the authors of this trend and their intolerance attitude was used to work against them.

Similarly, immunity from civil and criminal sanctions does not mean that a president can insult any one at any time. Criminal defamation should not be used to safeguard

73 In Kitwe MMD cadres forcibly pulled out Michael Sata out of Radio Icengelo Studios twice for allegedly insulting Levy P. Mwanawasa and for alleging that U.T.T.A. owes both Kitwe and Kalulushi councils up to K100 millions in rates arrears.
the interest of a president who keeps on insulting fellow politicians. In this way the country will be promoting partial rule according to the law where "some animals will be mere equal, than others – Animal farm kind of scenario." The president should not use this platform to insult, humiliate and antagonise political opponents. This will make the presidency above the law and a mockery of democratic principles and constitutionalism.

In sum, it is submitted that the criminal defamation of the president is repugnant to the principles of the rule of law and should therefore be repealed or reformed so as only as to retain the civil defamation so that the political playing field is equalised.

SEPARATION OF POWERS

The doctrine of the separation of powers as we have it today is derived from Montesquieu whose elaboration of it was based on his study of John Locke and and imperfect interpretation of the 17th century English Constitution.

This doctrine has been faithfully followed by the American Constitution framework. In the United State of America system of governance, no organ of government ever alone can claim supremacy and each organ of government offers checks and balances.

In the Zambian constitution order which is a mixture of both the presidential and the parliamentary system, there is a fusion of power. The implication is that in a system where the President appoints cabinet from the legislature, the President buys the loyalty of members of Parliament (MPs). It therefore follows that in the Zambian system, allegiance of an MP is to his party and President rather than to the constituents. This further jeopardises the rule of law and the separation of powers.

75 Kavindele Former Vice President is being investigated for corrupt practices while out of office. Former Presidential Press aid has been charged with abuse of office and has been appearing in court ever since.
76 Miyanda is a frustrated Politician. Mwanawasa The Post 23rd October, 2002.
78 When Dipak Patel was a back Bench he used to attack the Mwanawasa government with vigour but when he was appointed Minister of Commerce and Industry he has being silenced probably due to the doctrine of Cabinet collective responsibility of decisions or policies no matter how absurd they may be.
It is further contended that the appointment by the President of practising judges to head commissions has further made it hard for the judiciary to be autonomous from the long arm of the executive.

If rule of law is to be achieved then the civil servants who are the agents of government must be seen to be committed only to the law and the constitution and not to individuals.

PROFESSIONAL CIVIL SERVICE

By professional civil service, we mean an efficient, honest and impartial civil service, Muna Ndulo added a further requirement that is a “ethically diversy civil service”. Civil servants must work professionally and adhere to the codes of ethics of their professions. It is submitted that the civil service in Zambia is not professional and listen move to the party in power especially heads of departments.

The regulating officers of the Public Order Act requires all members of society to give them a notice before holding a meeting or demonstration. However, it is not so with the ruling party. Further still where a notice is given by the conveners, the regulating officer still has a discretion to allow or not to allow a meeting. In most cases, the regulating officer succumb to unprofessional reasons such as there is an intelligence report that groups opposed to the group convening a rally would disrupt the meeting hence the police’s role is to prevent the occurrence of violence. The Resident Doctors Association of Zambia and 51 Medical Students V The Attorney General is the Case in point.

The court ruled that it has never been the law in Zambia to allow criminals to destabilize a meeting held by peaceful citizens. This decision went parallel to another high court ruling that “allowing such insinuation can lead to the breakdown of

81 1999 HCZ HPO 817) at Lusaka (unreported).
82 Ibid
law and order as the President’s supports can forcibly beat those that are insulting the President.” The same proposition was endorsed by the Supreme Court of Zambia\textsuperscript{83}.

The civil service is also used by the state as an agent of oppression. They are used by political leadership to harass political opponents. For example the Zamia Revenue Authority workers can be used to squeeze a political opponents pay tax even when it is not due: other bodies that are used are Zambia Electricity Supply Cooperation, Zambia Telecommunications Company and the Zambia Security and Intelligence Services\textsuperscript{84}.

Thus, it is submitted that the civil service which ordinarily should be honest, impartial and only serve the interests of the Zambians and subject only to the constitutions and the laws of the land are subject to the leadership in power.

**EFFECTIVE GUARANTEES OF HUMAN RIGHTS**

Human rights refers to the rights that a person has by virtue of being human and are derived from the inherent dignity and worth of a human person. For it is universally acknowledged that all human beings are born free and equal in dignity and rights. These rights are not given by the constitution of a country but are intrinsically human

In order for a country to be called democratic that country must have put in place an effective guarantee of fundamental civil liberties. These liberties must be enforced by an independent judiciary. Most countries, Zambia included have enshrined in their constitutions bills of rights. This is one way of limiting government powers.

Professor Nwabueze in his book, *Constitutionalism in an Emergent State*\textsuperscript{85}, argues that to entrench civil liberties in a constitution is not in itself safeguards to human rights because government can merely use them as political tools which do not have

\textsuperscript{83} Mwape and Mmembe v the people Justice Chitenge came up with this startling proposition which he abandoned in the Resident Doctor’s case.


\textsuperscript{85} (Fair leigh Dickinson University Press: Ruther Ford 1973) p 1-4.
any enforceable legal restraints. For example Article 111 of the Zambian constitution.\footnote{CAP I of the laws.}

Fundamental freedoms and liberties should be entrenched. In the case of Zambia, basic rights are in part III of the constitution and cannot easily be altered without holding a referendum. In sum the Zambia bills of rights are entrenched and this part of the constitution cannot be altered in an ordinary way of just 3/5 majority of the members of Parliament.

Violations of an individual’s liberties can be enforced in the courts of law at the suit of the injured party.\footnote{Dean Mun’gomba was awarded millions and millions of kwacha for unlawful detention after his acquittal in 1997 attempted coup d’etat.}

Human rights, which are guaranteed, are an indication of a democratic state and similarly a country upholding constitutionalism. A country upholding and giving effective guarantee of these rights is a truly democratic state and in De – Smith’s preference truly constitutionalism.

**FREEDOM OF EXPRESSION AND THE PRESS**

Freedom of expression and of the press is one of the values according to professor De-Smith upheld in a constitutional democracy hence a constituent part of a democratic society. If a country is to be called democratic, freedom of expression must be enhanced Dr. A.W. Chanda, in his article, “The Freedom of expression and the law in Zambia” argues that a constitutive part of the freedom of expression is the freedom of the press.\footnote{A. W. Chanda. The Freedom of Expression and the Law in Zambia 30 Zambia Law Journal 123 (1998).} He defined the freedom of the press as, “the right to receive and impart ideas and information with out interference.” Interference according to Dr. Chanda connotes legislative constraints and executive control.\footnote{Ibid}
Freedom of expression is important in a democratic society because it plays four (4) important functions they include\textsuperscript{39}:

1. Enabling an individual to participate in a democratic society.
2. Helping in the discovery of the truth
3. Enhancing the capacity of a person to take part in a democratic society.
4. Providing a mechanism by which to establish a reasonable balance between stability and social change.

In recognising the importance of the press article 20 (2) of the constitution provides for the protection of this freedom in the following manner\textsuperscript{91}:

Subject to the provision of this constitution a law shall not make any provision that derogates from the freedom of the press.

Prima facie, the protection given by this provision seems to be broad enough however, there are laws in the statutes that have a chilling effect on the freedom of the press. They include sedition, banning of publication, publication of false news as well as civil and criminal defamation of the president and government officials\textsuperscript{92}.

However, this essay will be concerned with banning of publications and criminal defamation of the President.

s 69 of the Zambian Penal Code seeks to protect the reputation of the president and dignity of his office. It has thus stated\textsuperscript{93},

Any person who with intent to bring the president into hatred, ridicule or contempt publishers defamatory statements shall be liable on conviction to three (3) years imprisonment.

The cases of the people V Freddie Mmembe and Bright Mwape\textsuperscript{94} and the people V Freddie Mmembe, Masautso Phiri and Goliath Mukonge\textsuperscript{95} gives us an illustration. Dr. Alfred Chanda argues that if the law of defamation is radically implemented, it may have a chilling effect on freedom of expression and therefore

\textsuperscript{90} Ibid
\textsuperscript{91} Article 20 (2) of CAP 1
\textsuperscript{92} s 57 (1) s 53 (1) s 67 (1) and s 69 of the Zambian Penal Code CAP 87 of the laws have a chilling effect of this otherwise broad Freedom of the Press others include contempt of court s 116 of the Penal Code Contempt of Parliament s 19 of National Assembly (Powers and Privileges) Act CAP 12
\textsuperscript{93} Ibid
\textsuperscript{94} HPR / 36 /94 (unreported)
\textsuperscript{95} SCZ Nos. 87 and 107 of 1995.
undermine good governance, transparency and accountability the very fibre of a democratic society. The European Human Rights Court ruled that “the conviction of an opposition member of parliament violates article 10 of the European human rights convention. The court further ruled that not only is the criticism of politicians and governments to be accorded special protection, in addition protections is due when the criticism is made by an elected representative especially a member of the opposition.” In the subordinate court of the first class was a court case involving Edith Nawakwe, Dipak Patel and Brian Sauluke for the crime of libel and defamation of the former President Dr. Chiluba. However, due to overwhelming evidence implicating Chiluba as being a thief, the state withdraw the case from court Instead the former head of state has been indicted for theft by public servant, corruption, plunder of the economy and abuse of office. Freedom of the press is very important as it can lead to accountability as is now the case with the former head of state but if this was denied, no one would have known the truth about the activities of the former head of state.

The Nawakwi case lead to the stripping of immunity from the former head of state. Thus immunity which should have been used as a shield by the former head of state in the event of being indicted has been removed. The Supreme Court of Zambia upheld the decision by Parliament to lift the immunity of the former President, thus, freedom of the press is very crucial in a democracy.

Finally in Oberschlick v Austria, the European court of human rights made a distinction between a politician and a private individual as the politician lay himself open to criticism and scrutiny and thus must exercise a greater degree of tolerance as he himself makes public statements that are susceptible to criticism.

In sum, the law of criminal defamation of the President has no justification in a democratic society, Dr. A.W. Chanda puts it clearly when he says,

...the president is a servant of the people and not their master and whether or not he has a reputation depends upon his conduct while in office...those who

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95 Castells v Spain, Judgement of 23rd April 1986.
96 Frederick Jacob Titus Chiluba v The Attorney-General Appeal No 125 of 2002 p 32
97 Judgement of 23rd May 1991, series A. No. 204 at paragraph 63.7.
98 Supra not 95 at p 144.
choose to do so must be thick skinned and must be prepared to lose a large part of their privacy. Why should the law give liberty to the President to defame his opponents at will by immunizing him from legal suits while making it criminal for opponents to defame him.

This is what we pointed out when we discussed the rule of law principle of equality before the law. The criminal defamation of the President should be removed and instead only the civil offence should be retained. Our contention for removal of criminal sanction as stated by Dr. A.W Chanda is that the President appears to be above the law and defames fellow political opponents with impunity. This seriously compromises the democratic society and leaves an ugly mark on constitutionalism.

However, in order for the freedom of expression to be enjoyed, it must be done in an orderly manner thus the justification for the restrictions of the freedom of the press. The restrictions that are common include defamation, requirements of public safety, public order, public morality, and public defence and what is not allowed is a system of licensing of the press or the control of opinions by the Minister of Broadcasting and information which minister is armed with powers of coercion. It is not allowed as it is incompatible with the democratic society.

In the Zambian constitutional order the derogations allowed include restriction on an account of defamation, requirements of public defence, safety, order, morality and health. However, these have not been defined and thus it is open to all sorts of interpretations. Thus, the definition depends upon the philosophy of a judge. If a judge does not appreciate the importance of the press, he can justify almost anything. This has happened before and the court went to the extent of stating that

No one could seriously dispute that side by side with the freedom of speech was an equally very important public interest in the maintenance of the public character of public men for the proper conduct of public affairs, which requires that they be protected from destructive attacks upon their honour and character. When a public person was the head of state the public interest was even more self-evident. The constitution elevates the President above every one else and he can, therefore, not be compared to an ordinary person.

Thus, nearly anything can be justified and the result is that Press freedom and that of expression is greatly curtailed.

In sum, though the constitution of Zambia guarantees freedom of expression and the press, there are laws that derogate from this freedom and it is our submission that the otherwise broad freedom of the press is watered down by such derogations.

The constitution is not the only law giving impediments to the freedom of expression and the press. There are other laws in the statutes as stated above. Our concern in this essay is the law allowing the President to ban publications on grounds of Public interest. What constitutes Public interest is left to the president to determine, since public interest "is an unruly horse\textsuperscript{101}\)” the president can justify almost anything on grounds of public interest.

The early attempt to challenge the president’s power under this section failed in \textbf{Shamwana and another v The Attorney-General}\textsuperscript{102}. In this case, two political detainees, Edward Shamwana and Valentine Musakanya, sent a petition to the National Assembly, requesting the Assembly to review the state of emergency, which had been in existence since Independence. In March 1981, President Kaunda banned the said Petition. Shamwana sought an order from the high court praying that the President’s decision to ban the petition was wrongfully, unlawful and unconstitutional. He contended that a petition to the National Assembly could not be prejudicial to the public interest and that by proscribing the document the President was negating his oath of office to uphold the constitution justice Florence Mumba held that the President had acted within powers conferred on him by s 53 of the Penal Code and that the President’s opinion was not open to question and that his decision following upon such an opinion could not be impugned.

Commenting on the judgement, Dr. Chanda states that the judge took an easy way out as there is no such a thing as unchallenged discretionary powers and went on to point out the grounds upon which discretionary powers could be challenged. He points out unreasonableness, bad faith, taking into account irrelevant consideration or failing to take into account relavent considerations, or acts under dictation\textsuperscript{103}.

\textsuperscript{101} Per Lord Green in Boulder proprietary Mines Ltd.
\textsuperscript{102} (1981) HPR as cited in Ibid note 101
\textsuperscript{103} Supra note 102- Associated Provincial Picture House V. Wednesbury Corporation (1948) IKB 223
This law of banning of Publication was again invoked by Former President Frederick Chiluba when he banned edition number 401 of the post Newspaper in February 1996. The post prematurely disclosed a plan by the government to organise a referendum over the constitution and resulted into the People v Freddie Mmembe and Bright Mwape and Masautso Phiri\(^1\) in which the trio werecharged with receiving documents, articles or information knowing or having reasonable grounds to believe at the time that the same documents, article or information were communicated or received in contravention of s 4(3) of the state security Act. The material in question, which concerned government programme of work on constitutional Reform Activities and a proposed Referendum on the constitutions, appeared in the post, edition 401 of February, 1996 which was banned by the president under s 53 of the Penal Code.

The high court held that the accused had no case to answer as the essential ingredient of knowledge or reasonable ground for belief that the information was covered by the act had not been proved Justice Chitengi noted that\(^2\):

Referenda are known lawful ways of asking the general citizen to decide by plebiscite certain contentious issues which the government does not want to decide on its own. The Zambian constitution contains provisions for referendum. In any case a referendum is nothing more than an election and there can be no secret about an election in these days of transparency, the revelation of which should invite the stiff penalties under the state security Act. I think it would surprise many and even jar their instincts to hear that in Zambia three nosy journalists have been imprisoned for twenty years for prematurely announcing government intentions to hold a referendum to decide a thorny constitutional issue.

In sum, it is submitted that a law that allows the President to ban publications erodes the very fibre of a democratic society in that freedom of expression and the press are constituent part of the democratic society without which we cannot talk about democracy.

Thus s 53 also goes against constitutionalism in that one of the values of constitutionalism as espoused by Professor De-Smith is that there should be transparency between the governors and the governed. Thus the press plays a major role in availing information. If such information is suppressed through s 53 of the Penal Code then a guaranteed right is stifled hence such a law is unconstitutional and cannot reasonably be justified in a democratic society.

\(^1\) As cited Media Law Supra p 77.
GOVERNMENT ACCOUNTABLE TO THE CONSTITUENTS

It has been the argument of this essay that democracy and constitutionalism has certain values in common. Those values include among others government being accountable to an entity independent of itself. The Zambian Constitution declares that all power resides in the people.\textsuperscript{106}

\textit{All power resides in the people who shall exercise their sovereignty through the democratic institutions of the state in accordance with the constitution.}

The implication is that the people are the source of all legal power and authority and are determined to uphold, appoint and proclaim the means and style of governing themselves. Since all power and authority resides in the people, the people have the power and authority to determine what constitution they want for themselves. We shall elaborate on this later.

The Zambian democratic system has adopted the representative form of government. As a result, MPs are only chosen once in every five years. After the elections, there is no real accountability of the governors to the governed as MPs are more loyal to the party and the President on whose tickets they went to Parliament. This is so because any behaviour to the contrary is punishable through party discipline of expulsions and suspensions. This is because we inherited the British system in which MPs should strictly abide by the system of the party whip. Thus in this kind of political arrangement, the ruling party and its president has been using threats of expulsion to bear on MPs that fail to toe the party line. A example of this behaviour is demonstrated by then Minister of Finance the late Ronald Penza when aspects of his 1998 budget was criticised by backbenchers\textsuperscript{107}:

\textit{We cannot have the MMD tearing itself apart. This document is a product of your party and should be your document as well. And if you are not happy with the budget, leave the party.}

In order to strengthen democratic rule and constitutionalism, the Mwanakatwe Review Commission recommended that MPs be subjected to a vote of no confidence if they do not perform according to the electorate’s satisfaction\textsuperscript{108}.

\begin{footnotes}
\item[106] Art 1 (2) of the Constitution of Zambia.
\item[107] Times of Zambia, February, 8\textsuperscript{th} 1998.
\item[108] Mwanakatwe Review Commission \textit{recommendations} Chapter 12 Paragraph 12.25.40
\end{footnotes}
This was rejected; in fact the constitution was divided into two parts: chapter three containing the bill of Rights and Article 79 containing the amending clause on the one hand and the rest of the constitution on the other.

The constitution Amendment bill was published in the Government Gazette as required by Article 79 of the constitution. It sought to repeal the whole constitution save for the bill of rights and Article 79. The novelties in the bill which bill rejected almost all the recommendations of the Mwanakatwe Review Commission and include among others:

1. Presidential candidates parents and candidates themselves must be Zambians by birth.
2. That Zambia should be a Christian nation thereby altering the secular character of Zambian state.
3. Removal of judges from office by the President for misconduct, misconduct was taken to include that if the judge has taken into consideration some extraneous factors, this could amount to misconduct.

It is submitted that this law was an intrusion into the independence of the judiciary. Dr A.W Chanda states that only determined opposition from the Judges and Magistrate Association of Zambia, the church, the Labour Movement, the independent Press and Nongovernmental Organisation forced government to drop these provisions.

Because government rejected most recommendations submitted by the Mwanakatwe Review Commission and Because government wanted the constitution to be adopted and enacted by Parliament which was dominated by the MMD, a group of interested citizens from different interest groups such as political parties, the church and various non governmental organisation assembled together in what was dubbed “Citizen’s convention” from 1st March, 1996 to 10th March, 1996 to discuss the Mwanakatwe draft constitution.

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They also made recommendations and submitted them to government on the mode of adoption of the constitution. The government rejected the recommendations in the same manner the government rejected the Mwanakatwe draft constitution and its recommendation on adoption.

Because history has shown that successive governments in Zambia do not want to be accountable to the governed nor do they want to listen to the masses, the Wila Mun’gomba constitution review commission has been characterised with anti-campaigns and people wanting to know before hand what method the government would use to adopt the constitution\textsuperscript{112}.

This campaign is spearheaded by the Oasis Forum – a group made up of interest groups namely the Law Association of Zambia, (LAZ) Zambia Episcopal Conference (ZEC) Christian Council of Zambia (CCZ) Evangelical Fellowship of Zambia (EFZ) and Nongovernmental Organisation Co-ordination Conference (NGOCC). The main concern of the Oasis forum can be summarised as follows:

- Method of adoption of the constitution.
- Mode of appointing the members of the constitution Review Commission under the Inquiries Act is compromised.
- The recommendation of the Review Commission should not only be submitted to the President but to other independent bodies.

In that vein, the Oasis forum is proposing the amendment of the inquiries Act especially s 5 which requires the Commission to report its findings and or recommendation to the President only. Their main contention is that trusting individuals rather than institutions has produced injustices in the now 1996 constitution amendments, thus, the Oasis forum is failing short of stating that the constitution should be adopted by the constituent Assembly a popular body which will embrace all people from various interest groups and the grass roots.

\textsuperscript{111} Ibid 140 MMD had 139 seats, ZDC had 2 seats, National Party had 5. Agenda for Zambia had 2 and Independent had 11.

\textsuperscript{112} Mess with the Constitution Review at your peril, Mwanawasa, Times of Zambia, Friday, July 29\textsuperscript{th} 2003
However, government's arguments is on the legal impediments and use the traditional argument that only parliament has the mandate to adopt and enact the constitution. To argue like that is to ignore the fundamental norm or ground norm upon which all organs of government are founded.

To begin with, the constitution provides that all power resides in the people who are the sovereign\(^{113}\) and therefore there is no limit to the extent to which the sovereign can exercise that power. Secondly the constitution bind all persons in the Republic of Zambia and the executive, legislature and judicial Organs of government at all levels\(^{114}\). In sum, the constitution is supreme. Thirdly the constitution creates all organs of governments and are therefore subjected to the constitution. It therefore follows that Zambia is a constitutional democracy, which means that the constitution is an original and direct act of the people and so it is the supreme law of the land.

The constitution, in a country like Zambia operates with supreme authority. The rational of supremacy is that the constitution is an original and direct act of the sovereign people. An act of the executive or the legislature is derivative and therefore subordinate to the constitution. Since the executive and the legislature stand in an inferior position in relation to the sovereign people, acts by the former are necessarily subordinate to and must be consisted with those of the latter. It follows therefore that no executive or legislature act contrary to the constitution can be valid\(^{115}\).

Thus, it is submitted that to argue that only parliament is vested with the legislative act and no organ, body nor constituent can host parliament from its sovereignty act is to ignore this fundamental difference between constitutional and parliamentary democracy.

Thus, since the sovereign have decided that they want the fifth constitution adopted by a constituent Assembly, government has no choice since its decision is inferior to that of the sovereign, then government must adopt the constitution through a

\(^{113}\) Art 1 (2)

\(^{114}\) Art 33 (1) Creates the Presidency and Article 33 (2) vests the executive power in the President Art 62 creates and vests the legislative power in Parliament and Art 91 (1) creates the Judicature or Judiciary.

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constituent Assembly and government can do so by effecting necessary amendments to the fundamental law in order to allow for the wishes of the people who are the sovereign to prevail.

In this way the much talked about accountability can be seen in action rather than only in speeches of government leaders.

In conclusion in order for accountability to be prevail, government should not only do what they think is right but also consider what the people think is right. This time the people of Zambia through the Oasis forum have spoken out that they want the constitution to be adopted through a constituent Assembly. If the composition is a problem, it is submitted that the Mwanakatwe Review Commission Report recommendations contained a sample of the composition of a constituent Assembly and if that can be adopted by the government.\footnote{ Carlson Anyangwe, Parliamentary and Constitutional Democracy, 31 Zambia Law Journal, 95 (1999).} \footnote{Mwanakatwe Constitution Review Report Chapter 10 Paragraphs 27.0. 71 - 73}
CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

CONCLUSION - SUMMARY

To be in a democratic state entails upholding certain values such as free and fair elections held at periodical intervals, freedom of the press and expression, freedom of assembly and association, protection and promotion of human rights, accountability of the governors to the governed, transparency, rule of law, separation of powers and independence of the civil service from government interference.

We have also shown that the values that are upheld in a democratic states are the same values upheld in a country upholding constitutionalism. We have demonstrated that democracy and constitutionalism may have minor differences but they are similar in a major way as both philosophies uphold the same values.

In order to ably demonstrate that democracy and constitutionalism are similar, we cited practical examples of the behaviour of people from all walks of life and we have shown whether such practices are democratic or constitutional. We have retaliated that sometimes the police allow cadres to prescribe conditions in Zambia on how to conduct Zambian political life. This system has generated into something serious which led us to the conclusion that political parties have no internal democracy and hence political parties do not practise constitutionalism. Because of the serious lack of constitutionalism we submitted that a political leader cannot give that which he does not have. Hence the lack of internal democracy reflects in government and other spheres of life.

Elections which are supposed to legitimise a government both locally and internationally are in most cases as we have shown used by the ruling party to perpetuate its rule and as such are characterised by malpractices, intimidation, uneven access to the press and police abuse of the Public Order Act. Thus elections are never free and fair.
Constitutionalism and democracy entails that freedoms of the press, association and assembly are respected. Though the constitution guarantees these freedoms, practices obtained on the ground have reduced these freedoms to mere licences and have thus being subjects of serious litigations, which have resulted in the invalidation of some sections of the Public Order Act. However, despite the mileage so far made in this freedom, the criminalisation of that which is not criminal remains a challenge. Some acts, which are not criminal but have been criminalize by the Zambian Penal Code include criminal defamation of the President. It is submitted that democracy and constitutionalism thrive well on divergent views.

The rule of law connotes rule of laws as opposed to rule by men, equality before the law and the existence of inalienable rights which have been removed from public tampering. However, the author’s concern has been the derogation clauses that water down that which has been given. The radical decision in the next constitution is to do away with derogation clauses and in the event of breach or infringement of right by the press interpretations of such infringement be left to the courts of law.

Separation of powers ensures checks and balances but if this principle is to be realised, then the ever encroaching executive powers should be curtailed by making each branch of government genuinely independent. The Presidency in which all executive powers culminates should stop appointing ministers from the legislature and should not be involved in the appointment of judicial officers and to prescribe their conditions of service. This should be left to an independent body of professionals to choose and the choices be ratified by the National Assembly.

Finally, in a country with high incidences of poverty and very limited resources, accountability and transparency can greatly assist in the alleviation of such inequalities. Financial mismanagement and corruption work against accountability and transparency and Swedish Government policy on democracy clearly indicates\(^\text{117}\).

Corruption is a clear sign of a lack of accountability and transparency of public expenditure because all forms of corruption are based on the possibility of exerting unauthorised power without being punished or with minimum risk


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of discover, The policy document concludes that corruption and other forms of abuse are a threat to democracy.

Though it is recommended that the ‘New Deal Administration’ seems to be concerned about corruption in their speeches, it is yet to be realised in their actions as far we have seen no single person has been convicted of corruption and economic plunder of the nation\textsuperscript{118}.

RECOMMENDATIONS

In order for democracy and constitutionalism to prevail in Zambia and in order that the government rule at the pleasure and satisfaction of the Zambian people, there are certain conditions that need to prevail and the author recommends that the following should take place:

ELECTION DATE

1. In the United States of America, the incumbent President does not announce nor suggest a possible election date in the election year. This is so because the law in America provides that election shall be held in October/November and January is the handing over of power to the incoming administration. In Zambia, this is not so, it is for this reason that, the incumbent President always announces the election date when his political party is ready, in order to prevent this manipulation of the election date to the advantage of the incumbent President and his party, the election dates ie Presidential, Parliamentary and local government be constitutionalised.

PRESS FREEDOM

2. The press plays a significant role in a democracy. By reporting what government is doing and what it ought to do but is not doing, the press keeps the members of the public informed and its role in a democracy cannot be

\textsuperscript{118} David Dangombo who was arrested for corrupt practices has since been cleared of the same charges and has since been appointed Deputy Director of Planning at Cabinet Office Xavier Chirunga has since been acquitted of corrupt charges.
over-emphasised. In order for the press to do its noble duties well, the freedom of the press needed to be protected and promoted. However, in Zambia, this freedom is subjected to a number of derogations both in the primary legislation and the subsidiary legislation. It is submitted that derogates on the freedom of the press be removed and the determination of whether the Press was infringing on any of the interests protected by law be subjected to the jurisdiction of the courts.

VOTE OF NO CONFIDENCE

3. The serious challenge facing the Zambian democracy is accountability and transparency of the governors to the governed. The President and the members of parliament only appear once to the people and that is during campaigns, once they are elected, they disappear and it is difficult thereafter to ensure that government rule according to the pleasure and satisfaction of the people. We therefore suggest changes to the law in order to subject both the President and Members of Parliament to a vote of no confidence by citizens and not overzealous Political Parties. However, in order to ensure good faith, care be taken to prevent a rival party, persons or others from creating chaos out of the Presidency and parliamentarians. Thus, it is submitted that in order for a petition to pass, it must have support from Copperbelt and Lusaka, which are cosmopolitan provinces, and a further ¾ majority from other provinces for a President and ¾ majority of constituents in a constitution for an MP.

POLITICAL PARTIES

4. Political parties are very important in a country practising constitutionalism and democratic governance in that they offer checks and balances to the ruling party. In Zambia, the opposition political party have not played this role satisfactorily due to a number of factors chief among them is the lack of funds to enable them play their meaningful role in a democracy. In Britain, in order to enhance democracy the leader of the opposition is paid by the government. This springs from a parliamentary culture that believes that an organised minority is essential for a proper functioning democracy. In Zambia, in order
to enhance democracy, political activities need to be funded. The government should not see institutions, donor communities and corporations funding opposition parties as enemies of democracy or narrowly of the ruling party. In order to enhance democracy and constitutionalism such practices need to be encouraged. Further, in order to remove stigma that characterises funding of opposition parties, a law be enacted that would enable the government and other co-operating partners to fund opposition political parties without any stigma attached\textsuperscript{119}.

MPs THAT CROSS THE LINE.

5. Since the re-introduction of pluralistic polities, there have been a perpetual but yet unhealthy practice of MPs moving from one political party to another and the sad thing is that MPs who cross lines are adopted to re-contest their seats thereby encouraging an undemocratic practice to continue. We suggest that MPs who cross party lines should not be adopted and a political party whose MPs cross lines should be allowed to choose others to replace the MPs who resigned. This may sound undemocratic but there is a mischief, which we sought to cure by this practice. Instead of holding expensive bye-elections for MPs who cross party lines there should be no bye-elections. Secondly MPs who are expelled from their political parties should not lose seats as this would directly violate people's right to an MP of their choice, further, the only time when a bye-election is to be held is when an MP dies. In this case there is justification for spending hard earned taxpayers' money in a country with few financial resources.

PUBLIC ORDER ACT

6. The major challenge that Zambians face in the enjoyment of freedom of expression, association and assembly is the Public Order Act. The Act has not

\textsuperscript{119} Chiluba President of Zambia cautions donors not to fund opposition Political Parties because funding them would destabilise the nation. VEEP attacks British High Commissioner. Times of Zambia. Monday 20th October, 2001.
been professionally administered by regulation officers and the law contained in the Act, is so rigid that it renders it impossible for citizens to enjoy those rights which are not only their birth rights but also guaranteed in the constitution. The Act criminalizes those acts, which are not criminal. It is our submission that the Act be administered professionally and that certain sections such as those requiring notice, guaranteeing the non breach of peace and those requiring the adequacy of the police officers to police the event be amended and replaced by those provisions that would even allow citizens to demonstrate, convene a meeting in time of emergencies like the British counterpart which are more flexible than ours, without notifying the police. This would enhance democracy and constitutionalism.

TRANSPARENCY

7. In order to be transparent, the treaties entered into by the executive with donors and other multilateral agencies be subjected to the general citizenry scrutiny. Since Zambia is a representative democracy, treaties entered into by the President of Zambia and other countries, Donor Agencies and ‘Multilaterals’ be subjected to ratification by the National Assembly. We have seen that the Zambian government is being run by donor and multilateral agencies. In order to cure this mischief, Presidential treaties be subjected to ratification that is 2/3 majority of the MPs present and voting.

The recommendations above are aimed at enhancing constitutionalism and democracy and we cannot be seen to be lagging behind just because it took European nations two to three centuries to fully democratise.

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