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SCHOOL OF LAW

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ENTITLED:

CORRUPTION IN THE ELECTORAL PROCESS: WHAT IS THE WAY FORWARD?

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DECLARATION

I, **CHIPASHA MULENGA**, do hereby declare that this dissertation is my authentic work and that to the best of my knowledge, information and belief, no similar piece of work has previously been produced at the University of Zambia or any other institution for the award of a Bachelor of Laws Degree. All other works referred to in this dissertation have been duly acknowledged.

Made this.....day of December, 2005 by the said **CHIPASHA MULENGA** at Lusaka.

DEDICATION

I dedicate this piece of work to the two most important persons in my life, who are, my parents.

To my father, Mr. Matthews Mulenga, I wish to convey my heartfelt gratitude for your encouragement and firmness just to ensure that I worked hard. Seeing you come to school to study at the age of 47, made me realize the value and importance of school which in turn has made me work even harder. You are and will always remain my source of inspiration.

To my mother, Mrs. Mary Ngosa Mulenga, Ebenezer (thus the Lord has brought us this far). Even though the beginning was not easy, I thank you for your understanding and patience. I want you know that your help was not in vain and it has been most appreciated.

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CHAPTER ONE
CHALLENGES IN THE ELECTORAL PROCESS

1.1 INTRODUCTION

Politically, Africa is emerging from the shadows. Throughout the continent old, inept, and corrupt one-party regimes have crumbled in the face of invigorated internal oppositions which blossomed in the vacuums left by Cold War super-powers who no longer needed satellite developing world states to rattle sabres by proxy.¹

The role and meaning of elections in sub-Saharan Africa have radically changed since the spread of democracy in the early 1990s. So much has happened in the field of elections over the last 15 years that one hardly remembers the *status quo ante* of the 1980s, when single-party regimes and military dictatorships were organizing elections 'without choice'. In many African countries elections have become organized methods of peaceful democratic transition, and represent indeed the principal institutionalized channel of peaceful participation in forming and changing governments.² At the international level, the holding of credible competitive elections has become a prerequisite for membership in donor programmes and regional bodies. Extensive international election monitoring and the influx of large amounts of financial and technical assistance have been instrumental in improving standards of electoral governance and in modifying and updating electoral legislation.

¹ Fred M. Hayward (editor), Elections in Independent Africa (Boulder, Colorado: Westview Press, 1987) p. 1

² Christof Hartsmann. Journal of African Elections. Johannesburg: EISA. Issue 103, April 2004, p. 1

It is highly regrettable, however that, neither the constitutions, nor the electoral systems or the practices of most institutions have been aligned to the new multiparty democratic culture. This applies to intra-party democracy or lack of it across the board. A level of tolerance of contesting views is still too low as is the empowerment of women to participate in decision-making process in Government. Furthermore, a lot still remains to be done to improve the political environment in which elections are conducted and ensuring that the existing legal and institutional frameworks work independently and impartially. There is still need to address issues relating to leveling the playing field for all the players contesting elections, inequality in the funding of political parties, inadequate access to state-owned media and election related violence.³

1.2 PROBLEM STATEMENT

It must be observed that the electoral process is premised on universal adult suffrage. Regular, free and fair elections are considered to be the primary manifestation of the citizens' voice.⁴ The principle of one person, one vote is fundamental to the representative nature of elections. However, without the necessary safeguards, political interference and electoral fraud can seriously affect the electorate and additionally, the legitimacy of electoral outcomes.

It is an established principle that elections should be free and fair. The holding of free and fair elections means that elections must be held in and under conditions which ensure that the electoral playing field is leveled and the entire electoral process and climate makes the whole electoral

³ SADC Parliamentary Forum. Norms and Standards for Elections in the SADC Region. Adopted by the SADC Parliamentary Forum Plenary Assembly on the 25th March 2001. Windhoek, Namibia

⁴ Reuben Lifuka. Corruption in the Electoral Process: A case of Kabwata Constituency By-Election. Report for Transparency International Zambia. September, 2001. p. 1

package and environment free, fair and safe for elections.⁵ Thus, things such as: causing violence or intimidation during election campaigns or elections, impeding of the democratic right of any party to have reasonable access to voters, offering any inducement or reward to any person, abuse of position of power and the use government transport⁶, raising campaign funds by making promises of illegal benefits (such as favourable government contracts) as payoffs to donors⁷, should not be allowed. Moreover, any person who induces another to vote or refrain from voting or give any such gift for that person shall be guilty of bribery.

Conducting of elections that are free and fair poses a variety of technical challenges. The official procedures must be reliable. Voters must be assured that only eligible voters have voted, that they have been given the chance to cast their ballots under circumstances that guarantee freedom from pressure, and that their votes have then been properly recorded.⁸

However, the reports on the 1996 and 2001 Parliamentary and Presidential elections in Zambia indicate that elections were marred by corrupt practices⁹.

Fred Hayward has stated that, the multiparty systems rest upon undeveloped or fragmented civil societies and are administered by bureaucracies imbued with an ethos of corruption.¹⁰ It has been observed that corruption in Zambia's electoral process exists. Abdon Yezi¹¹ postulates that, "...corruption during elections has been perpetuated by all political parties in both their internal

⁵ Carlson Anyangwe, "Elections and Electoral Codes of Conduct", *Legality Journal of the University of Zambia Law Association*, 1998, p. 6. (Lusaka: Litovia)

⁶ Section 7 of the Electoral (Conduct) Regulations, Statutory Instrument on. 179 of 1996

⁷ <http://www.aceproject.org/main/>

⁸ Ibid.

⁹ Reuben Lifuka. *Op cit.* at p. 6

¹⁰ *supra* note 1

¹¹ Corruption & the Election Process- Some Reflections (paper presentation at the Transparency International-Zambia chapter organized workshop on "The Role of the Media in Combating Corruption"), 2001, p. 4

elections (party elections) and during their participation in national elections (whether local government, parliamentary or presidential); and...the corrosion of the citizen's minds by these corrupt activities has engendered corruption as an acceptable vice....” In addition, Dr Alfred Chanda (now professor) has also lamented to the effect that, political corruption is rampant in Zambia, particularly in the context of elections. The use of public resources by the Movement for Multiparty Democracy (MMD) in its election campaign has been common.¹²

This, then, means that elections have not been free and fair. It is imperative that elections in a democratic country are free and fair. This means that; the use of any form of unlawful means to solicit votes from the electorate must be rejected. The problem that is existent currently in our electoral process is corruption.¹³ Much of the problem has been attributed to the weakness of the Electoral Commission and Electoral laws to deal with the issue of corruption.

1.3 RATIONALE

As already stated, one of the major challenges of our electoral process is corruption. For us to know the way forward there must be an assessment of the current law and its efficacy in dealing with the issue of corruption. If it is the laws that are weak, then we will forever have perpetual use of corrupt means by people to earn themselves a vote into government. The end result being petitions clogging the courts on the results that have been declared free and fair. Therefore, the rationale for undertaking this study is to:

¹² Report on National Integrity Systems Country Study Zambia (Transparency International Zambia: March, 2003), p. 10

¹³ It must be borne in mind that this is not the only problem affecting the electoral process but only one of the many major problems.

(a) give guidelines on how the Electoral laws can be strengthened to deal with malpractice in the electoral process;

(b) ensure good governance when it comes to management of elections; and

(c) underscore the importance of the concept of free and fair elections, breach of which may lead to serious human rights abuse.

1.4 LIMITATION OF THE STUDY

It has been observed that corruption during elections in the One Party era was not as pronounced as it has become today and this did not warrant large scale corruption in comparative terms to the experiences now seen in the multiparty era.¹⁴ It is for this reason that the scope of the study will chiefly be limited to the multiparty era. In order to have a broader understanding, a comparative study between our Electoral laws and those of other SADC countries will be undertaken to see how Electoral Commissions in such countries function. The objective is to assess how our Electoral laws can be made more responsive to the scourge of corruption in the electoral system.

For purposes of the subject to be undertaken, the Obligatory essay is divided into Six Chapters.

Chapter ONE is the introduction. It contains the statement of the problem and other general considerations. It is an overview covering the challenges faced by the electoral process.

¹⁴ supra note 4. Ibid.

Chapter TWO reviews the nature of an electoral system, the importance of elections in a democracy and the features or characteristics of democratic elections. It also focuses on the types of electoral systems (whose pros and cons will not be addressed due to the specificity of the subject being discussed) and the type of electoral system that is used in Zambia. Furthermore, it highlights what is meant by an electoral process.

The Chapter also reviews the legal framework of holding elections in Zambia. It looks at the provisions of the Constitution, the Electoral Act and the Electoral Commission Act.

Chapter THREE discusses the concept of free and fair elections in a democracy. This segment looks at the criterion that is required to have free and fair elections in a democratic country. The chapter also looks at the international and regional standards for free and fair elections. It seeks to establish that corruption undermines free and fair elections.

Chapter FOUR focuses on corruption in the electoral process. Corrupt practices may take many forms i.e. bribery, abuse of office, abuse of state machinery, vote buying, victimization of underprivileged groups, donation of goods and services during election times and promising to embark on certain projects once put in office. It provides an answer to what is meant by corruption in Elections and the problem it has created in Zambia's electoral process. It seeks to establish that corruption has been perpetrated due to the weakness in our Electoral laws.

Chapter FIVE seeks to make a comparative study with other Electoral Commissions of the SADC region (i.e. Namibia, Botswana, South Africa and Malawi) in order to see what the Electoral

Commission of Zambia can learn from them in order for it to be more responsive and active to its duties as spelt out in the Constitution and the Electoral Legislation.

Chapter SIX contains the conclusion on the issues raised in this research and the recommendations.

CHAPTER TWO:
ELECTIONS IN A DEMOCRATIC COUNTRY

2.1 INTRODUCTION

A democratic country can basically be said to be a country that has adopted democratic principles in the governing of that country's national and internal affairs. It is imperative for a democratic country not to ignore the significance of the rule of law. It has been said that, "the heart is deceitful and above all things wicked, who can know it?" it is for this reason that various laws have been laid down that every human being has to follow. When it comes to elections, various statutes have been enacted to provide and ensure that proper guidelines and standards as expected in a democratic state are followed.

Elections are indispensable in a democracy as the governors must derive their mandate to rule from the voters. An election is said to be a means by which people exercise their right to vote, which right is recognized by international law as an inalienable human right.¹⁵ It has thus been said that the selection of public leaders is clearly a central function of all political systems. "Man's rise to political power, after all, hinges upon the manner in which the political leaders are chosen."¹⁶

Elections are chiefly a rejection of dictatorships and authoritarian forms of government and are important in this context because they oblige officials to justify their actions and decisions to the citizens; make political parties responsible and accountable to the people; provide a mechanism of peaceful, institutionalized competition for legitimate power and authority; offer regular opportunities

¹⁵Peter H Aranson, American Government: Strategy & Choice (Cambridge: Winthrop Publishers, 1981), p. 125-127

¹⁶Marian D Irish and James W Prothro, The Politics of American Democracy (New Jersey: Prentice-Hall Inc, 1967, 4th ed), p. 291

for people to change or review their governments and provide the peace and stability necessary for development.¹⁷

2.2 ELECTORAL SYSTEM

In any country, there are norms and guidelines that have to be followed in order to ensure that there is a smooth running of election from the time the country is delimited up to the time the results are announced.

An election could be defined as a process where people choose their leaders by voting.¹⁸ In an election to choose political representatives, citizens must be eligible to stand as candidates for elections if they so wish, and to vote, if they so wish. They must be able to do so freely.¹⁹

At present there is awareness amongst the citizen of the world's democracies that the ballot leads to power. Voting in an election is an expression of individual autonomy, and an act of internal political self-determination as elections are the basis of authority of government and the cornerstone of representative democracy.²⁰

Electoral systems are about voting and the translation of votes into legislative seats and executive leadership, which determines who governs, how rulers govern and how citizens hold government

¹⁷ The International Institute for Democracy and Electoral Assistance (IDEA), Report on the Democracy Forum. (Stockholm: IDEA, 1996), p. 17

¹⁸ Stefan Melnik (ed.), Electoral Monitoring and Electoral Systems (Brussels: Fredrich-Naumann- Stiftung Foundation, 1994), p. 3

¹⁹ Ibid

²⁰ Carlson Anyangwe. Op cit. ibid

accountable.²¹ Viewed widely, an electoral system refers to a sequence of events leading up to the selection of one person among many candidates to occupy public positions.²² These positions may vary from area to area depending on the level of representation. In Zambia, there are three common levels of representation when it comes to public elections and these are: (a) ward (for Councilors); (b) constituency (for members of parliament); and (c) national (for presidency).

Ideally, an electoral system should be country specific, up to date and fitted to a society's establishment and changing values and political behavior.²³ All electoral systems or a combination of electoral systems do have advantages and disadvantages, as well as factors of imperfection, under particular historic and social conditions. For an electoral system to cater for all stakeholders, it must have the following features: easy to manage and administer; simple to understand and apply; have multiple safeguards against misuse and abuse; transparent and a simple method of vote circulation; cost-effective and affordable; and easy to audit, review and adjust over time.

In fact it has been stated that an election has four elements, which are: (i) Voters: A voter is a citizen who votes and these are considered as the fundamental persons in an election. (ii) The vote: this is the citizen's fundamental political resource. The citizen in a collective choice must decide to use his resource or not to use it. (iii) Election candidates: this is the object of the citizen's vote, the thing for or against which he or she might vote. (iv) Election rules: the election decision

²¹ Final Report of the Electoral Reforms Technical Committee, August 2005. p. 167

²² Foundation for Democratic Process, The Electoral Process & Management of Elections in Zambia (Lusaka: FODEP Secretariat), p. 1

²³ Final Report of the ERTC. p. 167

rule takes the votes that have been cast, and aggregates or combines them to declare the winning candidate if there is one.²⁴

The correct function of an electoral system is important in a democratic country.²⁵ This allows the voting citizens to vote freely, without fear of coercion or reprisal and in order to offer real possibilities of choice to the voter, the competition must be fair and the vote must be secret.²⁶ The internationally accepted mode of choosing managers of state affairs is a voting system usually based on the principles of universal suffrage and secret ballot. Birch²⁷ maintains that, "The way in which an electoral system works will depend partly upon the methods adopted of dealing with a certain practical problem of electoral organisation which arises in every country. Electoral laws have to deal with the controlling of expenditure by or on behalf of the candidates. The concept of free and fair contests implies the elimination of bribery, lavish entertainment and 'free beer all round'."²⁸

It has been said that to be free, participation in elections must be conducted in an atmosphere characterized by the absence of intimidation and the presence of a wide range of fundamental rights. To that end, obstacles to full participation must be removed and the citizenry must be confident that no personal harm will befall them as a result of their participation.²⁹

²⁴ Peter H Aranson. *Op cit*, p. 125

²⁵ Norman Palmer, *The Indian Political System* (London: George Allen & Unwin Ltd, 1961), p. 233

²⁶ Melnik, *Op cit*, p. 3

²⁷ *The British System of Government* (London: George Allen & Unwin Ltd, 1967), p. 75

²⁸ Peter Aranson, *Op cit*, p. 127

²⁹ Centre for Human Rights *Human Rights and Elections: A Handbook on the Legal, Technical and Human Rights Aspects of Elections* (1994), 6

Democratic elections are periodic and based on equality and universality of suffrage and secrecy of the ballot. Genuine democratic elections offer a real choice to the electorate and reveal and give effect to the freely expressed will of the people.

For elections to be periodic or regular, they must be held at prescribed intervals. On this requirement, international law sets no particular schedule of periodicity, but it does require that elections should be held often enough (every four or five or so many years as each state chooses) to ensure that government authority continues to reflect the will of the people which is the basis of government legitimacy.³⁰

Elections are said to be competitive if they take place in a system in which active and passive suffrage rights are fully assured. Opposition parties and candidates must enjoy the freedom of speech, assembly and movement necessary to voice their criticisms of the incumbent government and to offer alternative policies openly.³¹ An election is not competitive if the choice of the electorate is restricted by an impermissible and untenable discriminatory measure that effectively eliminates Opposition candidates feared to be posing a strong challenge to the candidates of the party in government.

For elections to be inclusive, the definition of eligible voter must be broad enough to include a large proportion of the adult population and in an atmosphere free of intimidation and corruption.

³⁰ Alfred Chanda, "The Role of the Media in Promoting Democracy and Human Rights", *Southern African Human Rights Review*, (1994), 4

³¹ Ibid

Furthermore, elections should determine the leadership of the government subject to the Constitution and electoral laws of the country.³²

Without glossing over the point, it must be mentioned that elections are supposed to be methods of peaceful democratic transition and must represent the principal institutionalized channel of peaceful participation in forming and changing governments. In fact, the legitimacy of the government hinges on the way in which it was put into office. However, it must be added that conditions precedent for such free and fair participation in an election must be exhibited. In the case of Zambia, peaceful participation may not be seen to exist for elections are marred by reports of corrupt practices being used in by-elections, parliamentary and indeed presidential elections.

2.3 TYPES OF ELECTORAL SYSTEMS

Modern electoral systems may be divided into four different categories:- (1) First- Past-the-Post (FPTP) systems, (2) Proportional Representation (PR) systems or Preferential System, (3) Single Member Majoritarian (SMM) system, and (4) Mixed Member Proportional (MMP) system (Semi Proportional System).

It must be borne in mind that all electoral systems or a combination of electoral systems do have advantages and disadvantages, as well as factors of imperfection, under particular historic and social conditions.³³ Many countries have, in attempting to combine the advantages of one system with those of another, adopted hybrid electoral systems. Since problems differ from country to

³² Coalition 2001, Voters Education Manual , p. 2

³³ Final Report of the ERTC. Op cit , p. 167

country, the selection of a particular system must be a reflection of the historical, cultural and economic heritage of a given country.³⁴

2.3.1 FIRST PAST THE POST (FPTP) SYSTEMS

The country is divided into geographical areas known as constituencies or wards and voters in each constituency or ward return one Member of Parliament or local government councilor, who has received more votes than others.

Under this system, the parliamentary seats gained by a member of parliament belonging to different parties may not be in proportion to the total number of votes cast for their parliamentary candidates. The most common major refinement to FPTP systems is the requirements, that a candidate receives an absolute majority of the votes cast in a constituency.³⁵

It is used in the United Kingdom and those countries influenced by Britain. Most former British colonies such as Zimbabwe, Botswana, Tanzania, Kenya and Malawi use FPTP.

As for Zambia, it inherited from the British the FPTP system. This is the system which has been in existence from 1964 up to date. Essentially, the Constitution of Zambia at Independence provided for a Westminster type of parliamentary democracy under an executive President. The hallmark of the Westminster type of parliamentary democracy is that it accommodates opposition parties.³⁶ That arrangement provided that the electorate can at any time decide to withdraw from members of

³⁴ Melnik, Op cit , p. 25

³⁵ Ibid. p. 27

³⁶ Under the One-party state, only the United National Independence Party existed. Under article 4 of the then Republican Constitution, the United National Independence Party became the sole and only recognized political party under the law.

the government the mandate they were given previously to be responsible for the administration.³⁷ Under this electoral system, a candidate is a winner if he “succeeds in getting more votes than any other candidate in an election” even though he or she may not be supported by an absolute majority of voters in that constituency.³⁸ This means that the winner wins on a simple majority rule.

2.3.2 SINGLE MEMBER MAJORITARIAN (SMM) SYSTEM

SMM, like FPTP, applies where MPs are elected in constituencies. But, voters in each constituency return one MP, who has received more than fifty per cent of the total number of votes cast for all candidates. Where no single candidate receives this absolute majority, fifty plus one vote, then an Alternative Vote (AV) or a second ballot is applied.³⁹ It is used in Australia and France.

The distinguishing feature of plurality-majority systems is that they almost always use single-member districts. In a First Past the Post system, sometimes known as a plurality single-member district system, the winner is the candidate with the most votes, but not necessarily an absolute majority of the votes. Voters have as many votes as there are seats to be filled, and the highest-polling candidates fill the positions, regardless of the percentage of the vote they actually achieve. The Majoritarian System tries to ensure that the winning candidate receives an absolute majority (i.e. over fifty percent). Each system, in essence, makes use of voters' second preferences to produce a majority winner, if one does not emerge from the first round of voting.⁴⁰

³⁷ John Mwanakatwe, *End of Kaunda Era* (Lusaka: Multimedia Publications, 1994), p. 85

³⁸ Khabele Matlosa, “Electoral Systems, Stability and Democratic Governance in Southern Africa: The Case Study of Lesotho”, 4 *Southern Africa Human Rights Review*, (1999), p. 22

³⁹ Ibid. p. 173

⁴⁰ <http://www.aceproject.org/main/english/esy/htm>

2.3.3 PROPORTIONAL REPRESENTATION

This is a system where political parties obtain seats based on the percentage of the total votes obtained in an election. The rationale underpinning the PR system is the demand for the reduction of disparity between a party's share of the national vote and a party's share of the parliamentary or local government seats. Proportionality is most likely to be attained where political parties present lists of candidates to the voters.⁴¹ The aim is not to promote good governance but fair representation.

Another variation of PR is the Single-Transferable vote system or Preferential Vote system or preferential system.⁴² This system is more likely to produce a reasonable close relationship between votes and the basis for representation in Parliament. It requires the country to be divided into multi-member constituencies which maintain between three to seven members.⁴³ If at any count no candidate obtains a quota figure, the candidate with the lowest number of votes will be eliminated and all his votes will be distributed among others.⁴⁴ This system is practiced in Namibia, South Africa and Germany.

2.3.4 MIXED MEMBER PROPORTIONAL (MMP) SYSTEM

It combines FPTP and PR. The system provides for some MPs to be elected through FPTP while others are elected through the PR system from party lists submitted at nomination time. A

⁴¹ Ibid. p. 174

⁴² Melnik, *Op cit*, p. 25

⁴³ Ibid. p. 30

⁴⁴ Ibid. p. 36

proportion of the parliament is elected by plurality- majority methods, usually from single-member constituencies, while the remainder is constituted by PR lists. Under the MMP system the PR list seats compensate for any imbalances and unfairness in the distribution of constituency based legislative seats.⁴⁵

Mixed Member Proportional (MMP) systems, as used in Germany, Mexico, Venezuela, and Hungary, attempt to combine the positive attributes of both Majoritarian and Proportional Representation (PR) electoral systems. A proportion of the parliament is elected by plurality-majority methods, usually from single-member districts, while the remainder is constituted by PR lists. This structure might on the surface appear similar to that of the Parallel systems described earlier; but the crucial distinction is that under MMP the list PR seats compensate for any disproportionality produced by the district seat results. For example, if one party wins ten percent of the national votes but no district seats, then they would be awarded enough seats from the PR lists to bring their representation up to approximately ten percent of the parliament.⁴⁶

2.3 ELECTORAL PROCESS

Having highlighted what is meant by an electoral system and the various types of electoral systems, the next aspect is to ascertain what an electoral process is.

An electoral process can be described as a set of laws or rules, procedures and practices that protect and facilitate the freedoms and rights of eligible citizens to freely participate in an election

⁴⁵ Ibid. p. 180

⁴⁶ supra note 34

either as contestants, voters or indeed as campaigners or monitors. The fundamental and underlying interest of having such an electoral process is to ensure that the election results are a true reflection of the free will of the electorate on the choice of their leaders.⁴⁷

Therefore, an electoral process is a means of making political and leadership choices by voting. The process actually begins before the election date itself. This will involve several stages which include issues of eligibility, delimitation, registration of voters, announcement of election date, adoption of candidates, political campaigns, media coverage, the Election Day, announcement of results, and lastly the declaration of results.⁴⁸

2.4 THE LEGAL FRAMEWORK OF HOLDING ELECTIONS

Voting is governed by a specific electoral system each country has adopted. In Zambia, the *Constitution of Zambia* provides the principal legal foundations of election of the President and of the Members of Parliament. The general administration of elections is governed by the *Electoral Act*, Chapter 13 of the Laws of Zambia, together with the rules and regulations made thereunder. The responsibility of election administration is vested in an autonomous Electoral Commission whose sole function is to supervise the registration of voters, to conduct presidential and parliamentary elections and to review the boundaries of the constituencies in which Zambia is divided.

⁴⁷ Mweelwa Muleya, "Corruption & the Electoral Process" Paper presented at a workshop organized by TIZ at Fairview Hotel in Lusaka on July 19, 2001. p. 3

⁴⁸ FODEP, The Electoral Process & Management in Zambia. (FODEP Secretariat: Lusaka), p.1

(a) **THE CONSTITUTION**

This is the supreme law of the land and it binds all persons in Zambia. Article 1 (3) provides that the Constitution is the supreme law of Zambia and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void. Article 1 (4) also states that the Constitution shall bind all persons in the Republic of Zambia and all Legislative, Executive and Judicial organs of the State at all levels.

Therefore, the Constitution has provided the legal foundations of election of the President and the Members of Parliament. It has also made provisions on who is eligible to vote and also laid the grounds upon which such person may be prevented from taking part in the voting.

According to Article 75, every citizen of Zambia who has attained the age of eighteen years shall, unless he is disqualified by Parliament from registration as a voter for the purposes of elections to the National Assembly, be entitled to be registered as such a voter under a law in that behalf, and no other person may be so registered.

Pursuant to Article 63, the National Assembly shall consist of- (a) one hundred and fifty elected members; (b) not more than eight nominated members; and (c) the Speaker of the National Assembly.

Article 64 gives qualifications of any one who intends to stand for election to the National Assembly. It states that subject to Article 65, a person shall be qualified to be elected as a member

of the National Assembly if- (a) he is a citizen of Zambia; (b) he has attained the age of twenty-one years; and (c) he is literate and conversant with the official language of Zambia.

A person may be disqualified by virtue of Article 65, if- (a) that person is under a declaration of allegiance to some country other than Zambia; (b) that person is under any law in force in Zambia, declared to be of unsound mind; (c) that person is under a sentence of death imposed on him by a court in Zambia or a sentence of imprisonment; (d) that person is an undischarged bankrupt; (e) that person's freedom of movement is restricted, or is detained under the authority of the law; or (f) that person, within a period of five years before his nomination for election, has served a sentence of imprisonment for a criminal offence.

In accordance with Article 88 (6), elections to the National Assembly are held: (a) every five (5) years; and (b) whenever the National Assembly is dissolved either by the President or the National Assembly resolving to do so by a two thirds majority of the members.

Qualifications for office of President are contained in Article 34 (3), which provides that a person shall be qualified to be a candidate for election as President if: (a) he is a Zambian citizen; (b) both his parents are Zambians by birth or descent; (c) he has attained the age of thirty-five years; (d) he is a member of, or is sponsored by, a political party; (e) he is qualified to be elected as a member of the National Assembly; and (f) has been domiciled in Zambia for a period of at least twenty years. Such elections to the office of President shall be held in every constituency in Zambia.⁴⁹

⁴⁹ s. 8. Electoral Act, Chapter 13

Article 35 (2) further adds that, a person who has twice been elected as President shall not be eligible for re-election to that office. In addition, the election to the Office of President shall be held in every constituency in Zambia⁵⁰

(b) THE ELECTORAL ACT (CHAPTER 13)

The Electoral Act and the regulations made thereunder are the major legislation governing the conduct of elections in Zambia. The Act makes provision relating to elections to the office of President, elections to the National Assembly, empowerment of the Electoral Commission to make regulations providing for the registration of voters and for the manner of conducting elections, for offences and penalties in connection with elections, with respect to election petitions and the hearing and determination of applications relating to Parliament, and for matters incidental to or connected with the foregoing.

The Electoral Act further provides for the unseating or removal of a member of parliament who was elected as a result of corruption.⁵¹ But the High Court must be satisfied that as a result of the corrupt practice the majority of voters in a constituency were or may have been prevented from electing a candidate of their choice. An election petition can be presented by a voter in the constituency concerned, a candidate, a prospective candidate, or the Attorney-General. Votes procured by any corrupt practice or illegal practice may be declared void by the High Court.

⁵⁰ Ibid

⁵¹ Ibid. s. 18 (2) Part VI

(c) **THE ELECTORAL COMMISSION ACT (CHAPTER 17)**

This Act makes provision for Presidential and Parliamentary elections, empowers the Electoral Commission of Zambia to make regulations providing for the registration of voters and for the manner of conducting elections. It also provides for offences and penalties in respect of elections and for the hearing and determination of election petitions.

According to section 4 of the Electoral Commission Act, the Commission as established by Article 76 of the Constitution shall have the functions specified in that Article. In view of this, Article 76 (1) states that; there is hereby established an autonomous Electoral Commission to supervise the registration of voters: to conduct Presidential and Parliamentary elections and to review the boundaries of the constituencies into which Zambia is divided for the purposes of elections to the National Assembly.

2.5 LIMITATION OF THE CURRENT ELECTORAL COMMISSION

Moral authority is immeasurably enhanced if the elected government is seen as being elected according to law and under the watchful eye of an independent Electoral Commission. At the core of the administration of an election lies the official body responsible for its conduct. While some countries are content to have ordinary civil servants run an election with political party representatives monitoring their conduct, increasingly the trend is in favour of a separate, stand-

alone Electoral Commission, which drafts in the staff it needs to run the poll on election days. Such a Commission should be independent of the government.⁵²

However, it has been noted that some of the weaknesses of the Electoral Commission of Zambia (ECZ) relate to its lack of proper administrative structures and trained staff at provincial and district levels.⁵³ Right now it does not clearly define the roles of the secretariat and the commissioners. The Mung'omba Commission has observed the above limitations and added that ECZ lacks the legal mandate to register and regulate the conduct of political parties, observers and monitors or even to enforce its own electoral code, as it has no tribunal of its own.⁵⁴

2.6 SUMMARY:

The legal framework for holding elections are: the Constitution and it prescribes the qualifications for those who intend to contest for political offices; the Electoral Act, which regulates the process of elections; and the Electoral Commission Act which, *inter alia*, focuses on the registration of voters, delimitation and conduct of elections. It has also been seen that the Electoral Commission also has limitations. It can thus be stated that, in order for the elections to be run smoothly, the Electoral Acts must be strengthened to curb any acts that may jeopardize or reduce the integrity of the election process or the manner in which it is conducted. It must be observed that, in democratic election, the electorate would like to choose candidates who will represent them. Therefore, there is a dire need to eliminate, if possible, such limitation.

⁵² Jeremy Pope (ed), Confronting Corruption: The Elements of a National Integrity System. (Berlin: Transparency International, 2000), p. 165

⁵³ Prof. Patrick Mvunga. Jurisprudence notes for fourth year law students of the University of Zambia, p.12

⁵⁴The Interim Report of the Mung'omba Commission, June 2005, p. 251.

CHAPTER THREE:

THE CONCEPT OF FREE AND FAIR ELECTIONS

3.1 INTRODUCTION

In a democracy, the will of the people should form the basis to govern. Elections are one important mechanism through which this will is expressed in a democracy. It is of great importance that a free and independent press must be part and parcel of any democracy. Otherwise the checks and balances necessary within such a system will be lacking and where such is the case, corruption becomes the order of the day, and human rights abuses get trampled upon.⁵⁵ Moreover, elections that lack legitimacy breed instability and an environment in which corruption can quickly breed.⁵⁶

The above criteria or elements constitute the minimum of what has to be in place for a country to qualify as democratic. It is for this reason that this Chapter seeks to address the issue of what may be said to constitute free and fair elections in a democratic country. It focuses on the international standards for free and fair elections and its place in Zambia's laws.

3.2 FREE AND FAIR ELECTIONS

Elections must be free and fair on the part of both the candidate and the electorate. Public confidence in the electoral process is the foundation of public confidence in the Government. An election provides the avenue through which members of a group, community or society choose

⁵⁵ Gloria Somolekae, Democracy, Civil Society and Governance in Africa: The Case of Botswana. (Botswana, 1998), p.4

⁵⁶<http://www.transparency.org.sourcebook/2000/18>

individuals who will make political decisions for it. Elections provide a channel for the exercise of political will.⁵⁷ Citizens choose their political leaders through exercising the right to vote. According to Kiondo⁵⁸, “In a democratic political system it is expected that all citizens be given an equal opportunity to participate in elections and electoral processes as voters, candidates or electoral administrators.”

Professor Carlson Anyangwe observes that elections are said to be free and fair if they are held in and under conditions which ensure that the electoral playing field is leveled and the entire electoral process and climate makes the whole electoral package and environment free, fair and safe for elections.⁵⁹ It has also been said that to be free, participation in elections must be conducted in an atmosphere characterized by the absence of intimidation and the presence of a wide range of fundamental rights. To that end, obstacles to full participation must be removed and the citizenry must be confident that no personal harm will befall them as a result of their participation.⁶⁰

Elections are free and fair if it is recognized that voting is an expression of individual autonomy, an act of internal political determination and that elections are the basis of authority of government, the cornerstone of representative democracy and an act of legitimation of governments among the community of states.⁶¹

⁵⁷ SADC-ESN (Electoral Support Network) 3rd AGM. “Building a Sustainable Network” 5/6 February, 2003. Gauteng, South Africa p. 10

⁵⁸ Elizabeth Kiondo. Elections, Electoral Processes and Women’s Empowerment in the Coming Millennium, paper presented at the Annual Gender Studies Conference 1999, TGNP, Dar es Salaam, September 1999, 2.

⁵⁹ Carlson Anyangwe. Op cit. ibid

⁶⁰ Peter Aranson. Op cit., p.127

⁶¹ Ibid

It is cardinal that democratic elections should be conducted freely and fairly.⁶² This entails that free and fair elections are chiefly a rejection of authoritarian or dictatorial rule and in the absence of genuine free and fair elections the very foundation of democracy is uprooted.

For elections to be declared free and fair, certain fundamental principles have to be evident during all stages of the electoral process. If these principles are not present, the election is not only generally not accepted as legitimate but also lends itself to being manipulated and exploited by parties, administrators or the electorate. Some of the fundamental principles include:

- (a) **Transparency:** where there is consensus among all stakeholders about the legislative and regulatory framework of the elections and their implementation;
- (b) **Inclusivity:** all stakeholders are able to participate in the process regardless of any inhibitory factors. Such inclusion should be based on gender, age, geographical location and ethnic association;
- (c) **Accessibility:** the electorate, and its representatives, have full access to the process during all its stages (i.e. campaigning, registration, voting and counting) and have the ability to reach all the voters by having sufficient means (funding) and access; and
- (d) **Legitimacy:** where the electoral authority has sufficient credibility to ensure that the process is conducted according to the legislative framework that has been agreed upon by

⁶² Assembly of Heads of State and Government at the Thirty-Eighth Ordinary Session of the Organization of African Unity 8 July 2002. Durban, South Africa. p. 30

the stakeholders and shows the willingness to deal in a non-partisan manner with any disputes or conflicts that may emerge during the election process.⁶³

3.3 FREE ELECTIONS

A 'FREE' electoral process is one where fundamental human rights and freedoms are respected, it includes: freedom of speech and expression by electors, parties, candidates and the media; freedom of association, that is, freedom to form organizations such as political parties and NGOs; freedom of assembly, to hold political rallies and to campaign; freedom of access to and by electors to transmit and receive political and electoral information messages; freedom to register as an elector, a party or a candidate; freedom from violence, intimidation or coercion; freedom to exercise the franchise in secret; and freedom to question, challenge and register complaints or objections without negative repercussions.⁶⁴ Therefore, a free election implies an absence of impediments to standing for elections for both political parties and individuals. Such an election provides for equal and universal suffrage and legal redress for aggrieved parties.

3.4 FAIR ELECTIONS

On the other hand, a 'FAIR' electoral process is one where the 'playing field' is *reasonably* level and accessible to all electors, parties and candidates, and includes: an independent, non-partisan electoral organization to administer the process; guaranteed rights and protection through the constitution and electoral legislation; equitable representation of electors provided through the

⁶³ [http://www.iss.co.za/PUBS/Crime Index/98VOL2NO3/PREVENTING](http://www.iss.co.za/PUBS/Crime%20Index/98VOL2NO3/PREVENTING)

⁶⁴ [http://www.commonborders.org/What constitutes a Free and Fair Election?](http://www.commonborders.org/What%20constitutes%20a%20Free%20and%20Fair%20Election?)

legislation; clearly defined universal suffrage and secrecy of the vote; equitable and balanced reporting by the media; equitable access to financial and material resources for party and candidate campaigning; equitable opportunities for the electorate to receive political and voter information; accessible polling places; equitable treatment of electors, candidates and parties by elections officials, the government, the police, the military and the judiciary; an open and transparent ballot counting process, and election process not disrupted by violence, intimidation or coercion.⁶⁵

Further, on polling day, an efficiently managed election should be reflected in the goings-on on the polling day. The setting of polling stations all over the country, the opening of the stations for voting, the closing of the stations, the nature and quality and availability of voting materials, the preparedness and competence of the election officials, the arrangement of election booths, the handling and transportation of the ballot boxes to the counting halls, the actual counting of the votes and the release of results, all go to show whether the parameters above have been properly adhered to.⁶⁶ After polling day, a fair election is one where there is an official transparent and expeditious environment of election results coupled with an impartial handling of all elections complaints. Further, a fair election is one where there are impartial reports on the election results to the public.⁶⁷

In conclusion, the words of **Fred M. Hayward** are instructive in terms of setting out the requisite parameters for free and fair elections. He writes:

All law abiding adult citizens are entitled to vote. Political organizations are free to put up candidates, debate their merits freely and criticize opponents. Political

⁶⁵ Ibid

⁶⁶ <http://www.iedafrica.org>

⁶⁷ Electoral Reforms Technical Committee Final Report. p. 145

organizations campaign with the objective of winning. Each voter casts one vote and is not hindered in expressing a choice (preferably in secret), votes are honestly counted and the results faithfully reported; the candidate, party or coalition with the most votes wins; the losing individual or party does not try to use force to alter the outcome or prevent the winner from taking office; and the party in power does not restrict political participation and competition which are within the parameters of existing rules.⁶⁸

It is imperative that free and fair elections should exist in every election. The people must be truly empowered in their question for real participation in the process of governance.⁶⁹

3.5 INTERNATIONAL STANDARDS FOR FREE AND FAIR ELECTIONS

For elections to be free and fair, they must conform to the set international standards. Participants in the electoral process need to understand the notion that the will of the people is the basis of authority of government. It must be understood that public elections in every state are governed by national legislation, which should conform to international electoral norms.⁷⁰

According to international standards, every state must be possessed of a government whose authority derives from the will of the people as expressed by secret ballot in genuine free and fair elections held at regular intervals on the basis of adult universal suffrage.⁷¹ The internationally accepted standards prescribe that an election is free and fair if certain conditions apply, such as: electoral laws and regulations are obeyed; democratic electoral laws and regulations are established; election results are accepted by all stakeholders; procedures guarantee accuracy of

⁶⁸ Fred M. Hayward. *Op cit.* p.3

⁶⁹ <http://www.iedafrica.org/>

⁷⁰ (1978) Selected decisions of the Human Rights Committee under the Optional Protocol, International Convention on Civil and Political Rights (2nd - 6th Session) Vol. 1, p. 67

⁷¹ Guy Goodwill-Gill. *Free and Fair Elections: International Law Practice* (1994), 84.

the count; equal and universal suffrage is guaranteed; an independent and impartial electoral commission is established; electoral conduct is agreed to and enforced by all stakeholders; the electoral process is free of intimidation, bribery, violence and coercion of any kind and all basic freedoms are protected.⁷²

It should be noted that the right to free and fair elections is an aspect that is so fundamental in International Human Rights Law and has been provided for in the Universal Declaration of Human Rights of (UDHR) 1948 and the International Covenant on Civil and Political Rights (ICCPR) of 1966 to which Zambia is a signatory.

(a) THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

According to Article 21 (1) of the Universal Declaration of Human Rights, “Everyone has a right to take part in the government of his country, directly or through freely chosen representatives.” Article 21 (2) further states that, “the will of the people shall be the basis of authority of government; this shall be expressed in periodic and genuine elections which shall be universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedure”.

(b) THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

Under Article 25 of the International Covenant on Civil and Political Rights, every citizen has a right to: (a) take part in the conduct of public affairs, directly or through freely chosen representatives; (b) to vote and to be elected at genuine periodic elections, which shall be by universal and equal

⁷² FODEP. Local Government Elections: Monitor’s Manual (Lusaka: FODEP Secretariat), p. 33

suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.

(c) THE AFRICAN CHARTER ON HUMAN AND PEOPLE'S RIGHTS

Article 13 of the African Charter on Human and People's Rights provides that, "every citizen shall have the right to freely participate in the government of his (or her) country, either directly or through freely chosen representatives in accordance with the provisions of the law."

Article 4 (4) of the Inter-Parliamentary Council states that, "In order that elections shall be fair, States should take the necessary measures to ensure that parties and candidates enjoy reasonable opportunities to present their electoral platform."⁷³

(d) THE AFRICAN UNION

The Organisation of African Union (now the African Union) Assembly of Heads of State and Government has provided that, "Every citizen has the right to fully participate in the electoral processes of the country, including the right to vote or be voted for, according to the laws of the country and as guaranteed by the Constitution, without any kind of discrimination."⁷⁴

⁷³ 154th Session. "Declaration on Criteria for Free and Fair elections." Paris, 26 March 1994

⁷⁴ Assembly of Heads of State and Government at the Thirty-Eighth Ordinary Session of the Organisation of the African Unity 8 July 2002. Durban, South Africa, p.31

(e) **THE SOUTHERN AFRICA DEVELOPMENT COMMUNITY**

According to the Southern Africa Development Community Standards (SADC) for free and fair elections, there must be a safeguard of the human and civil liberties of all citizens including the freedom of movement, assembly, association, expression and campaigning as well as access to the media on behalf of all stakeholders, during electoral processes.⁷⁵

In addition, all SADC member countries must take all necessary measures and precautions to prevent the perpetration of fraud, rigging or any other illegal practices throughout the whole electoral process in order to maintain peace and security. In addition, they must safeguard the human and civil liberties of all citizens including the freedom of movement, assembly, association, expression, and campaigning as well as access to the media on the part of all stakeholders, during electoral processes.⁷⁶ Furthermore, it is a duty of SADC member states and election observers who have a responsibility to spotlight the flaws in the entire electoral process. The fact that the campaign period is marred by such human rights abuses certainly undermines the electoral process itself.⁷⁷

3.6 THE LAW IN ZAMBIA ON FREE AND FAIR ELECTIONS

The concept of free and fair election has been embraced in the Constitution for Zambia. The freedom of assembly and association is guaranteed by Article 21 of the Constitution of Zambia, which defines it as the right to Assemble freely and associate with other persons and in particular

⁷⁵ <http://www.sokwanele.com/articles/>

⁷⁶ SADC Principles and Guidelines Governing Democratic Elections. p. 7

⁷⁷<http://www.hrw.org/press/index/>

to form or belong to any political party, trade union or other association for the protection of one's interest.

Article 21 (1) provides that, " Except with his own consent a person shall not 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 any political party, trade union or other association for the protection of his interests."

Freedom of expression (freedom of speech for candidates, media and the electorate) is also an important aspect of a free and fair election.

Article 20 provides that, "except with his own consent, a person shall not be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to impart and communicate ideas and information without interference, whether the communication be to the public generally or to any person or class of persons, and freedom from interference with his correspondence."

Guarantee of the freedom of movement is equally crucial in the sense that it enables the candidates to move freely and campaign in any part of the country.

Article 22 (1) states that, " Subject to the other provisions of this Article and except in accordance with any written law, a citizen shall not be deprived of his freedom of movement, and for the purposes of this Article freedom of movement means- (a) the right to move freely throughout

Zambia; (b) the right to reside in any part of Zambia; and (c) the right to leave Zambia and to return to Zambia.”

Participation in voting on the part of the electorate is cardinal. However, there is a condition that for any person to take part in an election, he or she must be eligible. Article 75 provides that, “every citizen of Zambia who has attained the age of eighteen years shall, unless he is disqualified by Parliament from registration as a voter for the purposes of elections to the National Assembly, be entitled to be registered as such a voter under a law in that behalf, and no other person may be so registered.”

3.7 SUMMARY:

It has been enunciated that free and fair elections are cardinal in a democratic state. In fact, it is a basis of an electoral democracy and forms its cornerstone. Zambia like any other nation that has put democracy as its centre for governance, desires elections that are free and fair. This means that all forms of electoral malpractices have to be removed. Voters must be permitted to cast their ballots without feeling under threat of violence or under an obligation to support a particular candidate or party. They should not be coerced in any form into voting but rather must do it on their own free will. As has already been enunciated, free and fair elections extend also to the campaign period. At a rally, President Mwanawasa stated that, “the game we are involved in is where I scratch your back and you scratch mine. We want you to scratch our back so that we can do more.”⁷⁸ Statements such as this at public gatherings can also prove to be coercive on the minds of the voters.

⁷⁸ The Post Newspaper, “Levy Asks People to Vote for MMD Candidate”, 9th June 2005, p. 3

CHAPTER FOUR:
CORRUPTION IN THE ELECTORAL PROCESS

4.1 INTRODUCTION

Controlling fraud, corruption, and unfair practices is a fundamental objective of any system of regulating political parties and candidates. When an election has been held, it is essential to ensure that citizens at large, whether they have supported winning or losing parties and candidates, should have faith in the integrity of the process. Serious electoral fraud, corruption, and unfair practices bring the reliability of the electoral process into question. They thus undermine democracy itself.⁷⁹

Corruption, in all its forms, is not unique to any one country.⁸⁰ Allegations of corruption, even if unfounded, undermine the confidence of voters in the lead-up to elections and can affect the outcome of even those elections declared "free and fair". "The abuse of public power for private gain" is one interpretation of corruption. However, corruption is not about material advantage being gained by individuals in their private capacity but political advantage that can be gained by the abuse of the existing laws and regulations where controls and checks on the activity of public servants are tenuous and where the constitutions and legislative framework for elections are not rigorously implemented.⁸¹

⁷⁹ <http://www.aceproject.org/main>

⁸⁰ <http://www.transparency.org/sourcebook/2000/2/>

⁸¹ [http://www.iss.co.za/PUBS/Crime Index/98VOL2NO3/PREVENTING](http://www.iss.co.za/PUBS/Crime%20Index/98VOL2NO3/PREVENTING)

Therefore, this Chapter discusses corruption in the electoral process. It seeks to bring out the devastating effects that corruption has in the electoral process and also whether the Electoral Act is comprehensive enough to deal with this scourge.

4.2 CORRUPTION DEFINED

The Anti-Corruption Act no. 24 of 1996 defines corruption as the soliciting, accepting, obtaining, giving, promising or offering of a gratification by way of a bribe or other personal temptation or inducement, or the misuse or abuse of a public office for private advantage or benefit.⁸²

The Malawi Corrupt Practices Act defines corruption as, “soliciting, accepting or obtaining, or to the giving, promising or offering of a gratification, by way of a bride or other personal temptation, enticement or inducement.”

The United Nations Development Program (UNDP) in its report on *Fighting Corruption to improve Governance* defined corruption as: “the misuse of public powers, office and authority for private gain through bribery, extortion, influence peddling, nepotism, fraud, speed money or embezzlement.”

Transparency International Zambia (TIZ) defines corruption as “abuse of public office for private gain.”⁸³

⁸² Chapter 91 of the Laws of Zambia

⁸³ Transparency International Zambia. What is Corruption? Lusaka: TIZ secretariat

For the purpose of this study, corruption will be taken to mean the abuse of public office for private gain through the use of unlawful means.

4.3 CORRUPTION IN THE ELECTORAL PROCESS

We elect politicians and political parties expecting them to act in the public interest. By electing them we give them access to public resources and the power to take decisions that affect our lives. Given this privileged position, the damage that can be inflicted by politicians or parties acting out of greed, or in the service of those who bankrolled their ascent to power, is immense.⁸⁴

Corruption in a political system may take the form of buying off political opponents, rewarding political supporters or ensuring the backing of key groups through bribery or simply accumulating resources to fight elections. In order to obtain these resources, some political leaders may form alliances with businesses or even criminal elements. For such corrupt purposes others abuse the state machinery to access state resources. This therefore means that political corruption is not isolated.⁸⁵ It is part of the national problem. Abdon Yezi⁸⁶ espouses that corruption in Zambia's electoral process exists and it has been institutionalized and has taken competitive dimensions and it has been perpetuated by all political parties.

The existence of free and fair elections that are corrupt free is a fundamental test of democracy. It is through elections that people in any democratic society exercise their inalienable right of

⁸⁴ <http://www.coriswed.org/article/archive/263/>

⁸⁵ ERTC Final report. p. 383

⁸⁶ Corruption & the Election Process- Some Reflections (paper presentation at the Transparency International-Zambia chapter organized workshop on 'The Role of the Media in Combating Corruption'), 2001, p. 4

choosing who should govern them. More important, it is only when elections are conducted democratically that important elements of liberal democracy such as freedom of association, assembly or conscience become meaningful. Dr. Alfred Chanda (now Professor) lamented that corruption poses a grave threat to democracy as powerful forces, including drug barons, can easily take over government through the financing of electoral campaigns. Another scenario possible is that of a ruling party taking advantage of this gap in the law to finance its operations from public funds.⁸⁷

A survey undertaken by Transparency International Zambia on corruption in the electoral process indicates that the level of corruption was extremely high.⁸⁸ Other studies have shown that corruption during elections in the One-party era was not as pronounced as it has become today.⁸⁹ During the One-party era, the central objective of the electoral system was to structure and control political competition within the One-party framework.⁹⁰ Abdon Yezi has enunciated, "I would hasten to state that corruption during elections in the One Party era was not as pronounced as it has become today...and this did not warrant large scale corruption in comparative terms to the experiences we see in the multiparty era."⁹¹ Professor Alfred Chanda also observed that, "During the past ten years corruption has become part of the Zambian culture."⁹² This means that corruption has become more pronounced in the multiparty era. Alleged corruption can be seen in

⁸⁷ Alfred Chanda. "Legal framework for fighting Corruption in the Electoral Process" Paper presented to a public forum at Chrismar Hotel, Lusaka, 26th July 2001

⁸⁸ Christine Munalula, "Corruption in Zambia's Electoral Process" in Robin Hodess; Tamia Inowlocki and Toby Wolfe (editors), Transparency International Global Corruption Report (London: Profile Books Ltd, 2003), p. 245

⁸⁹ Perhaps the reason for this is because there was only one party in power- the United National Independence Party.

⁹⁰ Bornwell C Chikulo, "Presidential & Parliamentary Elections in the Third Republic: 1991-1994" in Owen Sichone and Bornwell C Chikulo (editors), Democracy in Zambia: Challenges for the Third Republic (Harare: Sapes Books, 1996), p. 25

⁹¹ Ibid. p. 4

⁹² Report on National Integrity Systems Country Study Zambia. p. 73

the number of election petitions that trail every election e.g. the 1996 presidential petition⁹³ (where petitioners alleged the sale of government house unduly influenced voters⁹⁴) and the 2002 presidential election petition⁹⁵ where there were allegations that the incumbent president used corrupt means.

Parliamentary elections are not an exception. A report by the Foundation for Democratic Process (FODEP) on the 2001 elections reveals that a total number of thirty-three Parliamentary seats were petitioned by the losing candidates in the High Court.⁹⁶ A case study in the Kabwata Constituency by-elections reveals that there was the use of malpractice by the candidates to earn themselves a vote. In terms of percentages, the Movement for Multiparty Democracy (MMD) led by 59.5 %; Forum for Development and Democracy (FDD) 24.5 %; and the United National Independence Party (UNIP) had 4 %.⁹⁷ Gero Erdmann and Neo Simutanyi observed that, the MMD government had learned from its predecessor how to use (most often clearly illegally) state resources (motor vehicles, helicopters, money, police, administrators, etc.) to its own advantage in the run-up to elections. So the uneven field of competition has been maintained throughout to the advantage of the party in power.⁹⁸ Due to the latter acts of improper electoral conduct carried out by MMD

⁹³ Lewanika and others v F.T.J Chiluba. SCJ/14/98

⁹⁴ Dr. Laurent Kaela, in "The Role of the Judiciary in the Electoral Process in Zambia: The 1996 Presidential Election Petition Re-visited. Concluded that, the case exposed the extent to which people can get away with malpractices under the current law. It is evident that the law cannot take its course when corrupt practices are not done by him, his agents or with his approval. The same applies to cases of deployment of public resources, such as the sale of council houses and donations to various organizations, calculated to win votes. p. 15 see also: <http://www.fiuc.org/iaup/sap>

⁹⁵ Mazoka and others v Mwanawasa & others. SCZ/EP/01/02/03/2002

⁹⁶ FODEP, Zambia's 2001 Tripartite Elections (Lusaka: FODEP National Secretariat, 2002), pp 59-61

⁹⁷ Reuben Lifuka, Op cit , p. 22

⁹⁸ Transition in Zambia: The Hybridisation of the Third Republic (Lilongwe: Konrad-Adenauer-Stiftung, 2003), p. 27

candidates against other parties, others have stated that, vote buying in its many forms has, basically, been the party's *modus operandi*.⁹⁹

They were many petitions that went to court. One of the most important cases was the Presidential petition in which the petitioners were challenging the victory of the incumbent President who was alleged to have used corrupt means to secure himself votes. In the case of **ANDERSON MAZOKA, LT GENERAL CHRISTON TEMBO AND GODFREY MIYANDA v LEVY PATRICK MWANAWASA, THE ELECTORAL COMMISSION & THE ATTORNEY GENERAL**¹⁰⁰ the court held that, we are satisfied, on the evidence before us, that the elections, while not being totally perfect as found and discussed, were substantially in conformity with the law and practice. The few partially proved allegations are not indicative that the majority of the voters were prevented from electing the candidate whom they preferred; or that the election was so flawed that the dereliction of duty seriously affected the result which could no longer reasonably be said to reflect the true free choice and free will of the majority of the voters. We, therefore, determine and declare that, Levy Patrick Mwanawasa was duly and validly elected as President of the Republic of Zambia.

The outcome has been that, very few cases where use of corrupt means had been alleged were successful. But in some cases, the outcome was successful. For instance, in the case of **BATUKE IMENDA V. ALEX CADMAN LUHILA**¹⁰¹ it was alleged that the appellant had committed a corrupt practice of undue influence when he had told voters that they would lose their land and fish ponds if they did not vote for him and further that appellant and his agent gave beer and salt to voters on the day of elections, a few meters from a polling station. The court reiterated that the learned trial

⁹⁹ The Guardian Weekly Newspaper, "MMD ELECTORAL MALPRACTICES: Inconsistency, not allegations, harming corruption fight", 17 April 2005, p. 8

¹⁰⁰ SCZ/01/02/03//2002

¹⁰¹ Appeal no.5 of 2003

Judge in his judgment analyzed the evidence of the witnesses who testified before him in extension and that his findings of fact were amply supported by the evidence on record and further that there was no merit in this appeal hence they dismissed it.

It has further been observed that a Member of Parliament retains his office amidst of allegations of use of corrupt means even when a matter has been taken to court. One might expect that a Member of Parliament whose election was voided by the High Court would be required to step down. However, that is not what the Electoral Act provides for. It rightly allows an appeal to the Supreme Court, but more controversially allows the declared winner to remain in place until an appeal is heard. Thus none of the defeated candidates whose election was voided stepped down, and all who are still alive remain as Members of Parliament up to today.¹⁰² This situation would be seen in the case where an MMD southern province MP, Michael Mabenga, whose election was petitioned due to alleged use of malpractice, still kept his seat for some months even when his candidature had been challenged.

Party representatives have admitted and stated that it is impossible to win an election without corruption unless major changes were made to the electoral laws and the Electoral Commission of Zambia became more effective in rooting out corruption. In fact, the ECZ has neither the legal authority nor the institutional capacity to combat electoral fraud. It cannot prosecute anyone for electoral malpractice, nor disqualify candidates engaged in corruption neither is there any law which requires political parties to disclose their source of financing.¹⁰³

¹⁰² <http://www.sokwanele.com/articles/>

¹⁰³ Christine Munalula. *Op cit*, p. 245

It is widely accepted that elections are generally won or lost before the actual poll takes place.¹⁰⁴ However, the mechanics of the poll itself are wide open to corrupt practices and results can be distorted in a variety of ways: undue influence; bribery; personation¹⁰⁵; promising to or embarking on developmental projects such as sinking of boreholes, grading or rehabilitation of roads and discriminatory application of the Public Order Act during election time.

When political parties promise special favours to particular groups of people in return for their votes they are not breaking the law. Even so, such behavior can be said to constitute a form of corruption, in that political parties are offering to trade special treatment for particular groups in return for electoral support. Vote buying is another form of electoral corruption and so is the use of government resources. If the governing party uses publicly owned facilities to promote its electoral fortunes, then it is guilty of electoral corruption.¹⁰⁶

Issues such as enforcement of the Public Order Act and Electoral Code of Conduct, fair media coverage, use of government resources by the ruling party and lack of transparency in elections were rigorously debated throughout the election period.¹⁰⁷ In effect political corruption stretches from abuse of public resources, purchasing of vehicles and bicycles for elections campaigns and distribution of materials such as fertilizers and conducting of ritual donations to schools and community projects in a place where elections are scheduled to take place.¹⁰⁸

¹⁰⁴ <http://www.transparency.org.sourcebook/2000/18/>

¹⁰⁵ <http://www.sokwanele.com/articles/>

¹⁰⁶ [http://www.iss.co.za/PUBS/Crime Index 99VOL3NO2/ELECTORAL](http://www.iss.co.za/PUBS/Crime%20Index%2099VOL3NO2/ELECTORAL)

¹⁰⁷ Press Statement by FODEP president, A.W Chanda on the Launch of the Electoral Reform Strategy document held at the National Museum on September 18, 2002

¹⁰⁸ Alfred Chanda. Report on National Integrity Systems Country Study Report Zambia. (March, 2003. Transparency International Zambia), p. 10

4.4 THE ELECTORAL ACT

The Electoral Act, Chapter 13 of the Laws of Zambia and the Regulations made thereunder are the major legislation governing the conduct of elections in Zambia. The Act does not only make provision relating to elections to the office of President, elections to the National Assembly, empowerment of the Electoral Commission to make regulations providing for the registration of voters and for the manner of conducting elections, but also provides for offences and penalties in connection with elections.

Section 17 (7) of the Electoral (Conduct) Regulations provides that, a person shall not- (a) cause violence or do any kind of action which may lead to violence or intimidation during election campaigns or elections; (b) impede the democratic right of any party, through its candidates canvassers or representatives, to have reasonable access to voters for the purposes of conducting voter education, fund raising, canvassing membership and soliciting support; (c) offer any inducement or reward to any person in consideration of such person- (i) joining or not joining any party; (ii) attending or not attending any political event; (iii) voting or not voting; or (iv) abuse or attempt to abuse a position of power, privilege or influence, including parental, patriarchal or traditional authority, for political purposes, including any offer of a reward or threat; (vi) use government transport or facility for campaign purposes or to carry voters to polling stations.¹⁰⁹

Section 17 (7) (l) of the Electoral (Conduct) Regulations states that a person shall not- (l) use government transport or facility for campaign purposes or to carry voters to polling stations; (2)

¹⁰⁹ Electoral Act Part VII as amended by Statutory Instrument no. 179 of 1996

where any form of Government transport or property is available for hire, it shall be made accessible to all political parties at a fee on the first come, first serve basis.

Section 17 (8) of the Electoral (Conduct) Regulations provides that all electronic media shall provide- (a) fair and balanced reporting of the campaigns, policies, meetings, rallies and press conferences of all registered political parties during the period of campaigning; and (b) news of the electoral process up to the close of poll.

Section 51 (1) of the Electoral (General) Regulations provides that any person who directly or indirectly, by himself or any other person-

(a) gives, lends, or procures, or offers, promises or agrees to give, lend or procure any money to or for any person on behalf of any voter or to or for any other person in order to induce any voter to vote or refrain from voting or who corruptly does any such act as aforesaid on account of such voter having voted or refrained from voting at any election;

(b) gives, lends, or procures, or offers, promises or agrees to give, lend, or procure, any money to or for any voter or to or for any other person on behalf of any voter or to or for any other person for acting or joining in any procession or demonstration before, during or after any election;

(c) makes any such gift, loan, offer, promise, procurement or agreement to or for any person in order to induce such person to procure or to endeavour to procure the return of any candidate at any election or the vote of any voter at any election;

(d) upon or in consequence of any such gift, loan, offer, promise, procurement or agreement, procures or engages, promises or endeavors to procure, the return of any candidate at any election or the vote of any voter at any election;

(e) advances or pays or causes to be advanced or paid any money to or for the use of any other person with the intent that such money or any part thereof shall be expended in bribery at any election, or who knowingly pays or causes to be paid any money to any person in discharge or repayment of any money wholly or in part expended in bribery at any election;

(f) before or during any election, receives or contracts for any money or loan for himself or for any other person for voting or agreeing to vote or for refraining or agreeing to refrain from voting at any election;

(g) after any election, receives any money on account of any person having voted or refrained from voting or having induced any other person to vote or refrain from voting at any election; or

(h) conveys or transfers or is concerned with the conveyance or transfer of any property, or pays or is concerned with the payment of any money, to any person for the purpose of enabling him to be registered as a voter, thereby to influence his vote at any future election, or pays to or is concerned with the payment of any money on account of any voter for the purpose of inducing him to vote or refrain from voting shall be guilty of the offence of bribery.

Where there is deliberate cheating by the authorities responsible for administering an election, the whole purpose of holding an election is negated. Corruption in the electoral process leads to

illegitimate electoral candidates winning their way into government. This leaves a lot of doubt on the credibility and integrity of such candidates. The use of such means is a betrayal on the part of the electorate who are exercising their right to vote and as such it is an abuse of human rights. The end results have been perpetual election petitions that have been clogging the courts the past decade.

Although in theory Zambia has the Electoral Act, it has been found that it is not so effective in combating corruption in the electoral process. For instance, electoral bribery and other forms of corruption are still rampant. There are a number of reasons for this apparent failure to curb corruption in the electoral process.

4.5 LIMITATIONS OF THE ELECTORAL ACT IN ADDRESSING CORRUPTION

Despite what the Electoral Act has laid down as acts that have been prohibited, electoral malpractice still exists. This actually points to the credibility of the institutions. Critics have said that the failure of the Electoral Commission has been said due to:

- (a)** The Electoral Commission lacks adequate power and institutional machinery to fight electoral corruption. It cannot prosecute anyone for engaging in electoral malpractices, including corruption. Neither can it disqualify candidates engaged in corruption. This weakness is compounded by an apparent failure by the police to enforce the electoral code of conduct.

- (b) There have been few election petitions brought to challenge results of elections marred by corruption. Thus, the courts have not been instrumental in curbing electoral corruption as they can deal only with cases brought before them. The failure to prosecute offenders has created a sense of impunity because people respect the law only if it is enforced.¹¹⁰

- (c) The penalties provided for those who contravene the law are very mild and do not deter corruption.

- (d) The electoral law prohibits neither the distribution of food relief, agricultural donations or tools, nor presidential donations from the presidential discretionary fund. The impact of such donations on the electoral process cannot be underestimated.

- (e) At the moment there is neither a law regulating electoral campaign financing, nor a legal requirement for candidates and political parties to disclose sources of funding. In addition, the absence of maximum spending limits threatens the survival of political parties that derive their support from the poor because these parties cannot compete effectively against wealthy rivals.¹¹¹

The Mung'omba Commission has also recognized the above limitations in its Interim Report and recommended that: appropriate legislation should regulate and prescribe the form of such campaign materials; electoral rules should be tightened to curb corruption and malpractices; cases of electoral corruption and malpractices should attract stiff penalties and the electoral code of

¹¹⁰ Transparency International. Corruption Fighters tool Kit 2003. "Fighting Corruption and Raising Awareness in the 2001 Tripartite Elections in Zambia." (Lusaka: TIZ Secretariat, 2003), p.52

¹¹¹ Ibid. p. 53

conduct should be streamlined and vigorously enforced; and the Electoral Commission should have power to oversee and supervise the enforcement of the Electoral Code of Conduct by all concerned.¹¹²

The Electoral Reform Technical Committee has added that, the provisions of the Anti-Corruption Commission Act (ACC Act) must be used to punish a person who illegally acquires funds for election campaign and further, the ACC Act be amended so as to empower it to be responsible for the enforcement of the law on corrupt practices in respect of elections.¹¹³

It has been observed that, in practice, the Commission considers that the only relevant legislation to its function is the ACC Act.¹¹⁴ This is not supposed to be the case and as such, the ACC must deal with any form of corruption that arises either under the Penal Code or the Electoral Act and Regulations.

Given the fact that Zambia is a member of the Southern Africa Development Commission (SADC), according to the principles that have been laid down, all member countries must, take all necessary measures and precautions to prevent the perpetration of fraud, rigging or any other illegal practices throughout the whole electoral process, in order to maintain peace and security.¹¹⁵

¹¹² Mung'omba Report, *Op cit* , p. 272

¹¹³ ERTC Report, *Op cit* , p. 65

¹¹⁴ Festus Chipungu, Senior Investigations Officer, ACC, Panel Discussion on Strengths and Weaknesses of the Enforcement of the Electoral Law at FODEP Conference on Electoral Reform at Mulungushi Conference Centre, Lusaka, 26th July 2002

¹¹⁵ SADC Principles and Guidelines Governing Democratic Elections. p.7

4.6 SUMMARY:

The mood prevailing is that there is nothing wrong because politicians of 'high standing' are the main perpetrators of this bribery and corruption and this sends the message to the people that corruption is inevitable and is an integral part of any political party's campaign strategy. Electoral corruption erodes one of the fundamental pillars of good governance and ethical leadership. It can lead to human rights abuses and a lot of undemocratic practices and the electorate need to be made aware that leaders they vote into power should be credible and be able to bring about positive change to their lives and to the nation as a whole. It is worthwhile to note that legislative and administrative mechanisms and strategies to curb the scourge are in place. For instance, there is the Anti-Corruption Commission of Zambia which tries to enforce the Corrupt Practices Act. But as it relates directly to elections, the current Electoral Act is devoid of any clear interventions on incidences that may be classified as corruption. The Electoral Commission of Zambia must be more responsive to the scourge of corruption. However, even with these legislation or administrative mechanisms in place, it is inconceivable that these would be effective as long as the attitudes and practices of the citizens are tolerant and wholly embrace these vices.

CHAPTER FIVE:

ELECTORAL COMMISSIONS IN THE SADC REGION: A COMPARATIVE STUDY

5.1 INTRODUCTION

The basic source of corruption is no longer the rigidity of the system, but the way in which the elections are conducted in Zambia. It can be stated that our Electoral laws lack the institutional capacity to deal with malpractices in elections. In fact recommendations that are given to government are designed to promote transparency and create a more even playing field in the way Zambia conducts its elections. Observers disenchanted at the refusal of the government to adopt certain recommendations, lament that, government only rejected because they would cost it the advantages it continues to enjoy over other parties in abusing the government resources available to its exposure as a party in power.¹¹⁶ Therefore, in this chapter the objective is to compare the Electoral Commissions that are in the SADC region and review their nature and see what Electoral Commission of Zambia can learn from them.

5.2 THE NATURE OF AN ELECTORAL COMMISSION

An Electoral Commission should be independent of the government. It can comprise a single person, or more usually, a group of Commissioners drawn from across the spectrum of politics, civil society and gender. At the core of the Commission's independence lies the manner in which the Commissioners are appointed. Ideally, these should be approved by the major political parties contesting the election, and certainly by all the political parties represented in the Legislature. The

¹¹⁶ The Guardian Weekly, "MMD ELECTORAL MALPRACTICES: Inconsistency, not allegations, harming corruption fight" April 17, 2005, 8

legal basis for the Commission can be contained in a country's Constitution, or in its general laws.¹¹⁷

The important concept is to create distance between the government of the day and any ability to manipulate the administration of the election. The Commission should therefore be responsible for the preparation of the voters' rolls (and the objection process which follows its publication); the receipt of nominations of candidates and checking their eligibility to stand); the design of the ballot papers; the physical arrangements for the poll; the conduct of the poll itself; the compilation and announcement of the results; the monitoring of the expenditure of the political parties and the individual candidates (to ensure that they comply with the laws in this regard); and the preparation of a public report, accounting for their stewardship and making any recommendations for reforms to the processes. The Commission should also have a public education role, running civic education programmes (ideally in co-operation with civil society groups as this extends the resources available to the Commission), informing voters how to vote and ensuring that they are aware of when and where they should go in order to do so.¹¹⁸

5.3 THE ELECTORAL COMMISSIONS IN THE SADC REGION

Under this heading, there are four countries whose Electoral Commissions will be looked at. These are: Namibia, Botswana, South Africa and Malawi.

¹¹⁷ <http://www.transparency.org.sourcebook/2000/18/>

¹¹⁸ Ibid

5.3.1 THE ELECTORAL COMMISSION OF NAMIBIA

It is evident that some of the commonwealth countries have granted full autonomy to their Electoral Commissions. This can even be seen from their mode of appointment. In Namibia, a Commonwealth country, the appointment of the commissioners to serve on the Electoral Commission for Namibia (ECN) is done in terms of the Electoral Amendment Act of 1998, which stipulates that prospective and aspiring election commissioners should apply through a Selection Committee. Upon receipt of the applications, applicants are screened by the committee, after which it recommends eight candidates to the President of the Republic of Namibia, who appoints five out of the eight recommended candidates.¹¹⁹

5.3.2 THE BOTSWANA INDEPENDENT ELECTORAL COMMISSION

This country seems to be the only country in the world where there is a process of political independence.¹²⁰ Its government is known for having conducted successive free and fair elections and promoted the notion of the Rule of Law. This is in direct opposition to some of the other countries in the SADC that have been torn apart by internecine strife, weak rules and procedures of the electoral process, the absence of a level political playing field, and co-opted civil society, manipulation and intimidation.¹²¹

The 1997 Constitution Amendment Act of Botswana has provided among others that: (1) There shall be an Independent Electoral Commission (IEC) which shall consist of – (a) a Chairman who

¹¹⁹SADC Elections Commissions' Report, 1999, pp. 8, as well as the Electoral Amendment Act, 1998, Article 2

¹²⁰Election Institute of Southern Africa. Elections update. Botswana. Number 1, 14 October 2004. p. 5

¹²¹ Ibid. p.1

shall be a judge of the High Court appointed by the Judicial Service Commission; (b) a legal practitioner appointed by the Judicial Service Commission; and (c) five other persons who are fit, proper and impartial, appointed by the Judicial Service Commission from a list of persons recommended by the All Party Conference.

Article 66 (7) of the 1997 Amendment Act of Botswana states that, In the exercise of his functions, the supervisor of Elections shall not be subject to the direction or control of any other persons or authority.

The IEC also gives the supervisor of election immunity and a constitutional office. It also makes provisions on how he or she can be removed from his or her constitutionally established office.¹²²

5.3.3 THE SOUTH AFRICA INDEPENDENT ELECTORAL COMMISSION

The South Africa Independent Electoral Commission (IEC) since its establishment in 1999 has consolidated a reputation for both integrity and efficiency. The most persuasive evidence of its administrative and moral qualities was the absence of any serious questioning of the 1999 results (as well as those of the 2000 municipal poll) by any of the parties, even those that did very badly. The IEC is meant to function both as a manager of elections and as a regulator. In practice it has performed the first role more confidently than the second.¹²³

¹²² Section 8-11 of the 1997 Constitutional Amendment Act

¹²³ Election Institute of Southern Africa. Elections update. South Africa. Number 1, 2 February 2004. p. 4

5.3.4 THE MALAWI ELECTORAL COMMISSION

The Malawi Electoral Commission (MEC) is constitutionally empowered to supervise and deliver credible, free and fair elections. However, the composition and procedure of appointment of the commission along party lines has resulted in the current situation whereby the Electoral Commission is largely perceived as partisan. As a result, what could be genuine administrative and logistical shortcomings of the MEC can be interpreted as deliberate attempts to manipulate the electoral process. The direct dependence of the MEC on the government for its funding has the potential to further compromise its independence vis-à-vis the incumbent government. It was also noted that the Electoral Commission appeared to be unwilling to fully exercise the powers vested in it by the constitution and the Electoral laws.¹²⁴

5.3.5 THE ELECTORAL COMMISSION OF ZAMBIA

The Electoral Commission of Zambia (ECZ) which is constitutionally established has as one of its core functions, supervision and registration of voters. It suffices to state that the only ostensible thing that the Commission has done is to enact the Electoral Code of Conduct¹²⁵ which too is non-enforceable.¹²⁶ Section 3 provides that every person shall during election campaigns and elections promote conditions conducive to the conduct of a free and fair election. An election observer has stated that in every election that is to take place there should be a code of conduct agreed between the parties as to how they will conduct themselves during an election campaign so as to ensure

¹²⁴ Electoral Institute of Southern Africa. Interim Statement by the EISA Election Observation Mission: Malawi Parliamentary & Presidential Elections. Lilongwe, May 20, 2004. p. 4

¹²⁵ Statutory Instrument 179 of 1996

¹²⁶ This is due to the fact that it is devoid of power in its provisions to do so.

that it is seen as being free and fair.¹²⁷ However, the Commission has failed lamentably to enforce the Electoral Code of Conduct. This has impacted negatively not only on the exercise of the right to vote but also cast shadows of doubt on the integrity of the entire electoral process.¹²⁸

There were flaws in the 2001 tripartite elections and none of the international and national observer groups could approve the elections. All national monitoring groups qualified the elections as “neither ‘free’ nor ‘fair’” (Ecumenical Observer Team, Christian Council of Zambia), questioned the “legitimacy and credibility” (FODEP) of the exercise and finally the legitimacy of the new government. It seems obvious that at least the results of the presidential elections were manipulated.¹²⁹ The European Union Long Term Observers deployed into every province observed that government vehicles were being used by the MMD, the ruling party and District Administrators were openly campaigning for the MMD.¹³⁰ However, rather than exposing these breaches of the Code of Conduct and taking action, the Electoral Commission announced publicly that it was unable to enforce the code arguing that it was the responsibility of the police and other law enforcement officers such the ACC. The police have similarly refused to enforce the Code, shifting the responsibility back to the Electoral Commission.¹³¹

5.4 SUMMARY:

The Electoral Act is inadequate to tackle the electoral malpractices that arise. It has not put up measures to stop the perpetration of electoral malpractices nor how these malpractices should be

¹²⁷ <http://www.transparency.org/soucebook/2000/18/>

¹²⁸ AFRONET. *Zambia Human Rights Report 2001*. (Lusaka: Afronet Secretariat, 2001), pp. 51-55

¹²⁹ Gero Erdmann and Neo Simutanyi. *Op cit*, p.28

¹³⁰ Michael Meadowcroft, “The Election that Might have been”, *Southern African Human Rights Review* Special Edition 9, (2002) pp. 1-3

¹³¹ AFRONET, *Op cit*, pp. 61-63

mitigated. Malpractices, if not curbed, we will forever continue to have petitions after every election. There is need to revise the current Act and legislation put in place to ensure total autonomy of the Commission. The appointment of the Commissioners must not be left to the President's discretion. There must be an established body, apart from Parliament, to scrutinize the persons who the President wants to appoint. Funding plays an important role in the function of the Commission. Therefore, the funds that are given to the Commission must be adequate. The incumbent government should not also restrict its funding to the Commission so that it yields to the demands of such government. The independence of the Electoral Commission of Zambia must be protected and enshrined in the Constitution.

CHAPTER SIX:

6.1 CONCLUSION

Chapter one served as an introduction to the study and its focus was on the challenges that are faced by the electoral process in Zambia. There are many challenges the most prominent one being corruption. Corruption is not a new phenomenon in Zambia's electoral system. The studies have shown that corruption has been there since independence although it is not as pronounced as it was during the One-party state. The study was limited to the multiparty era. Surveys done by Transparency International Zambia and other organisations reveal that, there was use of corrupt means in the 1996 and 2001 elections whose effects have been the lack of legitimacy in the outcome of an election.

Chapter Two reviewed the nature of an electoral system, that is, the importance of elections in a democracy and the features or characteristics of democratic elections. It also centred on the types of electoral systems as well as the legal framework for holding elections in Zambia. A conclusion has been made to the effect that, elections are very cardinal in a democratic country and as such, any acts that may jeopardize or reduce the integrity of the election process or the manner in which it is conducted must not be entertained. In democratic elections, the electorate would like to choose candidates who will represent them.

Chapter Three examined the concept of free and fair elections in a democracy. Elections must be free and fair and such is the basis that forms the cornerstone of every democracy. This means that any form of practice that may endanger an election must be removed. The conclusion reached is that there must be total practice of democracy and transparency when it comes to elections. Voters

must be permitted to cast their ballots without feeling under threat of violence or under an obligation to support a particular candidate or party. It is also incumbent on the political parties taking part in an election to adhere to the game of fair play.

Chapter Four analyzed corruption in the electoral process. Corruption, even if unfounded, undermines the confidence of the voters and affects the outcome of even those elections declared "free and fair". Corruption if allowed to perpetuate the electoral process, it can lead to individuals in their private capacity to gain political advantage and further lead to human rights abuses. The voters want to see people of moral caliber and integrity in government and not corrupt minded men. Therefore, the author has come to the conclusion that, electoral corruption exists and it has been perpetuated and this is due to the weakness in our laws to combat the scourge. This if allowed to continue, would lead to serious flaws in the electoral system.

Chapter Five served as a comparative study between Electoral Commissions in some SADC countries and Zambia. The weakness in our laws has made corruption be seen as an acceptable vice in our electoral system. The Electoral Commission of Zambia lacks the adequate power to deal with corruption in the electoral process. It is for this reason that the author made a comparative study with Electoral Commissions in other SADC countries, that is, South Africa, Namibia, Botswana and Malawi in order to see what the ECZ can learn from them.

The Electoral Commission of Namibia has laid a good foundation in terms of appointment of commissioners. In relation to Zambia, this provision is progressive and of the essence in the sense that, the commissioners chosen would have been chosen on merit rather than on somebody's

discretion to whom as long as they still serve in their various offices, will pledge their allegiance. In addition, such a provision would help bring back public confidence in the electoral process.

The Botswana Independent Electoral Commission (IEC) has done progressive work by protecting the office of the Commissioner. Impartiality and independence of the electoral commission is very important. Thereby, a bold electoral commission will do all that is expressly stated as its mandate in the Act without fear from the government in power. In looking at our situation in Zambia, this can be very progressive because the Commissioner will be able to do his work independence.

It is imperative that an Electoral Commission maintains its integrity and efficiency as that exhibited by the South African Independent Electoral Commission (IEC). It has been observed that our Electoral Commission is always dragged to court when election petition cases arise. Surely, attributes such as those exhibited by the South Africa Independent Electoral Commission (i.e. integrity) must be seen in the Electoral Commission of Zambia. In terms of efficiency there is a call on Electoral Commission of Zambia to conduct voter education on a continuous basis.

The author has come to the conclusion that Zambia needs to learn from such countries in order to make her Electoral Commission more responsive and active to its duties as spelt out in the Constitution and the Electoral Acts.

6.2 RECOMMENDATIONS

Therefore, considering and having in mind what other people have suggested, stated or indeed recommended; the author would like to make the following recommendations:

Firstly, there has been increased use of malpractice in elections and the Electoral Act is devoid of power to deal with such cases. As electoral malpractices points to the issue of corruption, the call becomes that of the Anti Corruption Commission. It is for this reason that the Anti Corruption Commission Act must be amended so as to encompass electoral malpractice. Punishment should not only be a heavy sentence on those persons found wanting, but that it should go beyond barring such a one from standing in ANY form of public election. A proper record must be kept to keep in check those persons who had been found guilty of electoral malpractice and ensure that they do not stand in any public election.

Secondly, it has been observed that the funding of political parties has not been closely monitored. It is for this cause that there must be legislation put in place in order to pave way for a permanent committee set up to oversee political parties funding, including the source of money of the party that is in power. This committee should include civic organizations and election monitoring organizations. They must be empowered to have full access to any information concerning a party's funding. In order to ensure autonomy, the members shall not be hand picked by the party in power. This will help reduce use of laundered money in funding parties and also prevent the party in power from abusing the state resources.

Thirdly, in order to ensure continuity and transparency, the Electoral Commission of Zambia should consolidate the voters' roll and documents in order to produce one accurate and reliable register of voters, which would be updated continuously. In addition the Commission should consider having a continuous voter registration process.

Fourthly, it has been seen that there has not been any fairness in elections. Therefore, the author recommends that the Commission should put in place the necessary mechanisms to enforce media regulations pertaining to the electoral process so as to ensure equitable access to the public media for a political parties and candidates. The airtime given by the media to the party in power should also be the same given to the other political parties. There should not be any disparity.

Fifthly, the independence of an Electoral Commission is imperative in any democratic country. The offices of those working for the Electoral Commission must be protected by the Constitution to ensure independence. Additionally, the author believes and submits that, for greater financial independence, the Electoral Commission of Zambia should be adequately funded and made accountable to Parliament.

Sixthly, the author agrees with the recommendations of the Electoral Reforms Technical Committee that there must be voter education. The author feels this is inadequate and recommends that, in order to ensure consistency in the provision of voter education, the Electoral Commission should provide overall guidance and supervision of all role players in voter education who should include various civic and non-governmental organizations.

Seven, the Electoral Code of Conduct 1996 has not been observed by political parties. The Electoral Commission for Zambia has failed to enforce it. It is submitted that the Electoral Code of Conduct, 1996, needs to be robustly enforced. It should have enforcement mechanisms, vis-à-vis, institutions and/or agents, clearly spelt out. There should be further provisions empowering the Electoral Commission of Zambia to enforce the Code.

Eighth, there has been use of Government vehicles and public funds in elections. In the interest of creating conditions for a level playing field for all political parties and promoting the integrity of the electoral process, parties should not use public funds in the electoral process. The Electoral Law should prohibit the Government to aid or to abet any party gaining unfair advantage.

Lastly, in the interest of promoting and entrenching pluralism, multi-party democracy and the integrity of the electoral process, the complete independence and impartiality of the Electoral Commission in dealing with all political parties should be reaffirmed in the constitution. Security of tenure of electoral commissioners should be entrenched in the Constitution. Their appointment and removal should be provided for in the Constitution. Such provision will ensure that the Commissioners discharge their function without fear.

6.3 SUMMARY

Elections are very cardinal in a democracy as they are the basis of a good leadership. A good electoral system produces a credible person to represent the people in a given office. Elections are one of a person's rights, thereby, free and fair elections are important for they produce leaders of moral fiber and integrity. An enabling environment has to be created to ensure that elections are free and fair. Unfortunately, this environment has often been breached by election candidates who use unlawful and corrupt means to earn themselves a vote into government.

One of the major problems that exist in Zambia's electoral process is corruption. Although it was not that pronounced in the One-party era, it has since increased in the multi-party era. The surveys conducted have revealed that the 1996 and 2001 elections were marred by electoral malpractices.

Corruption in elections poses a great threat to the democratic norms of any given state. If corrupt means are used by people to earn themselves a vote into government, it will erode the fundamental pillars of democracy which points to the integrity of the leaders in power. In Zambia, political party in power (Movement for Multi-party Democracy) has been found to use public resources to finance its selfish needs and perpetuate its stay in power at whatever cost. However, this does not mean that other parties do not use corrupt practices to earn themselves a vote in government. In fact, others parties as well have been found to use malpractices and a classic example is the 2001 Kabwata Bye-Elections. This is a betrayal on the party of the electorate as they have entrusted the leaders the mandate to rule them as citizens and not as slaves. There is an old saying that, "if a man is given too much power, he is liable to abuse it." A Latin maxim states that, "*Nullum Crimeri Sine Lege, Nullum Poena Sine Lege*" meaning, where there is no law, no one can be punished. Therefore, there is need to control the powers of such corrupt leaders by putting appropriate legislation in place hence the need for a complete reform of the Electoral Act to deal with the issue of corruption in elections.

Therefore, the above recommendations, if adopted and implemented by the Government, would certainly go a long way to entrenching a democratic culture, in minimising conflict and contributing to political stability and peaceful development in Zambia.

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