

Resolutions, which were accepted by the Legislative Council on 29 July, 1954. It was resolved that:

(1) The objective of policy in Northern Rhodesia must be to remove from each race the fear that the other might dominate for its own racial benefit and to move forward from the present system of racial representation in the territorial legislature towards a franchise with no separate representation for the races.

(2) Until that objective can be fully achieved a period of transition will remain during which special arrangements in the Legislative and Executive Councils must continue to be made so as to ensure that no race can use either the preponderance of its numbers or its more advanced stage of development to dominate the other for its own racial benefit.

(3) During this period of transition, special legislation must be in force to protect, to the extent that may be necessary, the interests of either race. Meanwhile this Council notes and agrees with the statement of the Secretary of State that it is the duty of Her Majesty's Government to ensure that on contentious issues the balance is fairly held.

(4) Every lawful inhabitant of Northern Rhodesia has the right to progress according to his character, ability and industry, without the distinction of colour or creed.⁴³⁰

The nature of the future constitutional order was settled and the years which followed witnessed its implementation. In December 1956 the Legislative Council passed a motion calling for the start of constitutional talks in the first quarter of 1957 and for the proposed changes to be announced in the first quarter of 1958.

In 1957 the Governor began a series of discussions on proposed constitutional schemes with individual and groups of members of the Legislative Council, including members of the ANC. At the end of the negotiations the general principles for the new constitutional arrangement were

⁴³⁰Quoted from *Northern Rhodesia Proposals for Constitutional Change* (1958; Cmnd. 530), para. 17.

agreed upon. The unity of all the races of Northern Rhodesia was crucial for the future of the Territory and this was possible only if party membership was broadly based. The system of racial representation by its very nature compelled members to advance the interests of their own races. All the parties were agreed that the new constitutional set up should win the confidence of all the peoples of Northern Rhodesia. Members of the Legislative Council had to be elected through a common legislative machinery providing for direct representation of all qualified voters in a geographical constituency. This was crucial for the legitimacy of the constitution, which is determined by the extent of acceptance and respect it commands among the people.

It was agreed that the new electoral system should ensure that the government rested in the hands of responsible men and women who understood the affairs of government, with sufficient education and experience, and able to reason and exercise judgment between different courses of action.⁴³¹ These men and women had to be motivated primarily by the spirit for public service to the community and consider and balance the interests of all racial groups. The system was to discourage extremists inclined to sectional interests from assuming power.⁴³² On

⁴³¹The consequences of ignoring such issues are glaringly obvious after independence. Corruption among those wielding political power and those using political power to enrich themselves are some of the major vices facing the leadership in Zambia. But no effort has been made, from the constitutional point of view to ensure that people of such disposition do not assume political power.

⁴³²The problem in the post-independence period has taken a new dimension. The problem is no longer racial but tribal.

the right to vote it was felt that it should be given to those contributing to the wealth and welfare of the country and capable of exercising sound judgment in the interest of the public.⁴³³ This was achieved through a qualitative franchise.

The idea of universal suffrage was rejected, in that it would lead to a worse kind of racial representation. It would give votes to an overwhelming majority of Africans with limited education and not conversant with the new system of government. It was feared that given such powers Africans would advance their own interests at the expense of other races. It was observed:

The basic fact, and therefore the crux of this problem in Central Africa today is that the majority of Europeans here are still far ahead of the majority of Africans; and if the franchise were limited to Europeans and to those few Africans who have, at the moment, achieved European standards, the African race would be seriously under-represented. This difficulty will persist for a number of years to come...the problem of giving Africans a proper measure of representation can be solved only by adopting a qualitative franchise.⁴³⁴

On the basis of these principles and broad objectives a constitutional arrangement was worked out and embodied in the Northern Rhodesia (Legislative Council) Order in

It has not yet been seriously addressed constitutionally. Attention needs to be directed at devising an electoral system which would create a responsible electorate which would vote not according to tribal affiliations or as motivated by the possibility of a pecuniary advantage, but vote for responsible men and women committed to promote sound governance.

⁴³³This is another issue which has been neglected after independence with the consequence that people who do not contribute to the welfare and wealth of the country and with no sense of judgment have the right to vote. Hence these people have proved to be easy to manipulate and influence.

⁴³⁴*The Northern Rhodesia Proposals for Constitutional Change*, (1958; Cmnd. 530), p. 20.

Council, 1959. We examine the various aspects of the Order in Council in particular the Legislative Council, Executive Council, franchise and the qualifications of candidates to the Legislative Council. The objective is to illustrate how the drafters went about devising a Constitution for such a complex multi-racial society.

(ii) Legislative Council

The Council was made up of a Speaker appointed by the Governor, and thirty members: twenty-two elected, four ex-officio, two nominated officials and two nominated unofficial members.⁴³⁵ More than half of the members were elected. From the British colonial constitutional scale the Northern Rhodesia Legislative Council became representative of the people and the Government assumed the representative status.

Northern Rhodesia was divided into eighteen constituencies, each returning one elected member. Twelve of them were ordinary constituencies located in areas most inhabited by Europeans. The remaining six were special constituencies comprising the remaining areas mostly populated by Africans. It meant that if an African voter wanted to be represented by an African member he had to vote for an African candidate. The same with Europeans. The election of an African member was guaranteed in the Special Constituencies and that of European members in the Ordinary Constituencies. In order to avoid elections being perceived as between Africans on one side and Europeans on the other

⁴³⁵See Art. 4 of the *Northern Rhodesia (Legislative Council) Order in Council, 1959.*

four reserved constituencies were created: two rural constituencies reserved for Europeans and two urban constituencies reserved for Africans. The entire area covered by the six special constituencies was re-divided into two constituencies reserved for two Europeans, and the area covered by the twelve ordinary constituencies was also re-divided into two constituencies reserved for African candidates.

According to this electoral system, for any party to contest in all the constituencies it had to be multi-racial in its membership and had to seek support from all eligible voters irrespective of race. It also had to find within the ranks of its members competent Africans and Europeans to contest for election in the various constituencies.

The four ex-officio members were the Secretary to the Government, Attorney General, Minister of Finance and Minister of Native Affairs. The constitutional changes of 1959 were significant in transferring power from London to Northern Rhodesia. But the Imperial Government wanted to ensure that it still retained some measure of control. The idea of parity between African and European members called for by the ANC was rejected on the ground that it would breed the very vices the new constitutional arrangement was designed to address. The new system envisaged a situation whereby fourteen constituencies returned white elected members and eight constituencies elected Africans, representing a difference of six members. "To maintain the balance, while still maintaining an important constitutional advance, it was proposed that the existing

eight official members of the Legislative Council should be reduced to six: four ex-officio and two official nominated members."⁴³⁶ The official members voted as directed by the Governor. The Imperial Government hoped to use the six official members to diffuse the European majority. The other two members were nominated unofficial members who voted as they deemed wise, hence it was not possible to predict which way they would vote.

(iii) Franchise

Wight observes that the constitutional structure and development of a dependency was largely affected by whether it was homogeneous or plural.⁴³⁷ In a plural society it was usually difficult to build an electoral system from the outset. In the initial stages electoral development tended to be on racial lines. Until 1959 the right to vote in Northern Rhodesia was confined to British subjects and the first electorate was established in 1918 during the election of the members of the Advisory Council. Africans, except those naturalized, were not British subjects but British protected persons, hence did not qualify to vote. The electoral qualifications set in 1918 were altered in 1925, and after the first elections of members of the Legislative Council they remained unchanged until 1959.

The right to vote was limited to all sane British subjects of twenty-one and above, in occupation of a house or building worth £250 within the Territory or in

⁴³⁶The Northern Rhodesia Proposals for Constitutional Change, (1958; Cmnd. 530), para. 61.

⁴³⁷Wight, *The British Colonial Constitutions*, p. 28.

possession of a mining claim or in receipt of an annual income of \$200. The prospective voter was expected to have been resident in the Territory for a continuous period of two years and for three months in the electoral district he sought to vote. Married women of twenty-one years and above voted on the strength of their husbands' qualifications. All the voters were expected to complete the necessary application forms in English without assistance. As a result of these conditions there were only eleven Africans on the 1957 voters roll. All direct election seats in Legislative Council were filled up by Europeans. African members were returned on an electoral college system through the African Representative Council.

The Order in Council of 1959 reflects the first attempt to create a unified electorate. It was the objective of the new electoral system to encourage election of responsible men and women prepared to consider and balance the interests of all races and motivated primarily by a spirit of service to the whole community. But this could be achieved only if the right to vote was given to those contributing to the wealth and welfare of the public and capable of exercising sound judgment in voting. The idea was to discourage enfranchising people who could vote on racial lines or on account of possible pecuniary benefit. This was possible through a qualitative franchise. A common roll was devised with two separate rolls. One had to register either as an ordinary roll voter or special

roll voter upon meeting the requisite conditions.⁴³⁸ Qualifications for the latter voters was less stringent than the former.

(iv) Executive Council

The composition of the Executive Council, of five official and four unofficial members, in place before 1959 was radically altered. The Governor's advisors in the Council were predominantly unofficial. The Council was made up of the Governor as President, four ex officio members as ministers and five other ministers, four of whom were elected on Ordinary Roll. In addition there were two assistant ministers, not members of the Executive Council but bound by the Executive Council oaths of secrecy, allegiance and office with access to the Council minutes and memoranda. Each assistant minister worked under instruction of his minister. In an effort to promote African participation in Government, of the total of eleven ministerial positions not less than two were to be filled up by Africans, and one of them was to be a full minister.

The Governor was bound to consult and pay due regard to the advice of the majority party leader before selecting the unofficial ministers. By providing for an elected majority in the Executive Council responsible government within defined limits, or semi-responsible government, was introduced in Northern Rhodesia. The subordination of the Legislative Council to the Executive Council was nearly eliminated and about to be replaced by an executive

⁴³⁸ For details on the qualifications see Mulford, *Zambia: The Politics of Independence 1957-1964*, pp. 56-61.

answerable to the legislature. A representative legislature derived its strength from the popular forces behind it, hence asserted its will against the executive. The general principle underlying responsible government is that the administration of government receives general support from the legislature. The government is run under the control of or on the advice of the ministers who are members of the legislature.⁴³⁹

Full responsible government for Northern Rhodesia meant the elimination of the internal subordination of the Legislative Council to the Executive and subordination of the Colonial Government to the Imperial Government. But this was yet to be achieved.

(c) Evaluation of the Constitutional Order of 1959

The Governor's autocracy was still in place. He retained the power to enact laws and pass any motion though opposed by the Legislative Council.⁴⁴⁰ He had the power to assent or withhold his assent to Ordinances passed by the Legislative Council. The Constitution remained silent on what would happen in the event that assent was withheld. On the other hand the Imperial Government's control of the Colonial Government was still in place. Northern Rhodesia had no mandate nor authority to deal with its external matters. The Crown's power to disallow any legislation made by the territorial legislature was retained.⁴⁴¹

⁴³⁹See Wight, *British Colonial Constitutions*, pp. 33-5; see also n. 2.

⁴⁴⁰See Art. 24 of *Northern Rhodesia (Legislative Council) Order in Council, 1959*.

⁴⁴¹*Ibid.*, Art. 26.

The new constitutional order was tested in the elections held later in 1959.⁴⁴² Although it did not perform as envisaged, it cannot be denied that it was a milestone development in the Territory. For the first time elections were held on party lines. A comparatively large number of Africans were enfranchised. The constitutional changes and the subsequent elections brought the two nationalist parties into bitter rivalry. The ANC accepted the constitutional changes and participated in the elections. ZANC boycotted the elections and vowed to undermine the constitution. It would be unrealistic for one to expect a constitutional arrangement as complex as that designed for Northern Rhodesia to achieve all its objectives on the first run. The fact that some unexpected events occurred does not reflect the inadequacy of the premise on which it was founded, but that the system needed refinement. The importance of the system lies in the fact that it was the first constitutional order initiated and designed in Northern Rhodesia with clearly identifiable goals. The constitutional order was perceived as a means to an end and not an end in itself. Perhaps much more important was the fact that the constitutional changes of 1959 speeded up the end of colonial rule and opened the way to independence, which was granted five years later.

On the British colonial constitutional scale the changes of 1959 were a major advance. First, the territorial Government moved from a semi-representative

⁴⁴²For an analysis of the elections, see David Mulford, *Zambia The Politics of Independence 1957 - 1964*, pp. 91 - 106.

status to fully representative standing. More than half of the members of the Legislative Council were elected. Second, it introduced responsible government within defined limits. The Legislative Council was no longer subordinate to the Executive Council; instead the latter was under the control of the former. The majority of members of the Executive Council were members of the Legislative Council.

III. The Road to Independence

The constitutional changes of 1959 marked the end of the third constitutional phase, and opened the way for the fourth and final phase according to the British colonial constitutional arrangement. The Territory was on its way to independence. The last stage is the most important in that *it reflects efforts made to rapidly transform an autocratic system into one calling for constitutionalism.* The significance of the period is largely evidenced by the fact that between 1959 and 1964 three constitutions were drafted and two general elections held. We examine the significance of each constitution and the forces behind it.

1. Northern Rhodesia Constitution 1962

The creation of the federation in 1953 gave impetus to constitutional changes; its demise had the same effect. Article 99 of the Federal Constitution provided for the review of the Constitution not less than seven and not more than nine years from the inception of the federation. The review of the Constitution had to take place not earlier than 23 October 1960 and not later than 23 October 1962. In preparation of this major event, the British Government

appointed a Commission headed by Viscount Monckton to advise the five governments on the preparations necessary for the 1960 constitutional review programme.⁴⁴³

Within the territories the appointment of the Commission was a controversial issue. The ANC and UNIP boycotted the proceedings of the Commission largely because it was not empowered to consider the dissolution of the federation.⁴⁴⁴ The Commission noted in its report that "the dislike of the federation among the Africans was widespread, sincere and of long standing. It is also pathological."⁴⁴⁵ Of significance to Northern Rhodesia was the recommendation that a new constitution for the Territory was necessary and needed to be put in place without awaiting the full revision of the federal constitutional structure.⁴⁴⁶ To dispel fears among Africans that the federation was impeding the constitutional progress of the Territory, the Commission called on the British Government to recognise as soon as it was possible and declare that further constitutional moves towards full self-government would be made in future.⁴⁴⁷

In response the British Government convened a Constitutional Conference at Lancaster House on 19 December 1960, nearly two months after the publication of the report. The Conference was preceded by a series of informal

⁴⁴³See *The Report of the Advisory Commission on the Review of the Constitution of Rhodesia and Nyasaland* (1960; Cmnd. 1148), p. 6.

⁴⁴⁴*Ibid.*, para. 26.

⁴⁴⁵*Ibid.*, p. 27.

⁴⁴⁶*Ibid.*, para. 338.

⁴⁴⁷*Ibid.*, para. 114.

consultations between the Governor and various interest groups within Northern Rhodesia. At the end of the consultations there was no agreement on key issues. The Conference was called to iron out these questions and agree on the next constitutional scheme to meet the aspirations of the peoples of the Territory and maintain a stable government and efficient administration.⁴⁴⁸ The protectorate status of the Territory and obligations of the Imperial Government had to be taken into account.

The Secretary of State for Colonies in his speech to the Conference outlined general principles for consideration. The next constitution was to provide for an increase in the number of Africans in the Legislative Council, and the Conference was to determine the mechanism for realising this objective. Universal suffrage was rejected in favour of an electoral mechanism which was qualitatively adjustable to allow for greater African participation. It was acknowledged that the Territory was moving towards self-rule, hence the Secretary of State urged the Conference to look to the future.

The participants' attention was drawn to the possible safeguards needed to protect both the individual and minority communities. This was deemed necessary in a plural society not yet fully developed. Whereas in developed Western countries such as Britain, the protection of minority interests is maintained by certain recognised conventions, in underdeveloped and mixed communities

⁴⁴⁸See *The Northern Rhodesia Proposals for Constitutional Change*, (1961; Cmnd. 1295) p. 1.

special provisions were needed. Without such safeguards a mass electorate dominated by a single party, might control all the organs of government and minority interests could be completely disregarded.⁴⁴⁹

The Conference was urged to consider the Monckton Commission's proposals on a Council of State and Bill of Rights in the context of the federation.^F Until 1960, when the Territory was on the brink of self-rule, a Bill of Rights had never been considered for Northern Rhodesia. This was largely due to the enormous powers enjoyed by the Governor. With both the Executive and Legislative Councils firmly under his control, it was possible for him to frustrate attempts by the colonists to promote their interests at the expense of those of Africans. But both forms of subordination were gradually being eliminated. Power was being transferred more and more to Northern Rhodesia, and the British Government in its own right and through the Governor as its agent, was slowly withdrawing from the Territory. It was, therefore, seen as cardinal for other safeguards in the form of a Bill of Rights to be put in place.

The creation of the House of Chiefs was another novel addition to the constitutional arrangement of Northern Rhodesia. Parties to the talks affirmed the need for special arrangements to be made for chiefs. It was argued that the chiefs were representatives of their people and by custom reflected the opinions of their subjects. They were in a special position which enabled them to understand what

⁴⁴⁹Ibid., p. 3.

their people thought and wanted, and that they spoke on behalf of the people irrespective of their party affiliation. They were viewed as valuable sources of information and advice for the Government. The chiefs were to keep the Government informed on public opinion among their people, and the Government was to consult them on various pieces of legislation.⁴⁵⁰

The ideas about the chiefs were founded on a wrong premise, and the continued existence of the House Chiefs in the post independence era reflects failure to relate the constitution to the reality in Zambia. The introduction of the Western system of government undermined the position of the chiefs. Hall has observed that the inevitable consequence of white administration was a slow disintegration of the traditional way of life. For some of the Zambian tribes the effect was gradual, so that even today they have retained much of the ancient social structures. For others, such as the Ngoni, whose political formation was shattered by military conquest or the Lamba whose tribal areas were swamped by white settlers, the change was overwhelming.⁴⁵¹ The people who lived in small homogeneous tribal groups were broken down and became part of one plural society. The people who once led communal lives were introduced to a cash economy. Some of them received Western education and developed a different perspective of life, hence did not find it necessary for their chiefs to speak for them. In fact the chiefs

⁴⁵⁰Ibid., p. 12.

⁴⁵¹ Hall, *Zambia*, p. 96.

consulted the new African elite on the ways of the white man.

UNIP in principle accepted the idea of non-racial approach to constitutional changes provided it did not delay self-rule. Time had come for the electoral system to provide for universal adult suffrage. For UNIP the stability of Northern Rhodesia was possible only if there was an African majority in both the Legislative and Executive Councils. The ANC, on the other hand, called for "One Man One Vote" without qualification. The United Federal Party (UFP) challenged the reasons given for increased African membership in the Legislative Council. They favoured the principles underlying the 1959 constitutional arrangement, that individual merit was the criteria for political and economic advancement.⁴⁵²

The divergence in ideas was so serious among the political parties that a compromise was not possible. The Secretary of State had no choice but to impose his own proposals in February 1961.⁴⁵³ These were in turn referred to the Governor for discussions with various parties in Northern Rhodesia. The Governor came up with some recommendations, which the British Government accepted with few amendments. The new constitutional proposals were published in June 1961, and provoked angry reaction from the Africans. UNIP condemned them and argued that the Imperial Government had altered the February proposals in

⁴⁵²See *The Northern Rhodesia Proposals for Constitutional Change*, (1961; Cmnd. 1295), p. 4.

⁴⁵³For details see *Ibid.*: Also David Mulford *Northern Rhodesia General Elections 1962* (London: Oxford University Press, 1964) pp. 19 - 30.

an attempt to appease the Federal and Southern Rhodesia governments.⁴⁵⁴ UNIP went on to declare the beginning of its campaign of civil disobedience aimed at destroying the constitutional framework. The British Government in response backed down and in March 1962 produced another set of proposals, which provided an acceptable compromise between the contending parties in Northern Rhodesia. This was embodied in the Northern Rhodesia (Constitution) Order in Council, 1962.

The new arrangement was a prelude to granting Northern Rhodesia internal self-rule, which meant the end of internal subordination of the Colonial Government to the Imperial Government. The Order in Council of 1962 is important in many respects: it repealed all previous Orders in Council of constitutional significance, including the Northern Rhodesia Order in Council, 1924. The Constitution was attached to the Order in Council as the second schedule.⁴⁵⁵ For the first time Northern Rhodesia had a traditional constitution: a selection of legal rules governing government embodied in one single document.⁴⁵⁶

⁴⁵⁴The ANC on the other hand accepted the proposals.

⁴⁵⁵The Constitution came into force as an appendage to the Order in Council issued by Her Majesty in Council, a practice which has continued in the post-independence era as a mode of bringing a constitution into force. The constitution is one of the schedules to the Constitution Amendment Act.

⁴⁵⁶K.C. Wheare *Modern Constitutions* (London: Oxford University Press, 1966) p. 2. Until 1962 the constitution of Northern Rhodesia was referred to in broad context. It was a collection of legal rules found in various Orders in Council and Royal Instructions to the Governor. Hence various Orders in Council and Royal Instructions covered different constitutional aspects.

(a) The Executive Council

Under the new Constitution the Governor's autocracy, the hallmark of the past constitutional orders, was reduced to some degree. He enjoyed powers conferred upon him by the Constitution and such other powers which were to be conferred on him by Her Majesty through Royal Instructions. Unlike under previous arrangements, where the Executive Council was merely advisory to the Governor, under the 1962 Constitution, he was obliged to consult the Council except where it was in the public interest for him not to consult. He could, however, act contrary to the advice of the Council, but he was under obligation to inform the Secretary of State.

The composition of the Executive council changed. It was made up of four ex-officio members, six appointed members and temporary members not exceeding twelve. The position of Parliamentary Secretary was introduced. They were appointed by the Governor from among the members of the Legislative Council, and served at his pleasure. They were appointed to assist ministers.⁴⁵⁷ In real terms the positions were occupied by Africans, and were created when it was obvious that under the new constitution Africans would be involved in government. The Africans, therefore, needed experience in the working of government.

At the opening of the first session of the twelfth Council the Governor declared: "The system of Parliamentary Secretaryship is a most valuable means for Members of the Legislative Council to gain experience in the working of

⁴⁵⁷Art. 18.

government and ministerial responsibility. At the present stage of our constitutional development it is of great importance to achieve a wide spread of such experience."⁴⁵⁸ Parliamentary Secretaries were members of government bound by the rule of collective responsibility for decisions of the Government but they were not members of the Executive Council.⁴⁵⁹

(b) The Legislative Council

The composition of the Legislative Council was also radically changed. The new Legislative Council was made up of forty-five elected members, the Speaker appointed by the Governor and all ex-officio members of the Executive Council. The Governor was empowered, on instruction from Her Majesty, to nominate some people as members of the Legislative Council. In order to maintain the number of nominated members in the Legislative Council at all times, the Governor was empowered to appoint temporary members in place of any nominated members who failed to attend the Council for whatever reason.⁴⁶⁰

The Constitution of 1962, like that of 1959, was equally committed to the promotion of politics on party as opposed to racial lines. The entire Northern Rhodesia was divided into thirty constituencies. Fifteen were high

⁴⁵⁸*Northern Rhodesia Legislative Council Debates*, cols. 5 - 6 (15 January, 1963) The first general elections under the new constitution were held on 30 October, 1962. Seven Parliamentary Secretaries were appointed when the Coalition Government of ANC and UNIP was constituted on 15 December 1962, and two more were appointed after the by-elections and all were Africans.

⁴⁵⁹*Ibid.*

⁴⁶⁰See Arts. 20 and 27.

franchise constituencies situated mostly in urban areas, populated by Europeans. The other fifteen lower franchise constituencies were in areas inhabited by Africans. The entire Territory was again divided into eight national constituencies and one of them was a special national constituency in which, like the lower and higher franchise constituencies, only one member of the Legislative Council was elected. The seven national constituencies were to elect two members.⁴⁶¹ This brought the number of members to be elected in national constituencies to fifteen.

A corresponding class of voters was created. Candidates standing in the higher franchise constituencies had to be elected by voters registered on the upper roll and lower constituencies by voters on the lower roll. National constituency candidates had to get the support of voters on both lower and higher rolls. The special national candidate needed the support of both Asian and coloured voters on either higher or lower franchise rolls. For candidates on lower and higher franchise constituencies to succeed they had to obtain the highest number of votes. A national candidate on the other hand needed to obtain a minimum number of votes from each of the races.⁴⁶²

⁴⁶¹Ibid., 34.

⁴⁶²One tenth of votes cast by Europeans and Africans. In addition they had to obtain one fifth of the votes cast by voters on the higher and another one fifth on the lower roll. Of the two national candidates one was a European and the other an African and each voter had to cast two votes for each of the two candidates. In the event that national seats were not filled, because no candidate had obtained the required votes a fresh by-election had to be held. If the same result was obtained then such a seat remained vacant until the next general election: Art. 38(3).

To qualify as candidate in any of the constituencies one needed to be a registered voter himself. Perhaps the most important qualification was the candidate's ability to speak, write and understand English well enough to take an active part in the proceedings of the Council. Such a qualification was necessary in that the business of the Council was conducted in English. After independence this qualification has been ignored.⁴⁶³ The intention of the drafter was to ensure that only competent and responsible individuals were elected to the Legislative Council. A candidate for a higher franchise constituency needed to be registered on the higher roll and that for the lower franchise on the lower roll. National candidates had to be on either of the two rolls.⁴⁶⁴

To qualify for registration as a voter on either of the two rolls one had to be either a citizen of the United Kingdom and colonies or of the Federation or British protected person, twenty-one years and above and resident in the federation for any continuous period of two years, and able to complete an application form in his own handwriting without assistance. In addition he had to meet specified conditions attached to the roll he had chosen to

⁴⁶³Art. 64(c) of the present Constitution provides that for one to qualify for election as Member of Parliament he had to be literate and conversant with English as the official language. The qualification is however vague, and no mechanism has ever been worked out to determine the candidates' literacy and competency in English. Under the 1962 Constitution knowledge of English was determined if one's native tongue was English or by one's attainment of a prescribed level of education.

⁴⁶⁴Art. 23.

register, which were based on income, education, property and social position.⁴⁶⁵

The constitutional arrangement was premised on the reasoning that for one to take part in the governing of the Territory he needed an understanding and appreciation of the system of government. Only in this way was it possible for him to vote wisely and not as motivated by the interests of his own race. He had to stand for and defend the interests of the Territory at large. Academic qualifications were indispensable in achieving this objective. Secondly, it was generally held that for a person to participate in the choosing of the government, which will affect his life as well, he had to be responsible and contributing to the welfare of the Territory. It was for this reason that property qualifications were introduced.

(c) The Evaluation of the 1962 Constitution

Notwithstanding the enactment of the new Constitution, Northern Rhodesia had not yet attained a full responsible government. The influence of the Imperial Government in the internal and external affairs of the Territory had not been eliminated. The Governor and the Legislative Council were expected to have regard to Instructions from the Crown in the discharge of their respective functions and strictly conform to them. The Governor's reserve powers to pass legislation and bring any motion into effect in the face of opposition of the Legislative Council was retained. Any law

⁴⁶⁵See Schedule three to the Constitution.

assented to by the Governor could still be disallowed by Her Majesty.

The general elections held on 30 October 1962 were a test of the Constitution. Amidst its successes there were a few disasters. In five of the seven national constituencies, in which elections were held, no candidate managed to secure the minimum support from both races.⁴⁶⁶ Of the five political parties which contested the election none of them got an outright majority to form a government, hence a coalition government of UNIP and ANC was constituted on 15 January 1963.⁴⁶⁷

In spite of its short-comings the Constitution of 1962, like that of 1959, was important in many respects. The drafters had a well-defined objective: to promote politics on party as opposed to racial lines. Opportunity had to be given to responsible men and women, with knowledge of English and in possession of some material resources, to contribute to this goal. It reflects an effort to use the constitution to address some of the most pressing problems facing the Territory. It was not merely an instrument establishing the various organs of government and prescribing their powers and functions.

Between 1958 and 1962 serious attempts were made to reduce the enormous powers enjoyed by the Governor. Power was gradually transferred to the colony. The internal control of the colony by the Imperial Government had

⁴⁶⁶See the Governor's address' *Legislative Council Debates* cols. 1-4 (15 January, 1963)

⁴⁶⁷See Mulford, *Northern Rhodesia General Elections 1962* generally for the discussion and analysis of the elections.

declined, but the external control was intact. The Crown's reserve powers were retained. The limitation of the legislative powers of the colonial legislature remained in place. The Governor and the Legislative Council were expected to have regard to Her Majesty's instruction in the discharge of their functions. Her Majesty also retained the general power to disallow any piece of legislation passed by the colonial legislature. The House of Chiefs was constituted, but the Bill of Rights recommended by the Monckton Commission and endorsed by the Secretary of State for Colonies during the constitutional talks was excluded. The Governor, in his address to the Legislative Council, promised to consult the political parties on the protection of the basic rights and freedoms of the people and on the most suitable mechanism for enforcement.⁴⁶⁸

The Crown continued to control the Territory's foreign and defence matters and the power to amend and revoke the Constitution. External control of the Territory by the Imperial Government was usually the last to disappear. The internal control of the Territory by the British Government had largely disappeared, making the territorial government semi-responsible. Wight observes that the establishment of semi-responsible government meant that the Imperial Government's internal control of the Territory could no longer shelter behind the subordination of the legislature to the executive.⁴⁶⁹ It appeared naked, and the Governor's reserve powers acquired a new emphasis as the device by

⁴⁶⁸*Legislative Council Debates* col. 7 (15 January, 1963)

⁴⁶⁹See Wight, *The British Colonial Constitutions*, p. 34 -

which the residual control of the Imperial Government was maintained. Semi-responsible government is a form of political dualism. Powers are divided between the Colonial Government, responsible to an elected legislature, and the Imperial Government operating either indirectly or through the Governor equipped with reserve powers. This dualism expresses a system where two governments exist independently in the colony, reconciled only by the constitution. The next constitutional phase, therefore, was the elimination of this political dualism and the creation of internal self-rule.

2. Northern Rhodesia Constitution 1963

The Northern Rhodesia Constitution of 1963 ended internal control of the Territory by the Imperial Government, and created self-rule short of independence. The position was characterised by the absence of any internal control by the Imperial Government, and the decline of its external control. Except in matters falling within the sphere of foreign relations and defence, the Imperial Government had no positive legislative powers in Northern Rhodesia. The Imperial Government became a sleeping partner.⁴⁷⁰ The forces behind the changes emanated within the Territory and from moves towards independence within Africa.

On 14 February 1963, during the first session of the twelfth Council, Kenneth Kaunda as leader of the coalition

⁴⁷⁰Ibid., 38.

Government called for a Westminster Constitutional model to be created for Northern Rhodesia. In his motion he stated,

...that this Council condemns the Constitution of Northern Rhodesia as undemocratic and unacceptable, affirms the right of the people of Northern Rhodesia to the free and unfettered control of the Territory through a Government chosen by the suffrage of all men and women and calls upon Her Majesty's Government to secure a new constitution for Northern Rhodesia based on the foregoing principles.⁴⁷¹

He argued that the complicated constitutional arrangement was not a solution to Northern Rhodesia's problems. The system was seen as devised to create parity in representation between the Europeans who numbered about 75,000 and Africans who numbered over three million. Kaunda and his Party strongly condemned the Constitution of 1962, though they had endorsed it and agreed to participate in the elections. He went on to suggest the major provisions of the new constitution. To qualify to vote, it was argued, one must be either a British citizen or British protected person, twenty-one years and above, and resident in Northern Rhodesia for a continuous period of five years. Kaunda also argued for the abolition of the subordination of the Colonial Government to the Imperial Government, through the Governor's power to legislate for the Territory and Imperial Government's authority to disallow legislation passed by the colonial legislature. He called for a Legislative Council completely unfettered. The Governor, it was suggested, should act as advised by the Cabinet. The House of Chiefs and the inclusion of the Bill of Rights

⁴⁷¹*Legislative Council Debates*, col. 1003 (14 February, 1963)

were endorsed. It was also suggested that in the event of any proposed Bill being *ultra vires* the Bill of Rights, any five members of the Legislative Council were to be at liberty to petition the Speaker to refer the Bill to the High Court for its opinion. The motion was carried through with twenty-one votes in favour and fourteen against.

Kaunda's demands were for internal self-rule as opposed to full independence, which entailed complete elimination of all forms of subjection by the Colonial Government. His only significant reason for opposing the 1962 constitution was principally the qualitative electoral system. Kaunda quoted Article 21 of the Universal Declaration of Human Rights, which provides for the right of all persons to take part in the government of the country, and the will of the people as the basis of government. People's will was expressed in periodic and genuine elections by universal suffrage. Kaunda argued that since the Constitution of 1962 provided for a qualitative electoral system as opposed to universal suffrage it was in conflict with the Universal Declaration of Human Rights. It was ignored that the Declaration has no legal binding force, but merely provides standards which all member nations and people should aspire to attain.

Whilst the introduction of universal suffrage is good and to be desired by all the peoples, the question for Northern Rhodesia at the time was whether it had reached the stage of development which rendered qualitative electoral system redundant. Though Northern Rhodesia was an African protectorate, it was imperative to protect the

rights of the minority racial groups. Some of the settlers had lived in Northern Rhodesia for a long time and had come to consider it as home. Their interests could not just be ignored because the Territory belonged to the Africans.

The relevance of universal adult suffrage in Northern Rhodesia should have been the issue. The conferment of a vote presupposes that the person in whom it is vested knows what it is and what he can accomplish with it. But this is possible only if one has some level of education and is conversant with the system. Such an electoral system was totally novel for the Africans of Northern Rhodesia. African involvement in government was strongly resisted until very late. Education for Africans was neglected by the Colonial Government. Gray writes: "It is one of the sober paradoxes of Central African history that at the moment when Africans were just beginning to demand better education and more opportunities of sharing in the white man's world, Europeans were becoming less ready to give active and confident help in this transition."⁴⁷² The consequence of such a policy was that at independence Zambia had less than 104 Africans with university degrees, out of a population of about four million. The majority of the people did not even have basic education.⁴⁷³ The viability of universal suffrage in such a situation should

⁴⁷²R. Gray, *The Two Nations: Aspects of the Development of Race Relations in Rhodesias and Nyasaland* (London: Oxford University Press, 1960), quoted from Patrick Ollawa, *Participatory Democracy in Zambia* (Devon: Arthur H. Stockwell Ltd., 1979), p. 83.

⁴⁷³*Ibid.*, p. 85.

have been the crucial issue to be determined by all the parties concerned, including UNIP.

In response to these demands, on 5 November, 1963 the Imperial Government announced that Northern Rhodesia was to proceed to internal self-government and the new constitution was issued appended to the Northern Rhodesia (Constitution) Order in Council, 1963.⁴⁷⁴

The Constitution was substantially in line with what Kaunda had called for. Notwithstanding the inclusion of the trappings of the Westminster constitutional model the new Constitution was no more than a modified version of the 1962 Constitution. The proposals made by Kaunda can be explained. For him and many leaders of his time brought up in a British ruled protectorate the only constitutional arrangement they were conversant with was that of the colonising power. If anyone was schooled in constitutional issues it was from the British perspective. The few educated Africans had received their education in schools and universities in England. The British Constitution, like many other Western constitutions, bears the influence of the classical constitutional perspective, which emphasises the limitation of power through diverse mechanisms. The devices are the symbols of Western constitutions, whose objective is to limit abuse of power so that it can be used to satisfy popular will instead of that of few individuals.

Most of these mechanisms and the general commitment to limit abuse of power were until then missing. Misuse of

⁴⁷⁴The Constitution was issued on 20 December, 1963 it appears in the Government Notices for 1964.

power was perceived from the British Government's standpoint since executive powers were vested in the Crown and exercised by the Governor on Her Majesty's behalf. The Governor was not expected to abuse the authority entrusted to him and act contrary to Her Majesty's instructions. Even when the Territory attained semi-representative status the possibility of the elected majority or the unofficial majority voting contrary to the wishes of the British Government was checked by Her Majesty's power of disallowance of legislation passed by the Council. In addition the Crown and Governor had the power to directly legislate for the Territory.

These were eliminated with the introduction of self-rule; hence there was need for new safe-guards to protect the rights of the European minority and their property.⁴⁷⁵ Part one of the Constitution provided for the Bill of Rights guaranteeing the traditional rights and freedoms. On the other hand chapter two provided for a Constitutional Council headed by a chairman and not more than four other members. On instruction of the Governor the Constitutional Council had the power to examine any proposed Bill or statutory instrument whether it was inconsistent with the Bill of Rights. At least seven members of the Legislative Assembly could request the Speaker within three days after

⁴⁷⁵In modern times the independence Constitution of Zimbabwe provides the best example of the efforts made by the British Government to protect minority interests. See John Hatchard and Peter Slinn "Towards an African Zimbabwean Constitution?" *Third World Legal Studies - 1988*, p. 119.

the final reading of any Bill or the issue of the Statutory Instrument to refer it to the Constitutional Council.⁴⁷⁶

(a) Executive Authority in the Protectorate

Previous constitutional orders of Northern Rhodesia were silent on who possessed the Executive powers. They constituted the Executive Council, and conferred on it various functions. However, according to British constitutional conventions, the executive authority was vested in the Crown and exercised by the Governor as a delegate of the Crown. The Constitution of 1963 broke this tradition and expressly vested executive powers in Her Majesty to be exercised on Her behalf, in Northern Rhodesia, by the Governor either directly or through officers subordinate to him.⁴⁷⁷ The Governor's powers were, however, substantially reduced. He had no power to summon or attend Cabinet meetings, which he enjoyed before 1963.⁴⁷⁸ The Prime Minister was under obligation to keep the Governor informed on all matters dealt with by the Cabinet, and any other matter under the responsibility of any minister.⁴⁷⁹ In the discharge of the functions vested in him by the Constitution or any other law the Governor was to act in accordance with the advice of the Cabinet. This obligation did not extend to matters of defence, external affairs, public order and safety and the operation

⁴⁷⁶See Arts. 19, 20, 21.

⁴⁷⁷Ibid., 68

⁴⁷⁸See Arts. 15 and 16 of the Constitution of 1962.

⁴⁷⁹*Northern Rhodesia (Constitution) Order in Council, 1963, Art., 77.*

of the police. These were exclusively reserved for the Governor and were determined in his own discretion.⁴⁸⁰

The Executive Council dominated by the Governor and made up of ex-officio, elected and nominated members was replaced by a Cabinet headed by a Prime Minister.⁴⁸¹ The Prime Minister was appointed by the Governor from among members of the Legislative Assembly who appeared to him best able to command the support of the majority of the members of the Assembly. The ministers were appointed by the Governor from among members of the Legislative Assembly in consultation with the Prime Minister .⁴⁸²

The Governor, in his own discretion, could remove the Prime Minister from office if a vote of no confidence was passed by the Legislative Assembly or if he lost support of the majority of members of the Assembly after the general election.⁴⁸³ Cabinet was collectively responsible to the Legislative Assembly for any advice given to the Governor and for all things done by or under the authority of any minister in the execution of the functions of his office.⁴⁸⁴ The system was strongly reminiscent of the Westminster model of responsible government.

(b) The Legislature

The Legislative Council became the Legislative Assembly and together with Her Majesty, constituted the

⁴⁸⁰Ibid., 73 and 75 (4).

⁴⁸¹Ibid., 71.

⁴⁸²Ibid., 69.

⁴⁸³Ibid., 70

⁴⁸⁴Ibid., 71(2)

legislature for the Territory.⁴⁸⁵ The Assembly was made up of seventy five elected members. The Speaker was elected from among members of the Assembly, but ministers and parliamentary secretaries were excepted from election as Speaker of the Legislative Assembly.⁴⁸⁶

The Governor's reserved powers were abolished. Under the new Constitution once a Bill was defeated in the Assembly that was the end, unlike in the past when the Governor had power to override such a decision. Neither the Governor nor Her Majesty could legislate for the Territory, a marked difference from earlier arrangements. The Governor had a choice whether to grant or withhold assent to any Bill passed by the Legislative Assembly or reserve it for the signification of Her Majesty's pleasure. Unless he had received instructions from the Secretary of State to assent, the Governor was obliged to reserve for the signification of Her Majesty's pleasure any Bill inconsistent with any obligation imposed on Her Majesty by any treaty, convention or agreement, or arrangement relating to any other country or international organisation.⁴⁸⁷

The Governor's power to disallow legislation, and the internal subordination of the Colonial Government to the Imperial Government, the hallmarks of British colonial rule since 1899 were abolished.⁴⁸⁸ Until 1963 the Governor

⁴⁸⁵Ibid., 32.

⁴⁸⁶Ibid., 34.

⁴⁸⁷Ibid., 56.

⁴⁸⁸See Art. 11 of the North-Western (Barotziland) Order in Council, 1899. See also Art. 60: It was reserved only to laws altering, to the injury of the stock-holder, any

could, in his own right, prorogue or dissolve the Legislative Council at any time. Under the new arrangement the power to prorogue or dissolve the Assembly could only be exercised on the advice of the Prime Minister.

The electoral system was changed. The Territory was divided into sixty-five main roll constituencies and ten reserved constituencies. Candidates for the reserved constituencies were elected by voters registered as reserved roll voters and those for the main roll constituencies by main roll voters. Qualitative franchise was eliminated and universal adult suffrage, demanded by Kaunda, was introduced. Registration of voters was open to British subjects and protected persons who were twenty-one years old and above. Any one who met these conditions, if he was an African, registered as a main roll voter. The Europeans registered as reserved roll voters. Those who were neither European nor African were at liberty to register on either roll.⁴⁸⁹ The reserved constituency scheme was meant to give representation to Europeans who were in the minority. Notwithstanding these innovations, a few long-standing practices and institutions were retained, among them the Parliamentary Secretaries, House of Chiefs; including the Public Service Commission introduced in the 1962 constitution to protect civil servants from political influence.

provision pertaining to stock, creating a departure from the original contract in respect of such stock. Any such law could be disallowed by Her Majesty through the Secretary of State. Stock in this respect meant the whole or part of the public debt of Northern Rhodesia.
⁴⁸⁹Ibid., 41 and 42.

The new position of Northern Rhodesia was short of full independence. The Territory had not yet attained the status of an independent sovereign nation with control over its international affairs. The Crown retained the power to amend the Constitution.⁴⁹⁰ The next constitutional step was the conferment of independence.

3. From Marlborough House to Independence

The general elections held in January, 1964 pursuant to the provisions of the 1963 Constitution ushered in an African government led by UNIP. The path to independence was opened and this called for a new constitution which would give the Territory status in the international community.⁴⁹¹ On 5 May, 1964 a conference opened at Marlborough House in London under the chairmanship of the Secretary of State for Commonwealth Relations and Colonies Mr. Duncan Sandys, to discuss the Independence Constitution for Northern Rhodesia.⁴⁹² The Conference sought to determine the changes necessary under the existing Constitution to establish an independent republic with a presidential system of government in Northern Rhodesia.⁴⁹³ It was the consensus of the Conference that the Independence Constitution should be on the lines of the 1963 constitution.

⁴⁹⁰Ibid., 56-7.

⁴⁹¹For details on the elections see Mulford, *Politics of Independence*: Hall, *Zambia*, generally.

⁴⁹²The Conference was attended by the governments of Britain, Northern Rhodesia, the Governor of Northern Rhodesia, Northern Rhodesia government officials, the ANC. and the United Progressive Party.

⁴⁹³See *The Report of the Northern Rhodesia Independence, 1964* (1964; Cmnd. 2365) , p. 4.

The Bill of Rights was retained with few modifications. Whereas the Constitution of 1963 permitted derogation of the fundamental rights and freedoms in case of a declaration of a full state of emergency and semi-state of emergency which brought into force the powers conferred on the Governor under the Emergency Powers Order in Council, 1939 and the Preservation of Public Security Ordinance respectively, there was no provision for the duration of either situation of emergency. This was left for the Governor to determine. Under the 1964 Constitution the position was altered in an effort to eliminate discretionary powers and limit abuse of power. The power to declare the state of emergency, previously enjoyed by the Governor, was vested in the President. Once the declaration was made it was to last for five days unless earlier revoked or ratified by Parliament, when in session, and for twenty-one days when Parliament was on recess. Once approved it was to last for six months and could be extended by the Assembly for another period not exceeding six months.⁴⁹⁴

The Constitutional Council was abolished, but members of the National Assembly were given the power to challenge the constitutionality of Bills approved by the Assembly and statutory instruments. Such an issue was to be determined

⁴⁹⁴See Arts. 26 and 29. Once a person was detained under the emergency regulations he was entitled within five days after the commencement of the detention to be furnished with a statement in writing in a language he understands specifying in detail the grounds of his detention. After 14 days from the date of detention his detention was to be gazetted. Every case was to be brought before a Tribunal initiated within one month after the commencement of the detention and thereafter every six months.

by a tribunal constituted by the Chief Justice. In the event of the Bill or statutory instrument being found inconsistent with the Bill of Rights the President had the option either to assent to it or to withhold his assent. In the event of the President withholding assent the Assembly had the right to pass it again and the President was obliged to assent to it or dissolve Parliament and call for fresh elections.⁴⁹⁵

Unlike most other former British dependencies the Constitutional Conference resolved that Northern Rhodesia should become independent with a presidential system of government as opposed to the Westminster system. The remarkable feature of the system is the extent to which the elements of the presidential system were incorporated into the 1963 Constitution.⁴⁹⁶ The Westminster constitutional model is premised on the principle of a parliamentary executive. The chief executive, the Prime Minister, is a member of Parliament. This was adapted, the President was not a member of the Assembly, though he together with the Assembly constituted Parliament and was at liberty to attend the Assembly at any time.⁴⁹⁷ The Prime Minister, on the other hand is primarily a member of Parliament. It was, however, different with ministers. The President was empowered to appoint his ministers, not exceeding fourteen and his Vice-President from among the members of

⁴⁹⁵Ibid., 27 and 72.

⁴⁹⁶See Nwabueze, *Presidentialism in Commonwealth Africa* (London: C. Hurst & Company, 1974) generally for a detailed examination of the system

⁴⁹⁷Art. 75.

Parliament.⁴⁹⁸ Continuous membership of the Assembly was essential for their continued occupation of the offices.

In a parliamentary system it is the legislature which constitutes the government, in that the support of a parliamentary majority determines the right to govern. The right to govern is vested collectively in the people's representatives in the Assembly. This is delegated to one of the members enjoying the support of the members in the Assembly. This principle was adapted in the Independence Constitution: both the President and Members of the House were popularly elected. The Presidential and Parliamentary elections were tied together, to give the President a popular basis while enjoying majority support in the House.⁴⁹⁹ The two elections took place at the same time. Each candidate for election to the Assembly was to declare in advance which presidential candidate he supported. Each voter was entitled to vote for the parliamentary candidate of his choice and the presidential candidate supported by that parliamentary candidate. The successful presidential candidate was one who received the highest number of votes.⁵⁰⁰ The President's right to govern was popularly conferred, therefore, strongly based on the legislature than under the Westminster system. Under the Westminster model the party members choose the Prime Minister. The leader of the Party with the highest number of seats in the legislature automatically became the head of government. He

⁴⁹⁸Ibid., 44 and 45.

⁴⁹⁹Nwabueze, *Presidentialism in Commonwealth Africa*, p.47.

⁵⁰⁰Art. 33 (4)

is the first among equals. Unlike the President the Prime minister is not chosen by the electorate.

In line with the classical constitutional tradition the Independence Constitution was totally silent on the economic, social and political imbalances associated with years of colonial rule, which the new Government was reasonably expected to address. The Constitution prescribed the various institutions of government and prescribed their respective powers and relationship with each other.

After the settlement of most constitutional issues the British Government decided that Northern Rhodesia as Republic of Zambia should attain independence on 24 October, 1964. On the election of the first President, the Conference endorsed the making of special provision before independence for the election of the first President by secret ballot among members of the Assembly.⁵⁰¹ Kenneth Kaunda with only two years experience in government was elected President by his peers.

Conclusion

The power relations in Northern Rhodesia were radically altered when the British Government assumed direct administration of the Territory 1924. This was somewhat disappointing to the settlers, who had hoped that with the elimination of the BSA Company in the Territory, they would assume internal self-rule, like their counterparts in Southern Rhodesia. They had come into Northern Rhodesia primarily to pursue their own interests.

⁵⁰¹*The Report of the Northern Rhodesia Independence, 1964* (1964; Cmnd. 2365), p. 7.

A number of factors worked to their disadvantage which benefited the Africans.

The hostile climate of Northern Rhodesia, the size of the Territory, the absence of precious minerals such as gold and diamonds, the declaration by the British Government that Northern Rhodesia was a protectorate and the treaties signed between the British Government and its agents on the one hand and the Litunga on the other hand altered the history of the Territory in favour of Africans. The climate and the absence of minerals discouraged the influx of white settlers. Only a small population of whites settled in the area, and the Imperial Government did not envisage such a population to grow. The few Europeans had no resource capacity to run a government in a huge Territory such as Northern Rhodesia; it was, therefore, unwise to grant them internal self-rule. The treaties signed with the Litunga placed obligations on the British Government as trustee of African interests. Internal self-rule could not be given to the white settlers without abrogating these obligations and departing from the declared status of Northern Rhodesia as a protectorate.

The constitutional changes introduced between 1924 and 1945 were compromises reached between the settlers and the British Government as trustee of African interests. The settlers were determined to assume control of the Territory and advance their own interests at the expense of those of Africans: either directly, by assuming internal self-rule, or indirectly through amalgamation of Northern Rhodesia and

Southern Rhodesia. Both options failed and emphasis was placed on partnership between Europeans and Africans.

Though the British Government was the trustee of African interests, until such a time that the Africans were capable of looking after their own interests, little was done to ameliorate their conditions towards the achievement of that goal. The colonial system of government was totally new to them. Education and actual participation were the most sure avenues towards the familiarisation with the operation of the system of government. But education for Africans was neglected. African involvement in the affairs of their own Territory was delayed until they had mobilised themselves into a strong force. As an interim measure their interests were pursued on their behalf by Europeans appointed by the Imperial Government.

The nature of the colonial system of government was authoritarian. The Governor, as an agent of the Crown, enjoyed greater powers than any other person or institution in the Territory. Both the executive and legislative powers were vested in the Crown and exercised within defined limits by the Governor. The traditional devices and practices which constitute the cornerstones of Western constitutionalism were unknown until a year before independence. The Colonial Government was subordinate to the Imperial Government both on external and internal matters.

Constitutional development in Northern Rhodesia meant the gradual alteration of the composition of both the Executive and Legislative Councils to allow for greater

presence of elected members. It also meant empowering Africans to participate in the government of the Territory by extending to them membership of both the Legislative and Executive Council, and giving those Africans who had attained a prescribed level of education or wealth the right to vote. The final stage before independence could be granted was to transform the authoritarian constitutional order into one emphasising constitutionalism.

The emergence of a strong African voice and the formation of African political parties changed the political scenario of Northern Rhodesia. There was a general move from separate representation for Africans and Europeans to a fused electoral system. The constitutional changes of 1959 and the Constitution of 1962 were the most complex formulations and important attempts to devise constitutional orders relevant to the contending interests within Northern Rhodesia. The 1963 Constitution, though it was an adaptation of the 1962, was largely dictated by the Africans who had then formed a coalition government. The formation of the UNIP and ANC government was the fulfillment of the British Government's historical mission of raising a backward and uncivilised people to the level where they can take part and win an election, and form a government. Everything else thereafter followed as a matter of course.

Although the Africans made constitutional proposals which were embodied in the Constitution of 1963, it does not follow that the Constitution was relevant to Northern Rhodesia at the time. What they had in mind was a

constitution similar to that in place in England. They had no other perception of a constitutional other than the Westminster model. This partly explains why most of Kaunda's proposals on key issues were fully endorsed by the British government.

CHAPTER FIVE

THE RECONSTITUTION OF THE CONSTITUTIONAL ORDER: 1964 - 1991

Introduction

The period October 1964 to October 1991 provides an opportunity to test the performance of the Independence Constitution, the One-Party Constitution, the theories underlying them and response to economic, social and political forces in Zambia, during the same period. It also accords an occasion to examine the attitude of the new African leadership to the new Constitution.

I. Economic, Social and Political Forces and Constitutional Government

The Independence Constitution, like many other constitutions drafted according to the classical constitutional perspective, was designed to promote constitutionalism and democratic rule. Constitutionalism rests on two basic tenets: limited government and the protection of individual human rights. Under such a constitutional arrangement the citizens are expected to feel free to criticise and censure the government without fear of any reprisals. Government is in turn expected to respond to constructive criticisms and suggestions.⁵⁰² The Bill of Rights guaranteed the traditional civil and political rights and freedoms, but was silent on people's

⁵⁰²Kivuta Kibwana, "Development of Democratic Culture and Civil Society in Africa: An Analysis of Relevant Constitutional Initiatives and Models", *Lesotho Law Journal* 6 (1990), 14.

economic and social needs. The constitution placed no obligation on government to use the state institutions to address the problems of hunger, poverty, ignorance and disease. Such problems are to be resolved through the industry of individuals. The government can either on its own motion or in response to pressure exerted by the electorate address these issues.

Notwithstanding the silence of such constitutions on people's economic and social needs, conclusions in most inquiries initiated to determine the extent of constitutional rule and democracy in post-independence period in Africa, which they professed to uphold, have been depressing.

Africa's experience with constitutionalism has not been a happy one in the last thirty years since most Sub-Saharan countries became independent. The great enthusiasm of the early 1960's that greeted new constitutions providing for democracy, rule of law, and guarantee of human rights has, in many places, been dashed by military coups, emergency decrees, suspensions of constitutional guarantees, and autocratic abusive rule.⁵⁰³

Nwabueze also concludes:

Erosion of the foundations and principles of constitutionalism there certainly has been. This erosion has had many causes.... Underlying these causes is the constitution's lack of legitimacy for the masses, and perhaps more disastrous, for the ruling politicians. Politicians in developing countries are yet to develop the right attitude towards the constitution; they are yet to learn to regard and respect it as an 'umpire above the political struggle' and not as 'a weapon in that struggle which can be used and altered in order to gain temporary and passing advantages over one's political opponents. The constitution lacks sanctity because the values and ideas which it

⁵⁰³*Third World Legal Studies* - 1988, xi (See Foreword by Jeswald W. Salacuse.)

enshrines are different and opposed to those of the rulers and society alike.⁵⁰⁴

Nwabueze notes that while a constitution is meant to limit the arbitrariness of discretion, the politicians' orientation was authoritarian. They tended to be impatient with, and want to break away from all constitutional restraints. If the constitution proved an obstacle, then it had to be by-passed or made to bend to their desires. The result was a systematic perversion of the institutions and processes of government coupled with a spate of amendments to the constitution.⁵⁰⁵

Lawrence Zimba, writing on the Zambian Bill of Rights twenty years after independence, noted the absence of respect of human rights. The Bill of Rights in its operation as an apparatus to limit the actions of government had made very little impact. In practical politics of African states Bills of Rights have a decorative existence.⁵⁰⁶ Chanda, writing on the same subject nearly a decade later, echoed the same conclusions and catalogued the extent of human rights violations.⁵⁰⁷ Sondashi in his study on democratic responses of Zambia's Single-Party Presidentialism, concludes that the obstacle to ensuring democracy in Zambia was the exaggerated role of the ubiquitous mass party and Presidentialism.⁵⁰⁸

⁵⁰⁴Nwabueze, *Constitutionalism in Emergent States*, p.301.

⁵⁰⁵Ibid.

⁵⁰⁶Zimba, *Zambian Bill of Rights*, p. 199.

⁵⁰⁷ See generally Chanda, "Zambia: A Case Study in Human Rights in Commonwealth Africa."

⁵⁰⁸ See generally Sondashi, "Zambia's Single Party Presidentialism," especially Chapters Four and Five.

That there has been failure of constitutional government, good governance and violation of basic rights is not in dispute, but what needs examining are the underlying causes. Nwabueze has singled out the attitude of the leadership as one of the reasons. This still does not explain the reason for that attitude. Most studies undertaken to examine the extent to which constitutional government has operated, and human rights upheld in Zambia have not focused on the various forces at play in Zambia. Human rights⁵⁰⁹ and constitutionalism⁵¹⁰ are considered on the presumption that they have universal application despite the economic, social, cultural and political differences between Zambia and the Western societies where the ideas emerged. The ideas may enjoy universal validity, but they cannot be articulated in the same way wherever they are transplanted. Even if the fundamentals of the concepts were to be accepted, it is imperative to examine the prospects of implementing them given each society's unique economic, social, political and other factors

⁵⁰⁹ See Issa Shivji *The Concept of Human Rights in Africa* (London: Codesria Book Series, 1989). In this work the writer has outlined the main debates on human rights and has also tried to build a new perspective on human rights in Africa taking into account the unique factors present on the continent.

⁵¹⁰ See Nwabueze, *Constitutionalism in Emergent States*, generally. The writer has taken the concept of constitutionalism as propounded by Western liberal writers and the minimum conditions set, to examine the extent to which the concept has been applicable in Africa. The uniqueness of the African material conditions have not been considered.

present. The idea of constitutionalism or human rights cannot be considered in a vacuum.⁵¹¹

Zambia's boundaries, for instance, were a consequence of European administrative convenience and rivalry among the contending imperial powers. Constitutionalism was never the basis of Colonial Government until a year before independence. The recognition and protection of human rights was unknown until 1963.⁵¹² Throughout the period of colonial rule constitutional provisions or models were drawn from prototypes familiar to lawyers and constitutional drafters in the Colonial Office. The consequence was that constitutions were based on assumptions common in Western societies.

The problems which have dogged Zambia from independence are quite monumental and constitutions have been silent about them. Immediately after independence Zambia was faced with the task of forging the bonds of national unity and nationhood and encouraging wider loyalties beyond tribal or regional boundaries. Different socio-political organisations existed in Zambia, ranging from centralized kingdoms of the Lozis in Barotseland to

⁵¹¹The Workshop organised by the Third World Legal Studies Association in 1988 in Antwerp, Belgium, noted the dynamism of human rights law. It is an ever expanding body of general principles capable of adaptation and application to the basic concerns of people living in widely different and often changing societies. Its dynamic character suggests that it is a body of general principles which can be locally adapted to meet the needs of different peoples in different context. See James C. N. Paul, "Developing Constitutional Order in Sub-Saharan Africa: An Unofficial Report", *Third World Legal Studies - 1988*, 31.

⁵¹²For an inquiry into the position of human rights during colonial rule see Chanda, "Zambia: A Case Study in Human Rights in Commonwealth Africa", Chapter Two generally.

the stateless societies of the Mambwe in Northern Province. European contact led to the reconstruction of the nations into what became Northern Rhodesia. The determination of boundaries was arbitrary without regard to the pattern of traditional allegiance.⁵¹³ Unity among tribal groups was sustained through treaties, which recognised the rights of the local rulers such as the Litunga of the Lozi, and by force as among the Ngonis and Bembas. Independence promised freedom from all forms of subjugation, which kept various tribal groupings under a semblance of unity. It was therefore the task of the new Government to keep the country together even in the face of the newly found freedom and right of the various tribal groupings to self-determination, denied to them under colonial rule.

The complexity of the situation is amply illustrated by the signing of the Barotse Agreement between the Lozi Royal Establishment and the new Zambian Government aimed at preserving after independence, the autonomy the former enjoyed through various treaties with the British Government and its agents. Without such an agreement Northern Rhodesia was unlikely to emerge a united independent state. The agreement was abrogated but today with the reintroduction of political pluralism there are demands to restore the Agreement. The claim, though not yet well articulated, is for self determination within the confines of Zambia and not secession.⁵¹⁴

⁵¹³Paul Cammack, David Pool and William Tordoff, *Third World Politics* (London: Macmillan, 1991) pp. 12-3.

⁵¹⁴For a detailed discussion on self-determination see Abdullahi Ahmed An-Naim, "The National Question, Secession and Constitutionalism: The Mediation of Competing Claims to

The second problem was to transform, immediately after independence, Zambia's economy without unleashing social turbulence and economic chaos. The communication network in the Territory was developed according to the needs of the British entrepreneurs. Copper was the principal commodity for export to European markets at prices which fluctuated. In return the Territory imported finished goods mainly from England at prices subject to the inflationary pressures of the British domestic economy.⁵¹⁵ Africans were frustrated in their economic activities in order to protect and promote the primary products produced by Europeans. African economic development was possible only if it did not threaten European commercial interests.⁵¹⁶

The creation of the mining industry increased demand for food on the Copperbelt. African response to the demand was positive, their sales of maize rose from 30,000 bags in 1930 to 100,000 bags in 1935. The depression of the 1930s affected the mining industry leading to the shrinkage of the market for farm produce. This in turn created competition between European and Africans farmers, which was resented by the former. This, coupled with growing unemployment among Europeans, prompted the Colonial

Self-Determination" *An African Debate on Democracy*, ed. Issa Shivji (Harare: SAPES Books, 1991), p. 102. Though national unity is desirable, nevertheless it should not be pursued at all costs: See also the *Report of the Constitution Commission, 1991*, p. 284. It was the general feeling of the people that the Agreement should be restored. The Commission was of the view that the Agreement was an issue outside its competence.

⁵¹⁵Cammack, *Third World Politics*, p. 20.

⁵¹⁶Ollawa, *Participatory Democracy In Zambia*, pp. 76-81.

Government to take measures to protect European farmers. In 1936 the Maize Control Board was created. It was empowered to purchase and sell maize at fixed prices. The grain market was divided into two: one for domestic market which was above the world market and the other, which reflected the world market price movements. African farmers were allocated only one quarter of the domestic market and Europeans three-quarters.⁵¹⁷ The railway network was constructed to assist the transportation of copper. On attaining independence the new Government had the task of addressing the economic imbalances associated with many years of colonial rule.

The third task was to industrialize the economy and introduce a sound system of agriculture. The fourth and final task was to eradicate poverty, disease and illiteracy: raise the standards of living of the people. These problems had to be resolved on a very limited resource base. The assignment was one of transforming a backward country into a modern state with all trappings of a developed country. To compound Zambia's position, less than a year after independence, Southern Rhodesia unilaterally declared independence. Zambia's route for imports and exports to the world market was cut-off. Alternative, but expensive, routes were established.

The Independence Constitution was silent on these issues, which are so critical to the success of any democratic order. They are so critical that like the problem of abuse of power, they have assumed constitutional

⁵¹⁷Ibid.

significance. They cannot therefore be left to discretion of the government in power. Through popular consensus the constitution must address them and every government must be obligated to devise policies aimed at addressing them and avoid taking measures which may worsen them.

Though it was generally acknowledged that the Constitution should have relevance to local conditions, the influence of the classical constitutional perspective is glaringly obvious. Both the British Government and the Northern Rhodesian delegation reduced constitutional talks to power, how it was to be distributed to the various organs of government. There was no discussion on the relationship between the Constitution and the many social, political and economic problems facing the country. Such an attitude is unproductive and has continued to this day. Ojwang writes:

The Western influence in constitutional practice, which comes firstly through the colonial connection, secondly through suzerain-managed constitution-making at independence, and thirdly through the reception of standard western-type public institutions (such as parliaments, courts, public service etc.) naturally has the effect of lodging within African governmental institutions elements of the liberal traditions - this for good measure given the adopted educational traditions and approaches to scholarship and legal thought.

It is obvious that such developments, coming so early in the history of African nationhood, led to serious potential contradictions between institutional values and philosophies evolved under western material conditions, and the hard reality of Africa, which is dominated by gravely depressed economic and social conditions, and by cultural orientations altogether alien to the west.⁵¹⁸

⁵¹⁸J. B. Ojwang, "Liberal Values in African Constitutional development: Some Reflections" *African Society of International and Comparative Law* 3 (1991), 19.

The Western liberal ideas and associated political and constitutional traditions are often presented as solutions to all problems of organisation and management of society. As part of the problem most scholars tend to treat constitutions as a static phenomena frozen at a particular moment in time in a photograph from which the background has been carefully excluded.⁵¹⁹

This scholarly disposition is a direct result of analytical positivism. The primary function of a constitution is to limit governmental authority and regulate the political process. Its origin lies in the liberal democratic tradition and forms the backdrop of many arguments among politicians and academics about the correct exercise of power in Africa. According to this view, there can be no constitutional government unless a mechanism exists within the constitution limiting the exercise of power. Such mechanism must be erected upon the doctrine of separation of powers and the principle of limited government both of which must conform to the theory that government itself ought, at all times, to conform to the rule of law.⁵²⁰

It is unfortunate that lawyers and political scientists have not taken full note of the relatively long historical process during which the institutional basis of Western liberalism has been falling apart in Africa. Many have merely passed censorious judgment on the non-practice

⁵¹⁹H.W.O. Okoath-Ogendo, "Constitutions Without Constitutionalism: Reflections on an African Political Paradox," *An African Debate on Democracy*, p. 3.

⁵²⁰Ibid., p.4.

of these values, placing themselves in a complacent and unconstructive intellectual posture and becoming unhelpful in any quest for solution to the constitutional problems being experienced.⁵²¹

The Western liberal ideas embodied in the Independence Constitution emerged from a social setting with specific economic, social and political conditions and totally different from those in Zambia. Furthermore, they were imported into Zambia two years before independence, whereas the preceding seventy years were years of absolute rule. The new ideas had no time to take roots and the institutions which supported the colonial autocratic regime were not fully adapted to the new demands of democracy and constitutional government, when political power was given to the new African leaders.

The need to limit government and guarantee constitutionalism is real, so is the need to address the pressing economic and social problems confronting the country. How then did the new African leaders respond to these forces?

II. The Remaking of the Constitution⁵²²

The Independence Constitutional framework went through a series of amendments with the consequence that by 1991, when the new constitutional order was put in place, its original structure designed to guarantee constitutionalism,

⁵²¹Ojwang, "Liberal Values in African Constitutional development: Some Reflections", p. 27.

⁵²²In this part of the Chapter we examine how the constraints outlined above influenced the alteration of the constitutional order left at independence.

and democratic governance had radically changed. The Constitution, which was initially viewed as an umpire became an instrument of manipulation whenever it was convenient for the political leadership. Most constitutional changes were justified on the premise that they were meant to make the Constitution truly Zambian and relevant to the Zambian conditions. But the net effect, consciously or unconsciously, was that the power relations were recreated and all organs of government became subordinate to the President, the position the Governor enjoyed before the attainment of internal self-rule. The most important change was the reconstitution of the constitution to provide for one-party system of government.⁵²³

After the 1991 Constitution was in place, following demands for constitutional government, democracy and human rights, it is appropriate to determine the net effect of the reconstruction of the independence constitutional framework. Three principal aspects stood out by 1991: There emerged the predominant position of the President similar to that enjoyed by the Governor of Northern Rhodesia before the attainment of responsible government. Secondly, contrary to the vision of the departing colonial administrators, instead of the political arena expanding to

⁵²³Various scholars have undertaken studies on the suitability and viability of the changes. But none of them has inquired into the general reconstitution process of the Independence Constitution and the forces behind it. See Sondashi, "Zambia's Single Party Presidentialism". Sondashi has inquired into democratic responses of Zambia's one party system: Chanda, "Zambia: A Case Study in Human Rights in Commonwealth Africa", has focused on the respect and observance of human rights under one-party rule.

encourage competition for political power, there occurred a shrinkage. The third aspect was the rise of the pre-eminence of discretion as the basis of constitutional powers. We examine each aspect.⁵²⁴

1. President the Reincarnation of the Governor

From 1924 until 1963, just a year before independence, when responsible government was introduced in Northern Rhodesia, the Governor was the most powerful person in the Territory. He was above all organs of government. Most of the nationalist leaders lived in this period and felt the impact of the powers he commanded. Within Northern Rhodesia he was answerable to no one and his term of office was indeterminate and depended on the Crown. The position changed at independence. The President who took over from the Governor as head of state and government was fettered in the exercise and discharge of his functions as the chief executive.

The presidential system of government prescribed for Zambia is a blend of two constitutional arrangements, which are dominant in the classical constitutional perspective: the Westminster and American constitutional models. Within a few years after independence the President assumed the imperial character of the Governor. There are two reasons for this development: there were inherent defects within the Independence Constitution which conferred upon the President powers which are not enjoyed by his counterpart

⁵²⁴See also Okoth-Ogendo, "Constitutions Without Constitutionalism: Reflections on an African Political Paradox", generally.

in the US.⁵²⁵ Secondly, upon assuming the reigns of power the new government in a genuine effort, in the first few years of independence at least, to re-organise the constitutional framework to address the social, political and economic conditions inherited, conferred extreme powers upon the President. In real terms what was re-constituted was the Constitution and instead of being the umpire in the power process, it became an instrument of manipulation with the consequence that the President became an all powerful person subordinating all other institutions of government.

(a) The President and other Organs of Government

Beginning from 1964 constitutional changes were initiated, which radically altered the foundation settled at independence, and brought into question the legitimacy and relevance of the Constitution in the post independence era. Considered in their totality the changes depict efforts to reorganise the constitutional order and recreate the authoritarian system of government in place before independence. The impact of the exercise is evident in the relationship between the President and other institutions of government.

From 1899 when the Barotziland North-Western Rhodesia Order in Council was enacted the administrative powers of the Territory were vested in the High Commissioner, who was empowered to appoint the Administrator and any other person deemed necessary from time to time for the administration

⁵²⁵See Nwabueze, *Presidentialism in Commonwealth Africa*, pp. 104-8. Nwabueze has discussed this point in detail.

of the Territory.⁵²⁶ The High Commissioner also made the law for the Territory. Apart from exercising both the executive and legislative functions he was empowered, contrary to the established British tradition, to discipline the Administrator and any other officer working under him. The High Commissioner also retained the absolute power to restructure the government administrative structure as dictated by the needs of the time.

Similarly, in North-Eastern Rhodesia the BSA Company, in whom administrative powers were vested, enjoyed unlimited power to discipline the Administrator and junior officers, and re-organise the government machinery at any time without restraint.⁵²⁷ Under the Northern Rhodesia Order in Council, 1911 the Company retained the power to discipline the Administrator and those under him.⁵²⁸ The Company had unrestricted power to reconstitute the territorial administration in any manner it deemed appropriate in order to meet its obligations under the Charter and Orders-in-Council. The position did not change in 1924 when the British Government took over direct administration of the Territory. The general bureaucratic responsibilities were vested in the Governor. He was empowered "to constitute and appoint or authorise the appointment of such public officers for the administration of the Territory and under such designations as he may

⁵²⁶See Arts. 5 and 6.

⁵²⁷See Art. 8 of *North-Eastern Order in Council, 1900*.

⁵²⁸Art. 9.

think fit and may prescribe their duties...."⁵²⁹ Equally included was the power to discipline such officers.

These were the powers enjoyed by the Governor and his predecessors until 1963 when the first constitution prescribing responsible government was enacted. He enjoyed great latitude in the organisation and reorganisation of the government machinery including the discipline of the civil servants. As the Territory steadily moved towards self-rule more constitutional devices aimed at curtailing these powers to conform to the classical constitutional perspective, were put in place. Under the 1962 Constitution the Public Service and Police Service Commissions were created as mechanisms designed to protect the civil servants from political control and influence.⁵³⁰ As checks they were limited in their effectiveness: the Governor's long standing power to constitute, in his own discretion, such offices as may be lawfully established and abolished was retained. Equally retained was his power of appointments, promotion, and transfer of any personnel deemed necessary. Though the power to dismiss, discipline, suspend any public officer was still vested in the Governor, for the first time he was required to consult the Public Service and Police Service Commissions.⁵³¹ Public Servants were being gradually removed from the control of the politicians to that of independent bodies.

⁵²⁹Art. 16, *Northern Rhodesia Order in Council, 1924.*

⁵³⁰See Art. 76(1), *Northern Rhodesia (Constitution) Order in Council, 1962.*

⁵³¹*Ibid.*, Art. 75 and 76.

The Constitution of 1963 went further and made provision for an elaborate and refined mechanism. Other commissions were included. Excepting those holding constitutional offices, the power to appoint any person to hold or act in any position in the Public Service, including the power to confirm appointments and exercise disciplinary control was vested in the Public Service Commission.⁵³² The Governor's powers of appointment and discipline were restricted to holders of constitutional offices. Even then he was required to appoint a tribunal to investigate the allegations. The tribunal could recommend either a dismissal or any other action.⁵³³ The Governor's power to control civil servants was effectively curtailed, and a wide chasm was created between politicians and civil servants. Such arrangements did not exist until independence for the Territory was certain.

Under the 1964 constitution the position was retained.⁵³⁴ The power to appoint, remove or discipline any civil servant was vested in the President. But in the case of the Secretary to the Cabinet, Permanent Secretary or Commissioner of Police, such powers were to be exercised in consultation with the Public Service Commission. For any other officer the powers were exercised by the Commissions on behalf of the President.

On attaining independence the new political leadership found certain offices entrenched and the holders of such

⁵³²See Art. 101(1), *Northern Rhodesia (Constitution) Order in Council, 1963.*

⁵³³*Ibid.*, 102(5).

⁵³⁴Art. 115.

offices were beyond their disciplinary control, a position which the Governor did not experience. The fetters constrained the new government's ability to reorganise the State machinery to address the needs of the time. From the classical constitutional perspective this was in order. From the anti-classical constitutional perspective, this was no doubt unacceptable as the constitution should not only constrain but also enable Government to use its institutions to meet people's most pressing needs. The conflict between the two perspectives is largely where to draw the line.

At independence the people looked to the new government to address all the imbalances and injustices created by years of colonial rule and modernise the country. This required new decision making institutions. But the ability to do so within the constitutional framework created at independence was restricted to the extent that the new Government could not rid itself of the colonial civil servants. Bihari writes:

The State apparatus is made up of confidential men of the former ruling class who, owing to their social background, attitudes, legal, political and moral views, cannot and as a matter of fact do not want to serve the new power.... There are two possible attitudes for any new government ruling class towards the old apparatus: whether to compel it to obedience through a series of reforms, winning over new causes through compromises - or to destroy it and create a new state organisation.⁵³⁵

The dilemma illustrates the difference between the classical and anti-classical perspectives. The former

⁵³⁵Bihari, *The constitutional Models of Socialist State Organization*, p. 30: Also Seidman, *Perspective in Constitution-Making: Independence Constitution for Namibia and South Africa*, p. 68.

perceives the state as a neutral tool. The same civil servants who served the Colonial Government were so value neutral that they were expected to serve the new African Government in addressing the problems inherited at independence. The state is seen as a neutral institution, good for all times and places.

The anti-classical perspective disputes the neutrality of the state machinery. The law which creates the state structures is not neutral hence the structures themselves so created can never be neutral. This is supported by the very evolution of the constitutional framework. When the British pioneers entered the area which became known as Northern Rhodesia they perceived the tribal groupings, then in place, as backward and in dire need of civilisation. They reorganised the social formations they found into something they were familiar with. They used the law to prescribe certain institutions and practices aimed at influencing people's behaviour in the way they desired. They were primarily being moved by their own values. Every law explicitly or implicitly prescribes behaviour.⁵³⁶ Neither law nor legal institutions are value free. It follows, from the anti-classical perspective, that the state machinery left behind at independence, including the personnel had loyalties and values which grew up to meet the needs of the colonial system of government, which had the seat of authority in England, and, therefore, inadequate for Zambia desperate to address the most pressing needs of the people. The conflict had to be

⁵³⁶Ibid., pp. 65-66.

resolved: either compel the civil servants to obedience through reforms and win them through compromises, or destroy the administrative structure and replace it with a new state order. The latter option was adopted. The bureaucratic arrangement was systematically altered to the point that the entire state machinery was subordinate to and supportive of the new chief executive. This, in principle negated the theory of neutrality of state machinery.

The first step towards this objective came in 1969. Article 47 of the Constitution provided for the post of Secretary to the Cabinet, which was a public office. His function was to act as a link between the political leadership in Cabinet and civil servants. The position was occupied by a non-partisan candidate. This curtailed the President's power to influence the Secretary to the Cabinet and manipulate the state machinery. A constitutional amendment altered this position: in place of the Secretary to the Cabinet the office of Secretary General to the Government was created. He was appointed by the President alone. With this amendment the Public Service Commission, as a buffer between the civil servants and the politicians was removed. The Secretary General to the Government was responsible for securing the general efficiency of the public service. Through him the President was guaranteed of unrestrained ability to influence the public service.⁵³⁷

⁵³⁷See *Constitution (Amendment) Act, 1969*

The choice of the candidate was that of the President, and he could even be a member of his party.⁵³⁸

The new Government went further to repeal Article 56 of the Constitution with the consequence that the President assumed powers to declare any office constituted by him that such an office was not an office in the public service, without consulting the Public Service Commission. Though he enjoyed this power before, he could only exercise it in consultation with the Public Service Commission. The effect was that appointments to non-public service offices was absolutely under the control of the President. Once an office had been so declared it ceased to be under the control or influence of the Public Service Commission. Through these amendments the President assumed the same powers enjoyed by the Governor in his relationship with the civil servants.

In these early days of independence it is difficult to doubt that the changes were made out of the genuine need to redesign the government machinery in order to address the inherited problems. The Vice-President forcefully argued:

The Secretary General to the Government who will combine the functions previously performed by the Minister of State for Cabinet and Civil Service and the Secretary to the Cabinet, will therefore be the head of the Civil Service and as such will be responsible for presiding over the transformation of our British oriented Civil Service into a truly Zambian Civil Service designed to service the interests and ensure the development of Zambia. The appointment of a Secretary General to the Government is the first step towards accomplishing this transformation. (emphasis is mine)⁵³⁹

⁵³⁸The first Secretary General to the Government was Mr. John Mwanakatwe who was a member of UNIP.

⁵³⁹Legislative Council Debates col. 63 (29 January, 1969)

Kapwepwe further argued,

The Civil Service we inherited at independence was principally designed for the maintenance of law and order in the interest of the Colonial Government of that time and not for those of the majority of the people. The Civil Service was not designed for development administration.... The main difference lies in objectives, methods, spirits and prospects. It will be the work of the new Secretary General to translate these administrative reforms into an efficient civil service machinery geared for rapid development in all the corners of the country".
(emphasis mine)⁵⁴⁰

For a country deep into problems inherited at independence, and whose leadership came to power promising to address the imbalances created by years of colonial rule, the argument is no doubt sound. But whether they would indeed use the power to attain the development goals is another issue. Even if the objectives are not realised that does not negate the reasons advanced for the change.

The amendment reflected an attempt to reorganise the civil service to bring it in line with the needs of the time. It needed to be transformed into an instrument of development relevant to the economic, social and political forces at play in Zambia. Sikota Wina also argued:

I think that we have set up a firm pattern in this House and in this country and that is that we are not going to imitate what happens in Britain. If Britain appoints a civil servant as Secretary to the Cabinet that does not necessarily mean that Zambia has got to appoint a civil servant as Secretary to the Cabinet ... the real problem which we are faced with here is really the question of coordination. In a new and developing country where you have got to merge the Party with the Government in order to get the Party and the Government and the people off the ground, so that instead of grumbling they are doing something, you have got to get a very close liaison between the ruling party and Government.⁵⁴¹

⁵⁴⁰Ibid. cols. 62-63.

⁵⁴¹Ibid. cols. 75-6.

Through the Independence Constitution the Imperial Government attempted to inculcate into the new political leadership a tradition which evolved in England over centuries, which they did not themselves practice throughout the colonial period. The mechanism could not be justified in the face of the pressing needs for rapid development, which required the government to take a leading role. Whereas the British colonial system of government was founded on the trust of the man right in the field and not law at independence emphasis changed and law became a crucial restraint mechanism.

The reorganisation of the constitutional order can be justified in the light of the constitutional making process which was adopted. The Constitution was dictated upon the new African leadership, though they attended the Constitutional Conference. The strategy of nationalist leaders has been to secure political independence first and eliminate external influence of the Imperial Government, thereafter adjust the constitutional framework as they deemed appropriate.⁵⁴² This would not have been the problem

⁵⁴²See E. J. M. Zvobgo, "The Zimbabwe Constitution After four Years of Independence", *Public Law* (Autumn 1984), 447. Also Hatchard and Slinn, "Towards an African Zimbabwean Constitution?", p. 119. In this Article the writers have demonstrated how the Zimbabwean Constitution, designed to protect private property and entrench minority privileges, was systematically altered to respond to the post-independence problems the country was facing: a plural society plagued with inter-ethnic rivalries, an agriculture sector in need of reform in order to meet the aspirations of the rural poor, who hoped and deserved to be the chief beneficiaries of the war of liberation. All these factors affect an exercise in constitutional engineering whereby the governing party sought to remodel the constitutional order so as to create a legal environment more compatible with the political culture and the social and economic circumstances of the country.

if there was a consensus on constitution-making strategy and the final constitution. Arguments that the constitution needed to be brought in line with the social factors present in the country would have been unconvincing.

(b) The Referendum to End all Referenda

Throughout the colonial era the power to change the constitutional framework was vested in the Crown; such power was not limited in any way. The constitutional changes were predetermined for most of the colonies under British rule until independence. Apart from providing the traditional restraint mechanisms, certain parts of the Independence Constitution were entrenched. Inquiry into this issue is important in that it illustrates how the President as the chief executive dealt with the problem which his predecessor never experienced.⁵⁴³

The President was under obligation to the electorate to address their demands, but the demands had to be pursued within the parameters set by the Constitution. Whereas the Governor reigned at the time when the ruling idea was that good men and not good law make good government, at independence this changed: good laws and institutions and not good men make good government. But the autarchic nature of the Colonial Government was far too deeply rooted to be eradicated through constitutional prescriptions.

To amend some parts of the Constitution, in addition the two thirds majority, a referendum was needed in which

⁵⁴³The Governor was not constrained by the constitutional order in that he was the delegate of the Crown who made the constitutional framework and did not represent any other interest other those of Her Majesty.

50 per cent of the registered voters were required to vote in favour of the amendment. This was viewed as an effective restraint mechanism to forestall alteration of the Constitution guaranteeing constitutional government.⁵⁴⁴ Article 72(3) of the Constitution entrenched the referendum clause and the Bill of Rights. Dicey notes on the referendum in Switzerland that it "is an institution of native growth, which has received there a far more complete and extensive development than in any other country."⁵⁴⁵ It is an agreement by which no amendment or alteration in the constitution comes into force until it has been submitted to the vote of the citizens who actually vote. Northern Rhodesia had no history of such a referendum mechanism until 1964. Whereas in Switzerland it is an home grown mechanism, in Zambia, it was introduced from above. The reaction of the new government was that such a constitutional provision was an unnecessary fetter for people in a hurry to address the imbalances and injustices perpetrated by years of colonial rule.

In 1969 the National Assembly endorsed the repeal of Article 72(3) of the Constitution.⁵⁴⁶ This was followed by

⁵⁴⁴In recent times constitution-makers seem to go even further. Article 131 of the Namibian Constitution bars any amendment or repeal of any provision of the Bill of Rights. Article 74 of the South African interim constitution bars any repeal or amendment of Article 74 itself and the constitutional principles to guide the drafting of the final South African Constitution, by a constituent assembly. How far such provisions will hold in the face of the many social, political and economic problems facing these countries is yet to be seen.

⁵⁴⁵A.V. Dicey, *Introduction to the study of the Law of the Constitution* (London: Macmillan & Company Limited, 1952), p. 615.

⁵⁴⁶*Constitution (Amendment) (No. 3) Act of 1969.*

a referendum in which people voted in favour of the removal of the clause.⁵⁴⁷ The reasons advanced for the change are worth noting and quite genuine to some extent in the light of the problems inherited. The desire to ensure constitutional government must be balanced against the need to address other problems facing the people, and the cost of constitutional government must be balanced against the cost of resolving the problems of hunger, poverty, disease and ignorance, which work against people's dignity.

For people who spent nearly a century under subjugation there is an overwhelming temptation to remodel the constitution and give it an autochthonous character and eliminate everything possible which would remind them of years of oppression. Such an urge is quite understandable. Though the new leadership attended the Conference at which the general framework and principles of the Constitution were settled they had limited input into the final document. The making of the new Constitution merely entailed the adaptation of the Westminster constitutional model of 1963. But the position would have been different had a popular constitution-making process been adopted, such as through a constituent assembly. The African leadership would have easily identified themselves with the Constitution, and considered it as their own.⁵⁴⁸

⁵⁴⁷For detailed analysis of the results of the referendum see Anirudha Gupta, *Government and Politics in Africa* (New Delhi: Vikas Publishing House PVT. LTD., 1975), p. 127.

⁵⁴⁸The Namibian Constitution was drafted by a constituent assembly and that of South Africa was drafted by the Multi-Party Negotiating Constitutional Conference, where reasonable representation was obtained. The final constitution is to be prepared by a constituent assembly made up of members of the two Houses of Parliament. The

Vice-President Kapwepwe speaking in support of the motion argued: "...it is the opinion of the Government that the Constitutional requirement for a two-thirds majority to be obtained in the National Assembly for any proposed amendment to the constitution is a sufficient expression of the will of the electorate, as members of the Assembly are the elected representative of the people of Zambia and entitled to speak on all matters on behalf of their constituents."⁵⁴⁹ Kapwepwe went on: "It is clear that the constitution of any country must reflect the national will of the citizens of that country, and this can be expressed either through the expensive and cumbersome process of national referendum or through the citizens elected spokesmen in the national Parliament."⁵⁵⁰

To Kapwepwe and the Government the Constitution was the hybrid child of the political compromise during the months before independence. In 1964 it was accepted as a welcome basis for the independence. It was a document

making of the Constitution of India is equally instructive on this point. The Indian Independence Act of 1947 set up two independent countries known as India and Pakistan. The Act left it to the constituent assembly in each country to draw up a constitution. The Indian Constitution has been described as: "The law of our constitution is partly eclectic but primarily an Indian-Anglian version of the Westminster model with quasi-federal adaptations, historical modifications, geo-political mutations and homespun traditions - basically blended view of the British Parliamentary system, and the Government of India Act, 1935, and near-American, nomenclature - wise and in some other respects. See Krishna Iyer J. in *Samsher Singh v State of Punjab* A.I.R. 1974 SC. 2192, 2212: quoted from Dale, *The Making and Remaking of Commonwealth Constitutions*, p. 71. The Indian Constitution has stood robust with very few amendments and the original framework has been maintained. This is largely due to its making process and support it received.

⁵⁴⁹Legislative Council Debates col. 2169 (16 April, 1969)

⁵⁵⁰Ibid.

fashioned to meet the needs of Zambia, not by Zambians, but by the British. If the Constitution was to reflect the continually changing and developing will of the citizens of Zambia more radical changes were necessary.⁵⁵¹

The constitutional amendment was seen as a move towards the acquisition of the country's identity, without which independence was meaningless. To appeal to people's emotions and sense of nationalism Kapwepwe argued: "No true Zambian can stand in opposition to the proposal contained in this Bill for a vote for the retention of all that is British in our Constitution and the rejection of an opportunity to Zambianise that which determined the very character of our nation." ⁵⁵² Sikota Wina brought in another dimension to the debate:

If we are going to reach a stage whereby at every turning we have got to run back and print ballot papers again to vote, we might find ourselves in a position where in one year it might be necessary to change the very small parts of the constitution four times, that is K 1 m. spent on asking people questions which were obvious in the elections. That K1 million might have been used for the construction of more than thirty schools throughout the country, they might have been used for the construction of 500 miles of road, good gravel road. This is the money now which they propose we should spend on future exercises of this nature. We expect this referendum to be the first and the last in the history of the republic of Zambia.⁵⁵³

Though the example given has some exaggeration, the point was clear. The referendum was an expensive exercise in the light of the urgent need to develop. Given the state of infrastructure at independence the choice in the allocation of resources was obvious.

⁵⁵¹Ibid., cols. 2169-70

⁵⁵²Ibid., col. 2171.

⁵⁵³Ibid., col. 2188.

The effect of the amendment was that, though the Constitution remained the supreme law of the land any part of it was subject to change like any other piece of legislation, by securing two-thirds of the votes cast in favour of the amendment. With a National Assembly dominated by members of one party, UNIP, it meant that the President being leader of the Party as well, alone had the power to alter the constitutional framework at any time and in any form he wanted, just like the Crown did.

From the classical constitutional perspective the changes entailed that the trappings of constitutional government and democracy were being gradually replaced by constitutional arrangement with proclivity towards authoritarianism. This development is a natural consequence of constitutions, which borrowed heavily from the Westminster constitutional model and imposed on the new independent country. The Wooding Commission appointed to review the constitution of Trinidad and Tobago observed that the Westminster political system, with its powerful executive, had a propensity to be transformed into a dictatorship when transplanted to societies without political cultures which support its operative conventions. Restraints on the Prime Minister in England and the President in the US, especially a vigorous press, powerful interest groups and alert public opinion do not operate in Trinidad and Tobago and Zambia.⁵⁵⁴ It is very unlikely that

⁵⁵⁴See Dale, *The Making and Remaking of Commonwealth Constitutions*, p. 70

the referendum would have succeeded if Zambia had strong interest groups, and an alert and independent media.

The President took the imperial character of the Governor in two ways: by assuming the power to control the civil servants, and power to alter the constitutional order at any time and in any way he deemed appropriate. His position was consolidated by further constitutional changes.

2. Shrinkage of Political Arena

(a) The Prelude to One-Party Rule

On 25 February, 1972, eight years after independence, Kaunda declared :

You know that since Independence there has been a constant demand for the establishment of a One-Party State in Zambia. The demands have increasingly become more and more widespread in all corners of Zambia. In recent months I have received hundreds of messages and letters from organisations and individuals appealing to me to take concrete steps to bring about a One-Party system of Government. In the resolutions passed by almost every conference, whether political or non-political, unequivocal demands have been made for the Government to introduce a One-Party system of Government. Chiefs last year joined the chorus of the overwhelming majority of the people. Indeed the UNIP National Council sitting in Mulungushi Hall between the 1st and 3rd October last year charged the Central Committee of the ruling Party to work towards the achievement of a One-Party democracy in which the liberties and welfare of the common man will be paramount. The Central Committee in its study of the subject noted that in this overwhelming public demand the objective for calling for a new system of Government is the fundamental need to preserve unity, strengthen peace and accelerate development in freedom and justice. Accordingly, the Central Committee decided in favour of a change in the Constitution and

directed the Government to take appropriate measures.⁵⁵⁵

Nwabueze has observed: "These demands were made by UNIP partisans, and should not be taken as conclusive of the wishes of the Zambian people as a whole".⁵⁵⁶ Gupta has indicated that the possibility of losing power in the next elections prompted Kaunda to take this drastic decision. The birth of Kapwepwe's party United Progressive Party (UPP) threatened to deprive UNIP of a sizable section of Bemba support. In such an event, UNIP might have lost seats in the Northern and Luapula provinces, in addition to those lost to the ANC in the Southern and Western provinces thus losing its majority at the centre. This was a strong possibility.⁵⁵⁷ However, the most important issue is not the soundness of the reasons advanced, but the events which preceded the decision to introduce one-party rule and the formation of UPP. These help to explain the action taken.

The introduction of One-Party rule was precipitated by forces unleashed by the interaction between the political, social and economic forces within the constitutional framework created at independence. It illustrates the incompatibility between the constitutional framework and the diverse forces in the country. The presidential parliamentary political system, and its supporting constitutional framework and underlying ideas were alien to Zambia. The Independence Constitution prescribed a

⁵⁵⁵Quoted from the *Report of the National Commission on the Establishment of a One-Party Participatory Democracy* (Lusaka: Government Printer, 1972), p. 67.

⁵⁵⁶Nwabueze, *Presidentialism in Commonwealth Africa*, p. 225.

⁵⁵⁷A. Gupta *Government and Politics in Africa*, pp. 143-4.

presidential multi-party system of parliamentary government. The sound articulation of the system required a ruling party or coalition of parties and an opposition party or coalition of parties. The Western parliamentary system adapted for Zambia to include the presidential aspect is based on the idea of politics understood in terms of *zero sum game*. Any gain in parliamentary seats by one party or a coalition of parties is equivalent to the loss of another rival party or a coalition of parties.

In the American presidential system and other Western parliamentary systems where the system is in place its operation does not provoke total hostility between the rival parties or coalition parties. Political parties perceive competition for political power as a mixed interest game, in which the competing parties have, not only ideologically antagonistic interests, but also significant interests in common to maintain competition for power. The winning party may take all the offices associated with the victory but it does not set out to destroy the future opportunities of the defeated party of ever coming to power. This has worked well in Western liberal societies, because there exists shared values and willingness between parties to abide by both the rules of the game and the maintenance of the political order.⁵⁵⁸

In the post-independence Zambia politics took a different dimension from what the drafters of the Constitution envisaged. Historically it was unrealistic to expect the system of government to operate as it did in the

⁵⁵⁸Ollawa, *Participatory Democracy in Zambia*, pp. 235-6.

Western presidential or parliamentary system of government. Party politics were unknown among Africans until 1959 when the ANC accepted to take part in the elections after the constitutional changes, which enfranchised a number of Africans.

The purpose of a political party is to mobilise the people and resources to gain access to the regular executive and legislative machinery of the State. The attainment of that goal, before 1959 was the negation of colonial rule. The very idea of colonial rule was based on the absolute supremacy of the Crown. Political parties were never recognised until it became obvious that the Territory was moving towards internal self-rule. There was, therefore, no time for the new African leadership to perceive and accept politics as a game in which, though the parties may have different ideological ideas, there must still be common interests and common desire to respect and maintain the political order. For Zambia and most other countries Ollawa observes:

Not surprising interaction between parties tended to degenerate into a negative mode of competition. Since politics as conducted by one party is felt by the other as to be *normless*, there hardly existed any shared common standards of the rule of the game which could permit of inter-party collaboration or compromise in the process of political interaction. This being the situation, a party or a coalition of parties on coming to power never hesitated to employ its 'organizational weapons' ... to exploit all sources of power that were latent or manifest in every aspect of political and economic life of the country to deal with its opponents or members of the opposing party.⁵⁵⁹

⁵⁵⁹Ibid., pp. 236-7.

Lewis has condemned this manipulation of power in the zero-sum game in Africa: "Translated from a class to a plural society this view of politics is not just irrelevant; it is totally immoral, inconsistent with the primary meaning of democracy, and destructive of any prospect of building a nation in which different peoples might live together in harmony".⁵⁶⁰

The chances of sustaining a multi-party political arrangement was further undermined by the fact that in Zambia's traditional societies the word opposition is unknown and largely meant an enemy who had to be destroyed. The position is further complicated by the diversity in cultures and political arrangements. Apart from notable nations such as those of the Lozi, Bemba and Ngoni very few traditional societies had comprehensive governmental institutional arrangements. They were all made part of one state and the impact of their advances in government did not go beyond the boundaries of their own nations.

This can be contrasted with the position in Botswana, which has emerged as a shining example of democracy in Sub-Saharan Africa. Mbao observes that the success is mainly because many Batswana believe that pre-colonial Tswana political tradition, relative to the *Kgotla*, was democratic and thus provides an historical basis for the liberal democracy. The powers of traditional authorities were limited by custom and law. Notwithstanding the fact that there is multi-party democracy in the country, members of

⁵⁶⁰Arthur W. Lewis "Beyond African Dictatorship: The Crisis of the One-party State". *Encounter*, 25 (1965), 9, quoted from *Ibid.* p. 237-8.

political parties still rally behind the chiefs and divest themselves of Party affiliations when they are at *Kgotla* meetings and still perceive the *Kgotla* as an effective institution for resolving issues that extend beyond political barriers. Botswana still rally behind the chiefs rather than behind their Members of Parliament. The use of the *Kgotla* and the chiefs in the evolution of the democratic process is an acknowledgment of the possible co-existence of the Westminster style of parliamentary democracy with the traditional government in one type of national government.⁵⁶¹ The other, equally important factors, include Botswana's relative economic prosperity and cultural homogeneity,⁵⁶² which are both lacking in Zambia

The successful operation of the political arrangement was limited from the very beginning. The elections of January 1964 saw UNIP win fifty-six of the sixty-five seats and the ANC with only nine. The weak position of ANC meant that there was no rivalry between parties. This instead shifted within the ruling Party. It must be noted that both leaders of ANC and UNIP lacked interest in promoting and sustaining the political system and this partly explains the inter-party violence experienced in the first few years of independence. Almost all UNIP Government policies were viewed in terms of how the areas supporting the ANC were going to be affected or how one region enjoyed material benefits and political advantages from the control of

⁵⁶¹M.L.M. Mbae "Constitutional Government and Human Rights in Botswana" *Lesotho Law Journal*, 6 (1990), 204-5.

⁵⁶²*Ibid.*, p. 205.

government machinery by the leaders of certain ethnic groups within the ruling group. The statement by Mungoni Liso (ANC Member of Parliament), in his contribution to the debate on the repeal of the referendum clause, is instructive. Whereas the Government's reason for the amendment was to make the constitution flexible to change and do away with the costly mechanism of the referendum, Liso argued: "I have been informed... that this amendment or this Bill has been prompted by the fact that the Barotse Province enjoys a certain amount of special status. In that there is a Barotse Agreement and there are some highly placed politicians who would not tolerate a tribe other than their own having any agreement that does not exist in their own home area."⁵⁶³ The Barotse Agreement could have been abrogated without repealing the referendum clause. Whichever way the issue is perceived it shows how far removed the system of government was from the reality.

Similarly when the UNIP Government decided in 1966 to ban the export of labour to South Africa most of the political leadership from Barotseland Province, where the majority of the migrant labourers came from, viewed the decision in terms of its negative economic impact on the region. Consequently when the Lozi based United Party (UP) was formed it capitalised on the decision to ban migrant workers and other grievances of the people of Barotseland to build its base in the area.⁵⁶⁴

⁵⁶³*Parliamentary Debates* col. 2177 (16 April, 1969).

⁵⁶⁴Ollawa, *Participatory Democracy in Zambia*, pp. 238-9.

Inter-party rivalry was instead replaced with intra-party competition for power. The political groups which competed for the control of the party and government policies were generally ethnic or regional groups which:

designates a regionally or ethnically structured group within UNIP which seeks to dominate the strategic positions in the authoritative decision-making structures of the political system with a view to, at the minimum, influencing government distributive outputs to its advantage or that of its region/province. Like inter-party competition, the two basic sources of social tension associated with party-sectionalism are those deriving from socio-economic developmental disparities among regions and those reinforced by communal group affiliations which are usually based on ethnic or linguistic interactional variables.⁵⁶⁵

In addition to providing the individual nationalist leaders with the quickest avenue for upward mobility and personal advancement the nationalisation of politics, which accompanied the transfer of power to indigenous Zambians, also presented for the masses a source of miraculous material benefits. And because of the clear absence of shared values among the politicians, even those within the same party, the national leadership was isolated on the basis of ideological motivations and aspirations.⁵⁶⁶

Internal political rivalry reached its zenith during the elections to the UNIP's Central Committee in 1967. The alliance between some ethnic groups ensured that members of some ethnic groups got seats on the Committee and others were excluded largely on tribal lines.⁵⁶⁷ At the end of the elections Kaunda decried:

⁵⁶⁵Ibid.

⁵⁶⁶Ibid. p. 239.

⁵⁶⁷For a detailed discussion of these events see Ibid.: Carolyn Baylies and Morris Szeftel, "The Fall and Rise of Multi-Party Politics in Zambia", *Review of African*

We have canvassed so strongly and indeed, viciously, along tribal, racial and provincial lines, that one wonders whether we really have national or tribal and provincial leadership. I must admit publicly that I have never experienced in the life of this young nation, such a spate of hate, based entirely on tribe, province, race, colour and religion, which is the negation of all that we stand for in this party and Government. I do not think that we can blame the common man for this. The fault is ours fellow leaders - we, the people here assembled.⁵⁶⁸

The resignation of Kapwepwe from UNIP and the formation of his own political party, UPP, was part of the continued convulsions within UNIP. Although UPP was immediately proscribed on 4 February 1972, it was clear to remaining members of the Party that the multi-party system of government, as operated in Zambia, was encouraging ethnic differences and posed a danger to national integration.⁵⁶⁹ Remedial measures were needed and the introduction of one-party rule was found to be the solution. According to Baylies and Szeftel the single party system can be seen as an attempt to contain structural political conflicts within the context of chronic underdevelopment. In an economy such as Zambia's, it is always unlikely that factional demands could ever be satisfied. The attempt to do so badly distorted an already unevenly developed mono-economy. The creation of a huge state sector fell victim to the effort to control resources

Political Economy, 54 (1992), 75-91: Idem, *The Dynamic of Zambia's One-Party State* ed. Cherry Gertzel (Manchester: Manchester University Press, 1984), generally, and Gupta, *Government and Politics in Africa*, pp. 127-51.

⁵⁶⁸Mulungushi Conference 1967 - *Proceedings of the Annual General Conference of the United National Independence Party* held at Mulungushi 14-20 August (Lusaka: Government Printer), p. 52.

⁵⁶⁹Ollawa, *Participatory Democracy in Zambia*, p. 249.

and rewards - and the parastatal corporations quickly became engulfed by political patronage.⁵⁷⁰

Kaunda explicitly stated the objective of the introduction of one-party rule:

The One-Party Democracy will help us to weed out political opportunists.... It has been fashionable in the past for any party member...to threaten to quit, or indeed quit, the Party to join the opposition; for any civil servant...to threaten to quit...for any businessman denied a license or a loan on perfectly legal grounds to run to the opposition, in the hope that if they formed the Government, he would be favoured. This era in which the politics of patronage has been a feature of life is gone.⁵⁷¹

One-Party rule as a solution to intra-party rivalry, which rocked the foundation of the Independence Constitution and tested the credibility of the ideas underlying it, had two major consequences. There was a shrinkage of the political arena and, secondly, the primacy of the Party whose powers were vested in its President. Whereas the introduction of one-party rule was seen as a solution to intra-party rivalry, it also helped to subordinate all organs of both the Party and Government to the President giving him an imperial character.

(b) One-Party System and the Position of the President

The introduction of one-party rule in 1972 was the last step in creating an authoritarian system of government. Analysis of the One-party constitutional arrangement and its response to democracy and other

⁵⁷⁰Baylies and Szeftel, "The Fall and Rise of Multi-Party Politics in Zambia", *Review of African Political Economy*, p. 80.

⁵⁷¹Idem, *The Dynamic of Zambia's One-Party*

democratic values such as human rights and rule of law has been undertaken by other scholars.⁵⁷² Of concern here is the effect of the changes in relation to the President within the constitutional order.

The one-party rule theory identifies the party with the nation and serves to emphasise the primacy of the executive more forcefully than in a multi-party system. In the latter system the executive is just one of the three principal organs of government and they all stand on par. But one-party rule brings in a new dimension. The party is seen as the people's party, and above all the organs of government. The party assumes the role of directing the political, economic and social policies of development which is left to the government in more developed democracies.⁵⁷³ The party is above the legislature, executive and the judiciary. These organs are there to be used by the party to meet its obligations to the people. The real power within the Party and the primacy of the Party was vested in the President. The legislature and other organs of government were subservient to the President.⁵⁷⁴

Within the executive branch of government the sovereignty of the Party was evident. The Secretary-General of the Party, who was in charge of the day to day functions

⁵⁷²See Sondashi, "Zambia's Single Party Presidentialism", generally.

⁵⁷³B. P. Wanda "The One Party State and the Protection of Human rights in Africa with Particular Reference to Political Rights", *African Journal of International and Comparative Law* 3 (1991), 759.

⁵⁷⁴See Nwabueze, *Presidentialism in Commonwealth Africa*, p.242-3.

of the Party,⁵⁷⁵ and not the Prime Minister, acted for or succeeded the republican President in the event of his absence, inability to hold office for whatever reason, resignation or death.⁵⁷⁶ Apart from the Prime Minister no minister was a member of the Central Committee of the Party. The Central Committee and the Cabinet were different bodies which met in joint sessions to resolve common problems. The Central Committee was responsible for the formulation of policies and Cabinet for implementation. The Central Committee was therefore superior to Cabinet: in the event that the decision of the former, on any matter of Government or Party, was in conflict with that of the latter, that of the former was to prevail.⁵⁷⁷

In relation to the legislature, the position of the executive was fortified in many ways. Party candidates for election to the National Assembly were approved by the Central Committee. Nwabueze observes: "Since the real choice is exercised by the party leaders and not by the electors, the elections become a ritual, thereby losing their value in sanctioning the political responsibility of the government."⁵⁷⁸

The lower status of the legislature to the executive is amplified in the legislative process and it was far worse than what existed in 1924 when the Legislative Council was dominated by official members. Though the

⁵⁷⁵Art. 15(c) *Constitution of UNIP*.

⁵⁷⁶Art. 42(2) *One-Party Constitution of Zambia, 1973*.

⁵⁷⁷*Ibid.*, 12(3)

⁵⁷⁸Nwabueze, *Presidentialism in Commonwealth Africa*, p. 243.

official members were guaranteed of every Bill, resolution, vote or motion suggested being passed by the Council, there was extensive debate in the Council. This was curtailed under One-Party system of government. Although individual members of the National Assembly attempted to show their oratory power, it was often not without consequences.⁵⁷⁹ The National Council of the Party was the policy making body of the Party,⁵⁸⁰ and was empowered to decide on the special proposals of legislative, financial or administrative nature needed to be included in the Party programme. All the Members of Parliament were also members of the National Council, hence when any such measure had been approved by the National Council, Parliament was expected to endorse them as a matter of course, without debate. The discussions of the National Council were often held in private, hence people were denied the opportunity to hear the various views advanced. This was never the system of Government the drafters of the Independence Constitution expected to develop.

The legislature created at independence had three principal functions: law-making; critiquing and controlling the performance of government; and involving people in the political process of the Country. But it failed to discharge these functions and was reduced to an extension

⁵⁷⁹See Sondashi, "Zambia's Single Party Presidentialism", generally on the performance of Parliament and conduct of individual Members of Parliament.

⁵⁸⁰Art. 31(1) of the Constitution of UNIP.

of the executive.⁵⁸¹ Laws were enacted as decrees of the President.

(c) Shrinkage of the Political Arena

The Independence Constitution provided a framework which guaranteed people free competition for political power, a cardinal element of any democratic system of government. The introduction of One-Party rule by its very nature limited the extent of political rivalry. Article 4 of the Constitution read:

- (1) There shall be one and only one political party or organisation in Zambia, namely, the United National Independence Party....
- (2) Nothing contained in this Constitution shall be so construed as to entitle any person lawfully to form or attempt to form any political party or organisation other than the Party, or to belong to, assemble or associate with or express opinion or do any other thing in sympathy with such political party or organisation.

All political activities were to be carried out within the Party. This also extended to organizations of non-political nature. In 1974 President Kaunda declared:

In the past the traditional source of power for the Party has been in the main the following groups of working people: (1) the peasants; (2) the industrial workers; (3) the commercial workers; (4) the agricultural workers; (5) students; (6) writers; and (7) committed intellectuals. With participatory democracy now our way of life we have now included such disciplined forces and services as the Army, Air Force, Police, Prison and National Service. We also now include the Civil and Teaching services as well as the Church. Indeed there are many more.⁵⁸²

The Women's and Youth Brigades were also affiliated to the Party. Every important organisation or institution was part

⁵⁸¹Robert Martin, "Legislatures and Development in Commonwealth Africa", *Public Law*, p.58.

⁵⁸²See Kenneth Kaunda *Humanism in Zambia and the Guide to its Implementation* (Lusaka: Government Printer, 1974).

of the Party and their activities were aimed at meeting the Party's ideological needs. This was the extent of the shrinkage of the political arena following the introduction of One-Party Rule.⁵⁸³

With the introduction of one-party rule the President assumed control over most the organs of government, similar to what was enjoyed by the Governor before the introduction of responsible government.

3. The Broadening of Discretionary Powers

Apart from the recreation of an imperial presidency and the shrinkage of the political arena the third aspect of the reconstitution of constitutional framework was the broadening of discretionary powers, which undermined constitutionalism. S. A.. de Smith wrote:

The principle that the exercise of political power shall be bounded by rules, rules which determine the validity of legislative and executive action by prescribing the procedure according to which it must be performed or by delimiting its permissible content.... Constitutionalism becomes a living reality to the extent that these rules curb the arbitrariness of discretion and are in fact observed by the wielders of political power, and to the extent that within the forbidden zones upon which authority may not trespass there is significant room for the enjoyment of individual liberty.⁵⁸⁴

The limitation of political power is the foundation of Western constitutional government. The Independence Constitution was based on this idea. Constitutionalism emphasises limited government and respect for human rights.

⁵⁸³For a discussion on the principal features of the One-Party constitutional order see Ollawa, *Participatory Democracy in Zambia*, pp. 254-289.

⁵⁸⁴S.A. de Smith, "Constitutionalism in the Commonwealth To-day", *Malaya Law Review*, 4, 2: 205-17 at 205. See also Nwabueze, *Constitutionalism in Emergent States*, pp. 1-2.

Other related values are accountability of the government through periodic elections, separation of powers, rule of law and an impartial judiciary.

Ironically the colonial system of government was authoritarian and pseudo-military in character. The Governor enjoyed broad discretionary powers. He exercised control over legislative and executive powers and authorities contrary to the basic tenets of constitutionalism and separation of powers. Moves towards constitutionalism did not occur until one year before independence. Political power was granted to the new African leadership before the institutions which supported the colonial authoritarian regime were reformed. A dual legacy was granted to the new leadership: one emphasising constitutionalism whose roots were far from established and the other dominated by colonial autarchic rule, in place since the establishment of British influence.

The new political leadership had two options: either build on the long standing peremptory order or move towards the new constitutional order buttressing democracy and constitutionalism. The scale swung in favour of the former and this is much more evident in the exercise of discretionary powers by the President under public security laws. Most limitations on the exercise of the powers vested in the President were systematically battered down resulting in the widening of discretionary powers.

In Zambia, unlike in Malawi and Kenya, the exercise of public security regulation was possible only in the event of a declaration of the state of emergency. By maintaining

the state of emergency the President assumed broad discretionary powers, which he could not enjoy in normal times. When faced with a problem he had two options: either use the powers conferred on him under the ordinary law of the land or use the extreme powers under the emergency legislation, whilst still maintaining a semblance of constitutionalism. A degree of uncertainty was created in the administration of justice. The background to the developments is necessary to appreciate the subsequent changes.

(a) The Colonial Developments

The maxim *Salus populi est suprema lex* is true whether a country is under colonial rule or independent. All the public security laws in Zambia have a colonial origin. The only difference in the post-independence period is that more limitations were placed on the exercise of discretionary powers. The principal emergency legislation during colonial rule were the Emergency Powers Orders in Council 1939-61. The Governor was authorised, under this Order in Council, when satisfied that a public emergency existed, to declare by formal proclamation that the provisions of the Order-in-council should come into operation in the whole or part of the country. He had an unchallenged discretion to determine when a public emergency existed. Once the Order-in-Council was in force the Governor could make any regulation, which in his subjective determination was necessary for securing public safety, the defence of the Territory, the maintenance of public order and the suppression of mutiny, rebellion and

riot, and maintaining supplies and services essential for the life of the community. The regulations in particular authorised the detention of persons without trial, the acquisition or taking possession of property. The declaration remained in operation until the Governor by another proclamation directed that it should cease to have effect.

The Emergency Powers Order in Council came into effect once a declaration of a state of emergency had been made. In order to deal with a situation which was not yet desperate, but if allowed to continue unchecked would lead to an emergency, milder powers were given to the Governor, through the Preservation of Public Security Ordinance.⁵⁸⁵ He was empowered to declare, by publication of a proclamation in the gazette that a state of emergency exists in the whole or part of the Territory, "if at all it appeared to him that any action has been taken or is immediately threatened by any person or body of persons of such a nature and so extensive a scale as to be likely to endanger the public safety or to deprive the community, or any substantial portion of any of the essentials of life." He was empowered to take any measures, which he deemed necessary for public safety and life of the community.

In 1957 the Ordinance was amended by the inclusion of Sections 4A, 4B, and 4C, collectively known as "twilight clauses". The Governor could now, if he considered that any

⁵⁸⁵The Ordinance started as *Emergency Powers Ordinance, 1927*, which was a substantial reproduction of the British *Emergency Powers Act, 1920* enacted to deal with the emergencies associated with the coal strike of 1921 and the general strike of 1926.

person was taking or was threatening to take action, which if continued unchecked was likely, in his opinion, to lead to the declaration of a state of emergency, make regulations to prohibit, restrict, or otherwise regulate such actions. Such regulations could apply to any individual or any class of persons or generally to the public. They remained in force, unless previously revoked, for a period of 30 days, but the Governor could still revoke them at any time before the end of that period. The Chief Secretary, Mr. Hone said: "the purpose of this Bill is to provide a means of dealing with situations which might lead to action being necessary under the Emergency Powers Ordinance, before such situations have reached such a degree of gravity as to necessitate the declaration of a full state of emergency."⁵⁸⁶

Towards the end of the 1950s it became clear that the twilight clauses had not achieved the intended objectives. The Government was prompted to enact the Preservation of Public Security Ordinance. The Acting Chief Secretary admitted during the debate on the Preservation of Public Security Ordinance:

The 'twilight clauses' have not proved fully satisfactory for their purpose of forestalling and preventing the actual state of disorder and violence which necessitates the declaration of an ordinary state of emergency. The prime reason of this Bill is, therefore, namely to repeal the Emergency Powers Ordinance, Cap 20, and to replace it with what we hope will be a far more effective and useful piece of legislation. In the past it has been the recognised tradition that emergency powers are only invoked when disorder has actually broken out. The governments are therefore placed in the

⁵⁸⁶*Legislative Council Debates*, cols. 593-603 (20 November 1957).

dilemma of either waiting to shut the stable door after the horse had fled or shutting it too soon and being accused of confining the spirited animal unduly. The requirement is clearly for some sort of security legislation enabling emergency powers or quasi-emergency powers to be invoked in varying degrees with the existence of proclaimed state of emergency under the Order in Council (the Emergency Powers Order In Council), and the Preservation of Public Security Ordinance was such a legislation.⁵⁸⁷

The exercise of the powers conferred upon the Governor under the emergency legislation was discretionary with very few limitations.

(b) The Colonial Legacy

When it became obvious that the Territory was to advance to nationhood within a matter of months, a few safeguards were provided within the framework of the Independence Constitution. The effect was that the broad discretionary powers enjoyed by the Governor transferred to the President after 24 October 1964, were curtailed. Article 13 of the Zambia Independence Order, 1964 provided that the Emergency Powers Orders-in-Council, 1939 to 1964, was to cease to have effect as part of the laws of Zambia on 24 October, 1964. Before the law lapsed, Kenneth Kaunda as Prime Minister introduced the Emergency Powers Bill, 1964, which was a substantial reproduction of the Emergency Powers Order-in-Council. The Preservation of Public Security Ordinance became the present Preservation of Public Security Act.

After independence the exercise of the powers conferred upon the President under the emergency

⁵⁸⁷Ibid., cols. 721-730 (26 January 1960).

legislation became a subject of regulation by the Constitution. Whereas, the determination as to when the declaration of the state of emergency could be made and its duration was the exclusive discretion of the Governor this was no longer the position after independence. Article 29 of the Constitution empowered the President to declare, by proclamation published in the gazette, either that a full state of emergency was in existence or that a threatened state of public emergency was imminent. Such declaration, if not sooner revoked, would cease to have effect, in the case of declaration made when Parliament was sitting or had been summoned to meet, within five days, at the expiration of a period of five days beginning with the date of publication of the declaration. In any other case the declaration was to lapse at the expiration of a period of twenty-one days beginning with the date of publication of the declaration, unless before the expiration of that period, it was approved by a resolution passed by the National Assembly. A declaration approved by resolution of the National Assembly would continue in force until the expiration of a period of six months.⁵⁸⁸ The National Assembly could, however, at any time revoke the emergency declaration.⁵⁸⁹

In the post-independence period some changes were effected which whittled down the safeguards.⁵⁹⁰ The outcome was that the President assumed the unchecked powers enjoyed

⁵⁸⁸Art. 29(3)

⁵⁸⁹Ibid., 29(4)

⁵⁹⁰See generally *Constitution (Amendment) (No. 5) Act, 1969*.

by the Governor. In 1969 the exercise of emergency powers was changed in two significant ways. Before 1969 a declaration, if not sooner revoked, ceased to have effect within five days if Parliament was sitting and within twenty-one days in any other case if it was not approved by the National Assembly; after 1969 such a declaration ceased to have effect on the expiration of twenty-eight days, unless it was approved by the National Assembly during that period. Secondly, before 1969 the National Assembly was required to renew a declaration at intervals of six months, after 1969 a declaration remained in force indefinitely until dissolved by the President or by a resolution of the National Assembly. With the National Assembly dominated by UNIP members the determination of the duration of the emergency declaration was the exclusive responsibility of the President, just like it was of the Governor before independence. The President directed his party on how to vote, and what was to be discussed in Parliament. The effect of these broad discretionary powers was that the state of emergency declared in July, 1964 remained in force, until it lapsed on 8 November, 1991, seven days after the change in the Presidency.

The One-Party Constitution of 1973 brought in another aspect. Article 30 empowered the President at any time, by proclamation published in the gazette, to declare either a full or semi-state of emergency. Such a declaration ceased to have effect within 28 days of its commencement unless before the expiration of such a period it was approved by a resolution of the National Assembly. The Assembly could at

any time, by a resolution supported by the majority of the members, revoke a declaration of emergency. The President could still revoke the declaration at any time before approval by the National Assembly. In view of the vagueness of the term national security, and submissiveness of the courts the emergency powers were used to deal with virtually any conceivable situation. The impact of the situation on the enjoyment of fundamental human rights and freedoms is incalculable, and undermined the very idea of constitutionalism.⁵⁹¹

Conclusion

Constitutional development during the period 1964 and 1991 can at best be described in terms of the transformation of the independence constitutional order into an authoritarian constitutional arrangement akin to that in place before 1963. There are a combination of factors, some historical, responsible for this development. The colonial system was in itself authoritarian. Constitutionalism, democracy and good governance were the negation of the very idea of colonial rule. After independence the system of government was expected to thrive on an institutional foundation which was largely authoritarian and not reformed in line with the new ideals. The new African leadership had no experience with a democratic system of government and had never lived under

⁵⁹¹The extent to which emergency powers have been used in the post independence era to negate enjoyment of the basic rights and freedoms has been ably undertaken by other scholars, foremost among them is Chanda, "Zambia: A Case Study in Human Rights In Commonwealth Africa": See especially Chapter 4.

one. Barry Munslow has captured the situation very well: "The problem was not so much a failure by Africa to learn the lesson of parliamentary government: rather, a lesson of authoritarian colonial rule was taught and learnt too well."⁵⁹²

Years of oppressive rule cannot be erased through some legal prescriptions alone. Such legal formulations must have relevancy to the reality otherwise a serious divergence is likely to emerge between the law and what is obtaining within society. The formal legal prescriptions do not always correspond with the living law.

The system of government introduced in Zambia was developed in the Western developed countries and is a product of specific economic, social and political conditions, which are lacking in Zambia. Such a system could not be expected to function in a country reeling under the impact of severe economic and social decline. The problems of poverty, hunger, illiteracy and disease are yet to be addressed. The country is yet to succeed in industrialising its economy. Strong public opinion on national issues is lacking. Powerful non-governmental interest groups capable of influencing government policies are yet to emerge.

Constitutional changes were initiated in the firm belief that the inherited system needed to conform to the new ideals. In the process the very basis of constitutional government was eroded. Broad discretionary powers were

⁵⁹²*Parliamentary Affairs* 36 (1983), p.218-228, quoted from Slinn, "A Fresh Start for Africa? New African Constitutional Perspective for the 1990s", p. 6.

conferred on the political leadership without a corresponding sense of responsibility. What finally emerged was a government of men and not a government of law. The rationale appears to have been that the nationalist leaders would still be able to exercise the broad discretionary powers they had assumed after independence fairly and justly and above all to the benefit of the people notwithstanding the absence of limitations on the exercise of such powers.

The drafting of the 1991 Constitution, therefore, provided an opportunity to address some of these problems and avoid previous pitfalls. Equally important was the emergence of a new leadership which had witnessed what unrestrained power can do and seen the country sink into economic and social chaos. They sprung up to challenge "the 'old stone throwers' who cut their political teeth in opposition to colonial rulers while learning the latter's authoritarian methods".⁵⁹³

⁵⁹³Ibid., p. 4

CHAPTER SIX

WIND OF CHANGE: POLITICAL AND CONSTITUTIONAL EVOLUTION: 1989 - 1991

Introduction

The period 1990-1 was the most turbulent in Zambia's history. From the political perspective, it was distinguished by demands for an end to one-party rule and the introduction of plural politics. From the constitutional stand point, it was identified with the repeal of the One-Party Constitution of 1973 and institution of the Constitution of 1991.

The independence constitutional arrangement, according to the new African leadership, failed to harmonise the demands for nation-building and constitutional government. The competition for power between competing political parties was perceived as wasteful of the scarce resources. It was eliminated by the establishment of the one-party state, and the interdiction of all political activities except through UNIP was intended to enhance the democratic process by providing a less divisive mechanism for popular participation.⁵⁹⁴ By the end of 1980s it was evident that one-party rule had abated the political arena: political competition was non-existent. Though Zambia enjoyed a reasonable degree of constitutional and political stability, there was failure of the anticipated economic

⁵⁹⁴See Peter Slinn, "A Fresh Start for Africa? New African Constitutional Perspectives for the 1990s" *Journal of African Law*, 35 (1991), 1-2: Also see Chapter Five generally.

and social progress.⁵⁹⁵ From the Western constitutional perspective there was no constitutionalism and the system had become authoritarian.

The agitation for change, which begun in 1989 was sparked off largely by the collapse of the economy. It was, in the process, acknowledged that economic and social reforms could not be effectively implemented without improving the political and administrative structures within a revitalised constitutional framework.⁵⁹⁶ The fundamental task facing Zambia was how to successfully reform or replace the structures then in place and provide a suitable legal environment for good government - respect for rule of law, freedom of the press, protection of human rights, economic, social and political development, and institutions which would make government accountable to the governed. In this chapter we examine the forces which precipitated the collapse of the monolithic rule; how the reform of the constitutional order was effected, the constitutional ideas which guided the making of the 1991 Constitution and the propriety of the Constitution itself given the various competing claims during the same period.

I. The Process of Change and the Underlying Forces

The political and constitutional changes which occurred between 1989 and 1990 were not spontaneous, but

⁵⁹⁵See the Preamble to the Constitution of UNIP.

⁵⁹⁶Slinn, *A Fresh Start for Africa? New African Constitutional Perspectives for the 1990s*, p. 4.

the result a build up of many forces both within and outside Zambia.

1. Internal Factors

The introduction of one-party rule in 1972 brought great promises for the future. One of the most forceful arguments advanced in favour of eliminating other political parties was the need for national unity, stability and economic development, which are the most urgent needs of any developing country.⁵⁹⁷ The preamble to the UNIP Constitution declared:

Recognising that the Party shall be the leading political force and shall continue to be a revolutionary mass organisation in which participatory democracy shall be rigidly and strictly maintained, welded together by patriotism and the revolutionary acceptance of belonging to it; determined to mould a new Zambia in which equality, justice, solidarity, peace, political, economic and social progress shall all reign, free from poverty, disease, ignorance and exploitation....⁵⁹⁸

By the end of the 1980s there was a semblance of national unity, and political and constitutional stability. But economic and social development, in real terms the elimination of poverty, disease, ignorance hunger and exploitation of the weaker members of the society, which the Party had pledged to eliminate was far from being addressed. In fact people's standards of living declined to catastrophic proportions. The social and economic infrastructure established in the first few good years immediately after independence, lay in ruins. The road

⁵⁹⁷See Nwabueze, *Presidentialism in Commonwealth Africa*, pp. 230-236, for the evaluation of these arguments.

⁵⁹⁸The Party Constitution was annexed to the Constitution of Zambia, 1973, by virtue of Article 4(3) thereof.

network had collapsed, hospitals had no medicines and schools lay in a state of disrepair. The unemployment levels soared and people's buying power tumbled down. The country's external debt soared to an all time high. By the middle of the 1980s the IMF had lent more money to Zambia than to any other country in Sub-Saharan Africa.

The country's total external debt was about \$ 3.5 billion at the end of 1984. By 1986 it had risen to \$ 5.1 billion and \$ 6 billion by 1988.⁵⁹⁹ The impact of the debt was graphically presented by Good: "The significance of this sum can be assessed first of all, on a *per capita* basis, where it represented a debt in excess of \$ 700 for every Zambian, just about the worst in Africa."⁶⁰⁰ Good went on to say: "For example comparable figures for 1986 were \$ 341 for the Gambia and Guinea Bissau, \$ 228 for Zaire and \$ 211 for Mozambique.⁶⁰¹ The last two countries have never known peace and stability as much as Zambia, and this pointed to the fact that peace and stability alone cannot lead to economic and social development.

The economic mess was attributed to mismanagement and wastage at the top levels of the one-party state.⁶⁰² Good argued: "The 25 year record of the Government led by

⁵⁹⁹Kenneth Good, "Debt and the One Party State in Zambia", *The Journal of Modern African studies*, 27 (1989), 297.

⁶⁰⁰Ibid., p. 301.

⁶⁰¹Ibid.

⁶⁰²Ibid., p. 300. See also Good, "Systematic Agricultural Mismanagement: the 1985 'Bumper' Harvest in Zambia", *The Journal of Modern African Studies* 24 (1986), 257-284. Good illustrates how lack of commitment on the part of the political leadership led to the wastage of the harvest of 1985; Also see James Pletcher, "The Political Uses of Agriculture in Zambia", *The Journal of Modern African Studies* 24 (1986), 603-617

Kenneth Kaunda is very largely negative. It has brought economic collapse to the country compounded by external and internal indebtedness, and by waste, mismanagement and misappropriation of production resources."⁶⁰³ As to the cause he concludes: "Zambia's acute malaise is a consequence chiefly of internal factors derivative of the single party state and Kenneth Kaunda's personal rule."⁶⁰⁴ The solution lay in carrying out economic and social reforms, which had to be pursued within a revitalised constitutional framework:

As things stand, debt concessions and additional foreign aid would worsen rather than improve the situation, since it would strengthen and encourage an inefficient and authoritarian regime without bringing benefit to the majority of the people. Domestic reforms aimed at creating efficiency and democratization in government, as well as the long term diversification of the economy, are the essentials for future development.⁶⁰⁵

Kaunda and his ministers, on the other hand, denied that the country's problems were caused by internal factors, but by external forces, and the principal causes being the collapse of copper prices on the world market, IMF conditionalities and the rising metropolitan interest rates. The picture painted was that Zambia, irrespective of its policies and system of government, was simply the passive victim of these external forces.⁶⁰⁶ This view is supported by some scholars. *Makgetla* writes:

Zambia's economic difficulties originated in international factors. In the two decades of independence an unusual high degree of external

⁶⁰³Ibid., p. 313.

⁶⁰⁴Ibid., pp. 297-8.

⁶⁰⁵Ibid., p. 298.

⁶⁰⁶Ibid., p. 297.

dependency, inherited from the colonial era, continued to characterize the economy. Imported inputs accounted for at least one-third of all costs in mining and manufacturing.... Meanwhile, the production of copper and related minerals contributed a steady nine-tenths of exports revenues. But in 1975, the terms of trade for copper plummeted by nearly 50 per cent, and merchandise imports promptly contracted by almost one-quarter, seriously affecting production. Since then the price of copper has stagnated.⁶⁰⁷

Between 1975 and 1986 Zambia was forced by the IMF to attempt, unsuccessfully, seven different stabilization and adjustment programmes. Almost without exception they all produced contraction of the economy, inflation and unemployment. A series of devaluation of the currency fueled galloping inflation. These also caused huge increases in the prices of the basic food, with the ending of subsidies. In December 1986 the increase in the price of mealie meal produced food riots in which a number of people were killed by security forces.⁶⁰⁸ Both views are valid and point to the fact that Zambia's desperate economic situation is a complex problem caused by a combination of factors.

Another black spot on Kaunda's reign was the country's human rights record. Though it was argued that the one-party system would not negate people's basic rights and freedoms, apart from the right to form or belong to a political party other than the ruling party, studies have

⁶⁰⁷Neva Seidman Makgetla, "The Theoretical and Practical Implications of IMF conditionality in Zambia", *The Journal of Modern African Studies* 24 (1986), 395

⁶⁰⁸Carolyn Baylies and Morris Szeftel, "The Fall and Rise of Multi-Party Politics" in Zambia" *Review of African Political Economy*, 81. Kaunda subsequently denounced the IMF stabilisation programme and stated in an interview that he hoped the IMF could devise adjustment programmes which would not require him to shoot his own people.

revealed gross abuses of basic rights.⁶⁰⁹ From 27 July 1964 when the last Governor of Northern Rhodesia declared the state of emergency to suppress the rebellion waged by the Lumpa religious sect, Zambia was under a state of emergency until 8 November, 1991, when the declaration lapsed with the change in the presidency.⁶¹⁰ The declaration remained in force notwithstanding the fact that the entire sub-region, including South Africa, was moving towards peaceful resolution of conflicts. Throughout the period of the emergency the President enjoyed extensive powers of detention without trial.

The introduction of a one-party system of government and the continued existence of the state of emergency were the two most critical factors which militated against constitutionalism and good governance in Zambia. The impact was widespread. A near pathological fear was created in the minds of the Zambians to the point that they dared not express views critical of the Government. It was, therefore, difficult to create a strong public opinion on pressing national issues. Conditions were not ideal for the emergence of non-government interests groups to assume the task of diffusing power throughout the country.

Press freedom was virtually unknown.⁶¹¹ The two daily papers: *Times of Zambia* and *Daily Mail* are government

⁶⁰⁹ See Zimba, *The constitutional Protection of Fundamental Rights and Freedoms in Zambia: a Historical and Comparative Study*; Chanda "Zambia: A Case Study in Human Rights in Commonwealth Africa." Chanda's work unlike that of Zimba is rich in terms of accounts of violations of human rights; See especially Chapter Four.

⁶¹⁰ See Article 31(7) of the *Constitution of 1991*.

⁶¹¹ See Chanda, "Zambia: A Case Study in Human Rights in Commonwealth Africa", pp. 205-226. The writer has ably

owned including the only electronic media Zambia National Broadcasting Corporation. Journalists in these institutions were expected to propagate the ideals of the Party and their activities were closely monitored by operatives in the Office of the President. Efforts to set up independent media institutions were frustrated. The consequence was that when people's energies were liberated in 1990 there was no way of stopping them.

The President through a number of constitutional reforms, which begun immediately after independence culminating into the institution of the One-Party constitution of 1973, assumed the imperial character of the his predecessor the Governor. He was above all institutions of both the Government and the Party. The people had experienced the consequences of such a system of government, which had become unpopular and when the time came they did not hesitate to demand its demise.

2. External Factors

The collapse of the Soviet Union and the entire Eastern Block was unthinkable in this generation, and when it happened the convulsions which followed permeated the African continent too. The Rumanian "revolution" and the killing of strong man Nicolae Ceausescu in December 1989, the mass demonstrations in East Germany and the arrest of Honnecker were clear messages to most leaders in Africa that no government was indestructible. These events

summed up the position of the press in Zambia during the period before the change of government in 1991; See in particular pp. 205-226.

liberated the energies of the citizens, media and non-governmental organizations, which had been operating in complete submission to the authorities. As a result of these momentous changes Frederick Chiluba, then Chairman General of the Zambia Congress of Trade Union (ZCTU), and a known critic of Kaunda, called for the change of the one-party system to political pluralism in view of the changes in Eastern Europe.⁶¹² The seed for change was sown and what remained was to water and tender it.

The second factor is closely related to the first. The disintegration of the Soviet Union effectively ended the Cold War era. It also marked the reversal of the Western policy of supporting authoritarian regimes or worse just to curtail the expansion of Communist influence. Issa Shivji asks:

Who does not know that Mobutu, who gracefully presides over death and detention chambers of Zaire, was installed by the CIA? Who is so ignorant as to forget that the lion of Juddah (Haile Selassie), who turned his country into a jungle where people in their thousands starved to death in fear and famine, was one of the greatest beneficiaries of US military arsenal? Many know that the US is one of the staunchest allies of South Africa: the military supplier of UNITA in Angola; the benefactor of dictators like Banda and Moi and the protector of Liberia's military nincompoop Samuel Doe".⁶¹³

This policy has changed, to some extent, receipt of aid from Western donor countries is linked to steps being made in democratising the government structures, promoting good governance and creating accountable leadership.

⁶¹²*Times of Zambia*, 31 December, 1989.

⁶¹³Issa G. Shivji, *The Concept of Human Rights in Africa*, (Codesria Book Series: London, 1989), p.55.

The third factor is related to the change in the policies of the world's major lending institutions, the IMF and the World Bank. In its report at the end of 1989: *From Crisis to Sustainable Growth* the World Bank noted that Africa's problems were as much political as economic: "A root cause of weak economic performance in the past has been the failure of public institutions. Private sector initiative and market mechanisms are important, but they must go hand-in-hand with good governance - a public service that is efficient, a judicial system that is reliable, and an administration that is accountable to the public".⁶¹⁴ The message was clear, economic reforms could not be effectively implemented without reform of political and administrative structures within a revived constitutional framework.

The fourth point is an extension of the third: leaders of the most industrialized countries amplified the World Bank's conclusions and recommendations by redefining their policies on further financial assistance to the needy countries on similar principles. President Francois Mitterand told the Franco-Africa meeting held at La Balle in June 1990 that democracy was to be a condition for cordial relations with France.⁶¹⁵ In 1991 the United States Agency for International Development (USAID) endorsed that,

⁶¹⁴*Sub-Saharan Africa: from Crisis to sustainable Growth*, (1989), p. xii.

⁶¹⁵See Samuel De Callo, "The Process, Prospects and Constraints of Democratization in Africa," *African Affairs* 91 (1992), 7-35: See also generally Filip Reyntjens, "The Winds of Change: Political and Constitutional Evolution in Francophone Africa, 1990-1991" *Journal of African Law* 35 (1991), 45.

"there is growing evidence that open societies that value individual rights, respect the rule of law, and have an open and accountable government provide better opportunities for sustained economic development than do closed systems which stifle individual initiative."⁶¹⁶ In March of the same year Congress spelt out guidelines on foreign aid: "foreign aid to individual countries will take into account their progress towards establishing democracy...democracy will be placed on an equal footing with progress towards economic reforms and the establishment of a market-oriented economy."⁶¹⁷ The British Foreign Secretary Douglas Hurd was blunt:

Countries that tend towards pluralism, public accountability, respect for the rule of law, human rights, market principles should be encouraged. Governments which persist with repressive policies, corrupt management, wasteful discredited economic systems should not expect us to support their folly with scarce aid resources which could be better used elsewhere.⁶¹⁸

By the end of the 1980s Zambia was largely dependent on foreign aid for survival. Efforts to abandon the IMF structural adjustment programme in favour of an autochthonous one, in 1986, failed. The country could not revert to international lending institutions as it did not meet the new conditionalities. The options were limited. The position of the Kaunda Government at the end of the 1980s was ably summed up by Baylies and Szeftel:

⁶¹⁶Ibid., p. 23.

⁶¹⁷Ibid.

⁶¹⁸Transcript of the speech given to the Overseas Development Institute in London on 6 June, 1990, printed as annex to Human Rights in Foreign Policy Foreign and Commonwealth Office, London 1991, quoted in Peter Slinn, "A Fresh Start for Africa? New African Constitutional Perspective for the 1990s" , p. 3.

Economic malaise, debt and stabilisation crises imposed huge political costs on the government. It was blamed by the west and the IMF for not implementing the stabilisation measures fully and by the populace for introducing them at all. Internationally, it became increasingly isolated; at home, its credibility and legitimacy were mortally wounded and a range of articulate critics was encouraged to attack it.⁶¹⁹

After several attempts to deflate the pressures brought by diametric forces, Kaunda finally gave in to demands for multi-party.

3. The Political Changes

For the first time in twenty-six years Kaunda lost control over unfolding events. He became just one of the many players in the unfurling political scenario. The initial reaction of the political leadership to demands for political and constitutional reforms was that the country was not ready for change. Such a move was seen as retrogressive and dangerous for Zambia. It was argued that the political rivalry which characterised the period immediately after independence would reoccur.⁶²⁰ The wind of change which had swept through Eastern Europe had no effect on Zambia, hence it was not necessary to change.⁶²¹ Kaunda for a while argued that the events in Eastern Europe were irrelevant to Zambia, since, "the circumstances which made us rally behind the one-party system have not

⁶¹⁹Baylies and Szeftel, "The Fall and Rise of Multi-Party Politics in Zambia", p. 80.

⁶²⁰*Times of Zambia*, 5 January 1990.

⁶²¹*Ibid.* So far as the writer has been able to ascertain there is no major publication on the evolution of the demands for the democratisation of the political system. An attempt has been made, whilst still remaining within the set parameters of the study, to contribute in filling this lacuna.

changed...our situation today is in no way similar to the one in Europe".⁶²² Some trade union leaders argued that Zambia was not ready for a multi-party system of government because people were not politically mature to run their affairs properly. The high rate of illiteracy and tribal groupings were cited as constraints. Emphasis was instead placed on perfecting the existing one-party structures.⁶²³

Despite their repeated resistance to the demands for change, the Kaunda leadership could not afford to ignore the political forces at play. Senior Government officials later⁶²⁴ accepted the need to assess the system of government. It was finally resolved that the Party's National Convention should discuss the reintroduction of plural politics. Both retired and serving politicians and civil servants were invited to the Convention.⁶²⁵ The Convention, which opened on 14 March 1990 was a disaster. Most of the invited former politicians were not allowed to present their papers, in which they made various proposals on how to address the many problems facing the country. They were compelled to walk out of the meeting.

This was one of the many indiscretions made by Kaunda, which undermined his own leadership. The return to plural politics was reduced to a party issue. In his opening address to the Convention Kaunda ruled out the possibility

⁶²²*Zambia Daily Mail*, 9 March 1990.

⁶²³*Times of Zambia*, 24 January 1990. This argument was advanced by Lucian Mutale, Chairman of the National Union of Building Engineering and General Workers (NUBEWG) at the Sixth Quadrennial Conference.

⁶²⁴This was acknowledged by the Secretary of State for Defence and Security Alex Shapi: *Times of Zambia*, 9 March 1990.

⁶²⁵*Ibid.*, 12 March, 1990.

of changing the system of government. His pronouncement curtailed debate on the subject. In an obvious attempt to consolidate his case against change he argued: "The one-party participatory democracy is itself a free evolution from our own experience of a multi-party democracy. The Second Republic was a free choice and creation of the people of Zambia. It was not a military or an ideological imposition from inside or from outside the population of Zambia".⁶²⁶ This was a deliberate misinterpretation of history to suit his case. The introduction of one-party rule was never the people's wish, but a political decision made by Kaunda.⁶²⁷ The Convention ended with the call for reform of the existing political system and those calling for change were challenged to come up with constructive proposals.⁶²⁸

In spite of the decision by the Convention not to endorse political pluralism, the course of history appeared to have been determined, and Kaunda had no choice but to respond. On 6 April he announced that he and a few other senior members of his party would review the decision of the Convention. He went on to declare: "UNIP is a well organised Party, I am not scared of multi-party. If we opened the doors to the other parties UNIP would still win. Democracy did not only depend on multi-party politics which

⁶²⁶Ibid., 15 March, 1990.

⁶²⁷See Kaunda's Speech at the Press Conference 25 February 1972 in the *Report of the National Commission on the Establishment of a One-Party Participatory Democracy in Zambia*, (Lusaka: Government Printer, 1972), 67.

⁶²⁸For a Party which claimed to be democratic the handling of the Convention was a disaster and created more enemies determined to destroy Kaunda.

Zambia had experienced for eight years before changing to the single party model".⁶²⁹ As a result of the review, it was announced that the question whether or not Zambia should revert to political pluralism would be determined through a referendum. This was a major development and gave impetus to the call for change.

There were a number of factors which compelled Kaunda to change: monumental changes were taking place on the continent which could not be ignored. After over two decades in power, Marshall Mobutu of Zaire accepted the existence of other political parties. In Moscow, as part of the reform programme, the Communist Party's Central Committee overwhelmingly voted to relinquish its seventy year hold on power. In South Africa, on 11 February, 1990 President de Klerk released Nelson Mandela from prison as part of his reform policy. In Tanzania, former President Julius Nyerere, a one time staunch advocate of one-party rule, told a meeting of local newspaper editors that time was ripe for alternative parties to exist in Tanzania and that debate on the introduction of a multi-party system should not be regarded as treason.⁶³⁰ In Kenya pressure was exerted by Washington leading to the suspension of aid until steps were made towards democratisation. Similar events were taking place in Francophone countries.⁶³¹ Kaunda, therefore, had no choice but to conform to the

⁶²⁹*Times of Zambia*, 7 April 1990. Kaunda was speaking in an interview with Yo' av Karny the Washington based correspondent of an Israeli daily newspaper.

⁶³⁰*Ibid.*, 24 February 1990.

⁶³¹See Reyntjens, "The Winds of Change and Constitutional Evolution in Francophone Africa, 1990-1991", generally.

pressures both within and outside the country. But he tried to buy time.

He responded by making some of the posts within the Party elective, but the popular outcry was for radical changes. He predicted the failure of political pluralism once endorsed in the referendum. The campaign on the referendum question was characterised by personal attacks. Those calling for change were labeled agents of foreign super powers.

Events took a new turn in June, 1990. The Government announced the increase in the price of mealie meal, the staple food by over 100 per cent. For people already reeling under the impact of economic decline the increase was unacceptable. Riots and looting broke out on 26 June in Lusaka spreading to other major towns. Curfew was declared in Lusaka, and when the situation was finally under control over twenty people were dead, killed by security forces. The University of Zambia was prematurely closed and thirty students were arrested for their alleged involvement in the riots.

In the confusion which ensued a few soldiers staged an unsuccessful *coup d'état* on 30 June, 1990. This was a clear message to Kaunda on the level of discontentment within the country.⁶³² To the dismay of people who have lived under

⁶³²The important achievement of this period was the freedom that the people enjoyed. Kaunda's secret service, which had kept people in fear, was equally dissatisfied. Its efficiency in the period of mass agitation was questionable. The international community was watching the developments giving the advocates for change some measure of security from harassment. No matter how autocratic and oppressive the system was, it could not harass those calling for change, in full view of the international

military rule, some Zambians took to the street to celebrate the short-lived unconstitutional seizure of power. Change was needed at all costs.

The campaign for change assumed new intensity when the Catholic Church, which was considered non-political, joined in the call for political reforms. They issued a Pastoral Letter, in various languages, which was distributed to their congregations and published in the national newspapers. The Letter opened with a caveat: "... at this critical time our duty and responsibility as moral leaders oblige us to do more than express sympathy and compassion. We also feel compelled to speak out on behalf of the poor in particular for the cause of justice".⁶³³ The statement went on to read:

"Although our reflections will necessarily bear upon the current political debate, we wish to make it clear at the outset that we speak as religious pastors and not as politicians, as preachers of the Gospel and not as proponents of political systems. It is not the role of the Church to make decisions concerning the type of political system to be adopted by any nation. However, the Church insists that it 'has the right to pass moral judgment, even on matters touching the political order, whenever the basic personal rights...make such judgment necessary.'"⁶³⁴

In reference to the events of the preceding weeks the Bishops noted:

We, however, feel that the present turmoil is more accurately seen as the explosive expression of an anger and frustration which has been growing in intensity among the majority of the people over a

community. Kaunda had repeatedly maintained that he was a democrat and could not be seen perpetrating acts contrary to the ideals of democracy.

⁶³³*Economics, Politics and Justice: Pastoral Statement of the Catholic Bishops of Zambia*, (Ndola: Mission Press, 1990), p. 1.

⁶³⁴*Ibid.*

long period of time. In the exercise of our pastoral care, we bishops have heard and felt the cries of our people. This anger and frustration has been brought to a head with the sudden and drastic rise in the price of mealie meal, the staple food of most of our people.

It is clear that there is need for serious restructuring of our national economy....What is not clear... is why the decision of such major importance - the raising of the price of a basic commodity - should have been imposed upon the people without any public discussion and in a way which placed an intolerable burden upon those already struggling to survive. It is not only the health but also the very lives of so many people, especially children, that have now been put at risk through the threat of malnourishment.⁶³⁵

Notwithstanding the riots and the coup attempt Kaunda declared that the referendum would go on as scheduled on 17 October, 1990. In an attempt to defuse tension and promote a sense of reconciliation Kaunda pardoned all those who were reported to have planned to overthrow his Government going back to 1980. Edward Shamwana, convicted for the 1980 coup attempt, Christon Tembo on trial for the coup attempt of 1988, and Mwamba Luchembe believed to be the architect of the June 1990 coup attempt, were pardoned. On 9 July, 1990 the President appointed a Special Parliamentary Select Committee mandated to study ways of democratising UNIP and the Government machinery and make them more responsive to the wishes of the people.⁶³⁶

That people's freedom and energies had been liberated, was manifest in the fact that certain things which were unthinkable began to happen. Between 20 - 21 July, 1990 a number of retired politicians, intellectuals, and trade union leaders met at the Garden House Hotel for a national

⁶³⁵Ibid., p.3.

⁶³⁶See *Report of the Special Parliamentary Select Committee* (Lusaka: Government Printer: 1990)

conference on the Multi-Party Option. The objective of the Conference was "to assist in the process of building a consensus of programmes and action for democratisation, within constitutional sanctions, and in the light of the imminent referendum."⁶³⁷

Out of the Conference came the Movement for Multi-Party Democracy (MMD), an organisation committed to campaign for the re-introduction of political pluralism. Whereas the initial effort was that of individuals making representations for change, these demands were not coordinated into one single loud voice. The MMD came in as the unifying force. When the advocates for change called for the update of the electoral register, after some protestation, Kaunda acquiesced to the demands. "As our multi-party friends (whom he called little men previously) are demanding fresh registration of voters I say alright. I am accepting this."⁶³⁸ To allow for voter registration the referendum was put off from 13 August 1990 to 17 October, 1990.

These developments were followed by resignations of some Members of Parliament to join the MMD in the campaign for the re-introduction of plural politics. The Law Association of Zambia, at a special meeting held on 2 September, 1990 passed a resolution in support of the introduction of a multi-party system of government. The Association went on to declare that as the introduction of

⁶³⁷ See *Proceedings of the National Conference on the Multi-Party Option* eds. Akashambatwa Mbikusita Lewanika and Derrick Chitala (Lusaka: Zambia Research Foundation, 1990), for an account on what transpired at the Conference.

⁶³⁸ See *Times of Zambia*, 26 July 1990.

one-party rule was not a subject of referendum the re-introduction of political pluralism should similarly be effected by repealing or amending Article 4 of the Constitution not later than 31 January, 1991. The Association also called for the lifting of the state of emergency. It was argued that there was no justification for its continuation.⁶³⁹

Public rallies organised by the MMD were attended by multitudes of people unprecedented in the country's political history, whereas those by UNIP were not as successful. The MMD, encouraged by the popular support they enjoyed, called for a time table for constitutional changes leading to the installation of a democratic government by August, 1991. The Government was urged to convene or appoint a commission to prepare a new Republican Constitution by 31 April, 1991. The idea of a referendum was considered unnecessary and a wastage of public funds.
640

The President had no choice but to respond to the demands. On 24 September, 1990, in an address to the Twenty-fifth National Council meeting called to examine the Report of the Special Parliamentary Select Committee, Kaunda informed the Nation that the Party and its Government had decided that Zambia should revert to a multi-party political system. The referendum was scrapped and Article 4 of the Constitution was repealed paving way for the creation of other political parties. In place of

⁶³⁹Ibid., 3 September 1990.

⁶⁴⁰Ibid. 9 September, 1990.

the Referendum Commission a Constitution Commission was appointed to gather people's views on the next constitutional arrangement for the country and to prepare a draft constitution.

Efforts by Kaunda to consolidate his position during the campaign were frustrated by both internal and external forces. Salary increases proposed for the defence and security forces ranging from 77 to 167 per cent were derailed by the donor community. The structural adjustment conditionalities for 1991 required a freeze of many capital projects and an increase in consumer prices on maize meal of up to 275 per cent. Kaunda appealed to the donors to allow a six months freeze on these increases until after the elections. The appeal was rejected and it was made clear that any delay in the implementation of the conditionalities would lead to loans pledged being withheld.⁶⁴¹

Within a period of one year the system of government, which had regulated people's lives for over 19 years was over and a new chapter full of hope, goodwill and expectation opened. What remained was to prescribe the constitutional arrangement under which these expectations were to be realised and the wrongs of the past addressed.

⁶⁴¹ Baylies and Szeftel, "The Fall and Rise of Multi-Party Politics in Zambia", p. 81.

II. The Process of Making the 1991 Constitution

1. The Pre-Conditions to Constitution-Making

After years of experience with constitution-making and functioning of constitutional orders, coupled with the successes and failures of some of these constitutions, it is possible to identify some pre-conditions to successful constitution-making. These are considered in relation to the making of the 1991 Constitution. There are some cardinal questions which must be settled before the constitution-making exercise can begin: *when* and *why* should a country embark on constitution-making and *who* is to be entrusted with the task of drafting the constitution. The last question is on what should be included in the constitution when finally drafted. The settlement of these questions requires careful study of the basic political, social and economic factors which condition the effective operation of a constitution in a particular setting. The content of any constitution is determined largely by the constitutional perspective that those entrusted with the responsibility of drafting it adopt.

(a) The Prior Constitutional Question

The starting point for any constitutional system is a political decision. This is a prior constitutional question and the answer lies in the realm of political science or sociology, but beyond the domain of law. Law comes in after the issue has been settled. In most countries the decision has been made after a fundamental change has occurred in

the existing economic, social and political arrangement, or after a popular revolution or similar fundamental event. A corresponding change in the constitutional order is often necessary. The 1964 Constitution was enacted to signal the change in the status of the Territory in the face of the international community. It ceased to be a dependency and assumed the position of an independent sovereign nation. This called for similar changes in the constitutional arrangement. The introduction of One-Party rule in 1972 was a cataclysmic event which called for change in the constitutional order also.

The decision to draft the 1991 Constitution was preceded by agitation for political reform on a scale unknown in Zambia. After seventeen years of one-party rule, it was clear that the system had failed to meet people's expectations. Competition for political power was limited. The people's economic and social expectations were far from being realised and the economic and social infrastructure lay in ruins. Events on the international scene dictated the need to change the political system. It was acknowledged that there was need for major economic, social and political reforms. This also called for a change in the constitutional order.

(b) The Time Element in Constitution-Making

A country may undergo serious economic, social and political changes which may call for corresponding reform of the constitution, but it does not necessarily follow that the constitution-making exercise will lead to the drafting of a relevant and legitimate constitution. Those

given the responsibility to draft the constitution need to determine whether the time is appropriate for such an exercise. To undertake the exercise before such a time would be, at best, an exercise in futility. There must be popular national support for the reform of the constitution. History has shown that successful acts of legal codification very often occur in or immediately after a period of great public excitement, when it is easy to build, and maintain, for a certain period, a climate of popular political consensus. The American Constitution was drafted after the war, when there was a general accord for a new constitutional order. The first Communist Constitution was drafted in the Soviet Union after the October Revolution. McWhinney observes that if the art of constitution-making is to benefit from such periods using a constituent assembly would be appropriate to enlist popular enthusiasm or public support to the full,⁶⁴² which is necessary for the legitimacy of the constitution.

The relevance of a constitution to any social setting is determined by its autochthony and nationalistic aspirations it espouses, and most importantly by its legitimacy. The legitimacy of the constitution is determined by the scope of loyalty, obedience and confidence it commands from the people.⁶⁴³ The constitution making process must be put through a process of popularisation, and generate public interest in it. An attitude must be cultivated that everyone has a stake in

⁶⁴²McWhinney, *Constitution-Making, Principles Process Practice*, p. 16.

⁶⁴³Nwabueze, *Constitutionalism In Emergent States*, p. 24.

it, and that it is the common property of all. The period for the making of the 1991 constitution was opportune. There was national accord for a new constitution to provide the framework within which the realisation of the new expectations would be pursued. The element of consensus should, thereafter, permeate through every stage of constitution-making.

(c) Who is to Carry out the Constitution-Making?

The question as to who should be entrusted with the task of working out the fundamental political compromises to be embodied in the constitution, should be determined through popular consultations. The citizens cannot have confidence in and respect for the constitution if they do not have equal confidence in those entrusted with the task. By the time the referendum was canceled, it was clear that the decision on the future constitutional arrangement was not the responsibility of Kaunda and his Party, but this was ignored. In an address to the Twenty-fifth National Council on 24 September, 1990 Kaunda announced the appointment of a Commission of Inquiry to recommend the Constitution for the Third Republic. On 8 October 1990 twenty-two members of the Commission were named and of these only two members: Akashambatwa Lewanika and Arthur Wina were from the MMD. The MMD had been transformed by then into a major opposition party, and its participation in the constitution-making exercise was indispensable if the final constitutional order was to be legitimate.

There are a number of factors, which explain why Kaunda alone determined who was to draft the new

constitution. The MMD, as the only credible opposition party at the time, did not consider the settlement of the constitutional order as paramount. Had they assumed a strong posture on the next constitution, when Kaunda agreed to revert to political pluralism, the constitution-making process, and the final constitution would have taken a different dimension. They did not object to, or show interest in constitution-making until after the Constitution was drafted. The Party's mission was that of "liberating the country from UNIP One Party Dictatorship and to introduce a democratic, pluralistic system of government and politics. The aim is to institute the ideals of democracy, namely: basic human freedoms, i.e. free and fair elections, freedom of assembly and association, freedom of expression, the fight against discrimination and above all, the accountability of Government to the people as a whole...."⁶⁴⁴ The Party accepted that: "In order to achieve these objectives, it was necessary to draw [up] a suitable multi-party constitution based on broad consultation and national consensus".⁶⁴⁵ These pronouncements were at best rhetorical: no programme of action was ever worked out to realise the goal.

Compounding this problem was the complete absence of intellectual debate on the constitutional options open to Zambia. Scholars, in particular lawyers and political scientists, should have taken a leading role in initiating

⁶⁴⁴*The Third Republic Alternative: A Bulletin for Socio-Economic Change*, No. 1, June 1991, quoted in Slinn, "A Fresh Start for Africa? New African Perspective for the 1990s", p. 4.

⁶⁴⁵*Ibid.*

debate on the subject. This would have entailed a critical evaluation of the decision as to who was to draft the constitution.

Previous constitution-making exercises have revealed that the making of a new constitution through a Constitution Commission is the best way for the politicians to ensure that the constitution when finally drafted was one they wanted.

Study of the different modalities of exercise of constituent power in different countries indicates a wide variety of options as to the arenas for constitutional drafting and enactment. The choice among these different options may be made casually or inadvertently, but it will never be value neutral in its consequences. What looks like a simple, technical machinery choice may in fact predetermine or influence the final substantive recommendation as to the content and direction of a new or renewed constitutional system. The evidence would suggest that governments are very often aware of this truth, and shape their choice of the instrument of constitution-making accordingly.⁶⁴⁶

By entrusting the task of making the new constitution to the Constitution Commission, Kaunda assumed the power to determine its composition and influence the framework of the final constitution. McWhinney notes: "But the constitutional and political domains are very close, and a government, through naming the members of the expert (or non-expert) commission is in a position to determine, or at least to decisively influence the commission's thinking in advance of its commencing its work."⁶⁴⁷ This is evident from the terms of reference of the Commission. The Commission was to examine and determine a system of

⁶⁴⁶McWhinney, *Constitution-Making, Principles Process Practice*, p. 27.

⁶⁴⁷Ibid.

political pluralism that would ensure a government, which would be strong enough to rule Zambia and guarantee personal liberties and freedoms of the citizens. The Commission was to take into account the guidelines contained in the President's opening address to the Twenty-fifth National Council of UNIP.⁶⁴⁸ The Commission was also to consider the recommendations of the Special Parliamentary Select Committee on the democratisation of the Party and Government machinery dated 9 July, 1990.⁶⁴⁹

If the intention was to come up with a popular constitution endorsed by people in the country this was unnecessary. The President, as the person who had appointed the Commission, was an interested party, hence should not have outlined his views on the next constitution. The Report of the Select Committee of Parliament, although it contained important recommendations was a Party report, while the Commission had a national task to perform.

It may on the other hand be argued that notwithstanding the settlement of the terms of reference and the appointment of commissioners by the President, the Commissioners could still exercise their independence and formulate a constitution relevant to Zambia and not necessarily appealing to Kaunda. Such a possibility was negated. The Commission's task was to make recommendations on the next constitution and come up with a draft constitution, but the recommendations and draft constitution were subject to the approval of the President.

⁶⁴⁸See the terms of reference S.I. 1990 No. 135

⁶⁴⁹Ibid.

The Report and draft constitution were submitted to the President in April, 1991. A White Paper on the summary of the Constitutional recommendations and the Government's reactions to the recommendations were later published. Some of the recommendations which were not appealing to Kaunda and his Government were rejected.⁶⁵⁰ This was another, not so subtle way, of ensuring that the final constitution was in accord with the taste of the political leadership.⁶⁵¹ Constitution-making through a commission amounts to a stage-managed constitution-making exercise on the part of the government in power as the outcome is often known in advance.

The decision to have the constitution drafted by a commission did not enjoy popular support. The MMD as the leading political force in the country at the time and

⁶⁵⁰*Summary of the Main Recommendations of the Constitution Commission of Inquiry Together with the Government Reactions to the Recommendations: Government Paper No. 2 of 1991* (Lusaka: Government Printer, 1991), p. 16-17. The Commission for example recommended the inclusion of Directive Principles of State Policy in the constitution, but the Government rejected the idea of including the principles in the main body of the Constitution. The reason was that such inclusion would lead to misunderstanding and unnecessary litigation regarding their implementation. The Government instead decided that the principles should be included in the preamble to the Constitution.

⁶⁵¹The Commissioners are also exposed to moral temptations. They spend nights in the best possible hotels and some have the opportunity to travel abroad frequently to Britain and US under the pretense of studying the constitutional systems of these two countries. All expenses are paid for by the Government. In the midst of poverty few candidates are likely to reject such opportunities. After millions of Kwacha have been spent on them there is a tendency to feel indebted to the appointing authority, the President. The best way to repay this "favour" is to draft a constitution pleasing to the President. But this is not likely to be the position if the decision as to who was to draft the constitution was popularly arrived at after broad consultations.

other interest groups were never consulted; neither was their support sought after the decision had been made.⁶⁵² Neither did the MMD fight to get involved in the exercise. The constitution-making exercise suffered in terms of legitimacy when two MMD members declined to take up their positions on the Commission. This meant that the MMD as a political party, its members and supporters did not support the exercise. The MMD objected, in particular, to the strongly pro-UNIP character of the individuals appointed on the Commission.⁶⁵³ The MMD did nothing until the Constitution was drafted.

The support of the MMD was indispensable if the exercise was to succeed, as they had a large following made up of all those calling for change. Even after the Constitution was drafted Kaunda did not adopt a popular way of bringing it into effect, such as through a referendum or through a constituent assembly. As a result of this position, for which Kaunda, the MMD and Zambian intellectuals have to take the blame, a constitutional crisis arose. The MMD threatened to boycott the elections

⁶⁵²The situation in South Africa presents an interesting comparison. Both President de Klerk and Mandela did everything possible to bring chief Buthelezi and his Inkhata Freedom Party (IFP) into the election process. It was recognised that the legitimacy of the emerging political order was dependent on the support it was to enjoy among the people. But IFP's support throughout the country did not exceed five per cent. No matter how limited its political following was its involvement was crucial to the success of the post-apartheid constitutional order.

⁶⁵³National Democratic Institute for International Affairs and Carter Center of Emory University, *The October 31, 1991 National Elections in Zambia* (Washington DC: National Democratic Institute for International Affairs, 1992), pp. 28 - 29.

unless the Constitution was radically changed.⁶⁵⁴ To avert the chaos Kaunda was compelled to accede to most of the changes proposed by the MMD.⁶⁵⁵ The final Constitution was "an unsatisfactory compromise patched up under pressure to facilitate multi-party elections."⁶⁵⁶ It had no relevance to the economic and social pressures at play in the country and it was a serious departure from what Kaunda wanted the Constitution to be. It also did not meet the aspirations of the MMD. Notwithstanding the changes, the MMD maintained that they would review the Constitution soon after assuming political power.⁶⁵⁷ This could have been avoided had a popular decision been reached on who was to draft the Constitution.

⁶⁵⁴The constitutional impasse was broken after series of church-brokered meetings at which UNIP conceded to almost all the constitutional demands made by the MMD; See Ibid.

⁶⁵⁵As far as the writer has been able to establish, the proceedings of the meetings were not officially documented and published. It is therefore difficult to determine the reasons advanced for the changes. The changes can be determined by comparing the *National Assembly Bill No. 1 of 1991* and the *1991 Constitution*.

⁶⁵⁶Akashambatwa M. Lewanika, "Let the People Determine a Democratic Constitution", *Weekly Post*, 17 December 1993, p. 6.

⁶⁵⁷The first two Cabinet Ministers to resign from the MMD Government, Akashambatwa M. Lewanika and Baldwin Nkumbula cited failure to review the Constitution as promised during the election campaign as one of the reasons for their resignation. This was repeated by Edward Shamwana another member of the MMD who resigned to join the National Party; See Shamwana Joins National Party; Ibid., *Weekly Post*, 23 November, 1993.

2. The Making of the Constitution

(a) The Necessary Relation Between Constitution and Societal Consensus.

The agitation for change, during the period 1989-1991, was an expression of the people's displeasure with a system of government which had failed to meet their needs. It was a revolt against the order and everything else associated with the system. The people had seen the shrinkage of the political arena, through the elimination of inter-party competition for power. Discretionary powers became the basis of government. Most of the mechanisms conceived and embodied in the Independence Constitution, to guard against authoritarianism, were systematically watered down. Through a series of constitutional amendments the President assumed the imperial character of the Governor.

At the end of the seventeen years of one-party rule the Country's economy was in ruins. People had lost faith in the political system. The re-introduction of political pluralism and the corresponding change in the constitutional arrangement brought hope for the future. This also called for a change in the perception of the constitution; it was not just an instrument creating the various organs of government and prescribing their respective powers in relation to each other. This classical view of the constitution had been tried before and proved unsuccessful. The forces at play did not call for the classical perception of the Constitution. The Constitution had to be looked at differently, from the anti-classical

perspective, as a means to an end and not an end in itself. Apart from dealing with the issue of power it had to address the economic and social problems as well.

The constitution must be relevant to the economic, social and political forces present in the country. Constitutional changes in developed Western countries fully endorse this point. In the case of France, since the revolution, each major epoch of political development has been accompanied by a corresponding constitutional change representing the successful blending of political and social forces which have brought about the change of the political power in the first place.⁶⁵⁸

The Weimar system of government ended in 1933 with the take over of power by the Nazi, and Hitler's appointment as Chancellor. The formal ending of Hitler's reign came with the Germany military collapse and unconditional surrender in May, 1945. The post-war reaction was a general condemnation of the legal abuses of the Nazi era. When the time came to establish the new West Germany basic law in 1949, there was a societal consensus to eliminate all those factors which helped the rise of Nazi rule and take over of power, under the previous constitutional order. The presidential executive established by direct popular election, the provision for direct plebiscite, and the decisive role of the President in the choice of the Chancellor were not repeated in the new Constitution.

⁶⁵⁸McWhinney, *Constitution-Making, Principles, Process, Practice*, p.18.

Under the new constitution of 1949 the office of the President of the Republic was weakened. It was confined to ceremonial functions, while the post of Chancellor was given the extra constitutional legitimacy and prestige of being filled by a candidate elected by the lower house (Bundestag) of the Federal Legislature. The constitutional makers were drawn from the three Western occupying forces: France, Britain and the US. They were all committed to the installation of a democratic constitution as a precondition to the restoration of political sovereignty in West Germany. Every effort was made to avoid repetition of past mistakes. They opted for a vibrant federalism, a judicially based control of constitutionality of both legislative and executive actions, and a parliament based executive, all within the framework of a republican presidential system. The Constitution of 1949 correctly reflected the experience of the West-Germany leaders to whom political power and sovereignty was handed in 1949 by the Western allies.⁶⁵⁹

In Zambia, due to lack of debate and popular interest in constitution-making, the final constitution was not reflective of anything that had been learnt from previous constitutions. There was no debate on what the next constitution should provide. Though the members of the Constitution Commission went throughout the country to receive submissions from the people, the views expressed cannot form the basis of a meaningful constitution. By the very nature of the mode of constitution-making adopted,

⁶⁵⁹Ibid., p. 21.

most of the recommendations of the Commission were fully endorsed by the Government. Only in very few instances did they differ, but these recommendations were rejected by the Government.

There was another intervening factor. Following the rejection of the Constitution by the MMD the Government was forced to concede to some serious changes to be made to the Constitution. The changes were not necessitated by the need to improve the Constitution, but out of suspicion and mistrust between the MMD and UNIP, hence the Constitution which finally emerged cannot be said to be reflective of the reality obtaining in the country at the time.⁶⁶⁰ What was needed was a constitution guaranteeing a democratic and constitutional system of government. A constitution which would guarantee that the system of government was not easily manipulated to support an authoritarian regime as was the case with the Independence Constitution. A constitution which would at the same time address the most pressing needs of society. The agitation for change was not all about abuse of power but against hunger, poverty, ignorance and disease, the vices which have continued to

⁶⁶⁰Based on the submissions of the people the Commission recommended the inclusion of the Constitutional Court with both original and final jurisdiction in all constitutional and related matters. This was approved by the Government, but was removed from the draft Constitution at a meeting between the MMD and UNIP. Looking at the delays in the Zambia's judicial system there is no doubt that the proposal was progressive. As things stand cases of constitutional significance are no more urgent than any other case before the High Court. See Section 99 of the *National Assembly Bill No. 1 of 1991*. Also rejected was the appointment of Ministers from outside Parliament.

haunt the country, and assuming frightening proportions every year.

(a) Constitutional Response to Economic and Social Problems

History has also shown that a democratic system of government does not flourish in countries wallowing in poverty, hunger, ignorance, disease and other socially debilitating conditions. These problems are critical to the operation of any democratic constitutional framework. Events of the past years have shown that these conditions have assumed constitutional significance, and cannot, therefore, be left to be determined through party programmes. The constitution needs to obligate the government to address these problems. Whilst certain fetters need to be placed on government to ensure constitutionalism there is a need to empower the government to meet the needs of the people.

Western constitutional ideas, institutions and practices bequeathed to Zambia at independence evolved from Western material conditions which are absent in Zambia. The condition in Zambia is characterised by gravely depressed economic and social conditions, and by cultural orientations altogether alien to the West.⁶⁶¹ These are deeply-rooted realities in Zambia which cannot be ignored. The Indian philosopher Humayun Kabir writes,

⁶⁶¹ See also Ojwang, "Liberal Values in African Constitutional Development: Some Reflections," *African Society of International and Comparative Law*, 19: See also Ojwang, "Constitutionalism - In Classical Terms and in African Nationhood", *Lesotho Law Journal* 6 (1990), 57.

The problem of the 20th Century is to reconcile the conflicting claims of liberty and security. A new charter of human rights must secure to each individual, irrespective of race, colour, sex, creed, the minimum requirements for a bare minimum existence namely:

- (a) the food and clothing necessary for maintaining the individual health,
- (b) the housing necessary for protection against and for allowing space for relaxation and enjoyment of leisure,
- (c) the education necessary for developing the latent faculties,
- (d) the medical and sanitary services necessary for checking and curing disease and for ensuring the health of the individual and the community.

These are the four basic rights on which all other rights depend. It will be noticed that they appertain to the security rather than the liberty of the individual. The demands for security must take precedence over the demands of liberty in respect of the minimum human needs.⁶⁶²

These conditions do present a new dimension which must be incorporated in the scheme of constitutionalism and calls for variations to the classical approaches to constitutionalism.⁶⁶³ In Western societies these problems have been addressed in a different way. McWhinney observes:

The constitution (American) was open-ended enough to allow of its continued adaptation to changing society conditions and demands, and to allow for a new content to be given to it as laissez-faire ideas ceased to correspond to dominant societal sentiment. The openness of constitutional system to societal change is a key element in liberal constitutionalism, and it is no barrier in itself to social democracy.⁶⁶⁴

McWhinney gives counsel to countries involved in making new constitutional arrangements :

Perhaps the process of community transition could be assisted, in the case of new ventures in constitution-making, by constitutional bills of

⁶⁶²UNESCO, *Symposium on Human Rights* (New York: Columbia Press, 1949) p. 192.

⁶⁶³Ibid. p. 57.

⁶⁶⁴McWinney, *Constitution-Making, Principles Process Practice*, p.36.

rights provisions that identify the new social and economic claims to sharing of wealth and social opportunity in addition to the classical liberal, 'open society,' freedom of speech and association and communication values; though there is always the risk of jelling as timeless constitutional absolutes the purely passing, temporary political claims of today and so, ultimately, of acting as a break on social change and social progress.⁶⁶⁵

By the time of the call for political reforms the country lay in economic ruins and it was clear that it could not sustain itself without assistance from the international lending institutions and donor community, whose assistance depended on their relationship with Zambia. The severance of ties with the Bretton Woods institutions and the adoption of the locally devised structural adjustment programme in 1986 was a failure. The creation of various organs of government and the prescription of their respective powers was a matter, admittedly, worth expressing in the Constitution; the economy was of equal importance to merit mention in the constitution. Unfortunately this did not happen. The 1991 Constitution was silent on the economy and other social problems facing Zambia. While it is acknowledged that the exercise of power within set constitutional limits is not possible amidst economic decline and poverty, it follows that the constitution should have addressed these constraints.

One of the Commissioners on the Basutoland Constitutional Commission noted that: "limited government is a luxury. It presupposes a substantial degree of

⁶⁶⁵Ibid., pp. 127-8.

economic affluence and is all very well in the rich countries of the West".⁶⁶⁶ He went on to say:

But we in Africa, in common with many of our fellow men in the Far East and Latin America, are economically frightfully poor. In addition we are scourged with ill health, malnutrition, and lack of education. What we need is emphasis upon what government should do, positively to remove these evils. The trouble with eighteenth and nineteenth century constitutionalism, which permeates the American constitution... is that it is laissez faire and negative in character. It emphasises what government should not do mainly, it would seem, in the interest of private enterprise and private property. We need more emphasis upon what government should do; more emphasis on planning, need less on non-interference with private enterprises.⁶⁶⁷

On the other hand Ojwang has accurately captured the problems facing countries such as Zambia and outlines the new standards in determining a country's response to constitutionalism:

...it would readily be appreciated that African countries are placed under obligation to provide for minimum conditions of decent living, for their peoples. Naturally, this would impose duties of both restraint, from infringing the relevant interests, and action, to create the missing amenities of life that would facilitate greater enjoyment of human life. The question of ensuring that both the negative and the positive kind of obligation is met would be a relevant element in any assessment of constitutionalism. Restraint of government action, as an aspect of constitutionalism would thus have to be seen in terms of actions taken, and actions abstained from, and on that basis the outcome for the people would have to be assessed. There may be many possible

⁶⁶⁶Quoted in Amankwah, "Constitutions and Bills of Rights in Third World Nations: Issues of Form and Content", p. 211.

⁶⁶⁷Ibid. The Government has a crucial role to play in uplifting the standards of living of the people. It need not necessarily take part, but may on the other hand initiate measures and policies to address these problems. For instance very few foreign investors would be inclined to invest in schools, hospitals or in the construction of new roads. In fact an investor is inclined to invest in a country where these amenities already exist.

modes of political structuring capable of maintaining such a balance; and it is thus open to African countries to work out and maintain, as best they can, such political arrangement as would facilitate that object".⁶⁶⁸

(c) Response to Ethnocentric Limits to Constitutionalism

Apart from the economy, there are cultural forces which act against sound constitutionalism. The drafters of the 1991 Constitution totally ignored the point. One of the basic tenets of the classical constitutional perspective is that good law in one country is good law in any other country where it is exported. This is largely the influence of analytical positivism. McWhinney asks: "Is constitutionalism and the essentially western derived institutional models and practices in which it is historically rooted something that is peculiarly limited to western culture, in the sense that it cannot be easily exported to other non-western societies with any reasonable prospects of its taking root there and becoming genuinely operational?"⁶⁶⁹ What is true and demonstrable in the light of comparative constitutional law experience is that, there is an ethnic-cultural barrier to the successful reception or transfer of particular constitutional institutions developed in one society to another. This can be surmounted so long as the special social, economic and other basic historical conditions under which those institutions developed in the first society are already present in

⁶⁶⁸Ojwang, *Constitutionalism - in Classical Terms and in African Nationhood*, p. 71.

⁶⁶⁹*Ibid.*, p. 129

reasonable period of time in the second society.⁶⁷⁰ The constitutional institutions and practices which the Imperial Government transplanted to Northern Rhodesia were of an essentially stable, politically advanced post-industrial societies. The Territory had not yet even achieved the task of mass education and was yet to go through the earliest stages of economic growth. From the very beginning of constitutional government in Zambia there has been a disparity between the material conditions and the constitutional order.

The approach to self-government and independence on the part of Northern Rhodesia was conditioned upon the development, within the Territory, of a democratic system of government as evidence of its capacity to govern itself, free from the benevolent paternalism of the departing colonial power. The new post-colonial Constitution was highly derivative and borrowed heavily from the constitutional institutions and developed practices of Britain as the parent colonial power. McWhinney notes that:

Some of the later political and economic problems of this new group of succession states...undoubtedly stem from this constitutionalist elitism - the too - ready application to non-European societies of essentially European constitutional stereotypes without prior examination of whether the different communities concerned were at the same essential stages of political and economic development, and whether, in consequence, the socio-economic infrastructure that inevitably condition the operation of positive law prescription were the same. A certain minimum equivalence of identity of underlying basic societal conditions is a pre-

⁶⁷⁰Ibid.

condition to the successful reception or transfer of legal models from one system to another.⁶⁷¹

The Independence Constitution was just as symbolic as a flag or national anthem. It had no relevance to the material conditions in place in Northern Rhodesia. Professor Reginald Green has poignantly observed:

Many African constitutions are simply irrelevant. They do not in any meaningful sense represent the goals or operating principles of any significant interest groups..., are not seen as relevant to constitutional orders and exist because it is believed that, like national anthems, coats of arms and flags, constitutions and the development plans are something that states have to have for ceremonial and formal symbolic purposes.⁶⁷²

This problem has become apparent after independence largely because the colonial constitution was flexible and subject to change at any time depending on the exigencies of the time. Furthermore, it was authoritarian; democracy, good governance and human rights were never in issue throughout the period of the imperial domination of the system. Good government and respect of basic rights was the basis on which independence was granted, but the Colonial Government never left the necessary conditions to support such a system of government. Hence the Independence Constitution collapsed without realising its objectives. The one-party Constitution of 1973 was equally unsuccessful.

The making of the 1991 Constitution provided an opportunity to determine why previous constitutional orders

⁶⁷¹McWhinney, *Constitution-Making, Principles Process Practice*, p. 4.

⁶⁷²"Participatory Pluralism and Pervasive Poverty: Some Reflections", *Third World Legal Studies- 1989*, p. 21 at p. 47.

failed? What are the pre-conditions to successful operation of the Western constitutional ideas in the Zambian social setting? Are some of these conditions present in Zambia? If these conditions are absent can the Western idea of constitutional government be adjusted so as to suit the Zambian conditions? There are certain peculiar conditions to Zambia which, due to their overwhelming impact on personal and social life, must perforce be incorporated in the main political ideas and arrangements designed to regulate the lives of the people. Failure to incorporate them in governance may lead to a dislocation between popular reality on the one hand, and the scheme of public control, on the other hand. This situation may in turn lead to instability, atrophy, or collapse in governmental structures.⁶⁷³

Ojwang has argued that the Western concept of constitutionalism cannot be implemented in African conditions due to differences in economic, cultural and social conditions between the giving and receiving society. He has instead advanced the idea of an African concept of constitutionalism. He has observed that the African context is in the first place a context of creation, of construction, of large rights and liberties, through orderly and well-conceived management of national resources - rather than a context of defence of a fully developed, well-founded and universally understood set of rights and liberties. The creative process may require certain

⁶⁷³McWhinney, *Constitution-Making, Principles Process Practice*, pp. 66-7.

compromises to be made within the body of emergent liberties.⁶⁷⁴

Instead of addressing these cardinal issues the Government and the MMD teams, which met at the Cathedral of the Holy Cross to work out a constitutional compromise, went back to the old 1964 Constitution discarded in 1973, as unsuitable in addressing the needs of the people. The few innovations introduced: the appointment of ministers from outside Parliament,⁶⁷⁵ the establishment of a second legislative chamber: Chamber of Representatives,⁶⁷⁶ and the establishment of the Constitutional Court,⁶⁷⁷ were rejected by the MMD. These were new proposals, which should have been tested. They constituted a major departure from the Independence Constitution, but were rejected so that the final Constitution could conform as much as possible to the Independence Constitution familiar to the negotiators.

In Francophone countries: "Recent constitutional draftsmen have again sought their inspiration in what they perceive as a reliable and unsuspected democratic model that of France."⁶⁷⁸ This raises a number of questions:

Is this 'second time around' approach likely to succeed? Are there 'innovations and experiments' still to be made to remove the perceived causes of previous breakdowns? Is the political, social and economic climate, both nationally and internationally now more favourable to the

⁶⁷⁴Ibid.: See also generally Ojwang, "Liberal values in African Constitutional Development: Some Reflections", p. 19.

⁶⁷⁵ See Art. 44 *National Assembly Bill No. 1 of 1991*.

⁶⁷⁶Ibid., Art. 72

⁶⁷⁷Ibid., Art. 99.

⁶⁷⁸Reyntjens, "The Winds of Change. Political and Constitutional Evolution in Francophone Africa, 1990-1991", pp. 50-1.

flowering of pluralistic systems? Or will attempts to introduce democratic reforms in the still fragile state structures create chaos and uncertainty, paving way for fresh bouts of military or authoritarian rule?⁶⁷⁹

These questions were never addressed. The mandate of the Constitution Commission was largely to examine the distribution of power according to the classical constitution perspective. The terms of reference of the Commission were to:

1. Examine and determine a system of political pluralism that would ensure a government which would be strong enough to rule the Zambian Nation and ensure the personal liberties of the people, but without prejudice to the generality of this power--

(i) to examine and determine a system of Government that would ensure the separation of powers of the Legislature, the Executive and the Judiciary so as to enhance the roles of these organs;

(ii) to examine and determine the status in relation to the Government of the ruling Party which has won an election;

(iii) to look into the composition and functions of the various organs of the State and recommend their modality of operation⁶⁸⁰

In the course of discharging their responsibility the Commissioners themselves took time to reflect on their understanding of the constitution, which understanding influenced the making of the constitution they came up with.

A constitution is the fundamental law of the land. All organs of state should derive their powers from the constitution. Any action by any organ of the state that does not comply with the constitution is invalid. The constitution in this sense distributes powers to all the organs of the state. It also ensures the fundamental liberties of the citizenry.

⁶⁷⁹Slinn, *A Fresh Start for Africa? New African Constitutional Perspectives for the 1990s*, p. 5

⁶⁸⁰S.I. 1990 No. 135.

. Ultimately the constitution derives its authority and legitimacy from the people In a plural democracy a *constitution cannot set out party programmes be they social, economic, political or otherwise*. ... In this diversity the constitution must not be rigid but not too flexible either ... the constitution must not be subjected to too frequent changes as a matter of routine. In the area of fundamental freedoms and rights, a written constitution must ensure these. The assurance lies in the enforcement of the rights and freedoms in a court of law in the event of any violation (emphasis is mine).⁶⁸¹

This improvident understanding of constitutional issues is a consequence of the British or British-style training of African law faculties. The training associates most African lawyers in Western democratic constitutional tradition. The impact of these ideas is so deeply rooted to the point that most scholars are convinced that there is no other way of looking at a constitution.

They tend to focus myopically upon the issues identified by that tradition, that is various devices to keep the government out of the sphere reserved for private activity. In their constitutional conversations, the heart of the matter becomes the desirability and content of bills of rights, the structure of parliament and the electoral system, the importance of judicial independence, the "British" or "American" models of the executive. The constitution they produce deals with these problems, but little else.⁶⁸²

The Commissioners concluded: "Central to the Constitution and constitutional rule is the Doctrine of Separation of Powers".⁶⁸³ The people who settled the terms of reference for the Constitution Commission, are people who went through a British tailored legal education system or educated in Britain. Even some of the Commissioners who

⁶⁸¹Report of the Constitution Commission, 1991, pp. 11-2.

⁶⁸²Seidman, "A Commentary on the Proposed Draft Constitution of the Republic Namibia", p. 39

⁶⁸³Report of the Constitution Commission, 1991, p. 13.

are lawyers went through the same legal system, hence religiously follow the basic tenets of classical constitution.

(d) Response to Impact of Constitutional History

Sir Ivor Jennings notes, "with all due respect to the memory of Jeremy Bentham, one cannot sit in Westminster and draft a constitution for Mexico unless one knows a good deal more about Mexico than appears in the reference book."⁶⁸⁴ Every constitution has to be a product of history, even though it comes straight from the draftsman's pen. It is a product of the manner in which the country concerned emerged, of the conflicts and other forces which have played upon it. To illustrate the complexity of any relevant and legitimate constitution Jennings observes:

...every constitution must be a product of its environment... for example we cannot imagine the British Constitution working without parties; but the British parties have grown out of the local environment. They have their origins at least as far back as the Civil War; their evolution has been affected by conflicts of religion, economic interest, race and even personality -- for our party organisation has depended upon the ideas of thousands of politicians from say Oliver Cromwell to Ramsay Macdonald. This history has created a complex of emotions helping towards conflict of the parties by which the complexion of Parliament and the Government, their relations with each other and the electorate are determined.⁶⁸⁵

Apart from supporting the case for non-transferability of constitutional institutions and practices, Jennings's argument confirms that a good constitution must be relevant to the economic, social and political forces unique to the

⁶⁸⁴Ivor Jennings, *The Approach to Self-Government* (London: Cambridge University Press, 1958), p. 11.

⁶⁸⁵*Ibid.*, p. 9

social setting it is designed for. Constitutional reform therefore, means the amelioration of existing structures so as to provide a secure environment in which the pressing needs of the time, social, economic and political, can be met and wrongs of the past redressed. To carry out such a delicate process the drafter must have an understanding of the history of the country, especially its constitutional history. The constitution-making cannot be carried out in a vacuum. The starting point is to examine the existing structures and determine how well they performed and how they can be improved upon, if at all it is possible.

Savigny maintained, that the nature of any particular system of law reflected the spirit of the people who evolved it. All law making, he maintained, should follow the course of history. Law is therefore not universal, it varies with people and age. In order to carry out any law reform a deep knowledge of the society involved is a prerequisite.⁶⁸⁶ The people who settled the terms of reference of the 1991 Commission and the Commissioners themselves had little regard for history. The terms of reference limited the sphere of operation of the Commission, notwithstanding the fact that it was provided that the Commission could "examine any other issues related to or incidental to the above terms of reference".⁶⁸⁷ They could not take into account anything not related to the terms of reference and break totally new ground.

⁶⁸⁶Dias, *Jurisprudence*, pp. 517-8. This is a very important consideration in the anti-classical perspective.

⁶⁸⁷S.I. 1990 No. 135.

The Commission made observations and comments on various matters and stated its understanding on constitutional concepts, which influenced the discharge of its task. But no reference was made to Zambia's previous constitutional history. The Independence Constitution was not an over-night metamorphosis, but evolved according to the economic, social and political forces at play in the Territory and the colonial constitutional thinking of the time. The One-party constitution of 1973 was an adaptation of the Independence Constitution.

The Report of the Commission does not indicate the appreciation of history in constitution-making. The Constitution was based on submissions and Commissioners' understanding of constitutional issues. Most submissions centered on how power was to be distributed between the various organs of government and how to limit it and ensure constitutionalism. These are ideas which have dominated constitutional discourse in Zambia. Some of the submissions were completely irrelevant and had nothing to do with the constitution. Furthermore, though there were suggestions on the changes in existing structures no reasons were advanced to explain why certain arrangements should be changed in favour of others.

III. Critical Evaluation of the 1991 Constitution

The events of the period 1989 to 1991 reawakened interest in formulating a new constitutional order which would bring genuine political participation and real respect for human rights for all citizens. But with a collapsed economy and a government that seemed unable to

cope with the problems, the challenge was to seek a new constitutional order that will guarantee the people a better life as well. The real question, which had to be addressed was whether the agitation for political reforms would lead to a new constitutional government or merely a repackaging of old constitutional arrangements into a new package.⁶⁸⁸

The 1991 Constitution, as a compromise constitutional framework, was a poor reproduction of the Independence Constitution in content, arrangement of various provisions and literally style. One of the reasons for lack of legitimacy for the constitutions bequeathed at independence, within the Commonwealth, was the language used. It was hardly the language understood by an average Zambian. As a way of making people feel that the constitution is part of their lives, the language must be simple. In fact recent constitution-making has totally departed from this tradition. The interim constitution of South Africa and that of Namibia are some of the examples in Africa.

The arrangement of various sections of the 1991 Constitution is largely the same as that of the 1964 Constitution. The institutions created and their relationship with other organs of government, except for few exceptions are the same as those in the Independence Constitution. The executive powers, like in the 1964 constitution are vested in an executive President who is

⁶⁸⁸See also Foreword by Salacuse in *Third world Legal Studies - 1988*, xi.

assisted by a Vice-President appointed by the President from among Members of Parliament.⁶⁸⁹ The President has power to appoint Ministers from among Members of Parliament, and Cabinet is there to formulate the policies of Government and advise the President.⁶⁹⁰

Chapter three in both constitutions is the Bill of Rights. The Bill of Rights guarantees the same rights and provides the same derogation provisions, despite the fact that the country's human rights position has been very poor and that Bills of Rights were at best merely decorative. The referendum clause has also been repeated in the new Constitution.⁶⁹¹ These provisions are important but there is nothing in the Constitution indicating what has been done to ensure that they ^{are} not ~~are~~ manipulated to the advantage of a few people as was the case in the period 1964 to 1972.⁶⁹²

The upheaval of the period 1989-1 was not for civil and political rights only, but for the need to address the question of hunger and improvement of the people's welfare. The constitution is totally silent on this question, notwithstanding the fact it is now widely acknowledged that economic and social rights are as important as civil and political rights.

⁶⁸⁹See Art. 45 of the 1991 Constitution and Art. 41 of the Independence Constitution

⁶⁹⁰ Ibid., Art. 49.

⁶⁹¹ Ibid., 79 (2).

⁶⁹²For instance Chanda, "Zambia: A Case Study in Human Rights in Commonwealth Africa", p. 525, proposes that the Bill of Rights must be redrafted without derogation provisions and the courts to be empowered to determine how far the legislature and the executive can interfere with the guaranteed rights.

The argument is not that economic and social rights are much more important than civil and political rights. Both are important, the question is how and where to strike the balance. The discourse on these issues is completely lacking in the Report of the Constitution Commission even during the negotiations between the MMD and UNIP. Consciously or unconsciously they devised a system of government which attempted to address the problem of abuse of power, by limiting government and not empowering it or obliging it to address some of the most pressing needs of the people. Such a constitution is in conflict with "the felt imperatives to use government power to achieve development, by definition a state-powered exercise in social, political and economic change".⁶⁹³ Admittedly there is nothing in the Constitution which prohibits the government of the day to address economic and social problems, but this has been left to their discretion. These issues are so critical that they are beyond the discretion of the party in power. Every government that comes to power must be obliged to address them. They are national problems, which affect the very foundation of constitutional government, and how they are to be addressed must be popularly determined.

The making of the Constitution of 1991 entailed a radical change of the discourse on the constitution, its functions and its making. There are other factors which point to the fact that a totally different constitutional

⁶⁹³Seidman, "A Commentary on the Proposed Draft Constitution of the Republic of Namibia", p. 37.

strategy should have been adopted. In the last Chapter we looked at the process of the reorganisation of the constitutional order left at independence, leading to the creation of an authoritarian government under a one-party constitutional arrangement. All the organs of government were subordinated to one individual who was both President of the Republic and of the Party. The civil servants were protected from the influence of politicians so as to ensure their neutrality and ability to serve any government in power. After the constitutional reforms they were placed under the direct influence of the politicians. The entrenched provisions, in the Constitution, particularly the referendum clause, were removed. The Constitution became amenable to change just like any other piece of legislation. The intra-party rivalry precipitated by tribal competition for material resources threatened the peace and unity of the country. This was resolved, at least for a while, through the shrinkage of the political arena, leaving all activities to be expressed and pursued within the one-party framework.

There is no proof of anything having been done by the constitution-makers to ensure that these problems do not reoccur. No study was undertaken or any discourse entertained to establish why the independence constitutional order failed and what needed to be done to make it work this time. Neither did the Commission identify any forces or institutions now in place which were not present then, which would allow a similar Constitution to operate effectively in Zambia in the 1990s.

The Constitution is irrelevant to the unique problems being experienced by Zambia. For a country faced with the problems of underdevelopment, disease, poverty, and illiteracy in alarming proportions can least afford the luxury of a strictly limited government, with an hands off approach to the problems facing the people. Freedom of speech and movement has no meaning to hungry people. Government has to assume the responsibility of initiating policies aimed at integrating the fragmented tribal groups into a strong united nation, for raising the standard of living of the people and generally ensuring the economic well being of all. These responsibilities cannot be left to the industry of the individuals and for the Government to assume the laissez faire posture. Amankwah, for instance, recommends that the constitution of a new African nation should contain a *Bill of Duties* as well as a Bill of Rights. The traditional Bill of Rights merely imposes a limitation on the sovereign's power. It is necessary in a developing nation to emphasise the positive aspects of a state's duty to individuals as well.⁶⁹⁴

The events of the past two and half years have revealed some inherent weaknesses in the 1991 Constitution. It cannot stand its celebrated task as a bulwark of defence against authoritarianism. The only restraint available is the morality of those wielding power. The same powers, institutions and practices, which led to the collapse of the Independence Constitution are still in place and at the

⁶⁹⁴Amankwah, "Constitutions and Bills of Rights in Third World Nations: issues of form and content", p. 211.

disposal of the new political leadership. Should they decide to use them there is nothing that can deter them. A few developments are worth noting. The electoral system now in place is the same as that of 1964, and coupled with the people's discontentment with the UNIP Government and the general economic decline enabled the MMD to get a landslide victory. UNIP has been reduced to a regional party,⁶⁹⁵ just like the ANC was in 1964.

There are interesting parallels with the developments soon after independence. The MMD secured 125 seats in the 150 seats National Assembly. This was the repeat of the 1964 elections, in which UNIP obtained fifty-five of the sixty-five seats. The elections of 1991 merely created a shift from a *de jure* one party system to a *de facto* one party state. To all practical purposes there is no opposition party, hence no inter-party competition for political power. As was the case between 1964 and 1972, the rivalry over power has shifted within the MMD. This is evident from the resignation of some members of MMD to form the Caucus for National Unity (CNU)⁶⁹⁶ and recently the formation of the National Party (NP).⁶⁹⁷

⁶⁹⁵See generally, National Democratic Institute for International Affairs and Carter Center of Emory University, *The October 31, 1991 National Elections in Zambia*.

⁶⁹⁶The CNU was formed by Patrick Katyoka as a reaction to the MMD Government's failure to address what was promised during the campaign. The CNU has since been dissolved and Katyoka is now back as a member of MMD.

⁶⁹⁷See *Weekly Post* (13-19, August, 1993), pp. 10-11. The National Party was formed following the resignation of about ten Members of Parliament from the MMD. Some of the reasons given for their resignations were corruption and drug dealing among Government officials, failure to promote a democratic culture and poor management of the economy.

The declaration of the state of emergency in February 1993 and the subsequent detention of some of the members of UNIP point to the fact that extreme powers are still in force and can be used whenever the political leadership decide to do so.⁶⁹⁸ It is just a matter of time. The economic reforms carried out so far have caused extreme misery among the people. There is no obligation on the part of the Government to take measures aimed at addressing the people's needs. In fact the present Government is preaching the eighteenth century laissez faire economic theory, which is not applicable anywhere in the world today.

IV. The Making of Another Constitution

In November 1993, two years after the installation of a new government, President Chiluba appointed a Constitution Commission to review⁶⁹⁹ the 1991 Constitution. During the election campaign the MMD promised to review the 1991 Constitution immediately after assuming power. This did not happen soon thereafter. Once in power there was no enthusiasm to carry out the exercise. The Government was accused of having reneged on its promise and some Cabinet Ministers resigned their Cabinet posts citing the delay in reviewing the Constitution as one of the reasons.⁷⁰⁰

⁶⁹⁸See Africa Watch, *Zambia Model of Democracy Declares State of Emergency* 5 (10 June, 1993), for the review of the events surrounding the declaration of the emergency.

⁶⁹⁹It is a misnomer to call the Commission as a "review" Commission. Its terms of reference are very wide. The Commission is mandated to collect people's views on the next Constitution to be enacted. It has to: "Recommend on whether the Constitution should be adopted by the National Assembly, by a Constituent Assembly, or by a national referendum or by any other method." See S.I. 1993 No. 151.

⁷⁰⁰The Ministers who resigned were Baldwin Nkumbula and Akashambatwa Mbikusita Lewanika. In 1993 they finally left

What has been said about the 1991 Constitution can be repeated for the current constitution-making task, and at the end of the exercise it is very unlikely that Zambia would be in a better constitutional position than now. There is the question of timing. Apart from a change in the constitution occurring after a fundamental change in the existing economic and social conditions precipitated by a popular revolution or similar radical political events, McWhinney observes: "Within existing nation-states, and especially those blessed with some stable and continuing experience in constitutional government, restatement or redefinition of main political and social premises may also occur on a full consensual, voluntaristic basis without the force majeure of revolution or internal political upheaval."⁷⁰¹

Neither conditions were satisfied before the current constitution-making exercise was embarked on. The euphoria for political and constitutional changes lasted until the end of 1991. The review of the Constitution should have been undertaken immediately after the elections, as a secondary mop-up measure. This was not done until two years later. By that time the original eagerness which spearheaded the collapse of the one-party regime had already waned. Within that period economic reforms were set in motion, which have created serious economic problems for the common man. Of great concern is to survive the hard

the MMD and formed the National Party, the former is now President of the Party.

⁷⁰¹McWhinney, *Constitution-Making, Principles Process Practice*, pp. 12-13.

times which have arisen and not to work out another constitution. In fact most people are disillusioned; the elections of 1991 gave the people hope for better and much more prosperous times ahead. So far this has not been forthcoming. What is evident is that some of the people who led the campaign for change, who were on the verge of bankruptcy, are the *nouveau riche*, whereas an average person is still struggling to feed himself.

Zambia has never had a stable and continuing experience in constitutional government. The colonial system of government was authoritarian. Attempts to run such a system of government failed between 1964 to 1972. One-party rule was in itself the negation of good governance. In the last three years since the return to multi-party politics there have been no serious moves towards constitutional government. The same old structures which supported and sustained authoritarianism in the past are still in place, and there are no indications that serious democratic reforms will ever be effected. Under such a situation of mistrust, suspicions between the governors and the governed and serious poverty, it is not possible to command consensus and voluntary support to draft a new constitution.

The people entrusted with the responsibility to draft the next constitution cannot escape the criticism made against the drafters of the 1991 Constitution. The only marked difference is that not all members of the present Commission were appointed by the President. Of the twenty-four members sworn on 9 December, 1993 five were appointed

by the President, seven from non-governmental organisations, five chosen by opposition parties, two from the church, four academics including students and one from the ruling party, MMD.

The intention was to make the Commission as representative as possible. But this does not enjoy popular support. The Government unilaterally decided that the Foundation for Democratic Process (FODEP) should co-ordinate the selection of some of the Commissioners and the rest of the Commissioners were appointed by the President. The MMD Government ignored that "the only way to rule out arbitrariness is by facilitating for broad participation. People should openly and democratically determine their own constitution."⁷⁰² The Commission has been described as grossly unrepresentative: a lot of interest groups are not represented on the Commission and that it is dominated by Bemba-speaking people from Luapula, Northern and Central Provinces.⁷⁰³ These are serious accusations which impinge upon the credibility of the Commission and its work. Lewanika has accurately captured the problem:

The Chiluba-Sondashi constitution affair is about a personalised executive using vulnerable persons and propaganda to short-cut and stage-manage constitutional reform. It is being done for self-preservation and the pleasure of the Western donors. As in all cases subsequent government may have to redo the exercise again and again after its fashion. This could be repeated until a genuinely

⁷⁰²Akashambatwa M. Lewanika, "Let the People Determine a Democratic Constitution", *Weekly Post* (17 December, 1993), 6: See Also Ludwig Sondashi, "Lewanika Had his Facts Wrong on the Constitution Review", *Weekly Post* (5 November, 1993), p. 6.

⁷⁰³*Weekly Post* (14 December, 1993), p. 4. The Accusations were made by Mr. Aldofus Mubanga Public Affairs Director of the Human Rights Association of Zambia.

national and democratic government side-steps its own interests in favour of the people's.⁷⁰⁴

The Commission has also been plagued by its own internal problems. The Secretary of the Commission was forced to resign his position on account of differences with the Minister of Legal Affairs. A dispute arose between the Minister of Legal Affairs and the Commission over the employment of Professor Yash Ghai as consultant to the Commission at a fee of \$ 1,000 per day: over half a million Kwacha, with all expenses paid for by the Government. Professor Ghai was forced to withdraw. Two members have since been removed from the Commission, and are facing criminal charges of abuse of their powers as Commissioners. The Vice-Chairman was forced to resign her position for undisclosed reasons, but has remained an ordinary member of the Commission.⁷⁰⁵ All these events have occurred within a period of six months. The Commission is still touring the Country and is yet to consider the submissions. It is, however, difficult to imagine how the Commissioners hope to reconcile the various submissions and work out the political compromises they are expected to address and embody in the final constitution, in view of the public differences among themselves, and the respect their recommendations will command from the Zambian people.

Unless serious measures are worked out aimed at cultivating people's interest in the exercise, and the Constitution is enacted in the most popular way possible,

⁷⁰⁴Ibid., "Let the People Determine a Democratic Constitution", (17 December, 1993), p. 6.

⁷⁰⁵*Weekly Post* (29 April, 1994)

this constitution-making exercise will be no more than a public relations venture.

Conclusion

The making of the 1991 Constitution was precipitated by the most radical political, social and economic changes ever experienced since independence. The one-party system of government established in 1972 failed to address the problems of underdevelopment it was designed to deal with. The problems in fact got worse. The collapse of similar monolithic systems of government and the collapse of the Soviet Union added another dimension to the problems. This was followed by changes in the policies of major lending institutions to which Zambia is linked. Further funding was dependent on the steps taken towards democratisation of government. These changes called for a corresponding change in the constitutional order. The enactment of the 1991 constitution was a constitutional response to the upheaval.

The constitution-making exercise suffered in many respects, this in turn affected the Constitution when finally drafted. The timing was perfect, there was a national consensus to draft a new constitution. But there was no debate nor accord on who was to draft the constitution and what was to be included. The exercise was political, as a consequence there was no discourse on why the previous constitutional orders failed and what needed to be done to avoid the repetition of previous failures. There was no regard to the political, economic and social problems, which necessitated the very constitutional reforms and how they were to be expressed in the

constitution. The outcome was that the final Constitution devised was a reproduction of the Independence Constitution. It merely focuses on power, how it is distributed among the various organs of government and how one organ of government can check on the other.

The decision to go ahead with the drafting of another constitution in 1993 is another exercise in futility, unless drastic steps are taken to win people's confidence and the constitution drafting exercise receives popular support. The timing is wrong and the internal differences among Commissioners pose serious questions on the Commissioners' ability to reconcile the various political interests presented to them and how they will reflect the compromises in the Constitution when finally drafted.

CHAPTER SEVEN

CONCLUSIONS AND RECOMMENDATIONS

The objective, in the preceding Chapters, has been to make a case for the adoption of a new perspective in constitution-making in Zambia. The development of constitutional government, since the Territory was determined almost a century ago, has been outlined and analysed. The economic, social, cultural and political forces, and leading constitutional ideas of the time have been taken into account. Admittedly not all issues have been exhaustively addressed, but what has been discussed provides underpinnings for some conclusions on constitution-making and functioning of constitutional government, and determining what needs to be done to nurture a viable constitutional order in Zambia.

I. Conclusion

Constitution-making is a complex exercise which is influenced by a myriad of forces both within and outside the social setting it is crafted for. The economic, social, political and cultural forces including tested and untested constitutional theories have an impact on the making process and the content of the final constitution.

The independence constitutional order was based on the need to promote constitutionalism, democracy and respect for human rights. Experience of the past thirty years of independence has revealed complete failure of constitutionalism and consequently of democracy and respect for human rights. Even after the end ~~one~~ of one-party rule

in 1990 and much talk about democracy, good governance and respect for human rights, subsequent developments have revealed proclivity towards authoritarianism. This gloomy picture is a product of many factors.

The colonial constitutional legacy has had a negative impact on constitutional government in the post-independence era. From the very inception of colonial influence in Northern Rhodesia the system of government introduced was authoritarian. It was premised on the fact that good men and not good laws make good government. This was reflected in the conferment of both legislative and executive powers in the British High Commissioners to South Africa and British High Commissioner to Nyasaland who exercised these powers in North Western and North-Eastern Rhodesia respectively. The powers were later vested in the Governor with the assumption of direct administration of Northern Rhodesia by the British Government.

The constitution as a body of rules which define and limit the exercise of governmental power and governs the major political activities in the Territory did not exist until a few months before independence. The constitutional framework did not regulate political activities. The Orders in Council and the Royal Instructions were not concerned with limiting power or how power was exercised, but mostly focused on the broad division of power between the executive, legislature and the judiciary, and the mechanism for ventilating a section of public opinion. The ultimate authority was reserved in the Governor for the Territory,

The frequent changes in the Orders in Council, Royal

Instructions and the frequent shifts in the colonial policy hindered the development of the idea of government of laws and not of men among Africans.

A few months before independence the ruling constitutional ideas changed: good laws and not good men make good government. The constitution of 1963 introduced various constitutional devices designed to limit government power and sustain constitutionalism. After independence the new perspective was developed further by the departing colonial authorities. The constitution became the permanent and fundamental law of the land drafted with the consent of all relevant parties. Some of the institutions and procedures of government were new, and the people who assumed political power were inexperienced.

These ideas and innovations came too late in the history of the country. The authoritarian nature of British colonial government was too deeply entrenched to be eradicated through constitutional prescriptions. Furthermore, the people who assumed the reigns of power had cut their political teeth in opposition to colonial rule and had the opportunity to learn and learn very well the authoritarian nature of the colonial system of government. They had no idea about democracy and human rights as that was never the basis of colonial government. It was unrealistic to expect the post-colonial government to follow the path charted by the departing colonial masters which they themselves never pursued.

The constitutional changes introduced immediately after independence were meant to get rid of the straight-

jacket condition deliberately devised, by the departing colonial masters, to hinder the new government from utilising the powers available to all previous governments. They were justified by the government's need to use the institutions of government and resources available to address the economic and social needs of the people. But the changes had negative implications. The powers of the President increased, the effectiveness of most of the institutions, whose function was to control the executive authority, decreased and in certain instances the institutions and practices were eliminated. These were the natural consequences of the dual legacy of colonial rule.

While the changes were necessitated by the need to address the economic and social welfare of the African majority, the constitution remained silent on these issues. The constitution silent on how these social and economic imbalances were to^{be} addressed. Neither was the government constitutionally obliged to resolve them. The decision to address these problems remained the exclusive discretion of the government. By the end of the one-party rule the people's economic and social welfare declined even further, notwithstanding the conferment of the broad powers.

The colonial constitutional order, including the independence constitution lacked legitimacy in the eyes of the African majority. The legitimacy of the constitution is determined by the scope of loyalty, obedience and confidence it commands from the people.⁷⁰⁶ The institutions and procedures of government have to be viewed with trust,

⁷⁰⁶Nwabueze, *Constitutionalism In Emergent States*, p. 24.

confidence and reverence. The people must identify themselves with the constitution, and develop the attitude that the constitution is there to benefit them, and that both the rulers and the ruled are governed by the constitution. They must arise in its defence in the face of attempts to supplant, or depart from its broad objectives. The legitimacy of the constitution is determined by how popular the constitutional framework has been determined and brought into effect. The people must feel that it is their constitution, which they helped to determine. Such an idea has never taken roots in Zambia.

Northern Rhodesia was a creation of colonial entrepreneurs, who perceived it as a solution to their problems. The institutions and practices of government from advanced social formations were transplanted into an area which was a loose formation of various nations. Different sets of laws existed for Africans and non-Africans. The British citizens took the common law and representative government with them, wherever they went and were entitled to all rights and privileges as British citizens. The constitutional changes which occurred during the period 1889 to 1959 were determined and influenced by the white settlers, who wanted internal self-rule, alternatively amalgamation with Southern Rhodesia.

The African majority had virtually nothing to do with the development of the Territory's constitutional order. Their involvement begun just a few years before independence. Even this was limited within the constitutional framework determined by the settlers, the

Colonial Government and the British Government as trustee of African interests. In fact African participation in the constitutional development was limited to a small number of African elite. Even then they could not propagate constitutional ideas different from those they had learnt from their colonial masters. The few that had some knowledge of the constitution received their education from British colleges and universities, and did not see issues other than from the white man's perspective. The African demands during colonial rule were in fact for greater African participation within the existing framework. In the eyes of the majority of Africans the laws, including the constitutional order, prescribed in various Orders in Council and Royal Instructions, had no relevance to their lives. The arrangement only bred contempt for the law and constitutional government.

The task of the new post-independence government was to create confidence in, and respect for the institutions of government. Legitimise the institutions in the eyes of the people, and distinguished between the permanent institutions of government and the passing members who manage them.⁷⁰⁷ But this did not happen. The constitution was not an umpire above the competition for political power, but a weapon in the fight against perceived and imagined political enemies. The constitution was altered to gain temporary advantages over one's political opponents.

⁷⁰⁷Ghai and McAuslan, *Public Law and Political Change in Kenya*, p. 506.

The determination of the constitution has remained the preserve of a small clique. The decision to introduce one-party system of government was made by the government and the role of the people was merely to give their views on the framework of the one-party system. The appointment of the Chona Constitution Commission determined in advance what was to be prescribed in the constitution. Furthermore, the recommendations were subject to the approval of the Government. The suggestions which were unfavourable to the Government were rejected. The same can be said for the Constitution Commission appointed in 1990.

The choice of a constitution commission to draft the constitution in itself undermines the legitimacy of the constitutions. There is a limit to the number of people who can give evidence to the Commission. The 1991 Constitution Commission received a total of 987 submissions: 586 oral and 401 written. With the population of the country at around eight million it meant that only 0.012 % of the population took part in the exercise and can identify themselves with the constitution. This also meant that the views of 0.012% of the citizens provided the basis of a constitutional framework that was to determine the lives of the remaining 99.988% of the population.⁷⁰⁸

The constitution was identified with the commission which drafted it and the government in power during that time and not with the rest of the population. Once the government or the leading figure on the Commission is

⁷⁰⁸See the Appendix to the Report of the Constitution Commission, 1991.

compromised or discredited the constitution is often also undermined.

Apart from the methodology used in the making of the constitution, past constitutions had inherent defects, which undermined their effectiveness. The colonial system of government was authoritarian supported by various oppressive laws. The independence Constitution, which introduced the new ideas of democracy, constitutionalism and respect of human rights, was designed in such a way that it co-existed with all oppressive laws which were in place before independence. The Bill of Rights guaranteed the traditional civil and political rights, but at the same time provided broad situations under which these rights can be abrogated. State action inconsistent with the various rights and freedoms guaranteed by the constitution was presumed to be legitimate if carried out in the interest of defence, public security, public order, public morality and other such similar vague situations. But such acts could be held to be inconsistent with the constitution if shown that they were not reasonably justifiable in a democratic society.

All pre-colonial laws were presumed to be in conformity with the constitution unless it was proved that they were not reasonably justifiable in a democratic society. The burden was on the citizens to challenge the constitutionality of state action, and legislation. The situation has remained the same since independence. The Government is at liberty to enact any piece of legislation and it is for the citizens to prove that the legislation or

the action taken is unconstitutional. In a country where people have never had trust and confidence in the law and unable to mobilise a strong public opinion on issues of concern this is unrealistic. Challenging government action requires retaining a competent lawyer, legal fees are not modest, and for people who can hardly afford to adequately feed themselves due to their impecuniousness, the constitutional premise is wrong. The State on the other hand has all the resources of the country at its disposal. Laws which are not in line with the post-independence values of democracy, human rights and constitutionalism continue to be in force, and there is nothing to stop the government from enacting many such oppressive laws.

In addition the electoral system continues to undermine the sustenance of a sound democratic system of government. The system envisaged the election of the Members of Parliament on their own merit. But in reality candidates are elected on the strength of their own parties. The elections of 1964 reduced the ANC into a regional party based in Southern Province and in the election of 1991 UNIP became another regional party enjoying support in Eastern Province. This has led to the creation of *de facto* one-party rule, which militates against the development and existence of democracy and constitutionalism.

The economic welfare of a country is crucial to the sustenance of any democratic constitutional order. The constitution may guarantee people the fundamental civil and political rights, but these are meaningless if the people

continue to live in abject poverty. The nature of the colonial system of government hindered the promotion of the economic and social welfare of the African majority. African economic advancement was possible only if it was not in conflict with the interests of the white settler community. Notwithstanding the abandonment of the purely hands-off approach to economic and social issues in most Western countries, in favour of the state-welfare and socialist approach, the colonial government in Northern Rhodesia remained largely a tax collecting capitalist government.

The consequence of the system of government was that the post-colonial government had the task of addressing the economic and social injustices facing the African majority in the shortest possible time. This entailed massive state participation, in fact only the government had capacity to address these problems. The constitutional changes effected immediately after independence were justified on the premise that they were designed to give the government greater powers to address the pressing needs of the people. Some of the constitutional mechanisms designed to limit the use of power were removed because they were a wastage of scarce government resources which could be used elsewhere to alleviate the poverty of the people. The introduction of one-party rule was justified on the premise that it was meant to bring forth economic and social development and national unity in the country.

Power was given without corresponding responsibility. There were no constitutional mechanisms to ensure that

power was indeed used to improve the quality of life of the people. The arrangement was founded on the presumption that the post-independence leaders would, without any compulsion or external checks, use power for the intended purpose and that purpose alone. Like the colonial system of government, the reconstituted post-independence system was based on the premise that good men and not good laws make good government. Broad discretionary powers were conferred on the President giving him the imperial character enjoyed by the Governor. But power was used to the detriment of the very people it was meant to benefit

The preceding conclusions point to the absence of a sound constitution framework to guide constitution-making, functioning of the constitution and general constitutional discourse. The classical constitutional perspective has had a serious impact on constitution-making in Zambia and has bred misguided intellectual arrogance. People with knowledge about constitutions do not look at the constitution and constitution-making other than from the classical constitutional stand point.

The constitutional ideas and experience of the Old Empire were transplanted to the new colonies and a framework was developed and each territory had to fit in that arrangement. Even though the main emphasis of the classical constitutional perspective is to limit government power and ensure constitutionalism, this was not the basis of colonial government in Northern Rhodesia. The constitution was much more concerned with the creation of various organs of government: the executive, legislature

and the judiciary and defining their respective powers. But in a true classical constitutional perspective the colonial constitutional order remained silent on the economic and social welfare of the people, and did not take into account the relevance of the institutions to the economic and social forces present in the Territory. Pieces of legislation passed in other territories were imported into Northern Rhodesia without inquiring into their pertinence in the Territory.*

In 1963 the Westminster constitutional model was introduced and there was no question as to how appropriate it was to Northern Rhodesia or whether the basic conditions which have made it effectual in its place of origin were present in Northern Rhodesia. A few months later it was adapted with the introduction of the presidential elements, and conferred upon the Territory as the Independence Constitution.

The influence of the perspective has continued in the post-independence era. The Bill of Rights which permitted the abrogation of fundamental rights and freedoms in the interest of public policy, order and morality was reproduced, in the face of ample proof that such a Bill of Rights is incapable of protecting the fundamental rights and freedoms of the people. The same electoral system which reduced the ANC into a regional party was reproduced under the 1991 Constitution. There was no question as to how well these institutions worked under the previous constitutional orders. As a result it has not been possible to draft a constitution which is relevant to Zambia.

Recently the writer, after waiting for two full days to make his submissions to the Constitution Commission given the mandate to draft the third post-independence constitution, suggested that in order to give the next constitution legitimacy and a truly national character, the Commission should not draft the constitution, but instead it be popularly determined by a constituent assembly or any other such similar popular and broad-based body. The suggestion was viewed as an affront to the intelligence of the Commissioners. The writer was asked why he was before the Commission if he did not have confidence in the Commission.

There is resistance to depart from well known but unsatisfactory ways of making the constitution. Since previous constitutions have been drafted by Commissions, it follows that the present Commissioners also have to draft the constitution. The critical question should be whether drafting the constitution by the Commission would place Zambia in a better constitutional position than previously. The impact of the classical constitutional model is so deeply rooted that there is no other way of looking at the constitution and constitution-making.

The writer also suggested that the next constitution must address the question of the economy. The economic welfare of the country is so critical to the operation of a constitutional government to the point that it was no longer a matter for the party in power. It was suggested that if the constitution was to be popularly determined it must also prescribe the economic system of country to avoid

giving confusing signals, where some parties once in power embark on utopian capitalist or socialist economic reforms. The writer was accused of advocating for an ideology to bind future governments and that the Commission had no mandate to do so. If the constitution is an expression of the will of the people what is wrong with the will of the people on the economy being expressed in the constitution? If the decision is popularly determined any government is bound by that decision and cannot depart from it and maintain that it was still acting in the interest of the people.

The position of the Commissioners reveals deeply seated convictions that there is only one way of making a constitution, that is through constitution commissions. It also shows that the constitution has nothing to do with the economy. The economy is the preserve of the individual citizens and that the government's role is that of formulating policies on how the conflict arising from the market should be resolved. The views continue to subsist even in the face of evidence that the soundness of the economy is crucial to the survival of any constitutional order and that even the leading capitalist countries have abandoned a purely hands-off approach to the economy in favour of an interventionist approach.

II. Recommendations: Viable Constitutional Order in Zambia

The first step towards correcting past constitutional failures and establishing a viable constitutional order is to change the constitutional perspective which has determined constitution-making, functioning of the constitution and general constitutional discourse in the past. There is need to shift from the classical to the anti-classical. Second, it follows from the anti-classical perspective that the future constitution of Zambia must be popularly determined in order to give it legitimacy and a truly national character, instead of being identified with a small group of people or government. Third, past constitutional frameworks must be reviewed and their weaknesses must be rectified. Fourth, apart from addressing the question of power the constitution must also address the economic system of the country to avoid experiment in economic extremism. The constitution must also oblige the government to address the most pressing needs of the people both economic and social.

Past constitutional developments occurred under the great sway of the classical constitutional perspective, but the outcome of these changes has been a sad constitutional experience. The central role of constitutions has been to ensure constitutionalism, but the history of the past thirty years has shown proclivity towards authoritarianism bringing into question the premise on which the constitutions were based. The position in itself justifies the shift from the classical to the anti-classical

perspective. It also demands the re-examination of basic constitutional ideas and issues which have been taken for granted. Very basic questions have to be posed and answered: What is a constitution? What is its objective? How and who is to determine its framework? What must it provide? When can it be drafted? There is need for a new attitude and disposition towards the making of the constitution and its operation. The anti-classical perspective provides the framework within which such issues must be settled.

The constitutions drafted in Africa in the past four years have shown a significant shift in strategies in constitution-making. The constitution drafters have benefited from the successes and failures of independence and one-party constitutions. The Namibian constitution was drafted by a constituent assembly. The interim constitution of South Africa was popularly drafted by a constitutional conference at which most of the interested parties were represented. The final constitution will be drafted by a constituent assembly made up of the National Assembly and Senate sitting together.⁷⁰⁹ The conditions in South Africa dictated that constitutional changes be pursued in two phases, a situation very novel in the history of constitution-making in Africa. These developments reveal the emergence of a new perspective in constitution-making which is gaining popularity - the anti-classical perspective.

⁷⁰⁹Art. 68 *Constitution of the Republic of South Africa*.

The adoption of the anti-classical perspective in itself will not necessarily conduce a viable constitutional order for Zambia. Previous constitutional orders have suffered from lack of legitimacy largely due to the constitution-making strategies employed in the past. Zambia's constitutional experience demands that the future constitution must be popularly determined in order to give it legitimacy in the eyes of the people. It must not be identified with a small faction instrumental in its making. The constitution needs to have a truly national character. The best constitutional framework may be devised, but it is useless if the people are not aware of it and do not, in any way, identify themselves with it. Neither SWAPO in Namibia nor the ANC in South Africa can be said to have single-handedly determined their respective constitutions. Similarly, neither the National Party of South Africa nor the D.T.A. of Namibia can question the legitimacy of their constitutions and seek their repeal once in power. Their constitutions are legitimate drawn with the consent and support of the interested parties.

To achieve this goal in Zambia the constitution must be drafted either by a constituent assembly, conference or any other such popular forum. The assembly must be made up of one or two representatives from each ward in Zambia popularly chosen by the people in that ward. Each ward must have its own meetings and agree on what they would like to see in the constitution. In addition interest groups must be reasonably represented. The assembly must be assisted by experts in various fields who will deal with technical

matters, but the final decision must be that of the assembly.

The constitutional discussions must be taken to grass-roots levels. This is the most popular way of determining the constitutional order. The advantage of this method is that no single person or group of people will be identified with the constitution as has been the case in the past.

It follows that for such an exercise to be effective the timing is important. Constitution-making must take place at the time when there is a national consensus for a new constitution to be drafted, or when it is possible to enlist wide support for the exercise. The procedure suggested is no doubt involving and costly, but given the country's experience this will be a worth while investment.

There are strong indications that the next constitution will be drafted by the Commission and subjected to a referendum for approval. Though such a method is much better than previous methods there are inherent weaknesses associated with this process. Zambia's major weakness has been in the process of making the constitutions, which has not been popular, and not so much with the content. The prospective system does not provide room for debate on the procedure and content of the constitution. The people's role will be merely to endorse or not to endorse the constitution settled by the Commission. Secondly, as the constitutional parameters are already set by the drafters any changes made will be incremental.

The quest for a viable constitutional order in Zambia involves not only the question of power, but also the need to resolve the most pressing needs of the people. A constitution which only addresses the former and ignores people's economic and social welfare is irrelevant and unsuitable for Zambia. The economic system of the country must be popularly determined by the assembly and embodied in the constitution. Given the country's economic experience over the last thirty years private enterprises should be allowed to co-exist with state enterprises. Some strategic industries must be under the control of the government. Article 98 of the Namibian Constitution has settled the principles of the economic order: "The economy of Namibia shall be based on the principles of a mixed economy with the objective of securing economic growth, prosperity and a life of human dignity for all Namibians."

Whichever economic system is chosen: capitalist or socialist the state has a major role to play. It is imperative for the constitution to set the parameters of state participation in the economy. The economic well being of Zambia is crucial to the emergence of a constitutional and democratic government. Events of the past few years have revealed that the occupation of a political office is the fastest way of securing economic wealth. Given a free hand in the determination of the economy there is nothing that can stop a small group of politicians from introducing economic policies and measures that will benefit them at the expense of the people.

The government in Zambia remains the crucial player in the resolution of most of the problems facing the citizens. It need not necessarily take part, but must at least provide the framework within which to address the imbalances. The government must be under constitutional obligation to take measures or formulate policies aimed at addressing the very essence of government: improving the economic and social well-being of the citizens. Every government action or measure must be seen in terms of how they benefit the people. The experience of the past one century of the Western system of government has revealed that these matters cannot be left to be addressed at the discretion of the government in power.

The Constitution of Ghana, which came into force a year after Zambia's, provides interesting response to the economic and social welfare of the people. In addition to the traditional Bill of Rights, under the Directive Principles of State Policy⁷¹⁰ the State is under constitutional obligation to take all necessary steps to ensure that the national economy is managed in such a manner as to maximise the rate of economic development and to secure the maximum welfare, freedom and happiness of every person and to provide adequate means of livelihood and suitable employment and public assistance to the

⁷¹⁰ The Directive Principles of State Policy stand as guide to all citizens, Parliament, the President, the Judiciary, the Council of State, the Cabinet, political parties and other bodies and persons in applying or interpreting the Constitution or any other law and in taking and implementing any policy decisions, for the establishment of a fair and free society in Ghana; See Art. 34 Constitution of Ghana.

needy.⁷¹¹ It is recognised that a secure democracy is one that assures the basic necessities of life for its people as a fundamental duty.⁷¹²

The State is the key player in economic development of Ghana, but it does not need to control the economy as was the case in one-party regimes. It has the obligation to initiate policies aimed at addressing the economic and social needs of the people. Article 36(5) obliges the President within two years after assuming power to present before Parliament a co-ordinated programme of economic and social development policies, including agriculture and industrial programme at all levels and in all regions of Ghana. In addition the President is under obligation to report at least once a year all the steps taken to ensure the realisation of the policy objectives contained in the Constitution and in particular the realization of basic human rights, a healthy economy, the right to work, the right to good health care and the right to education.⁷¹³

Although the actual content of the constitution must be popularly determined by the constituent assembly two fundamental issues must be addressed to cure the weakness revealed in previous constitutions and enhance control on the use of power. The elections of 1964 and of 1991 have revealed serious weaknesses in the electoral system. The system is premised on the presumption that Members of Parliament will be elected on their own merit, and not necessary on the strength of the political parties

⁷¹¹Ibid., 36

⁷¹²Ibid., 36(2) (e)

⁷¹³Ibid., 34(2).

sponsoring them. But there are strong indications that people are elected on the strength of their parties. The consequence has been that unsuitable candidates have been elected because they campaigned on a popular party's ticket. But those who are competent and better placed to serve the interests of the people lose largely because they belong to a party, which does not command a large following. Since their continued presence in Parliament is dependent on party membership, there are temptations to accord primacy to the affairs and interests of the party as opposed to those of the people.

The electoral system led to the creation of a *de-facto* one-party system in 1964 and 1991. In view of this pattern of voting the constitution must embody an electoral system that is relevant to Zambia, one that would discourage the consolidation of power into one party. Under the circumstances a system of proportional representation would lead to better representation of people's interests and better distribution of power.

Second, the Bill of Rights needs to be strengthened. It must guarantee people not only the usual civil and political rights and freedoms, but must also guarantee them, provided it is popularly determined, the right to a decent standard of living, and right to education, in addition to the settled economic social and cultural rights. For Zambia the existence of a sound constitutional and democratic government is dependent on the existence of an enlightened people, and such a people enlightened is of little value if their stomachs are empty.

The rights and freedoms must be guaranteed in absolute terms. Their abrogation on account of public order, morality, health or in the interest of defence must be abolished. The power to determine when to derogate from the guaranteed rights and freedoms must be left with the courts, who will interpret each case according to the facts available. Such changes on their own are meaningless unless they are accompanied by a serious review of the existing laws so that those found to be inconsistent with the constitution are repealed. In Namibia and South Africa the move from an authoritarian constitutional order to democracy has also necessitated the review of the law. Laws found to be inconsistent with the new ideals have been repealed. No law review has taken place in Zambia since independence, notwithstanding the fact that the colonial system of government was largely autocratic.

The recommendations made are practical, and can be effected, but given Zambia's constitutional experience the politicians and not the people are crucial to success of any constitutional reform. The enactment of a new constitution is primarily a political decision. The politicians have the power, and government resources and institutions under their control. All they need to do is for once in Zambia's history to side-step their own interests in favour of those of the people, and allow constitutional matters to be determined in the most popular way possible.

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