

CONSTITUTIONALISM IN THE THIRD REPUBLIC.

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ABSTRACT

The principal objective of this study is to examine and evaluate the relationship between a written constitution and the management performance of government. The conduct of national affairs by the three arms of government, the Executive, Legislature and Judiciary will be analyzed to determine whether such conduct conforms to constitutional rule in the 'Third Republic'.

The existing Constitution and other legal framework supporting constitutional rule may be deficient, yet to a large extent they are supportive of constitutional rule. There may be no major problems with the Constitution and with its compliance. For example, the Bill of Rights enshrined in Part III of the Constitution is sufficiently protective of individual rights, regardless of race, place of origin, colour, political opinion, sex or status in society. These rights are not sufficiently protective of individuals because they have clawback provisions. To enhance strict observance of human rights, the derogation clause should be deleted. This is also said to be the major problem with the African Charter on Human and Peoples' Rights. The Bill of Rights survived the introduction of a One-Party political system.

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The sharp focus of the thesis is that, despite the return to Multi-Party politics in 1991, with its emphasis on democratic governance, the three organs of government moreso, the Executive is a repository of enormous powers, enabling it to deviate from constitutional precepts.

The thesis is intended to be a treatise on constitutionalism in the 'Third Republic' and will extensively discuss the functioning of the three organs of state and institutions supporting constitutional democracy. The citizen expects the Executive to be accountable, the Legislature to check the Executive boldly and the Judiciary to play an effective role through courageous human rights 'activism' and a generous interpretation of the provisions of the Bill of Rights.

It is the author's sincere hope that this thesis will make a significant contribution to the body of current constitutional rule discourse.

DEDICATION

The Study is dedicated to my late father and mother, Phillip Mumbo Nkonde and Emeliya Shimulanda who died on 27th December 1979 and 5th April 2000 respectively. May their souls keep resting in eternal peace.

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LIST OF ABBREVIATIONS

ACC	-	Anti Corruption Commission
ACHPR	-	African Commission for Human and People's Rights
ANC	-	African National Congress
APRM	-	African Peer Review Mechanism
AU	-	African Union
AVAP	-	Anti Voters Apathy Project
BOMA	-	British Overseas Management Authority
BOP	-	Balance of Payments
BSAC	-	British South Africa Company
CCC	-	Committee for Clean Campaign
CCJP	-	Catholic Commission for Justice and Peace
CG 20	-	Consultative Group of the 20 most industrialized countries
CCZ	-	Christian Council of Zambia
CMJA	-	Commonwealth Magistrates' and Judges' Association
DANIDA	-	Danish International Development Agency
DEC	-	Drug Enforcement Commission
DFID	-	Department for International Development
DPP	-	Director of Public Prosecutions
EAZ	-	Economic Association of Zambia
ECZ	-	Electoral Commission of Zambia
EFZ	-	Evangelical Fellowship of Zambia
ERTC	-	Electoral Reform Technical Committee
FDD	-	Forum for Democracy and Development
FETUZ	-	Federation of Trade Unions of Zambia

FINNIDA	-	Finland International Development Agency
FPTP	-	First Pass the Post
GTZ	-	Government Republic of Zambia
GTZ	-	German Technical Cooperation in Zambia
HIPC	-	Heavily Indebted Poor Countries
ICOZ	-	Independent Churches of Zambia
IFIs	-	International Financial Institutions
IMF	-	International Monetary Fund
JCTR	-	Jesuit Centre for Theological Reflection
LAZ	-	Law Association of Zambia
LDC	-	Less Developed Countries
LGAZ	-	Local Government Association of Zambia
LPF	-	Liberal Progressive Front
MMD	-	Movement for Multi-party Democracy
MPLA	-	Popular Movement for the Liberation of Angola
NCC	-	National Constitutional Conference
NGOCC	-	Non-Governmental Organizations Coordination Council
NGOs	-	Non- Governmental Organizations
NEPAD	-	The New Partnership for African Development
NOCE	-	National Organization for Civic Education
NORAD	-	Norwegian Agency for Development
OAU	-	Organization of African Unity
PEAP	-	Poverty Eradication Action Plan
PRSP	-	Poverty Reduction Strategy Paper
PAC	-	Public Accounts Committee

PLGO	-	Provincial Local Government Officer
PPS	-	Provincial Permanent Secretary
PUDD	-	Party of Unity Democracy and Development
SAP	-	Structural Adjustment Programme
SIDA	-	Swedish International Development Agency
SWAPO	-	South West African Peoples Organization
UDF	-	United Democratic Front
UNDP	-	United Nations Development Programme
UNITA	-	Union for the Total Independence of Angola
UNIP	-	United National Independence Party
UNO	-	United Nations Organization
UP	-	United Party
UPND	-	United Party for National Development
UPP	-	United Progressive Party
USAID	-	United States Agency for International Development
VAT	-	Value Added Tax
ZANACO	-	Zambia National Commercial Bank
ZAPU	-	Zimbabwe African People's Union
ZCTU	-	Zambia Congress of Trade Unions
ZEC	-	Zambia Episcopal Conference
ZESCO	-	Zambia Electricity Supply Corporation
ZINCOM	-	Zambia Industrial and Commercial Association
ZNBC	-	Zambia National Broadcasting Corporation
ZNFU	-	Zambia National Farmers Union
ZRP	-	Zambia Republican Party

ZUFIAW - Zambia Union of Financial and Allied Workers

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CHAPTER ONE

CONSTITUTIONALISM

1.1.0. Introduction

The meaning of constitutionalism has in recent times been stretched due to various additions to it. Constitutionalism and Good Governance can only be adequately defined if the Constitution which is 'Formal Constitutionalism' is defined. Constitutionalism must also be defined in the substantive context also known as the 'Spirit of Constitutionalism.'¹ Before the 'Third Wave of Democratization,' constitutionalism was associated with liberal democracy. As leaders were democratically elected or re-elected, liberalism was spreading quickly. Civil Society and the International Community in their quest to consolidate democracy and encourage the gradual development of constitutional liberalism, added some aspects to the definition.²

The International Community under the 'Good Governance Project', have added to the definition of constitutionalism, the 'Rule of Law' and good governance as important aspects of constitutionalism, as not only meaning 'Government by law' or 'Government of Laws,' but that those laws must reflect the philosophical and moral values of a given society. Added to the definition of constitutionalism is the 'Ethical Expenditure of Resources' by the regime. The latest addition to the definition by Condoleezza Rice, the former American Secretary of State, is that of a 'Fear Society' and a 'Free Society' using the 'Town Square Test.' Are people free to express their opinions by way of demonstrations uninhibited?³

¹ Stanford Encyclopedia of Philosophy plato. Stanford.edu/entries/constitutionalism 12th April, 2006.

² Zakaria Fareed, The Rise of Liberal Democracy (file:c/date 2/democracy.htm November 1997) p.1.

³ Rice says, if a person cannot walk into the middle of the town square and express his or her view without fear of arrest, imprisonment, or physical harm, then that person is living in a 'fear society', not a 'free society', New African No.439, April 2005.

Rice, here places emphasis on freedom of expression and assembly as necessary constituent elements of constitutionalism. Zakaria, places emphasis on the 'Rule of Law' and poverty alleviation.⁴ The latter can only be achieved if there is ethical expenditure of resources.

This Chapter defines variants of constitutionalism with some theorists emphasizing the democratic variant, while others, the 'Rule of Law' variant. Yet others emphasize the taming of the State or controlling the State. Such theorists put premium on the doctrine of 'Separation of Powers,' also known as checks and balances theory or doctrine. Discussed in this Chapter are the foundations of constitutionalism in various parts of the world. Constitutionalism in the 'Third Republic' was a product of pressure from both internal and external forces. Civil society, churches and trade unions, put pressure on Kaunda to revert to 'plural politics.' The deteriorating economy made the government vulnerable to external and internal pressure to liberalize the economy and create democratic space.

Constitutionalism is commonly identified with a written constitution. Yet not all constitutional texts are committed to the principle and serve the ends of constitutionalism. A Constitution generally provides a blueprint for governance and government, but the system that is blueprinted may not satisfy the demands of constitutionalism. Some Constitutions merely describe the existing system of government, proclaim societal goals, promise programmes and policies or serve other purposes that may not ultimately be related to the concerns of constitutionalism. Examples are Constitutions of the former Union of Soviet Socialist Republics and the People's Republic of China.⁵ The hallmark of these Constitutions is centralization of power and a constitution is merely a political, social and economic charter.

⁴ Zakaria Fareed, *The Rise of Liberal Democracy*, op cit, p.5.

⁵ Nwabueze, says, "The Soviet constitution consist to a large extent of nothing, but lofty declarations of objectives and a description of organs of government in terms that import no enforceable legal restraints. Far from imposing a brake upon government, the constitution has legitimized the assumption of dictatorial powers by the government." Nwabueze B.O, *Constitutionalism in the Emerging States* (London: C. Hurst & Co. Publishers Ltd 1993) p.2.

As the number of diverse Constitutions purporting to adhere to the fundamental tenets of constitutionalism proliferate, the relationship between Constitutions and constitutionalism and the very boundaries of the concept of constitutionalism tend to become increasingly blurred. Constitutional autochthony has significantly contributed to writing and re-writing of Constitutions. There appears to be no accepted definition of constitutionalism, but in the broadest terms, constitutionalism requires the imposition of limits on the powers of government, adherence to the 'Rule of Law' and the protection of fundamental rights. Moreover, not all Constitutions are written and constitutionalism is not dependant on the existence of a written Constitution, as this may be subverted.⁶ However, where you have a constitution, the legality of government actions has to be based on the Constitution. Where you do not have a written Constitution, you have conventions. There are only two countries in the world without written Constitutions, the United Kingdom and New Zealand. A constitution is a living document and may be amended to suit the changing values of society.

The realization of the spirit of constitutionalism generally goes hand in hand with the implementation of a written Constitution, which is 'Formal Constitutionalism.' Constitutionalism is the idea, often associated with the political theories of John Locke and the 'founders' of the American Republic, that government can and should be legally limited in its powers, and that authority depends on its observing these limitations. This idea brings with it a host of vexing questions of interest, not only to legal scholars, but to anyone keen to explore the legal and philosophical foundations of the State.⁷ How can a government be legally limited, if law is the creation of government? Does this mean that a government can be 'self-limiting', or is there some way of avoiding this implication? If meaningful limitation is to be possible, must

⁶ Stanford Encyclopedia of Philosophy, op cit, p.3.

⁷ Ibid.

constitutional constraints be somehow 'entrenched?.' Must they be enshrined in written rules?, If so, how are they to be interpreted?. In terms of literal meaning or the intentions of their authors or in terms of the possibly ever-changing values they express?.⁸

How one answers these questions depends critically on how one conceives the nature of, identity and authority of Constitutions. Does a constitution establish a stable framework for the exercise of public power, which is in some way fixed by factors like the original meaning or intentions? Or is it a 'living tree' which grows and develops in tandem with changing political values and principles?.⁹

1.2.0. Formal Constitutionalism

In some minimal sense of the term, a 'Constitution' is a higher law, 'Basic Law' or 'Supreme Law', which could be either written or unwritten.¹⁰ Some scholars believe that constitutional rules do not exist unless they are in some way enshrined in a written document. Others argue that Constitutions can be unwritten, and cite as an obvious example of this possibility, the Constitution of the United Kingdom. One must be careful here, however, though the United Kingdom has nothing resembling the American Constitution and its 'Bill of Rights', it nevertheless contains a number of written instruments, which arguably form a central element of its Constitution. Magna Carta (1215 AD) is perhaps the earliest document of the British Constitution, while others include the Petition of Rights (1628), and the Bill of Rights (1689). Furthermore, constitutional limits are also said to be found in certain principles of the common law, explicitly cited in landmark cases concerning the limits of government power.

The fact remains, however, that Britain seems largely to have an unwritten Constitution, suggesting strongly that having a written Constitution is not the only defining feature of

⁸ Stanford Encyclopedia of Philosophy, op cit, p.3.

⁹ Ibid.

¹⁰ Ibid.

constitutionalism.¹¹ A Constitution consists of a set of rules or norms creating, structuring and defining the limits of governmental power or authority. Understood in this way, all States have Constitutions and all States are constitutional States. Anything recognizable as a State must have some acknowledged means of constituting and specifying the limits placed upon the three basic forms of governmental power, Executive Power, Legislative Power and Judicial Power.¹²

Take the extreme case of an absolute monarch Rex, who combines unlimited power in all three domains. If it is widely acknowledged that Rex has these powers as well as the authority to exercise them at his pleasure, then the Constitution of this State could be said to contain only one rule, which grants unlimited power to Rex. He is not legally answerable to the wisdom or morality of his decrees, nor is he bound by procedures or any kinds of limitations or requirements, in exercising his powers.¹³

When scholars refer to constitutionalism, they however, normally mean something where there are rules, creating Legislative, Executive and Judicial powers, but that these rules impose limits on those powers. Often these limitations are in the form of individual or group rights against government, rights to matters like expression, association, equality and due process of law.¹⁴ But constitutional limits come in a variety of forms. They can concern such matters as the scope of authority. In the Zambian case, district and provincial governments have little authority over local affairs like health care and education. They cannot formulate budgets or fire or hire staff. The national government has overreaching powers and can overrule the district and provincial governments in those areas. In the United States, matters not listed devolve to the

¹¹ Boli Li, what is Constitutionalism, perceptive, Vol. 1 No.6 www.oycf.org/perspectives/6_063000/what_is_constitutionalism.htm pp. 1-2.

¹² Stanford Encyclopedia of Philosophy, op cit, p.2.

¹³ Ibid.

¹⁴ Ibid.

constituent states those listed devolve to the Federal Government.¹⁵ Where there is real evolution of the power to make such decisions, it is vested in local authorities. Some writers emphasize, not on the existence of a written constitution, but the performance of the regime.¹⁶ A written constitution consists of conventions, customs and practices, which circumscribe standards and procedures of acceptable behaviour.

Boli,¹⁷ cites nine elements as constituting constitutionalism. Government according to the Constitution; 'Separation of Powers;' sovereignty of the people and democratic government; judicial review; independent Judiciary; limited government subject to a bill of individual rights; controlling the Police; civilian control of the Military and State power; or very limited and strictly circumscribed State power to suspend the operation of some parts of, or the entire constitution.¹⁸

Broadly speaking, the nine elements of constitutionalism can be divided into two groups, which correspond to two basic functions of a liberal constitution. One concerns power construction and power lodging and the other deals with rights protection. These two groups of constitutional arrangements work together to ensure the supremacy of the Constitution, the existence of limited, yet strong government, and the protection of basic freedoms.

Boli's nine elements that constitute liberal constitutionalism mean for instance that the two socialist giants, China and the then Soviet Union, fail to meet the test. Democratic centralism is the hallmark of Socialist Constitutions. In China, the Communist Party of China enjoys a supreme position in the country. It is the core leadership of the whole Chinese people. It has been the guiding ideology of the People's Republic of China. In fact, all important

Article 1 Section 10, United States Constitution.

Barnett Hilaire, *Constitutional and Administrative Law*, Second Edition (London: Cavendish Publishing Limited 1998) p.5.

Boli Li, *What is Constitutionalism*, op cit, p.3.

Ibid.

functionaries in the top governmental bodies, including judges, are taken from the rank and file of the Party. They remain in power so long as they retain the confidence of the top leadership of the Party.¹⁹

The role of the Judiciary in China, especially the Supreme People's Court, the highest organ of the Chinese Judiciary is the guarantor of socialist legality. The President, Vice, and other judges are elected by the National People's Congress. The Constitution is a creature of the Communist Party.²⁰ The then Presidium of the Soviet Union was a body of heterogeneous character possessing legislative, executive and judicial functions.²¹ It is clear that under the two Socialist Constitutions, there is no 'Separation of Powers', there is no independence of the Judiciary, nor is there supremacy of the Constitution.

'Judicial Review' of Executive acts is non-existent in these polities, nor could you find constitutional jurisprudence in China and the Soviet Union. The National People's Congress in China is the center of power, as the presidium in the then Soviet Union used to be and is no longer in present day Russia.

Sadly, one country which is supposedly democratic, but whose 1978 Constitution undermined the concept of judicial independence and constitutional supremacy is Sri Lanka. Section 35(3) prevents lawsuits against the President even when he violates the Constitution. The President is not obliged to follow the Constitution and is free to act in contravention of the Constitution. Paradoxically, the Supreme Court endorsed that position recently, when an appeal regarding the violation of the Constitution by the President in the appointment of persons to the

¹⁹ Li Boli, What is Constitutionalism, op cit, p.3.

²⁰ Stanford Encyclopedia of Philosophy, op cit, p.27.

²¹ Ibid, p.38.

Public Service Commission and the National Police Commission, was challenged.²² The Court held that Article 35(5) provides blanket immunity to the President.

The President purportedly acting pursuant to the 17th Amendment to the Constitution, appointed Members of the Public Service Commission and the National Police Commission without the approval of the Constitutional Council. He blatantly violated the Constitution. The government's argument was unconvincing that the Members of the Constitutional Council had not yet been appointed and therefore the President acted out of necessity, which is a typical argument of all tyrants. What was being covered up, was that the selection of Commissioners had been taken over by the President, which is exactly what the 17th Amendment was meant to prevent. The Attorney General initially advised the government against making any appointments, as they would be illegal unless made through the Constitutional Council.

When a President is allowed to contravene the Constitution, the supremacy of the Constitution is itself diminished. The President is above the Constitution, which means that he or she is above the law. When the overreaching legal situation has reached this level, there is hardly any meaning of a Constitution.²³

1.3.0. Substantive Constitutionalism

The spirit of constitutionalism is sometimes referred to as '**Substantive Constitutionalism.**'

Barnett's definition of constitutionalism captures the unwritten variant,²⁴ when he states:

"Constitutionalism is the doctrine which governs the legitimacy of government action. By constitutionalism is meant – in relation to constitutions written and unwritten – conformity with the broad philosophical values within a state. Constitutionalism implies

²² In the matter of *Public Service and National Police Commission Vs The Attorney General*, AS 139 of 2006.

²³ Asian Human Rights Commission paper, Sri Lanka: How has the Judiciary been diminished in value since 1978 and why? [www.ahrchk.net/sttements/mainfile.phd/2006 statements/595/12th April 2006](http://www.ahrchk.net/sttements/mainfile.phd/2006%20statements/595/12th%20April%202006), pp.1-4.

²⁴ Barnett Hilaire, *Constitutional and Administrative Law*, op cit, p.5.

something far more important than the idea of 'legality' which requires official conduct to be in accordance with pre-fixed legal rules. A power may be exercised on legal authority, however, that fact alone is not necessarily determinative of whether or not the act was 'constitutional.'

The characteristics of constitutionalism, which may be described as classic or neo-classic, seem to have achieved a particularly high degree of universal acceptance, though not cast in rigid forms and concepts. These can, however, fairly be said to recur frequently enough in constitutions of emerging states.

Constitutionalism has achieved international currency, comparable to concepts like human rights, the 'Rule of Law' and democracy, though it seems to be everything to everybody.

1.4.0. Good Governance as an Aspect of Constitutionalism

'Good Governance' as an aspect of constitutionalism has been defined as "the management of public resources or public administration; the activities of government or the system of governing; governments interaction with civil society and citizens in general. This includes the constraints and accountability mechanisms under which Parliamentarians operate, and the interaction of traditions, values, institutions and process that shape society. Government is less central, though a central player in some interactions, it may be marginal or absent in others. Governance is viewed as the exercise of power in society."²⁵

Good governance has been defined by Khan and Bilney as, "the effective management of a country's social and economic resources in a manner that is open, transparent, accountable and equitable."²⁶ The United Nations Development Programme (UNDP), equates good governance with 'democratic forms of governance.' Those forms 'rely on public participation,

²⁵ Verspaandonk Rose, Good Governance in Australia, Parliament of Australia library web library @ apl.gov. AU, 25th September 2001 p.1.

²⁶ Bilney, G (1994) "Good Governance and Participatory Development in Australia's Aid Programme", Development Bulletin, Vol 32 October, pp. 16 – 19. Khan, M.M. 1998 "Good Governance, The Case of Bangladesh". African Journal of Public Administration and Management Vol. X, No. 2 December 1998, pp. 44 – 57.

accountability and transparency.’²⁷ Kabumba observes that, “the ministers who were attending the Joint Ministerial Conference of the European Union (EU) and the African and Pacific Countries (ACP) defined good governance as “the transparent and responsible management of public resources for the purposes of equitable and sustainable development.”²⁸

‘Good Governance’ is associated with liberal principles and the growing dominance of liberal democratic values. Therefore, ‘Good Governance’ is defined from a liberal democratic perspective as manifesting the following: Accountability, democracy, efficient and effective administration and programme delivery, equal rights for all citizens, ethical use of public resources and authority, individual liberty, participation, ‘Rule of law’, and transparency.²⁹ Accountability and transparency are elements of ‘Good Governance.’

Political freedom, democracy and respect for human rights have been linked to economic and social progress. When there is no national commitment to human rights on which constitutionalism is premised, constitutionalism may be said to have profoundly failed.

Nwabueze observes that:

“Constitutional democracy exists where the character of a Constitution as law and a supreme overriding law is like an eternal truth accepted by all as axiomatic.”³⁰

Nwabueze quotes a leading authority on the subject, Professor de Smith, who said:

“A contemporary liberal democrat, if asked to lay down a set of minimum standards, may be very willing to concede that constitutionalism is practiced in a country where the government is genuinely accountable to an entity or organ distinct from itself, where elections are freely held on a wide franchise at frequent

²⁷ United Nations Development Programme UNDP (1997) – Reconceptualising Governance, Discussion Paper 2. New York, Management Development and Governance Division, Bureau for Policy and Programme Support.

²⁸ Kabumba Ijuka, Good Governance and Sustainable Development in Africa: Meaning, Relationship, Problems and Strategies AAPAM Zambia Paper, 2005, p.9.

²⁹ Ibid.

³⁰ Nwabueze Ben, Constitutional Democracy in Africa, Volume 5 (Lagos: Spectrum Books Limited, 2004) p.158.

intervals, where political groups are free to organize in opposition to the government in office and where there are effective legal guarantees of fundamental civil liberties enforced by an independent judiciary; and he may not easily be persuaded to identify constitutionalism in a country where any of these conditions is lacking.”³¹

The African Union in a pragmatic approach when formulating the New Partnership for Africa's Development (NEPAD) has assumed that there is 'Bad Governance' in Africa. The core focus areas of the process are democracy and good political governance, economic governance and management, corporate governance and socio-economic development.³² NEPAD was enthusiastically received and unanimously adopted in the form of Declaration 1, as Africa's principal agenda for development. It provides a holistic, comprehensive and integrated and strategic framework for the socio-economic development of the continent, within the institutional framework of the African Union.³³

Constitutionalism has therefore, assumed many nuances in Africa, as economic management has been added to it. Further added to it is democratic development, meaning that the grassroots as major stakeholders in the process, must participate. Decentralization which has been discussed in detail in chapter six, is a vehicle through which the grassroot can participate in the governing process. NEPAD has made economic development and poverty alleviation central to constitutional governance. While the classic definitions are skewed towards democracy and human rights, NEPAD's definition of constitutional democracy is holistic as it is all-embracing.

³¹ Nwabueze Ben, Constitutional Democracy in Africa, op cit, 151.

³² Republic of South Africa, Department of Foreign Affairs, An overview of NEPAD, www.dfa.gov.za/nepad/nepad/overview/htm, p. 1.

³³ Constitutive Act of the African Union 2000/2001, Article 3.

1.5.0. The Foundations of Constitutionalism

It is significant to discuss the foundations of constitutionalism in various regions of the world as this has had an impact on developments here at home. English constitutionalism had a bearing on Northern Rhodesia, later Zambia as Britain was a colonizing power and law giver to the Territory. The Constitution of Zambia was actually drafted in that country. The English judicial and legislative practices were wholly imported into Zambia.

American constitutionalism influenced the structure of the Executive powers and to some extent, the allocation of powers to the three organs. The English doctrine of 'Parliamentary Supremacy', was perceived to be unsuitable for the emerging State. What was appealing was 'Constitutional Supremacy' with an executive President, who was Head of State and Government, who inherited the vast powers of the Governor. The Governor had the Secretary of State overseeing him, nobody was overseeing the post-independence Head of State and Government (executive President). A detailed discussion of this subject is in chapter three.

French constitutionalism was precipitated by the American War of Independence, which France joined on the side of the American colonies. The French heavily borrowed from the American experience in terms of democratic government. Zambia's independence Constitution is a Presidential system which is largely parliamentary. The Bill of Rights provisions were based on the European Convention of Human Rights. The United Kingdom had no Bill of Rights of its own. Zambia and most African States that fought the liberation wars were financially and materially supported by the communist bloc. It was not surprising therefore, that most of these countries abandoned Independence Constitutions and adopted One-Party political systems later. The totalitarian systems of that era were imported from the Communist bloc. In those political systems, the ruling parties were elitist and monolithic.

When socialism as a social, political and economic concept collapsed in Eastern Europe and democratization set in, this had knock-on effects on Zambia and other African States. By this time the African States' economies had almost collapsed, so was the Communist Bloc's economies. The International Financial Institutions (IFIs) had to come to the rescue of Zambia and other African countries with balance of payments support. Accompanying this support were conditionalities based on the Trinity of liberalization, privatization and globalization. The prime movers were the 'Washington Triumvirate' or the 'Washington Consensus', namely the United States Treasury, the International Monetary Fund and the World Bank.

1.5.1. The Foundation of English Constitutionalism

The domestic human rights revolution in England was fuelled by the theory of 'Social Contract'. The exponents of the theory of social contract were motivated by the concept of a covenant, moral or otherwise, which existed between individuals in a community. Such a covenant could also exist between citizens and their governments or governors. That theory postulated that a person must be willing to abandon his self-preservation instincts in exchange for security of his life, liberty and property. Every person must be contented with as much liberty as he could be willing to allow others to have.³⁴ Life without order would be short, brutish and nasty.

The theory of social contract began in the early days of Plato and Aristotle. Plato formulated the idea of philosopher kings, who would formulate the true idea of God and Rulers of moral behaviour, to regulate economic life, and to control all Art and Science by its systems.³⁵ All these Philosophers had, in one way or another, postulated their theoretical concepts, leading to designs of a covenant or social contract.

³⁴ Baker Ernest, *Essays on Government*, Second Edition (Oxford: Clarendon Press 1991) pp.8-9.

³⁵ *Ibid*, p.10.

The Social Contract theory precipitated the development of constitutional government in England, as this led to the passage of emancipatory legislation like the Magna Carta (1215), which was a great Charter of English civil liberties. It was granted by King John I in 1215, under the threat of civil war. The Petition of Rights (1628), was an embodiment of the doctrine of the due process of law or the 'Rule of Law.' It asserted the maxim '*no taxation without representation.*' There came the enactment of the 'Bill of Rights' of 1689, which provided for freedom of speech and debate in parliament.³⁶ It also provided for free election of members of parliament, for freedom of worship and for a free press.

The 'Bill of Rights' of 1689 provided for freedoms, which are found in Part III of the Zambian Constitution.³⁷ These pieces of United Kingdom legislation were partly the sources of our Independence Constitution which was drafted in Whitehall.

1.5.2. The Foundation of American Constitutionalism

The domestic human rights revolution in the United States was a spin-off from legislation in England, which was emancipatory in character and introduced an element of monarchical accountability, which had been non-existent hitherto.

The English revolutionary experience of 1688 and the Bill of Rights of 1689 emanating from there, was an inspiration to American revolutionaries who sought independence due to high levels of taxation and lack of representation. In 1776 the Colonists proclaimed themselves as independent of the British Government. The prime movers of the declaration and constitutional enactment were Thomas Jefferson and James Madison. The American 'Bill of Rights' was incorporated in the Constitution in 1791, though the Constitution was adopted in 1776. Human rights were guaranteed under the first ten amendments to the Constitution. The rights

³⁶ Baker Ernest, *Essays on Government*, op cit, p.25.

³⁷ The Constitution of Zambia, Chapter 1 of the Laws of Zambia.

enumerated therein were entrenched. For example, the right to life, liberty, property, freedom of speech and freedom of religion. Congress was forbidden to make a law which could impact negatively on these freedoms. American Democracy, is sometimes referred to as Madisonian democracy, because James Madison was the primary mover of these amendments.³⁸

The American 'Bill of Rights,' became a model in emerging democracies, which incorporated them in their Constitutions though with clawback clauses. In the Zambian case the clawback clause is Article 25.³⁹

1.5.3. The Foundation of French Constitutionalism

The theories of natural rights and social contract postulated the principle that every person is born with certain inalienable rights such as the right to life, liberty and property. Prominent among the French philosophers who contributed to the development of the concept of human rights, was Rousseau. He threw light on the theory of social contract and Montesquieu forcefully formulated the doctrine of 'Separation of Powers'. The sovereignty of the nation and the legitimacy of the government had to be seen to rest in the hands of the people.⁴⁰

Events in America were followed with keen interest in France. During the American War of independence, France had sent important military assistance, the presence of the French fleet, under Comte de Grasse, was key to Cornwallis's surrender at Yorktown. When Americans turned from war to nation-building, Benjamin Franklin and Thomas Jefferson, both familiar figures in Paris, were glad to help spread word of what was taking place on the American continent.⁴¹

³⁸ Madisonian democracy simply means that the Bill of Rights has no clawback clause.

³⁹ The Constitution of Zambia, the Article is derogation from the citizen's enjoyment of fundamental rights and freedoms when the Republic is under a semi or full state of emergency.

⁴⁰ Baker Ernest, *Essays on Government*, op cit, p.27.

⁴¹ *Ibid*, p.28.

In declaring the inherent rights of men, French draftsmen were drawing upon a natural rights tradition nurtured by the 'Age of Reason' and compromising the common legacy of enlightenment thinkers on both sides of the Atlantic. The French Parliament was privileged to draw from two American constitutional models, namely the State and Federal Constitutions.⁴²

The French Revolution, its American precursor, promoted the concept of government of the people, for the people and by the people. Thus, theories of natural rights and social contract of the Lockean dimension, were reflected in the revolution and Montesquieu's definition of liberty,⁴³ was similar to that of Locke, which emphasized the right of the individual to do anything, which the law permitted. The principles of separation of powers advocated the need to restrain possible arbitrary rule by the State, thus, advocating the principle of the 'Rule of Law', instead of the rule of men.

1.5.4. Foundation of Constitutionalism in Former USSR and Eastern Europe

There was no constitutionalism in the Soviet Union and Eastern Europe in the 1990s. Events in Eastern Europe can only be adequately discussed by alluding in brief, to the constitutional history of the then Union of Soviet Socialist Republics (USSR). The democratization in the late 1980s in Eastern Europe was the result of changes in Soviet policy, even more far-reaching and dramatic than those that Congress and Presidents Jimmy Carter and Ronald Reagan respectively, had prescribed. Carter and Reagan laid emphasis on human rights observance and democratization in the late 1970s and early 1980s⁴⁴ respectively.

President Mikhail Gorbachev repudiated the 'Brezhnev Doctrine' and conveyed to Eastern European governments as well as opposition groups the clear message that the Soviet

⁴² Howard Dick, *Constitutionalism and Human Rights in America, Poland and France*, (New York: University Press of America, 1991) p.2.

⁴³ Ibid.

⁴⁴ Huntington P. Samuel, *The Third Wave, Democratization in the Late Twentieth Century* (University of Oklahoma Press: 1993) p.99.

government would not act to maintain existing communist dictatorship. This was the very principle on which the 'Brezhnev Doctrine' was anchored. And instead favoured economic liberalization and political reform.⁴⁵

For the first time in the USSR, which was the 'Architect' of socialism, free and democratic elections were held in March 1989. The result of the elections showed an impact of Glasnost-openness and democracy in practice.⁴⁶ Some of the voters, voted against the official candidates. Boris Yeltsin, a person who had been sacked from party post two years earlier, won from Moscow city constituency, defeating Brakov – a Chief Executive of luxury car manufacturer by a massive majority.⁴⁷ Election results indicated that electors exercised freedom to elect their representatives without any coercion. In many constituencies, the Communist Party candidates suffered huge reverses.

The new Soviet approach opened the way for the ouster of established Communist leaders like Erich Honecker in East Germany, Todor Zhikov in Bulgaria and Milos Jakes in Czechoslovakia and their replacement by reform communists who would be Gorbachev's natural allies.⁴⁸ This led to the participation of non-communists groups, the selection of governmental officials through competitive elections, the opening of frontiers with Western Europe and intensified efforts to move toward more market-oriented economies.⁴⁹

The Polish transition of 1988-1989 apparently derived primarily from internal developments within Poland. However, Gorbachev reportedly intervened to urge Communist Party leaders to join in a Solidarity Union-led government in August 1989. In September of that

⁴⁵ Huntington P. Samuel, *The Third Wave*, op cit, p.119.

⁴⁶ Zakaria Fareed, *Liberal Democracy*, op cit, p.14.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*, p.99.

⁴⁹ *Ibid.*

year, the Soviets did not object to the Hungarians opening their border with the West.⁵⁰ Gorbachev gave impetus to democratic change by forbidding the use of Soviet troops to put down protests in Eastern Europe. In December 1989, he repudiated the Soviet invasion of Czechoslovakia to suppress a non-Communist movement, thereby delegitimizing the Czechoslovak party leadership, hitherto sustained by Soviet military force. Gorbachev sternly warned the Czechs against using force to prevent change.⁵¹

The demise of socialism was caused by snowballing and a waning legitimacy, as socialism as a political and economic concept, could not be sustained. Consequently the wind of change was sweeping across Eastern Europe.⁵² The whole region opted for the multi-party political system and a market economy.

The demise of communism in Eastern Europe ushered in a liberal democratic tradition. The principle of a limited government was embraced. The East European States evolved towards an increasingly decentralized political structure, whose functioning resulted in a practical separation of powers, enforced by a network of checks and balances. Constitutional amendments provided a basis for further evolution of the policy by eliminating the essential features of the communist system, contributing to the emergence of constitutionalism.⁵³ Almost all socialist States were one-party systems, which suppressed both competition and participation.

The Soviet shift led to highly nationalistic prodemocracy demonstrators chanting, "Gorby! Gorby!" in the streets of Leipzig, Budapest and Prague and to Mikhail Gorbachev

⁵⁰ I Zakaria Fareed, *Liberal Democracy*, op cit, p.99.

⁵¹ Huntington P. Samuel, *The Third Wave of Democratization in the late Twentieth Century*, op cit, p.100.

⁵² *Ibid*, p.104, notes that, the most dramatic snowballing in terms of constitutionalism occurred in Eastern Europe. Once the Soviet Union acquiesced in and perhaps encouraged the coming to power of non-communists in Poland in August 1989, the tide of democratization swept through Eastern Europe. Germany in October, Czechoslovakia and Bulgaria in November, and Romania in December. As one East German remarked, "we saw what the Polish and Hungarians, were doing, we heard Gorbachev, everyone felt, they were being left behind. Everyone knew from their neighbours experience, that it could be done. The democratization of some countries also aroused pride of their neighbours. War sophisticated, industrialized, middleclass Spain to trail behind small poor Portugal?. Was Czechoslovakia, the one Eastern European country with a truly democratic tradition, to lag behind others?."

⁵³ *Ibid*.

joining Pope John Paul II, Jimmy Carter and Ronald Reagan as major transnational promoters of democratic change in the late twentieth century.⁵⁴

It is not clear whether Gorbachev favoured or intended the full democratization of Eastern European countries and the virtual total collapse of Soviet influence in those societies. Yet that is what his actions produced.⁵⁵ The events in Eastern Europe in the 1990s were significant for Africa. These events completely undermined the ideological institutions for one-party States in Africa.

1.5.5. Historical Foundation of Constitutionalism in Africa and Zambia in Particular

Ihonvbere observes that:

*“By 1988, Kaunda was beginning to ‘smell’ multi-party politics and prodemocracy advocates in almost every sector of the population. The truth was that he was becoming more insecure by the day as prominent members of the party and leading scholars and activists were beginning to openly challenge his domination of Zambian politics and his ability to continue in power. In September 1988, he accused traders of teaming up to form a new political party in Zambia. The security forces were specially instructed to ‘fish out and detain’ any person or persons found to be in sympathy with the idea of multiparty politics. Such efforts to suffocate the demands for opening up the political space and respecting basic rights of Zambians did not deter the advocates for multipartyism.”*⁵⁶

Kaunda unsuccessfully tried to hold the tide to multiparty democracy.

Huntington credits political and economic liberalism in Africa and Zambia in particular to the American policy toward the promotion of human rights.⁵⁷ One other major concern of the United States as a world power was that Sub-Sahara Africa was growing in strategic importance.

⁵⁴ Huntington P. Samuel, *The Third Wave of Democratization* op cit, p.100.

⁵⁵ Ibid.

⁵⁶ Ihonvbere O. Julius, *Economic Crisis, Civil Society and Democratization: The Case of Zambia* (Trenton NJ: Africa World Press, Inc, 1996) p.64.

⁵⁷ Huntington P. Samuel, *The Third Wave of Democratization*, op cit, p.105.

This meant that western citizens also deserved the chance to prevent the failure of these States from becoming seed beds of future acts of pointless aggression against the freeworld.⁵⁸ While the United States was making unilateral efforts to export democracy to the 'Third World', the International Financial Institutions jumped on the bandwagon by imposing Structural Adjustments Programmes (SAP) on debt ridden nations like Zambia. The programmes advocated the adoption of pro-liberal social, political and economic policies.

Structural Adjustment Programmes thus often led to consideration of political reforms, especially in the 1990s. Some programmes advocated for the decentralization of political authority in African states as a way to improve government allocation of developmental resources. More broadly, international institutions began to emphasize 'Good Governance' programmes. 'Good Governance' programmes are much more ambitious than the SAP they have begun to replace, in that they seek, simultaneously, to limit the economic role of the State, while expanding the role of the market, and to establish liberal democracy as a counterpart to economic reform.⁵⁹ When Zambia reverted to plural politics in 1991, the nation witnessed unprecedented social, economic, and political liberalism with its offshoots of privatization and inflow of foreign direct investment.

What has driven 'Good Governance' as a guiding preference for development and democratization, is that it has become clear 'that governance as a 'principle' will give rise to appendages such as democracy, 'Rule of Law,' effective bureaucracy, decentralization and limited discretion. Indeed, modern economists have increasingly associated prosperity and

⁵⁸ Huntington P. Samuel, *The Third Wave of Democratization*, op cit, p.9.

⁵⁹ Owen James, *Government Failure in Sub-Saharan Africa*, op cit, p.46.

development with good institutions such as property rights and the 'Rule of Law', rather than with good policies alone.⁶⁰

The IFIs have taken a step further to ensure that there is ethical use of resources. They exert a degree of influence over African States because of the region's high levels of public debt. One latest initiative in the IFIs "Good Governance Project," is to stretch the meaning of constitutionalism to include the ethical use of resources.⁶¹ Today they emphasize the link between governance and development and have appropriated the debate.

The International Monetary Fund (IMF) has established offices in most of the Ministries of Finance in sub-Saharan Africa, including Zambia, which monitor the use of donor funds as well as funds raised from domestic taxation. They also ensure that aid conditionalities are complied with.

1.6.0. Facts Militating Against Constitutionalism and Good Governance

Though, constitutionalism is a finished concept, its actualization is problematic for a variety of reasons. The failure of Constitutionalism in Africa is directly related to weak institutions. Most of the oversight institutions have been captured by a powerful presidency. In the developing countries, the immediate post-colonial period had to deal with past injustices. The social, economic and political transformations led to nationalization, indigenization, expropriations, which acts violated property rights of the settlers, which were enshrined in the Independence Constitutions.⁶²

⁶⁰ Owen James, *Government Failure in Sub-Saharan Africa*, op cit, p.46.

⁶¹ Ibid. He argues in support of this initiative that, the World Bank has explicitly taken a stance in favour of Good Governance in terms of the Chad-Cameroon Oil project in which the Bank, providing minority funding, managed to erect financial structures whereby at least some of the revenues earned by the project will bypass the ordinary (and corrupt) political regime in favour of social and economic programmes in the countryside. Good Governance policies and Structural Adjustment Programmes have grown in popularity against the shadow of the reprehensible levels of corruption and violence that have marred so much of Africa's post-colonial history. By focusing on limiting the state's economic power, and in turn, on creating a legitimate check on the state's political power and through democracy promotion, international institutions and domestic reformers seek to address the empirical problem of corruption and state failure in Sub-Saharan Africa.

⁶² Ibid, p.45.

Constitutional rule consolidation in Zambia suffers from a foundational impact i.e. the non-democratic constitutional making process. This is rooted in the culture of African leaders who are born with the template of being worshipped. The Constitutions do not reflect the will of the people, but that of their leaders.

1.6.1. Weakness of Governance Institutions in Africa

One major threat to constitutional rule in Zambia and Africa in general is the weaknesses of governance institutions.

The legislatures in Africa do not function in a manner consistent with the dictates of representative government. Legislative institutions have remained, against constitutional prescriptions and pretence to the contrary, one of the junior partners in the tripartite arrangement of governmental powers in Africa. Many countries' constitutional provisions tend to strengthen the executive while the legislatures remain weak. In these circumstances, legislature – executive relationships in African countries remain unbalanced, with governmental powers skewed in favour of the Executive, to the detriment of the Legislature.⁶³

Generally, they are denied effective participation in financial and foreign relations as well as public policy. Attempts by the legislatures to assert their relevance are often viewed as indications of serious intra governmental conflicts with the attendant stress of the entire political system.⁶⁴

There is a challenge of judicial independence. In general, Africa's post authoritarian Constitutions carry the minimum standard provisions deemed necessary to protect judges as well as their jobs, salaries, jurisdiction and judgments against political manipulations. The modern African constitutions do not, however suggest elite pre-commitment or fidelity to the principle.

⁶³ Alabi A. Mojeed Olujinmi, *The Legislatures in Africa: A trajectory of weakness*, Department of Political Science: University of Ilorin, Ilorin Nigeria, pp.233-239.

⁶⁴ *Ibid.*

For Africa's political elites, under pressure from international donors and creditor nations to demonstrate their democratic credentials, a formal constitutional guarantee of judicial independence makes for the regime "presentability." In practice, judicial independence remains vulnerable to political control.⁶⁵ The environment created is if one is not politically correct, that could seriously damage one's judicial career prospects.

Professor Emmanuel Gyimah-Boadi argues that, "if governance is about checking of power, then in Ghana, we have to look at institutions like the Legislature, Executive, the Judiciary, the Commission on Human Rights and Administrative Justice and the Electoral Commission." These institutions must be truly autonomous. What Professor Gyimah-Boadi says about Ghana is applicable to Zambia. These institutions suffer from severe resource scarcity and lack of financial and operational autonomy.⁶⁶

6.2. The Non-Democratic Nature of the Constitutional Making Process

The constitutional making process in Zambia has not been people driven, but Executive driven. The President appoints the Constitutional Commission under section 2 of the Inquiries Act.⁶⁷ The terms of reference are outlined by him/her. The President appoints Commissioners, regulates the process and determines the content by issuing the White Paper. This has resulted in serious failure to enact a constitution which can stand the test of time since independence.

The failure of Africa's constitution-makers to reconfigure the structure and distribution of power within the African State means that apart from democratizing politics, the contemporary constitutionalism in Africa is essentially concerned with juridical constitutionalism, with its emphasis on judicial enforcement of 'Bills of Rights' in the context of privately initiated

Prempoh Kwasi H, Marbury in Africa: Judicial Review and the Challenge of Constitutionalism in Contemporary Africa 2
The Law Review (Vol. 801, p.66).

Alabi A. Mojeed Olujimi, The Legislatures in Africa, op cit, p.239.
Chapter 41 of the Laws of Zambia.

litigation. Most Constitutions have not achieved structural constitutionalism – meaning the installation of credible checks and balances between the political branches, strong independent agencies of horizontal accountability, and meaningful devolution of power to the local level – has been left largely unexplored by Africa’s constitutional designers. As Africa’s constitutional reforms proceed, this deficit of structural constitutionalism must be confronted in order to consolidate progress toward credible constitutionalism.⁶⁸

1.6.3. Poverty

Poverty has impacted negatively on constitutionalism in three senses. The existence of poverty has made the voters vulnerable to electoral corruption, which has made regime change through democratic means very difficult, as incumbent regimes have used State resources to bribe the electorate. The distribution of cheap mealie meal by the Movement for Multi-party Democracy (MMD) in the 1996 elections undoubtedly helped them to win the elections.⁶⁹

Corruption thwarts the common man’s will, Jeff Milchen states:

*“Lack of fair competition and the excessive power assigned to money is glaring. Even the 2002 United States Congressional races, money was the determinant of the victors. In 2002, 95 per cent of all House seats and Senate seats were won by higher-spending candidates.”*⁷⁰

Monetization of politics seems to undermine the ‘will of the people’ in both developed and developing countries, though the negative impact in poor countries is profound. These governments have become plutocratic (government for the rich, of the rich, by the rich). Consequently, there is seemingly corporate dictatorship as the corporate world are the major contributors to election campaigns.

⁶⁸ Prempeh, Marbury in Africa: Judicial Review and the Challenge of Constitutionalism in Contemporary Africa, op cit, p.66.

⁶⁹ Evidence by the petitioner’s witness in the Presidential Petition *Akashambatwa Mbikusita Lewanika and Others V Frederick Jacob Titus Chiluba SCZ Judgment No.14 of 1998*.

⁷⁰ Milchen Jeff, Reclaim Democracy Organization, *Democratic Elections Look Like?* [http: www.reclaimdemocracy.org/political](http://www.reclaimdemocracy.org/political) 15th November 2002.

Lack of employment opportunities has led opposition politicians to cross to the ruling party, not because they agree with the policies, but because they are seeking employment,⁷¹ which has significantly weakened the opposition and undermined executive accountability and democracy.

The negation of constitutionalism by poverty was succinctly acknowledged by Abubakar, the Nigerian Vice President, when he said:

*“The problems of poverty and corruption have previously plagued my country. Whenever poverty endures, democracy is always in danger. Democracy to our people, will remain meaningless if there continues to be no discernible and progressive improvement in their living conditions. Partnering with the United States shows Nigeria’s commitment to democracy and promoting good governance, and is a great step in reforming the Nigerian system, since corruption and the practice of liberal democracy cannot co-exist”.*⁷²

Abubakar’s statement is illuminating. A society living in abject poverty is vulnerable to electoral corruption. A relatively small clique of corrupt politicians in partnership with the private-sector, speculators and rent seekers hold the economy hostage and have no interest of the nation and its people. In the Zambian case, poverty has compromised democracy. It is doubtful whether the ruling elite can fight poverty spiritedly as they are beneficiaries, by way of manipulating the poor. During elections, the ruling party at times using State resources distributes mealie meal and chitenge materials, thereby bribing the electorate. Hence the opposition always disputes the outcome of elections.

⁷¹ Love Mutesa, formerly spokesperson of UPND and a relative of Mwanawasa, crossed to the MMD and was appointed ambassador to Geneva at the time he was almost a destitute.

⁷² Washington line, 25th July 2005.

1.6.4. The Nature of the Colonial Legal Order

The colonial legal order was despotic. There was separate development. The colonial governments were elitist. The relegation or abandonment, under an elitist regime, of the public welfare as the purpose of government, was perhaps nowhere better manifested than by the elitist colonial government in Zambia and elsewhere in Africa. Colonial rule was exercised principally for the exploitation of the colonial people rather than their social and economic advancement.

The western political liberal thought extols individualism, freedom of expression and individual ownership of property which was alien to Africa. The post-colonial ruling class embraced the evil of elitism in Zambia. The rulers are set apart in interests and outlook from the masses, particularly the grassroots. They are unwilling to break free of their confining class interests. They have not established rapport with the grassroots nor have they effectively mobilized them for common action in furtherance of the socio-economic development of the country.⁷³ This is why there has been no political will to implement decentralization. The rulers and the ruled are set apart from one another in a disabling divorce that prevents or retards social economic development.⁷⁴

Nwabueze observes that:

*“The attitude of the rulers towards State power is that it is an instrument of oppression, exploitation and plunder. This is manifested in the personalization of the State. These attitudes and their manifestations are among the most tragic of Africa’s inheritance from colonialism. Their eradication is the task of civic education and of an ethical revolution”.*⁷⁵

⁷³ Nwabueze Ben, Constitutional Democracy in Africa, Volume 3, op cit, p.117.

⁷⁴ Ibid.

⁷⁵ Ibid, p.278.

1.6.5. Donor Hegemony

Multilateral, regional, bilateral, political and economic conditionalities have delimited constitutionalism by depoliticising public policy formulation and marginalization of Parliament and the Executive from actively participating in the policy process. The power of Parliament to legislate under the Constitution is diluted,⁷⁶ so is the power of the Executive to formulate policy. A classic example is the Executive's insistence in privatizing Zambia National Commercial Bank (ZANACO). The National Assembly passed a bi-partisan resolution to the contrary, but the National Assembly resolution was overridden by the Executive, because that was tied to Zambia reaching the Heavily Indebted Poor Countries status, (HIPC). This entitled the country to a substantial debt write off.⁷⁷ 'The doctrine of 'Separation of Powers', has been assailed by this donor hegemony over Executive as well as parliamentary powers and functions.⁷⁸

Thirdly, the Governors at the behest of the Washington Consensus i.e. the International Monetary Fund, the World Bank and the United States Treasury, have pursued 'neo-liberal' economic policies. These have been perceived as an expression of an aloof and elitist governing style at odds with the ruling party's pro-poor liberationist mission.

Donor rhetoric stresses the liberal democratic values of transparency, representation, pluralism and accountability and major political and economic decisions are not legitimized in the traditional arenas of political contestation, but in contexts supported and conditioned by development and this has had the potentiality of undermining the regime. The development process becomes paternalistic. The recipient government's accountability to donors undermines their answerability to their own electorate and institutions of accountability.

⁷⁶ The President ignores National Assembly resolutions that he considers may run counter to donor policies i.e. his overriding a National Assembly motion to sell 49 percent shares in Zambia National Commercial Bank to Zambians. The motion was passed on 4th December 2004. (See Parliamentary Debates of that day which can be accessed at www.parliament.gov.zm).

⁷⁷ An interview with IMF Desk officer Martin Phillips on 5th December 2002 at Ministry of Finance Headquarters, Lusaka.

⁷⁸ Gould Jeremy, Ojaneu Julia, Merging the Circle, The Politics of Tanzania's Poverty Reduction Strategy (University of Helsinki: 2000) p.106.

1.6.6. Cultural Practices and Traditions

Pre-colonial African Societies were homogeneous. Each tribe and clan had its own traditions and cultures. Their legal framework was based on those traditions and cultures. There were no opposition parties. In any event, positions of village headmen and chiefs were and are hereditary. Democracy in the west means there is a political party or are political parties in opposition to the ruling one. In the West, there is also vibrant civil society, which exposes weaknesses and shortcomings in the policies and actions of government, to provide alternative ideology as well as different groups of people ready to assume government, should the people be disposed to bestow the mandate on it.⁷⁹ In Africa in general and Zambia in particular, the governing was by consensus in the pre-colonial period. The community debated under a tree until they reached a consensus. There were no divisive politics as the concept of oneness (ubuntu) was paramount.

Kwasi Wiredu,⁸⁰ calls these consensual democracies. Oppositional politics were alien. In these societies, leaders were worshipped and revered. However, it must be realized that today we are dealing with complex societies. The post-colonial African leaders, having been brought up and bred in non-democratic environments, found it difficult to internalize western political liberal thought, which was contained in the Independence Constitutions. It was not surprising therefore that these values were later repudiated. The concept of consensual democracy was advanced in support of the one-party State by Kaunda and Nyerere. There was therefore a clearly felt need to rewrite the Independence Constitution.

The post-colonial elite, Nwabueze observes, is indeed so closely, if not inseparably, connected with plutocracy, which has earlier in the chapter been defined as government of the

⁷⁹ Nwabueze Ben, *Constitutional Democracy in Africa*, Volume 3, (Lagos: Spectrum Books Limited, 2004) p.5.

⁸⁰ Wiredu Kwasi, *Democracy and Consensus in African Traditional Politics: A plea for a non-party polity* in E. Chikwidi, *Post Colonial Philosophy, A Critical Reader* (Oxford: Blackwell Publishers, 1997) p.303.

rich by the rich, for the rich. Elitism has enthroned money as the accepted measure of success in society. This love for money has fuelled corruption and consequently, bad governance.

1.7.0. Statement of the Problem

The people of Zambia were hopeful that the introduction of a Multi-Party political system was a harbinger to constitutional rule. The excesses of a One-Party-State political system, where there was no freedom of expression and association had come to an end. The State of threatened emergency had been lifted. The President no longer had power to detain anyone under the Preservation of Public Security Regulations. The “Third Republic” was therefore going to be an era when the Governors were going to observe constitutional tenets. The people of Zambia strongly believed that there was a co-relationship between a multi-party Constitution and ‘Good Governance’. To put it simply, it was assumed that a liberal Constitution was an end in itself.

1.8.0. Purpose of the Study

The purpose of the Study is therefore to examine and understand the causes and lapses in government accountability to its citizens. Whether the assumption that there was a co-relationship between multi-partyism and constitutionalism is valid or flawed. Are there impediments that if removed, Zambia could be said to be a State under which the ‘Rule of Law’, democracy and human rights flourish?.

1.9.0. Objectives

The Study seeks to answer the broad question, “is a good Constitution an end in itself or a means to an end and is there constitutionalism in Zambia?.” To answer this question, the Study addresses the following specific questions:

- (a) what is constitutionalism?;
- (b) is constitution-making in the Third Republic people driven? Or how democratic is the constitution making process itself?;

- (c) have these constitutions evenly distributed power among the governmental organs?;
- (d) how legitimate is the electoral outcome? If contentious, why?;
- (e) to what extent do the people participate in the governing of the country, meaning are the people sovereign?;
- (f) how effective are institutions supporting constitutional democracy?;
- (g) Zambia as a donor-dependent economy, what effect has the fiscal and material donor support had in enhancing constitutional democracy?;
- (h) how have the domestic actors propelled constitutional rule in Zambia?; and
- (i) what could be done to enhance constitutional rule?

The working hypothesis at the start of the study was that while there may be a formal constitution, the existence of substantive constitutionalism is seriously doubted. The problem is, although the written constitution may contain democratic values, fundamental rights and freedoms, governmental accountability, but its realization is problematic. The Constitution is normally manipulated.

This Study is about the failure to adhere to constitutional tenets by Chiluba and his successor, Mwanawasa. The study seeks to define the meaning of the Constitution and constitutionalism. The constitutional development of Zambia will be analyzed. The study further examines the doctrine of 'Separation of Powers' as it applies to Zambia, its merits and demerits. The legal regime governing elections and institutions of good governance and transparency will be considered. The domestic and external catalysts of constitutionalism will be analyzed.

The writer is suggesting that the three arms of government, namely, the Executive, the Legislature and the Judiciary do not function in consonance with the doctrine of separation of powers because of Executive hegemony. The other two arms have failed to act as a check on the Executive, which has rendered the doctrine of 'Separation of Powers' illusory.

A thought-through analysis of Zambia's experience with constitutionalism in the 'Third Republic' has been graphically illustrated by Zambia's first Minister of Legal Affairs in the 'Third Republic,' Dr. Rodger Chongwe SC, when he observed:

"All the problems we are facing---- all the weak public institutions we have is as a result of Chiluba's Presidency. When we took over as MMD in 1991, the judiciary was competent, impartial and fair --- there was no sign of the Judiciary being compromised by the Executive ---- the Police was competent and impartial and all government institutions were managed by trained civil servants, but by the time Chiluba left office, the Judiciary was in shambles, the Police had become an instrument to serve Chiluba's interests -- - the Anti-Corruption Commission (ACC) and Drug Enforcement Commission (DEC) were dead. They could not operate effectively because Chiluba's associates in government were corrupt and drug traffickers. Chiluba introduced 'State Impunity', by preventing Zambians from enforcing Judgments against government or local authorities. He deviated from the observance of the Rule of Law. His successor (Mwanawasa) has made no efforts to correct these injustices".⁸¹

Chongwe indicts the Chiluba and Mwanawasa regimes for corruption, cronyism, nepotism, tribalism and non-observance of the 'Rule of Law', which is at the core of constitutionalism.

Chiluba allegedly used State resources through the Zambia State Intelligence Service to fund political campaigns, for which he was prosecuted by his successor and then acquitted. He was unwilling to enact an effective Electoral Code of Conduct. The lamentation by the then Chairman of the Electoral Commission, Judge Bwalya, bears out this assertion:⁸²

"We are toothless over disciplining electoral offenders. We are not satisfied with the country's electoral legal framework. We have submitted various

An Interview with Dr. Roger Chongwe, the first MMD Minister of Legal Affairs in the Third Republic, 17th November 2001
to see The Post, 18th December 2001.

An interview with Judge Bobby Bwalya the then Chairman of the Zambia Electoral Commission on 22nd August 2002.

recommendations to government and only continuous registration of voters has been accepted”.

There have been electoral imperfections which have delegitimized the electoral outcome as Richard Joseph, succinctly observes.⁸³ Yet ‘free and fair’ elections are at the heart of constitutional democracy.

The Study notes that the Executive in the ‘Third Republic’ has had no political will to enact an effective Electoral Code of Conduct, because the MMD has been allegedly engaged in vote buying, bribing the electorate, using government resources, which at times have been channeled through the Office of the President.⁸⁴

It is doubtful whether they would have scored electoral successes without materializing and monetizing the electoral process. This has delegitimized the electoral results. Evidence by Levi Mumba, a Cabinet Minister in the Mwanawasa government, who confessed on oath, during the Electoral Petition against President Mwanawasa, that he had given Mwanawasa and his wife, a motor vehicle and medical kits respectively, to help them in their Presidential campaign, is a pointer to electoral malpractices. He was subsequently fired by President Mwanawasa as Cabinet Minister for presumably performing that civic duty of telling the Court the truth.

It will be argued in this Study that Zambia’s local government system is not participative. The nation is generally characterized by highly centralized political and legislative power. Decentralization has not been effectuated. Consequently, the majority are excluded from decision making. Decentralization fulfils the notion that the government is truly of and by the Zambian people. A detailed discussion of decentralization is conducted in chapter six.

³ Joseph, notes, as the Zambian case strongly illustrates, electoral imperfections are caused mainly by incumbent leaders who openly manipulate constitutional and electoral rules to trip up their competitors. The elections did not resolve persistent disagreements among participants about the basic rules of the political game in Zambia and the second elections did not help consolidate Democracy, Joseph Richard, *State, Conflict and Democracy in Africa* (London: Reinner Publishers, 1999) pp.61, 68.

⁴ *Anderson Mazoka et al V Levy Mwanawasa et al* (2005) ZR 138.

The study strongly advocates the independence of institutions supporting constitutional democracy. The heads of these institutions should have security of tenure and be accountable to Parliament. The current arrangement where the Auditor General merely produces an audit report and advises the National Assembly, impacts negatively on fiscal discipline. The Auditor General has no enforcement powers. The Investigator General reports to the President. The Drug Enforcement Commission reports to the Minister of Home Affairs. This has led to these institutions being perceived as instruments of the ruling party. They further have been perceived to engage in selective prosecutions, which undermines the 'Rule of Law'. Moran's view is here pertinent to restate when he states:

"Constitutional democracy can only flourish in a State in which institutions supporting constitutional democracy do their work properly. These institutions should be independent and creatures of the Constitution".⁸⁵

Thus, the coming of the 'Third Republic' simply signified the introduction of Multi-Party politics. The ruling elite have retained authoritarian methods, previously employed in the One-Party-State. The militarism of youths in these political parties has glamorized violence, which is committed with impunity by youths belonging to the ruling party. Their focus is to destroy an opponent. Their language often promotes intolerance or even legitimizes violence. The language of disrespect has descended from the highest levels of leadership. There are politics of lawlessness that speak of "destroying leaders' opponents", a proposition that offends the Constitution and our values.

Under such a political culture, freedom to belong to a political party of your own choice is often negated. As Zackie Achmat points out, "fearless respect for disagreement without threats of violence is the test of maturity, democracy and ubuntu. Democratic freedom of those

Moran Greg, "You and the Constitution" Journal of the (Constitutional Commission of South Africa 1995) p.6.

furthest away from us in political opinion, material interest, belief and conscience is the essence”.⁸⁶

In Zambia, the organizational function of the Constitution has been heavily contested. The 1991⁸⁷ Constitution only reached consensus, after the Church mediated. The 1996⁸⁸ constitutional amendments were not people-driven. The Legislature applied the ‘majoritarian concept’ in amending the Constitution. Firstly, Cabinet headed by the President through the ‘White Paper,’ ignored progressive recommendations. They only accepted that both parents of a Presidential candidate should be born in Zambia of Zambian parents. This provision barred Kaunda, a former President, from standing and it became apparent that, that was the primary objective of amending the Constitution in 1996.

Three important lessons can be drawn from Zambia’s “Third wave of Democratization.” First, the Zambian political elite have continued their wrangling over office and prestige, often at the expense of pressing national issues, i.e, economic development and job creation. Chiluba failed in the first instance to prove to the public that he was going to establish a more accountable government than Kaunda. Mwanawasa came to establish a government of laws or the ‘Rule of Law’. The Zambian society expected accountability and transparency when Mwanawasa declared that there would be zero tolerance to corruption in his government. Unknown to Zambians, the declaration was intended to give him political mileage and to legitimize his rule, as he was a product of flawed elections,⁸⁹ which issue is dealt with in detail in chapter five. It has been observed that, the first ten years under a liberal Constitution has been

Achmat Zackie, an ANC member, who works with the Centre for Law and Justice. This was an extract of a discussion paper sent to the South African ANC National Executive Committee, *The Mail and Guardian* 13-19th March 2009.

Constitution of Zambia, Chapter 1 of the Laws of Zambia.

Constitutional (Amendment) Act No.18 of 1996.

The Mirror, notes that President Mwanawasa has not yet approved the ACC to investigate financial abuses at ZESCO, Grassroots Against Corruption and Transparency International have complained against the President’s selectiveness in the investigation of high profile cases, *Mirror* April 27 – May 3, 2007.

the worst experience in Zambia's Parliamentary democracy. There was nepotism, corruption and the privatization of the State.⁹⁰

Though Zambia has a liberal Constitution, this has not totally eliminated authoritarianism. Though we are in an era, which prides itself in being concerned with the spread of democratic values, democracy has suffered a reversal in Zambia. The political and economic conditionalities did further weaken the State by reducing its legitimacy and sovereignty. Zambian citizens believed that there was correlation between a liberal or neo-liberal Constitution and constitutionalism. However, a liberal or neo-liberal Constitution is not an end in itself. Democracy's success will not depend solely on free elections, open markets, or government policies. It will depend ultimately on the internalization of democratic values in people's hearts, minds and everyday lives.

The Constitution alone cannot act as a check upon the arbitrary exercise of executive power. In 2001, Chiluba sought to amend the Constitution and go for a 'Third Term'. He did not seek Cabinet advice as he was obligated to do, which resulted in a Cabinet revolt. The breakaway Ministers formed an opposition party, the Forum for Democracy and Development (FDD).⁹¹

10.0. Significance of the Study

The Study is justified firstly in that before the enactment of the 1991 liberal Constitution, Zambia experienced human rights violations and a deteriorated economy. It was therefore assumed that the new Constitution will limit the power of government and make government more accountable. Secondly, it was assumed that a democratically elected government, in

Thonvbere O. Julius, *Economic Crisis and Democratization*, op cit, p.113, observes that, "the 1991-2001 period as the worst in Zambia's experience with parliamentary democracy. The period was characterized by political factionalism, nepotism, corruption and unprecedented personalization of state power and misuse of political authority. There was a general neglect of pressing national issues and high unemployment among school leavers and university graduates alike". His former Vice President Christon Tembo, became its President and senior ministers, Nawakwi and Malambo left the MMD and joined FDD.

competitive elections could not turn on its people. Thirdly, it was assumed that the ruling elite having been a product of free and fair elections, would continue to consolidate democracy. The Study is not limited to the analysis of a single document called the Constitution, but extends to the existing political behaviour, political culture and political tradition.

1.11.0. Methodology

The Study is multi-disciplinary, expanding legal and democratic concepts to take into account economic and political conditions, which have influenced constitutional making and constitutionalism.

Data collection will be dependent primarily on qualitative desk research. More importantly, the study is enriched from the author's own experience in the field of constitutionalism, as consultant to the Minister of Legal Affairs on good governance, and one of the authors of the 'Good Governance' Policy Document for the Republic of Zambia.⁹² The writer interviewed notable politicians, lawyers and academics. With a lot of website stored materials on constitutionalism, democracy and the 'Rule of Law', the internet was one of the sources of material for the Study. Thus both primary and secondary sources of data will be accessed, but applied qualitatively.

1.12.0. Organization of the Study

The thesis is divided into eleven chapters. The first chapter is an overview of the thesis. The second chapter defines the variants of constitutionalism. The foundations of constitutionalism, differ from region to region. Regions have different reasons for liberalizing their political, social and economic orders.

The third chapter, analyzes the Constitutional development in Zambia, starting with the Charter Rule, earlier colonial rule, the Federation, the two pre-independence Constitutions of

⁹² Republic of Zambia, Governance Document 2000.

1962 and 1963 Orders-in-Council, the independence Constitution 1964, the 1969 Referendum, which abolished all referendums, the One-Party-State Constitution of 1973, the 1991 Multi-Party Constitution and the 1996 amendments to the Constitution. The manner in which the Constitution is arrived at determines the content. The content may have profound negative or positive impact on constitutional rule.

The fourth chapter discusses the doctrine of 'Separation of Powers' and its philosophical foundations. The chapter then discusses the institutional framework, functions and duties of each organ of government and the relationship with other organs, the merits and demerits of 'Separation of Powers', its later deconstruction and recommended reconstruction.

The fifth chapter analyses the electoral system, and the structural and legal framework of the Electoral Commission. The chapter critically examines the electoral rules in practice during Presidential, Parliamentary and Local Government elections. The sixth chapter discusses decentralization and considers the question whether the institutional framework facilitates co-operative government and democratic development.

The seventh chapter discusses institutions of accountability and transparency. It considers the question whether or not the legal frameworks and institutions are capable of sustaining and consolidating constitutionalism. The institutions examined are the Investigator General, Auditor General, the Anti-Corruption Commission, the Human Rights Commission and the Press. A comparative analysis with a neo-liberal Constitution of South Africa is undertaken.

The eighth chapter considers the external factors which have propelled constitutionalism in Zambia. There has been economic and political pressure by way of economic and political conditionalities by multilateral, regional and bilateral institutions. IFIs, popularly known as the

'Washington Consensus', have played a primary role. The chapter discusses the precipitate to economic and political conditionalities.

The ninth chapter discusses the internal catalysts to constitutionalism, which are Civil Society, the Church, Political Parties, and Trade Unions. The tenth chapter explains why Zambia has not adhered to fundamentals of constitutionalism. The eleventh chapter comprises conclusions and recommendations to enhance 'Constitutional Governance'.

The next chapter will discuss the constitutional history of Zambia.

CHAPTER TWO

CONSTITUTIONAL HISTORY OF ZAMBIA

2.1.0. Introduction:

This Chapter discusses the Constitutional history of the then Northern Rhodesia now Zambia. Discussed are the three decades of British South African Company rule. The period when Northern Rhodesia became a protectorate of the British government. Later the British government passed the 1953 Order-in-Council creating the Federation of Rhodesia and Nyasaland comprising, Northern Rhodesia, Southern Rhodesia and Nyasaland, which Federation was dissolved in 1960 after disturbances in the two territories. After independence in 1964, Zambia was a multi-party state until 1973 when she became a one-party state. Later the country reverted to multi-party politics. The Chapter further discusses constitutional developments thereafter.

2.1.1. Charter Rule:

Northern Rhodesia's (now Zambia's,) colonial history was substantially influenced, not only by the independence Constitution, but subsequent Constitutions as well. It is therefore imperative to discuss Northern Rhodesia's pre-independence Constitutions, which were despotic, as the Governor was omnipotent and such omnipotence found its way in the independence Constitution and was inherited by the Executive President. The battle for enacting a durable constitution has been centered over the vast presidential powers. The poor governance record of Zambia is rooted in these vast powers, which have been abused. There has been no President, willing to reduce these powers, which they have used to perpetuate their rule.

British colonialism, was triggered by the quest for wealth and the general desire to create a vast empire from Cape to Cairo. There was the desire to promptly accomplish the mission, as

other European powers were desirous of expanding their empires as well. The British had just lost the American Colonies, which were a vast market for their industries.¹ The British government was unwilling to venture into further colonization due to the enormity of the responsibility and the attendant financial implications.²

The primacy of extracting mineral resources was forefront in Rhodes' thinking and strategy. While the Crown was of the view that someday, the natives would take charge of their own affairs, the Colonists intended to make the territories their permanent home. Rhodes concealed the objectives underlying his petitioning for the Charter, when he formally petitioned the Queen on 13th July 1889.³ After being granted the Charter, he signed a mining concession with the Litunga of Barotseland in return for an annuity of £2,000.

When Lewanika realized that the concession he had signed with Rhodes' emissary Frank Lochner, was not with the British Government, but with a commercial concern, he threatened to abrogate the concession. With the help of George Middleton, a Missionary who had become a trader, Lewanika sent protest letters to the then Prime Minister, Lord Salisbury.⁴ He humbly petitioned the British Government.⁵ Lewanika wrote:

“What I wanted was not money but protection. Not the protection of a mining mercantile company, but the protection of your government, nothing else. I bring tears to you, great and gracious Queen, the mother of men. I earnestly pray that your majesty may extend over me the cloak of your protection.”

¹ Sangwa John, *The Making and Remaking of Constitutions in Zambia. The Need for a New Perspective*, LLM Thesis, unpublished, (University of Zambia: 1994), p.80.

² *Ibid.*

³ *Ibid.*, pp.81-82, The petition read in part, your Majesty's petitioners believe that if the said concession, agreements, grants and treaties can be carried into effect, the condition of the natives inhabiting the said territories will be materially improved and their civilization advanced, and an organization established which would tend to the suppression of the slave trade in the said territories, and the said territories being opened to the immigration of Europeans and to the lawful trade and commerce of your majesty's subjects and other nations.

⁴ *Ibid.*, p.83.

⁵ *Ibid.*, pp.87-88.

The commercial objective of the British South Africa Company (BSAC) was put forward by Rhodes thus, “my cherished idea is a solution to the social problems. In order to save 40,000 inhabitants of the United Kingdom from bloody war, we colonial statesmen must provide new lands to settle the surplus populations, to provide new markets for the goods produced in the factories and mines. The empire... is a bread and butter question. If you want to avoid civil war you must become imperialists.”⁶

The settlers pointed out: “We as people have not come to this country solely and even mainly to raise the native in the scale of civilization. Our main objective is to survive ourselves, to improve our conditions if we can and occasionally some of us...to raise a family and perpetuate our race, we are here to raise ourselves to a higher scale of civilization.”⁷ The British South African Company (BSAC) was given power to establish a police force to administer justice in Northern Rhodesia. There was North-Eastern Rhodesia and North-Western Rhodesia which created its own High Courts in 1900 and 1906 respectively. The jurisdiction of the High Courts was unlimited in civil and criminal proceedings. The judges were appointed by the Governor. In 1911 the two High Courts were amalgamated into the Northern Rhodesia High Court, as Northern Rhodesia was constituted a territory in that year. There were provincial courts presided over by Senior and Resident Magistrates with civil jurisdiction of up to £200. The jurisdiction over land was up to £144 annual rent. The District Courts could impose up to 3 years sentence, with consent of the High Court and had civil jurisdiction of £100. These were Courts of Districts Officers and Courts of Cadets attached to provincial administration.⁸

⁶ John Sangwa, *The Making and Remaking of Constitutions in Zambia*, op cit, pp.89-90.

⁷ Ollawa Patrick E. *Participatory Democracy in Zambia, Political Economy of National Development*, (Evon: Aurthur Stockwell Limited, 1979) p.73.

⁸ Northern Rhodesia Colonial history, Wikipedia, *The Free Encyclopedia*, p.1.

The Missionaries were opposed to BSAC rule in these terms, "A Chartered Company is not a government and never can. To be ruled by such is to rule for commercial ends by absentee directors and shareholders, whose real interests are only served by tangible dividends", declared the monthly journal of the missions.

It was this attitude which on May 15, 1891, forced the British government to declare:

*"It is hereby notified for public information that, under and by virtue of agreements with the native chiefs and by other lawful means, the territories in Africa, hereinafter referred to as the Nyasaland Districts are under the protection of Her Majesty the Queen."*⁹

2.1.2. Colonial Rule

In April (1st) of 1924, Northern Rhodesia became the protective of the Crown. A legislative council was established in which the Governor sat ex-officio, as presiding officer. The members were nominated. In 1926, members of the legislative council became electable and five unofficial members were elected.¹⁰

In 1930 the United Kingdom's Secretary of State for Dominion Affairs, Lord Passfield said, "the natives' interests should be paramount in Northern Rhodesia and if they came into conflict with the settler community's interests, the native interests should take precedence." In contrast to Southern Rhodesia, Northern Rhodesia followed a policy of indirect rule of African areas. The administration attempted to build up self-governing institutions within the African community and to leave them to their own devices.¹¹

Hall Richard, Zambia, London: Pall Mall Library of African Affairs 1965, p.87.
Northern Rhodesia Colonial history, Wikipedia, The Free Encyclopedia, p.1.
ibid, p.2.

In 1935, the rates of the poll tax charged in the Copperbelt were increased retrospectively because of a large number of defaulters. The decision provoked an all-out Copperbelt strike, which broke out from 22nd to 25th May in three of the four mines, Mufulira, Nkana and Roan Antelope. On 29th May, 1935 when police in Luanshya attempted to disperse a group of Africans, violence erupted and six Africans were shot dead.¹²

Hall, observes that:

*“It may be that more antagonistic attitudes by some district commissioners after 1935 riots on the Copperbelt drove the ‘native intelligentsia’ into its shell. By 1938 there was even concern among senior administrators at the withering of the native welfare societies.”*¹³

There was firm hostility to African political expression by the settlers. A small ‘Northern Rhodesia African Congress’ formed in Mazabuka by Ellison Milambo and George Kaluwa in 1937 was denied sanction by the Secretary for Native Affairs and so it expired.¹⁴

After the strike, there was an election to the Legislative Council, in which all candidates supported amalgamation of Northern Rhodesia and Southern Rhodesia. This was the genesis of the Federation. In January 1936, Southern Rhodesia political parties resolved in favour of amalgamation under a constitution conferring the right of complete self government. Initially the United Kingdom government refused, but appointed a Royal Commission which though accepting amalgamation in principle, it rejected its immediate implementation. The Northern Rhodesia white population was outraged, but before they could respond, World War II broke out

² Northern Rhodesia Colonial history, Wikipedia, The Free Encyclopedia, op cit, p.13.

³ Hall Richard, Zambia, London: Pall Mall Press, 1965, p.119.

⁴ Ibid.

in which the Northern Rhodesian Africans actively participated in the Eastern African Campaign on behalf of the United Kingdom and the Allied Forces.¹⁵

The war gave the opportunity for increased participation by Africans in the affairs of the Territory. In 1946, the Federation of African Societies was formed. Welfare societies had been set up by educated Africans in towns in the 1930s, who discussed local affairs in English. In 1938, Africans were represented in the Legislative Council by one unofficial nominated member. Post war unofficial members representing Africans rose to three. After the war, the need for an African political party became increasingly obvious as Welensky forced the pace towards closer association between the Rhodesias. The case for amalgamation was hammered relentlessly in the Northern News, a European newspaper founded by two Nchanga Miners, J.C. Wykerd and George Hovelmeir. The white population, though it numbered less than 25,000 as compared with an estimated 1,600,000 Africans, was clearly moving closer to a full political control, and the old Passfield doctrine of the 'Paramountcy of Native Interests' was becoming a dead letter.¹⁶

In January 1948, African attitudes hardened even further, when Gore-Browne, the European in whom they reposed most trust, suddenly advocated 'Responsible Government' for Northern Rhodesia. At the time the expression was synonymous with white rule on the Southern Rhodesia pattern. Africans were shocked by this attitude and Kenneth Kaunda criticized him bitterly.¹⁷ It was a sad situation for the man who had tried his best to construct a bridge across the racial divide.

In 1948 the Governor was replaced by the Speaker as Presiding Officer of the Legislative Council. The December 1953 Order-In-Council provided for a new Legislative Council

Northern Rhodesia Colonial history, op cit, p.2.

Richard, Zambia, op cit, p.123.

p.124.

consisting of a speaker, ex-officio, eight nominated officials, twelve elected unofficials and four African unofficial members. Nominated officials were the Chief Secretary, Attorney General, Financial Secretary and Secretary for Native Affairs and four others. The 1959 Order-In-Council saw a vast increase in the elected proportion of the Legislative Council.¹⁸

As part of their attempts to hold African control, the idea of a federation with Southern Rhodesia and Nyasaland was again suggested. The British Government was disposed to the idea as a way of relieving the burden of running loss-making protectorates like Nyasaland. The climax of a growing African awareness that unity was essential to meet the rising political tempo came in September 1948. By this time, Northern Rhodesians (now Zambians) working as far as Beira and Johannesburg were writing to friends on the Copperbelt to urge the formation of a national front. There was deep suspicion of Roy Welensky's changed approach to closer association between the Rhodesias, he had dropped amalgamation in favour of federation, which the Africans decided was merely a political wolf in sheep's clothing. In the middle of the year, Welensky had attended preliminary talks in London on federation, together with the new Governor, Sir Gilbert Rennie, despite protests from the African welfare societies. Two African civil servants, Safeli Chileshe and Moses Mubita also flew to the talks, for discussion of partnership rather than paramountcy of either native or settlers' interests.¹⁹

In September 1948, the Federation of Welfare Societies held its annual conference at Munali School in Lusaka. It was opened by the Secretary of Native Affairs, R.S. Hudson. The government provided food and accommodation for delegates ironically. The conference resolved to reject any form of association with Southern Rhodesia and renamed the Federation of

¹⁸ Hall Richard, *Zambia*, op cit, p. 125.

¹⁹ *Ibid*, p.125.

Welfare Societies, the 'Northern Rhodesia African Congress'. Lewanika was elected President.²⁰

In February 1948, the first branch of the African Mine Workers' Union was formed at Nkana. Its Chairman was Lawrence Katilungu, a Bemba clerk who had worked in the mines since 1936. His defeated rival for the position was Godwin Mbikusita Lewanika. By the end of 1948, Unions were operating in all the mining centres, and by March 1949, these had merged to form what was soon to become the strongest African trade union south of the Equator. Although it was constantly urged by authorities to keep out of politics, it was inevitable that the African Mineworkers' Union was to become a potent force in the nationalist struggle. The Union branches became focal points for the discussion of political grievances and many union officials were simultaneously leaders of Congress.²¹

When the Congress delegation met government officials, Sir Steward Gore-Browne was present and proposed the partition of the country into 'Native States' covering the rural areas while Copperbelt and line-of-rail were to become white controlled with close ties to the South. Kapwepwe tore up his copy of the proposals, declaring angrily: "the Country is one and is going to remain one". Partition proved to be a non-starter.²²

By the end of 1948, the idea of a federation had been given encouragement by Arthur Creech-Jones, Colonial Secretary in the British Labour Government. Welensky and Sir Godfrey Huggins, the Southern Rhodesia Premier, came back from London in high spirits, because at last they were making headway in Whitehall. In June 1948, a statement was issued saying that, 'the only form of closer union which was immediately practicable from the Northern Rhodesian

²⁰ Hall Richard, Zambia, op cit, p.134.

²¹ Ibid.

²² Ibid, p.125.