

**THE UNIVERSITY OF ZAMBIA
SCHOOL OF LAW**

Coup D'etat: A legal perspective

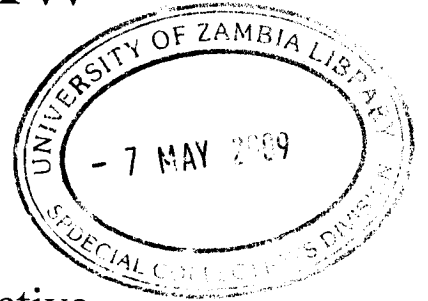
BY

SONIA SHAMWANA

UNZA

FEBRUARY, 2009

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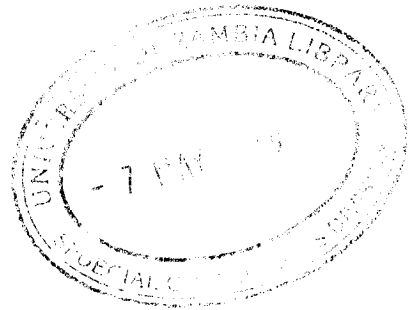
BY


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**Being a Paper Submitted in Partial Fulfillment of the Examination Requirements
for the Degree of Bachelor of Laws of the University of Zambia**

DECLARATION

I, **SONIA SHAMWANA**, Computer Number: 26130564 **DO HEREBY** declare that the contents of this research paper are based on my own findings and that I have not used any person's work without acknowledging it.



Signed by Sonia Shamwana -----

THE UNIVERSITY OF ZAMBIA

SCHOOL LAW

I RECOMMEND THAT THIS DIRECTED RESEARCH WAS DONE UNDER MY SUPERVISION


BY
SONIA SHAMWANA

ENTITLED

Coup D'etat: A legal perspective

BE ACCEPTED FOR EXAMINATION. I HAVE CHECKED IT CAREFULLY AND I AM SATISFIED THAT IT FULFILLS THE REQUIREMENTS RELATING TO THE FORMAT AS LAID DOWN IN THE REGULATIONS GOVERNING DIRECTED RESEARCH.

Date...13/2/09.....

Supervisor..........
Dr. M. Munalula

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I would like to thank my family for all the support they rendered during my studies.

I am really indebted to my supervisor Dr. M. Munalula for her guidance and patience throughout this research paper.

I would also like to thank my friend McQueen Zenzo ZaZa for all the help he gave me and the patience he exuded during my paper

ABSTRACT

This Directed Research paper addresses unconstitutional methods of changing democratically elected governments or Coup D'état. In trying to realise the aforementioned, the paper looks firstly at the definition of the word 'Coup D'état' and the different types of Coups that can occur. The paper deals specifically with Zambia as a case study and looks at the Coups that happened in Zambia under the 'one party participatory democracy'. Zambia became a one party state and this meant that only one political party was allowed in Zambia and this was the ruling party. People were therefore not free to join the political party of their choice. This in essence meant that the people were not free to choose whom they wanted to be governed by. Finally the paper will look at the constitutional implications of a Coup D'état.

In concluding, the paper answers the question: Is unconstitutional change of Government not a violation of fundamental human rights? Coups are unconstitutional no matter how just they may seem at the time. As said by former American President Abraham Lincoln, Governments are for the people, by the people. The people are supposed to choose who they want be governed by and this is an exercise of their fundamental freedoms and freedom of expression. Coups are an imposition on the people, as the people do not democratically elect them.

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CHAPTER ONE

1.1. INTRODUCTION

This chapter serves as the research design for the obligatory essay on ‘Coup D’etats: A legal perspective.

Specifically, the essay looks at the spate of Coups D’etats that took place in Zambia during the first republic, documenting them and providing a basis for their further analysis. A Coup D’etat is essentially an unconstitutional means of changing Government and this carries with it constitutional implications. The research intends to explore these implications.

The late 1950’s and 1960’s saw the end of the colonial period in Africa as the colonial masters packed their bags and handed over the instruments of power to the indigenous people. This marked the end of slavery, human degradation and exploitation for most African nations. Unfortunately the end of the colonial period introduced a new political phenomenon known as Coup D’etat. This swept through Africa as country after country became a victim of this phenomenon.

The research will analyze all these factors that were happening both in Africa and in Zambia at this time to try to articulate a legal perspective to this spate of coups on the continent.

1.2. STATEMENT OF PROBLEM

Since the introduction of democracy in society today, whenever citizens of nations feel that the current Government does not live up to their expectations; the normal procedure was simply not to vote for them at the next elections. In some cases however, this system did not prove adequate to remove the said Governments. This then led certain individuals

in the nations with no choice but to resort to unconstitutional means of removing the said Governments from power. This type of 'take over' is called a Coup D'etat and has constitutional and legal implications.

The purpose of this paper is to articulate and present the Coup D'etats that occurred in Zambia during the first republic and to bring to the fore the constitutional implications that they had and the impact they had on the constitutional development of this country.

1.3.STUDY OBJECTIVES

The general objectives of this research is to determine why in Zambia and certain countries all over the world, the military or individuals in certain countries see the need to take over the Government using unconstitutional means. However specifically, my objectives shall include articulating the concept of Coup D'etat in Africa, using Zambia in particular as a case study, describing the series of coups that happened in Zambia during the first republic and analyzing them from a legal perspective.

1.4.RESEARCH QUESTIONS

My research questions shall include establishing what a Coup D'etat is and the different type of Coups that can occur in a nation. The second research question deals specifically with Zambia as a case study and the attempted Coups D'etats that occurred in Zambia during the first republic and why these attempts were made. The third research question is to present an analysis of the legal implications of a Coup D'etat and in particular the constitutional implications of a Coup D'etat.

1.5.METHODOLOGY

My main method of data collection is desk research. Opinions and views from different writers will be compiled to best answer my study objectives. Some internet research will also be useful as a lot of information is available on the internet which relates to the coups. There are also news paper articles available that documented these events when

they occurred. I shall also look at court records, owing to the fact that all the coup attempts in Zambia were unsuccessful, all involved were arrested and put on trial and these trials were all documented in the Zambia law reports and other court documents.

1.6. CHAPTER OUTLINE

The research paper shall consist of four chapters. Chapter one is the introductory chapter to the paper and will set out the problem as well as the study objectives and the method of data collection that will be used therein. Chapter two of the paper shall serve as an introduction to the concept of a Coup D'etat. It explains that there are four types of Coup D'etat that can occur in a nation. These are Breakthrough, Guardian, Veto and lastly Bloodless Coup which is sometimes referred to as a self Coup. The third chapter shall deal with Zambia as a case study and the events that transpired during the Coup attempts in Zambia focusing on the first republic. Zambia has in its history unconstitutional attempts to change Government that occurred during the first republic. The introduction of a one party participatory democracy saw a gradual but effective accumulation of power in the hands of the chief executive at the expense of the legislature, the cabinet, and to a lesser degree the central committee and the courts This chapter will specifically discuss the different legal issues that were raised in the Shamwana and others case in particular. The fourth chapter shall deal with the legal implications of a Coup D'etat. In a democratic country there should be clearly defined procedures of becoming the President of nation and also defined procedures of removing incumbent leaders from power. Coup D'etat is not listed as one of the procedures of removal of Governments anywhere in the world. Further this constitutes a breach of constitutional rights that are vested in each individual of a nation. Individuals have the right to elect a leader of their choice to govern them. A Coup infringes on this right thereby infringing the values of the constitution. This chapter therefore focuses on the infringement of constitutional rights. Lastly, chapter four will provide a summary of the paper and a conclusion to all the issues discussed therein.

CHAPTER TWO

2. What is a Coup D'état?

Linguistically, coup d'état is French for "a strike to the state". Analogously, the term also is casually used to mean gaining advantage on a rival, either by a group or a person, e.g. an intelligence coup, boardroom coup¹. Coup d'état is the sudden, illegal overthrowing of a government by a part of the state establishment — usually the military— to replace the executive branch of the stricken government, either with another civil government or with a military government.

Politically, the coup d'état is a type of political engineering, generally violent (hence "strike", "blow"), but not always, yet differing from a revolution (by a larger, armed group to effect violent, radical change to the political system) in that the change is to the government, not the form of government.²

Tactically, a coup d'état usually involves control by an active portion of the country's military, while neutralizing the remainder of the armed services possible counteraction.

The acting group captures or expels the political and military leaders, seizes physical control of the most important government offices, means of communication, and the physical infrastructure, such as key streets and electric power plants.³

¹[http://www.wikipedia.com/search/coup d'état](http://www.wikipedia.com/search/coup%20d%27etat) 2008, Wikimedia foundation Inc. USA accessed on October,2008

² Edward Lutwaka, 1980 '[Coup D'état : A practical handbook](#)', Harvard University press

³[http://www/search/coups d'états](http://www/search/coups%20d%27etats) Wikimedia foundation, Inc, 2008 accessed October,2008

As Edward Lutwaka⁴ remarks in *Coup D'état: a practical handbook*:

A coup consists of the infiltration of a small, but critical, segment of the state apparatus, which is then used to displace the government from its control of the remainder. In this sense, the use of either military or another organized force is not the defining feature of a coup d'état.

In recent years, the military coup d'état has declined worldwide as a means of changing government. The usual military intervention in civil government, regarded as a coup d'état, uses the threat of military force to depose a politically vulnerable or an unpopular leader.⁵ In contrast to a traditional coup d'état, the military do not directly assume power, but install a militarily-acceptable civilian leader. The advantage is the appearance of legitimacy; classic examples are the collapse of the French fourth Republic, and the bloodless coup d'état effected on August 3, 2005, in Mauritania while the president was in Saudi Arabia.⁶

There have been examples of the potential for mass street protests to persuade the military to withdraw its support of unpopular leaders, sometimes leading the opposition to take power in a coup d'état fashion.⁷ In such situations, such as in Serbia(2000), Argentina (2001), the Philippines (1986 and 2001), Bolivia (2003), Georgia (2003), the Ukraine(2004-2005), the Lebanon, Ecuador (2005), and Bolivia (2005), popular uprisings forced the incumbent president or leader to resign so that a new leader might assume power. This often results in economic stability and political calm, in which an unknown and uncontroversial interim leader can govern until proper elections are held. Generally, these changes of government are described as coups d'état, because they are not

⁴Supra see footnote 2

⁵ Ibid, 3

⁶ Ibid, 4

⁷ Ken Connor and David Hebditch, 2008 'how to stage a Coup D'etat: from planning to execution', Pen and Sword books ltd, p 41

orchestrated by a small group, but result from popular action. The Iranian Revolution of 1979 is such a change of government, led by the Ayatolla Khomeini, because it sprang from popular opposition to the rule of the last Shah of Iran.⁸

The coup d'état succeeds if its opponents fail to thwart the usurpers, allowing them to consolidate their positions, obtain the surrender of the overthrown government or acquiescence of the populace and the surviving armed forces, and thus claim legitimacy.

Coups d'état typically use the power of the existing government for the takeover.

2.1. Types of coups d'état

2.1a. Breakthrough coup d'état

This is where a revolutionary army overthrows a traditional government and creates a new bureaucratic elite.⁹ These are generally led by non-commissioned officers (NCOs) or junior officers and happen once. Examples are China in 1911, Egypt in 1952, Greece in 1967, Libya in 1969, Bulgaria in 1944, and Liberia in 1980.¹⁰

2.1b. Guardian coup d'état

This is sometimes called the musical chairs coup d'état.¹¹ The aim of which is to improve public order, efficiency, and ending corruption. There usually is no fundamental

⁸ Ibid, 64

⁹ Samuel P. Huntington, 2008 'When is a Coup D'état not Coup' University press, p 20

¹⁰ Monty G Marshall and Donna Ramsey Marshall, Jan 10th 2007 'Coup D'état events' Center for systematic peace, pg 4

¹¹ Ibid 21

change to the power structure. Generally, the leaders portray their actions as a temporary and unfortunate necessity. An early example is the coup d'état by Sulla, in 88 B.C., replacing the elected leader Marius in Rome. A contemporary instance is civilian Prime Minister of Pakistan Zulkifar Ali Bhutto's overthrow by Chief of Staff General in 1977, who cited widespread civil disorder and impending civil war as his justification. In 1999, General Perez Musharaff overthrew Pakistani Prime Minister Nawaz Sharif on the same grounds. Nations with guardian coups shift between civilian and military government. Example countries include Pakistan, Turkey, and Thailand.¹²

2.1c. Veto coup d'état

This type of Coup occurs when the army vetoes the people's mass participation and social mobilization in governing themselves.¹³ In such a case, the army confronts and suppresses large-scale, broad-based civil opposition, tending to fascist repression and killing. The prime example is the U.S.-instigated coup d'état in Chile in 1973 against the elected Socialist President Salvador Allende Gossens, at the behest of President R.M. Nixon and Secretary of State Henry Kissinger, as documented in *The Trial of Henry Kissinger*, by Christopher Hitchens.¹⁴

A coup d'état is also classified by the rank of the military men leading the governmental overthrow¹⁵. A Veto coup d'état or Guardian coup d'état is led by the army's top

¹²Supra see footnote 10 at p 6

¹³ Supra see footnote 11 at p 23

¹⁴ Ad hoc interagency working group on Chile (1970-12-04) 'Memorandum for Mr Henry Kissinger', United States Department of state. Retrieved on 2007-12-10

¹⁵ Supra see footnote 7 p 44

commanding officers (usually generals). Sometimes the commander-in-chief, or a few very top commanders are excluded, as being appointees of the regime and thus loyal to them. In a Breakthrough coup d'état the leaders are junior officers (colonels or below), or even non-commissioned officers (sergeants), and most of the army's senior officers are displaced too. When junior officers or enlisted men seize power in this way, the coup d'état also is a mutiny with grave implications for the organizational structure and professional integrity of the military.¹⁶

2.1d. A bloodless coup d'état

A bloodless coup d'état occurs when the threat of violence is sufficient to depose the incumbent government with no fighting, and there are no subsequent executions of the deposed faction. The "bloodless coup" usually arises from the Guardian coup d'état.¹⁷

However, a "bloodless coup d'état" is not always truly non-violent. Napoleon's 18 brumaire coup d'état is considered an exemplar "bloodless coup", but during the coup, legislators were forcibly ejected from their meeting place by soldiers.¹⁸ In 1999, Pervez Musharraf assumed power in Pakistan via a bloodless coup, and, in 2006, Sonthi Boonvaatglin assumed power in Thailand as the leader of the Council for democratic reform under constitutional monarch.¹⁹

¹⁶ Supra see footnote 9 at p 23

¹⁷ Ibid 26

¹⁸ Curzio Malaparte, 1931, 'Technique du Coup D'état (published in French) Paris,

¹⁹ Supra see footnote 10 at p 7

CHAPTER THREE

3. COUP D'ETAT: An African problem?

With the advent of independence in the late 50's and early 60's euphoria, new hopes swept through Africa as nation after nation attained self-governance.²⁰ There were new dreams and expectations as the colonial masters packed their bags and handed over the instruments of power to the indigenous people. To most Africans this was the end of a long struggle in which so many had suffered. It was the end of slavery, human degradation and exploitation. However, these dreams were soon shattered as Government after Government fell victim to the coup d'état across the continent.²¹ The new military rulers accused the civilian Government of everything from corruption and incompetence to mismanagement of the national economy. However, experience in Africa has shown that the military are no better than civilians when it comes to running Governments.²² Rather than solve African contemporary political and socio-economic problems, military coups d'état in Africa have tended to drive the continent into further suffering and turmoil. This has been the case in Uganda, Ghana, Togo, Congo, and several other African states.²³

²⁰ Edward E Rackley, 1980, 'Across the divide: Analysis and anecdote from Africa', Washington DC University, USA ,p 2

²¹ Tormod K Lunde, 1991 'Modernization and political instability: Coup D'etat in Africa 1955-85', Lunda Acta Sociologica, USA, p10

²² W.F Gutteridge, 1995, 'Military regimes in Africa', Methuen and company, London, p 45

²³ Ibid 46

3.0. Zambia, A case study

The formation of the Zambian National Congress Party (ZANC) at its inaugural congress at broken hill on 26 October marked a turning point in the political history of Northern Rhodesia.²⁴ On 24 October 1964, Northern Rhodesia became the new Republic of Zambia.

The decision to introduce a one –party state for Zambia was an admission by UNIP and the government that they had failed to control the growing sectionalism in the country. It meant that the government was prepared to limit political opposition by force and coercion. Followers of the one party state claimed that the multi party system hindered national unity.²⁵ When a country decides to implement a one party system of government, the question is inevitably asked ‘how can you have democracy in a one party state?’ The serious arguments against the one party system are that by its nature, it restricts policy choice to one and it restricts the freedom to associate for political purposes.²⁶

Zambia became a one party participatory democracy in 1972.²⁷ It was however difficult to understand the significance of the words ‘participatory’ and ‘democracy’ after the proclamation of a one party state for Zambia. A critical examination of the words ‘participatory’ and ‘democracy’ shows them to be superfluous in their context.²⁸ But they may show that Kaunda was at pains to demonstrate that he did not intend to introduce dictatorship in Zambia through a one party system of government. A test of democracy in the one party system was the manner in which elections to parliament were organized and

²⁴ John Mwanakatwe 1994 End of Kaunda era Multimedia publications Zambia p 51

²⁵ Ibid 88

²⁶ John A Wiseman, 1995, ‘Democracy and political change in Sub- Saharan Africa’, Routledge, London, p 60

²⁷ A A Macpherson, 1984, ‘Kenneth Kaunda of Zambia’, O.U.P, London, 1984, p 67

²⁸ Supra see footnote 24 p 228

conducted. In a truly democratic system, people were free to elect their own members without any form of interference whatsoever. The electoral arrangement introduced during the one party system did not enhance known democratic principles and practices.²⁹ All limitations on individual freedoms involve questions of balance, of fixing a point at which restrictions become unacceptable judged by universal standards.³⁰ Freedom of association in such a state is limited to the extent that one cannot associate in or form another political party.

3.2. Coup Attempts

Zambia, under the one party system of government, witnessed a gradual effective accumulation of power in the hands of the chief executive at the expense of the legislature, the cabinet and the courts.³¹ Most of the more important posts in the party and in the government were offered to cadres considered loyal to Kenneth Kaunda who was president of the Republic of Zambia at the time. In a political system in which power is concentrated in the hands of one man, it is natural for the ambitious women and men to strive in every possible way to ingratiate them with the sole appointing authority. Such a system breeds inefficiency, corruption and discontent among the people.³² The result of which was attempted Coup D'états.

²⁹ P Brownrigg, 1989 'kenneth Kaunda' Neczam, London, 1989, p 130

³⁰ Ibid 3

³¹ W Tordoff, 1984, 'Politics in Zambia', Manchester University Press, Manchester, p 106

³² Supra see footnote 29 p 166

3.2. a. Shamwana and others

Zambia had its fair share of attempted *coup d'états*. They were all virtually insignificant and passed almost unnoticed. However in 1980, the government uncovered a plot which the officials considered serious. At first the government alleged that eight men were suspected to have been involved in the coup plot. However, thirteen men were subsequently charged with the offence of treason.³³ The charges were that they had conspired to kidnap Kenneth Kaunda and fly him to an isolated place while the conspirators executed a bloodless *coup d'état*. The men were arrested in October 1980 and charged with treason and the further charges were that they hired a mercenary army which they stationed on a farm in Lusaka, and that they made arrangements to procure or purchase arms for the execution of the coup plot.³⁴ The charges also included an allegation that they attempted to corrupt members of the armed forces to support their bid to overthrow the government by unlawful means. They allegedly enlisted the help of 'katengese' mercenaries who had fled Zaire and the government of Mobuto Sese Seko. The conspirators were all alleged to have promised them assistance in ousting President Mobuto from power once Kaunda's government was overthrown.³⁵ Three prominent businessmen were among the eight arrested in October 1980 and charged with treason, namely Valentine Musakanya, Edward Shamwana and Yorum Mumba.

Musakanya was a well known intellectual who had retired from government after a distinguished career as a civil servant and had held high political office in the Kaunda

³³ Supra see footnote 24 p 168

³⁴ Ibid

³⁵ Ibid 169

administration. Shamwana was also a well educated intellectual who pioneered the admission of Africans into the legal profession in Zambia. Kaunda had recognized Shamwana's abilities and experience as a lawyer by appointing him as a high court commissioner, a part time job which he held until the time of his arrest in 1980. Mumba was the youngest among them and he was the former manager of the Industrial Finance Company and Zambia National Building Society.³⁶

Edward Shamwana and twelve others were charged with treason contrary to section 43(1) (a) of the Penal code Cap 146 of the laws of Zambia, and the particulars are that the twelve accused together with one Matinanga Liswaniso who was struck off the information due to his ill health and ordered to stand his own trial and another person, Pierce Annfield, between the 1st day of April, 1980 and the 16th day of October, 1980 prepared at Mwinilunga and other places unknown in the Republic of Zambia to overthrow by unlawful means the Government of the republic of Zambia as by law established, by or through 11 overt acts. The twelve accused were Edward Jack Shamwana, Valentine Shula Musakanya, Mundia Sikatana, Goodwin Yorum Mumba, Anderson Kambwali Mporokoso, Macpherson Mbulo, Patrick Mkandawire, Thomas Mpunga Mulewa, Godfrey Miyanda, Deogratis Symba, Albert Chilambe Shimbabile and Roger Kanyembu Kambwita³⁷ (they will hereinafter be referred to as accused 1 to 12 respectively).

Before the commencement of the trial after the 12 accused were arrested but before they were formally charged, another issue was raised by accused 1 which I now wish to deal with. Accused 1 made an application by way of motion and it was an application of

³⁶ Ibid

³⁷ S.C.Z Appeal Nos /12-19/1983/HP/166/1981 p1

redress under article 29 of the Constitution. The article relates to the enforcement of the provisions of article 13 to 27 of the Constitution which were usually referred to as the protective provisions, which guarantee the protection of the fundamental rights and freedoms of the individual.³⁸ Article 29 of the Constitution reads as follows:

‘.....subject to the provisions of the clause (6), if any person alleges that any of the provisions of article 13 to 27 has been, is being or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the high court for redress.

The applicant submitted that he was a commissioner of the high court and a leading member of the bar and was detained pursuant to a detention order signed by the president in accordance with Section 33(1) of the Preservation of Public Securities regulation.

Section 33(1) read as follows:

‘Whenever the president is satisfied that for the purpose of preserving public security it is necessary to exercise control over any person, the president may make an order against such person, directing that such person be detained and thereupon such person shall be arrested, whether in or outside the prescribed area, and detained’

The applicant submitted that he had been detained from the 24th of October 1980 and though he had been occasionally interrogated, he had not up to now the 29th December 1980 been charged with any offence. The applicant’s case raised the issue of infringement of his constitutional right to freedom of movement and personal liberty with his continued detention and the failure by the state to charge him with any criminal offence.³⁹ The applicant submitted that the Constitution was the supreme authority in Zambia and all laws were subordinate to it. He relied on the authority of article 15(3) of the Constitution which reads as follows:

³⁸ S.C.Z Record of Appeal no 12/1981@p 8

³⁹ Ibid 9

‘(3) Any person who is arrested or detained –

(a) For the purpose of bringing him before a court in execution of the order of a court; or

(b) Upon reasonable suspicion of his having been committed under the law in force in Zambia;

And who is not released, shall be brought without undue delay before a court; and if any person arrested or detained as mentioned in paragraph (b) is not tried within a reasonable time, then without prejudice to any further proceedings that may be brought against him, he shall be released either conditionally or upon reasonable conditions, including in particular such conditions are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to a trial.’

He argued that since article 15(3) speaks of ‘arrested and detained’, if there is any delay in the trial of that person, then that person must be released. He argued that section 15(3) did not make any distinction between bailable offences and unbailable offences.⁴⁰ He further submitted that since the state speaks of him having committed criminal offences then that brings it within the provisions of section 15(3). The state submitted that they had detained him relying on the authority of section 27 of the Constitution.⁴¹ Article 27(1) of the Constitution read as follows:

‘Where a person’s freedom of movement is restricted, or he is detained under the authority of any such law as is referred to in article 24 or 26 as the case may be, the following provisions will apply’

The applicant drew the courts attention to the word ‘detained’ which was used in article 15 as well as article 27 of the constitution. He argued that the meaning of the word ‘detained’ in article 15 should have the same meaning as in article 27, but the state submitted that the applicant had been detained according to section 27 and the word ‘detained’ in section 27 was used in a different context to the manner that it was used in

⁴⁰ Ibid 9

⁴¹ Ibid 12

failed to report this to the police.⁴⁶ He stated that the said activities were prejudicial to public security and that if he were not arrested he would have continued to pursue these unlawful activities and for the preservation of public security, it was necessary to keep him in detention. He submitted that the detention of a person by the authority other than the president was for the purpose of taking them before a court.⁴⁷ He further argued that section 33 stipulated that only the president has the power to vary a detention order on such conditions that the president may see fit.

The applicant was urging the court to find that the word 'detained' has the same meaning in article 15 as in article 27 and that if the court came to that conclusion then his detention would automatically come under the provisions of article 15 and that the court would have no choice but to release him.⁴⁸ The Learned judge Chaila stated that what was required was to look at the context in which it was used in the Constitution. Article 15(1) laid out the instances in which personal liberty may be interfered with. He stated that in order to arrive at a meaning of the word 'detained' as used in article 15 and article 27 of the Constitution, it was helpful to look at the Supreme court's decision in the case of Kapwepwe and Kaenge V the Attorney General⁴⁹ where Baron J.P said:

'The machinery of conviction or restriction without trial (I will hereafter use detention) is, by definition intended for circumstances where the ordinary criminal law or the ordinary criminal procedure is regarded by the detaining authority as inadequate to meet the particular situation. There may be various reasons for the inadequacy; there may be insufficient evidence to secure a conviction; or it may not be possible to secure a conviction without disclosing sources of information which it would be contrary to the national interest to disclose; or the information available may raise no more than a suspicion, but which someone charged with the security of the nation dare not ignore; or the activity in which the person concerned is believed to have engaged may be a

⁴⁶ Ibid

⁴⁷ Ibid 16

⁴⁸ Ibid 17

⁴⁹ Z.R (1972) 182

criminal offence; or the detaining authority may simply believe that the person concerned if not detained is likely to engage in activities that are prejudicial to public security....’

In the above case, the learned judge also stated that the detaining authorities are not obliged to prefer criminal charges against the applicant. It is up to them to decide whether to detain the persons or prosecute. It therefore follows that the applicant’s complaint of not being charged with a criminal offence does not hold a valid argument. It is purely of the detaining authority to decide whether to prosecute him or not.⁵⁰

The judge also referred to section 33(1) of the Preservation of public security order and referred to the case of **D.J Sharma v the Attorney General**⁵¹ where D.C.J Baron stated that the deprivation of a man’s liberty without trial is allowed in certain situations in the Republic and these included emergencies or a declaration under article 30 of the Constitution. Therefore from the Supreme Court’s decision in the **Sharma** case, regulation 33(1) would be regarded as a law which authorizes taking away the personal liberty of persons during the time when Zambia is at war or when a declaration is in force under article 30 is in force.⁵² As was seen in the **Sharma case**, the law authorizes deprivation of personal liberty without trial. The judge further stated that the word in both articles means keeping somebody in confinement. Article 15 mentions the various instances in which somebody must be detained which include somebody being detained pending a court appearance for criminal charges or pending investigations on suspicions of having committed a crime, Whereas under regulation 33(1), somebody is kept in confinement either to allow the police to establish whether a detention order must be

⁵⁰ Ibid see footnote 38 p17

⁵¹ S.C.Z Judgement no 13 of 1978

⁵² Ibid see footnote 38 p 19

issued or allow the president to exercise control over any person for the purpose of preserving public security.⁵³ In the judge's opinion, the word 'detained' in article 15 was used for the purposes mentioned in that article and in article 27; it was used for the purposes of preserving public security. The judge therefore held that the provisions of article 15(3) did not apply to the applicant and the application was dismissed.⁵⁴

I will now deal with the charges that were put against the 12 accused.

The essential elements for an act of treason were laid down in the leading case of **Rex V Makalo Moletsane and others**⁵⁵ by the learned chief justice of Lesotho Mr. justice A.C.J Contram, namely; an overt act, that has been unlawfully committed, by a person owing allegiance to the state, who must possess majestas and with hostile intent. This allegation was particularized by eleven overt acts. The overt acts were headed 'overt acts of the said treason', meaning that the general allegation is to be proved by the eleven to the overt the proof of overt acts specifically set out. Indeed the law requires that evidence must be applied acts, and not proof of the principal charge of treason.

The first overt act was conspiracy, namely that all twelve conspired to overthrow the Government of the Republic of Zambia in the district of Lusaka. It is essential with conspiracy to connect each of the accused with the conspiracy. Where conspiracy is laid as an overt act, the acts of the conspirators in furtherance of the common design may be given in evidence against all.⁵⁶ Conspiracy is a difficult branch of law to prove. Lord chief justice Brett said this about conspiracy in the case of **R v Aspinall**⁵⁷ :

⁵³ Ibid

⁵⁴ Ibid see footnote 37 p 20

⁵⁵ (1974-1975) L.L.R 316

⁵⁶ Archibald, London, 40th edition paragraph 3018

⁵⁷ 1976 2 QBD 48

‘.....it is necessary to determine the essential facts to be alleged in order to support the charge of conspiracy. First the crime of conspiracy is completely committed if it is committed at all, the moment two or more have agreed that they will do, at once or at some further time certain things. It is not necessary to complete the offence that any one thing should be done beyond agreement’

And in **Reg v Murphy**⁵⁸ chief justice Coleridge said this:

‘It is not necessary that it should be proved that these defendants met to concert this scheme, nor is it necessary that they have originated it. If the conspiracy has already been formed, and a person joins it, he is guilty.’

Then in **Reg v Doot**⁵⁹, Lord Wilberforce said this about conspiracy:

‘..... it is necessary to refer that although the offence of conspiracy is complete when the agreement to do the unlawful act is made and it is not necessary for the prosecution to do more than prove the making of such an agreement, a conspiracy does not end with the making of the agreement, it continues so long as the parties to the agreement intend to carry it out. It may be joined by others and some may leave it.’

For the first overt act, the state relied on the evidence of Mr Bread, a Zairean man and member of the National Front for the liberation of Congo (F.N.L.S), which aimed at overthrowing the Government of Mobuto in Zaire. He testified that accused 10 and 11 were members of this organization and he knew them in Zaire. On the 29th September, 1980, he met with accused 10 at his house in Roma where they had discussed the revolution that was to be supported by wealthy people in Lusaka and that other members of the party were staying at a farm in Lusaka and Kitwe.⁶⁰ The next day he met with Accused 8 and 11 who took him to a farm in Chilanga where he found other people who belonged to his organization. He was told that very powerful people in Lusaka helped take care of all these people and the list included Mr Shamwana and Mr Sikatana who were both lawyers. They allegedly explained to him that if he and his organization helped

⁵⁸ 1837 8 c & p 297

⁵⁹ 1973 2 weekly law reports 532

⁶⁰ Ibid refer to footnote 37p 2

them overthrow the Government of the Republic of Zambia then they would in turn help them overthrow Mobutu's Government.⁶¹ They also told him that they had already acquired 180 firearms and ammunition for the same and accused 10 showed him a sample of the AK 47s that they had planned to use.⁶²

The state also relied on the evidence of General CJ Kabwe who was commander of the airforce. According to him, he was approached by accused 4 at the flying club where accused 4 informed him of a plan to overthrow the Government of Zambia and that this plan was in the advanced stages and they were receiving financial support from people both in and outside Zambia.⁶³ The state submitted that the importance of this evidence was to show that at the time General Kabwe met accused 4, a plan already existed to overthrow the Zambian Government.⁶⁴ Accused 4 then took Kabwe to the house of Pierce Annfield where he met accused 3. Annfield confirmed what accused 4 had discussed with him at the flying club. A week later Kabwe went to the house of Annfield again and there he met accused 2 and they all went to the house of accused 1, where they all laid down the plan to him, which was to arrange for suitable pilots to divert the aero plane in which the President would be traveling in to an unauthorized landing place and force him to resign by signing a declaration stepping down from office and handing over power to some other person, whose name was not disclosed.⁶⁵ Kabwe was expected to participate in the plan by virtue of his position as chief of staff in the Zambian air force. Kabwe was given K500.00 by Annfield for the exercise of coercing a suitable and agreeable pilot. Those present at the meeting, without disassociation whatsoever also discussed other

⁶¹ Ibid 4

⁶² Ibid

⁶³ Ibid 5

⁶⁴ S.C.Z Appeal No's 12-19/1983/HHP/166/1981 7

⁶⁵ Ibid

arrangements such as the arrest of some senior leaders such as the Secretary General, Zambia national defense commander, the senior service chiefs, including General Kabwe himself but that he would be released as soon as possible.⁶⁶ According to Kabwe, on subsequent visits to accused 4's office he had seen a man who was introduced to him as 'deo' and was later identified as Mr Deogratias Symba, accused 10.⁶⁷ The state also relied on the evidence of accused 5 who in his caution statement, admitted that he had been approached by accused 4 and asked to join the coup plot and that this meeting took place at the house of accused 1.⁶⁸ This accused was promised K250, 000 if the coup succeeded and then was advanced K1000 which was to be used to recruit other officers. The state submitted that the fact that he accepted the money was sufficient to link him to the conspiracy, bearing in mind that the conspiracy is completed immediately after an agreement is reached.⁶⁹ There was also evidence of a cheque of K5, 000 from accused 1's bank account with the name A.K Mporokoso endorsed at the back. This taken with the earlier evidence showed that accused 5 received money from one of the conspirators thereby making him part of the conspiracy.⁷⁰ The state submitted that the basic evidence of Kabwe was uncontradicted and stood united through vigorous cross examination by defense counsel.⁷¹

There was ample evidence submitted by the state linking accused 7 to the conspiracy. Sergeant Yorum Katumu testified that acting under instruction of Colonel Mkandawire, he collected two consignments of Zipra arms AK 47s from the Central Ammunition

⁶⁶ Ibid 8

⁶⁷ Ibid

⁶⁸ Ibid 25

⁶⁹ Ibid

⁷⁰ Ibid 26

⁷¹ Ibid 8

Depot (C.A.D) on the 2nd and 3rd of October 1980, respectively.⁷² Each consignment consisted of 40 boxes each containing 10 guns. The second consignment of 3rd October was taken from C.A.D to special projects department where accused 7 personally took part in the off loading with a fork lift then he opened one box, took out one gun and showed it the chief army of staff so that similar guns may be procured for the army.⁷³ The state attached considerable importance to this piece of information as it corresponded with the evidence of Mr Bread that accused 10 had showed him one of the AK 47 guns that had been procured for the specific purpose. Added to this was evidence that accused 7 subsequently on the 4th and 5th of October, 1980 removed in total 16 boxes of guns from the special projects department. On both occasions, he used a white van with a closed body.⁷⁴ On examination of the boxes it was discovered that the boxes and the guns found at the Chilanga farm were identical to the ones that were kept at the special projects department and from the evidence submitted by the state, the only inference that could be drawn is that the guns removed by accused 7 from the special projects department were taken to the Chilanga farm and therefore accused 7's participation in the conspiracy was established.⁷⁵

Major Gershom Mubanga gave evidence against accused 6 that this accused tried to bribe him in order to obtain a large quantity of military uniforms. There was also further evidence by Christopher Kayukwa who was responsible for the custody of ammunition that accused 6 tried to obtain a large quantity of ammunition of 6.72mm from him.⁷⁶ The state submitted that the evidence of Major Mubanga supports that of Kayukwa in the

⁷² Ibid 27

⁷³ Ibid

⁷⁴ Ibid

⁷⁵ Ibid 28

⁷⁶ Ibid 26

sense that it showed a pattern of trying to obtain military equipment by accused 6 and taken in conjunction with evidence that there was a group of persons at Chilanga farm awaiting guns, ammunition and uniforms, they submitted that these attempts were made for the specific purpose of supplying the items to the group at Chilanga farm.⁷⁷

Annifield's part in the conspiracy was established through the evidence of Kabwe and Bread. Corroboration evidence was established by the finding of 30 AK 47 guns and other military equipment hidden at his house in the roof and chimney.⁷⁸

The second overt act was the coercion of Kabwe as commander of the air force to recruit suitable and agreeable pilots who were to divert the aero plane in which the President would travel to an unauthorized landing place and force him to resign by signing a declaration stepping down from office and handing over power. The state relied on the evidence of Kabwe for this act as was discussed earlier. The defense however submitted that the evidence of Kabwe was flawed and unreliable on the ground that Kabwe's evidence as an accomplice must be corroborated by other independent testimony.⁷⁹ Corroboration is only required where the evidence given is truthful. Where there is doubt as to whether the evidence is truthful, the need for corroboration does not arise.⁸⁰ Kabwe also never produced the K500.00 that he had allegedly been given by Annifield for the recruitment of the pilot who was to divert the plane. Kabwe when asked why he did not report this to higher authorities claimed that he had been told by the conspirators that if he told anyone about their plans then he would be killed.

⁷⁷ Ibid

⁷⁸ Ibid 28

⁷⁹ Ibid 53

⁸⁰ Ibid

The Third overt act was the arrangement for the sale of a Chilanga farm by accused 1 to Pierce Annfield which was alleged to be used for the stationing and training of an illegal army which was intended to be used to overthrow the Zambian Government.⁸¹

Overt act number four alleged the recruitment of persons between the 1st April, 1980 and the 14th October, 1980, with the intention of forming an illegal army for the purpose of overthrowing the Zambian Government by unlawful means. The essential ingredients for the prosecution to prove were:- proof of the recruitment in the Mwinilunga district between the dates mentioned, proof that all the persons named in the overt act were recruited in Mwinilunga, proof of intent to form an illegal army and proof of intent to overthrow the Government of Zambia unlawfully or at all.⁸² The state relied on the evidence of Alick Muzeya, Lewis Masuwa, Manuel Kafumbo, Soneka Mashinkila, and Francis Muteba. They all testified that around August 1980 they were recruited from their villages in Mwinilunga as farm labourers initially on a farm in Kitwe, and then later taken to a farm in Lusaka by accused 8 and 11 where they met many other labourers including Ileli Mwansa who was the manager at the farm. They testified that accused 4 and 10 used to bring food to the farm for them and whilst on the farm they were also introduced to Annfield. They further testified that in October 1980, Annfield brought guns in a motor vehicle and at the time when the guns were brought to the farm, accused 4, 8, 10 and 11 were all present.⁸³ The guns were distributed by Ileli who informed them that the guns were to be used for protecting the farm from thieves. The state relied on the evidence of the farm labourers and submitted that the purpose of the recruitment of these men was to

⁸¹ Ibid 56

⁸² Ibid 57

⁸³ Ibid

use them as soldiers to help in the overthrowing of the *Zambian Government*.⁸⁴ The defense submitted that these labourers did perform farm work which included growing vegetables, harvesting maize and erecting of fences. It is important to note that these witnesses never mentioned any form of training that took place and they were given a reason for the issuing of the guns and that was the only reason given. The defense further submitted that all the persons recruited on the farm were specifically recruited to work as farm labourers and did perform the work for which they were recruited.⁸⁵

Overt act number five was the command of an illegal army and this act could be dealt with together with overt act number 4.

Overt act number 6 was the receipt and distribution of money for the purpose of overthrowing the *Zambian Government* by unlawful means.⁸⁶

Overt act number 7 was excluded as it applied only to *Matinanga Liswaniso* who had been struck off the accused list due to ill health and was ordered to stand his own trial.

Overt act number 8 was the purchase of a dye line map. It was alleged that *Mundia Sikatana* purchased the dye line map which was intended to be used for the specific purpose.⁸⁷ *George Chikaloma* testified that he had worked in the survey department as the drawing assistant and that in addition to his duties as a drawing assistant, he sold maps of various kinds to the public. He testified that on 1st July 1980 he sold one city map of Lusaka street dye map to *Veritas Chambers* but he was unable to recall the person who actually bought the map, and when he was shown the map, he could not say whether the

⁸⁴ *Ibid* 35

⁸⁵ *Ibid* 57-58

⁸⁶ *Ibid* 37

⁸⁷ *Ibid* 41

map exhibited was indeed the map that he sold to Veritas Chambers because all the maps of that type of maps were the same with no individual distinct marks. The defense submitted that indeed Mr Sikatana was a partner of Veritas Chambers but there was not enough evidence to suggest that he is the one who bought the dye line map in question.⁸⁸

Overt act number 9 was the attempt to obtain uniforms by accused 6. The state relied solely on the evidence of Major Gershom Mubanga who testified that his main function was to act as a link between the army and defense headquarters. He testified that he was approached by accused 6 who asked him to supply 40 pairs of combat uniforms.⁸⁹

Overt act number 10 was an attempt to obtain 7.62 mm of ammunition. The state relied solely on the evidence of Christopher Kayukwa who was the armaments technician with the Zambia air force. He stated that he was responsible for the storage of ground weapons and ammunition.⁹⁰ He testified that early in October he met accused 6 at a bar in Lusaka where accused 6 asked him whether he could get him some ammunition, specifically 7.62mm ammunition and a price of K500.00 per 100 round was suggested by the witness. He stated that he had invited accused 6 to his house to discuss the matter further, but he did not turn up. The witness stated that he later reported the incident to the station authority. However the defense submitted that the witness was unreliable and showed that he had lied on a number of points for example he had claimed that he had reported the matter but when pressed under cross examination he said it was a verbal report.⁹¹

Overt act number 11 was that accused 7, 9 together with Annfield supplied arms. The state relied on the evidence of the labourers who witnessed Annfield bringing the arms to

⁸⁸ Ibid

⁸⁹ Ibid 41

⁹⁰ Ibid 42

⁹¹ Ibid 65

the farm. Mr Bread had also testified that accused 9 had showed him a new gun which he recognized as an AK 47 and told him that there were more guns to follow. The defense submitted that there was no evidence to show that the accused took, delivered or supplied arms to any place. The evidence of the witnesses is that only guns which were taken to the farm were those guns taken by Annfield. Annfield went there alone if the witnesses were to be believed.⁹² The defense further submitted that all the witnesses called for the prosecution were either accomplices or had an interest of their own to serve, or are so unreliable that a reasonable tribunal cannot act on their evidence without looking for support outside their evidence.

The learned Judge dealt with each of the overt acts. On the first overt act of conspiracy the judge stated that it has never been law that all the conspirators should meet altogether at the same time and agree to do something unlawful. It is settled that if two or more people agree to do something unlawful, the conspiracy is committed and people may leave or join the group and adopt the original agreement.⁹³ Conspiracy is a difficult offence to prove because of its own nature of secrecy and yet the burden of proof upon the prosecution does not change, it is always beyond a reasonable doubt.

Lord Wilberforce said this about conspiracy in R v Doot⁹⁴:

‘Often in conspiracy cases the implementing action is itself the only evidence of the conspiracy-this is the doctrine of overt acts’

And in the same case Viscount Dilhorne at page 540 said:

‘A conspiracy is usually proved by proving acts on the part of the accused which lead to the inference that they were acting in pursuance of an agreement to do an unlawful act’

⁹² Ibid 66

⁹³ Archibald 39th edition paragraph 4951(ii)

⁹⁴ 2W L.R 532

The court analyzed the evidence that was submitted by Kabwe and there was an issue raised as to whether the evidence of Kabwe should be admitted based on the fact that he was an accomplice and his evidence was uncorroborated. The prosecution submitted that they did not dispute that Kabwe was an accomplice but his evidence could be accepted if the requirements as set out in **Phiri and others V The People**⁹⁵ had been satisfied. It stated as follows:

A judge sitting alone or with assessors must direct himself and the assessors if any as to the danger of convicting on uncorroborated evidence of an accomplice with the same case as he would direct a jury and his judgment must show that he has done so. No particular form of words is necessary for such direction. What is necessary is that the judge has applied his mind to the nature and the facts of the particular case before him.

The judge should examine the evidence and consider whether in the circumstances of the case those dangers have been excluded. The judge should set out reasons for the conclusions; his mind upon the matter should be clearly revealed.

As a matter of law, these reasons must consist of more than a belief in the truth of the evidence of the accomplices based simply on their demeanor and the plausibility of their evidence-consideration which should apply to any witness.

These circumstances do not lead to close descriptions; the nature and sufficiency of the evidence in question will depend on the nature and the facts of the particular case. As a principle, the evidence will be in the nature of the corroboration in that it must be of necessity support or confirm.

The state further submitted that on application of this rule to the case there was ample evidence to support the evidence of Kabwe. The supporting evidence was given by Mr Bread, Ileli(the farm manger) and the caution statements from the accused.⁹⁶ However, the defense pointed out the admissibility of the accused's caution statements as evidence by citing the case of **Mataka V The Republic of Tanzania**⁹⁷ which stated that the acts

⁹⁵(1978) Z.R 79

⁹⁶ Ibid see footnote 37 p 10

⁹⁷ (1971) E.A 495

of a co accused cannot be given in evidence. They also cited the case of The People V Japau⁹⁸, where the judge stated that one accomplice could not corroborate another.

The judge further stated that an accomplice's evidence is acceptable in court but it only needs corroboration if the accomplice is found to be credible. If he is not credible his whole evidence is rejected. It was submitted by the defense that this witness was not credible because the reasons that he gave for not reporting the alleged meeting with some of the accused namely that he feared for his life cannot be believed and they tend to only show untruthfulness.⁹⁹ The learned judge responded by stating that he could not agree with the reasons by Kabwe for his failure to report the incident and these only strengthened the fact of his being an accomplice. The fact is that he never reported the incident to the authorities because he had joined the conspiracy. The defense however in their submissions seemed to have some difficulty with this witness. On one hand they portrayed him as untruthful on all other matters but when it came to testifying about the treatment he received while in detention, he was their star witness as they relied on the case of The People V Japau¹⁰⁰ where Evans J cited that he approached the evidence of prosecution witnesses 'with great caution' knowing that the witnesses has been under police care and control for months. He further stated that he found the evidence of the principal state witness to be unreliable, suspect and uncorroborated and he was convinced that it would have been unsafe to convict the accused based of treason based on this witness testimony.¹⁰¹

⁹⁸ (1967) Z.R 95

⁹⁹ Ibid see footnote 37 p 34

¹⁰⁰ Ibid see footnote 64 p 97

¹⁰¹ Ibid see footnote 38 p 98

The judge however disagreed with the defense on points of the assessment of untruthfulness of Kabwe's evidence and thus held that Kabwe was a truthful witness. The judge further relied on the evidence given by Mr Bread and Ileli. Based on the testimonies of the witnesses above, accused 1, 2, 3, 4 and 10, were linked to the conspiracy. As far as accused 6 went, there was no direct link that the court could find linking him to the conspiracy. The evidence of Kayukwa is flawed in that if he really reported the incident of accused 6's request for combat uniforms to the station officer, one would have expected such an officer to be called to confirm this and also to tell the court what steps he took to investigate this. This witness was a witness with an interest to serve of his own.¹⁰² Evidence on accused 7 was mainly from the army officers on the collection of the arms by accused 7 and the movement of them to the special projects department. The state wanted the court to infer that the guns taken by the accused were taken to Chilanga farm; however there was no evidence to support this theory. The court could not therefore link accused 7 directly to the conspiracy.¹⁰³ On accused 8, the evidence submitted of the steps accused 8 took to recruit the labourers was relied on and the court was satisfied by this evidence and that he was aware of the conspiracy and did something to achieve the plan. On accused 9, the court relied on the evidence of Ileli who was the manager of the farm. The court however stated that they hesitated to rely on this witness in the absence of independent evidence. The police failed to carry out an identification parade and the state conceded that the identification was of no effect.¹⁰⁴ The court was therefore not able to find a direct link tying accused 9 to the conspiracy.¹⁰⁵

¹⁰² Ibid see footnote 37 p 38

¹⁰³ Ibid

¹⁰⁴ Ibid 39

¹⁰⁵ Ibid

On the above analysis of the evidence, the court was of the opinion that sufficient evidence had been adduced to establish a conspiracy to overthrow by unlawful means the Government of Zambia against the following accused persons:- 1, 2, 8, 10, 11, and 12. The court found that although accused 5 was aware of the conspiracy he did nothing to adopt the plan but he failed to report it. The court found no direct link tying accused 3, 6, 7 and 9 to the conspiracy.¹⁰⁶

Overt act 2 involved accused 1, 2, 4 and Annfield which involved the holding of a meeting to persuade Kabwe to make certain arrangements for the diversion of the presidential plane. The evidence relied upon was that of Kabwe who was declared a credible witness and the judge was satisfied that the overt act had been laid out.¹⁰⁷

On overt act 3, the court found that the evidence produced by the prosecution showed that there was nothing illegal in the sale of the farm in question. Proper procedure seemed to have been followed. There was no evidence to show that accused 1 made arrangements to sell this farm to Annfield for the purpose of stationing and training an illegal army, which army was intended to overthrow the Government of Zambia. This overt act was therefore not made out.¹⁰⁸

Overt act 4 and 5 were dealt with together, the court relied on the evidence of Alick Muzeya and the other farm labourers including warn and caution statements of accused 11 and 12. The court stated that it had no doubt that the labourers were recruited as farm labourers. However taking into account the facts of later development at the farm such as the arming of these people, the court had no hesitation to believe that they were tricked by accused 8, 10 11 and 12 into believing that they were farm labourers when they were

¹⁰⁶ Ibid

¹⁰⁷ Ibid

¹⁰⁸ Ibid 40

infact soldiers. Arming a group of 60 people with arms is prima facie evidence of an army, and as it was not established by the lawful Government of Zambia, it was therefore an illegal army. It is not reasonable to arm over 60 people with arms to protect the farm from thieves, especially when there is no evidence of thieves. The only reasonable inference to be drawn from the arming of these people is that they were to be formed into an illegal army without their knowledge. There was further evidence that the accused 10 was the overall boss at the farm and of the illegal army. The court was therefore satisfied that overt acts 4 and 5 were satisfied.¹⁰⁹

On overt act 6, involved accused 1, 2, 3, 4, 5 and 10 where the state alleged that accused 1 gave money to accused 2, 3, 4, 5 and 10 for the purposes of overthrowing the Government of Zambia. The learned judge stated that although the state have shown that through their bank accounts/books or documents that there was movement of money; the purpose has not been established.¹¹⁰ It is apparent that from Shamwana and company, money was distributed to Veritas chambers, P. Annfield office account, Mumgood flooring, Goodwin Associates but no money was paid to an individual. Veritas chambers and P. Annfield were law firms and the state seemed to be asking the court on this overt act to assume that since some of the accused persons worked for these firms and companies, the court should have drawn the conclusion that the money was for unlawful purposes, to which the judge stated that this was not the only reasonable inference that could have been drawn from the facts and it would have been highly dangerous to draw such a conclusion¹¹¹. With regards to accused 2, it was alleged that accused 2 received K3000.00 form Annfield for the purposes alleged. To prove this, a cheque dated 11the

¹⁰⁹ Ibid 41

¹¹⁰ Ibid 36

¹¹¹ Ibid

April 1980 was produced. This cheque was drawn on the clients account of Annfield, however there was evidence to show that accused 2 had been a client of Annfield for a long time. It was clear that this cheque was drawn on the client's account, the money belonged to the client not the office of Annfield and the judge was unable to draw to the conclusion that the money was for the purposes alleged.¹¹² As regards accused 5 the evidence was based on two cheques, the first drawn in the personal account of accused 1 dated 11th September 1980 to the sum of K5000.00 that was made to 'cash' and endorsed A.K Mporokoso at the back in addition to accused 1's signature. There was no evidence as to who endorsed the name on the cheque as the handwriting from the signature of accused 1 and the endorsement differed and was in different ink. The second cheque was dated 9th June 1980 and was drawn on the account of Goodwin associates in the sum of K7000.00, and made payable to accused 5.¹¹³ The learned judge stated that where the courts are asked to draw the inference from the set of facts, the conclusion so drawn must be the only reasonable inference under the circumstances and in the conclusion the inference that the money was for unlawful purposes could not be established.¹¹⁴ On accused 10, there was evidence on counterfoils with the name 'Deo' endorsed on the back. There was no other evidence in this aspect and in the absence of such evidence the learned judge found it difficult to draw the conclusion that the money was given for the unlawful purpose. Therefore overt act number 6 was not made out.

Overt act number 8 dealt with accused 3 as mentioned earlier. The court found that there was no link between the map found at the farm and the one that was bought by someone at Veritas Chambers. There were many city of Lusaka maps sold to members of the

¹¹² Ibid 37

¹¹³ Ibid

¹¹⁴ Ibid

public and the fact that accused 3 works for Veritas Chambers cannot be the only reason for drawing the conclusion that the map found at the farm was the one bought by Veritas Chambers. The evidence of who took the map to Chilanga farm is unclear. In the absence of these links the court found that this overt act had not been made out.¹¹⁵

Overt act 9 and 10 were dealt with together as they involved accused 6. The court stated that even if they were to find that these overt acts were proven, there was no evidence linking accused 6 to the conspiracy and so these overt acts hang in the air as these could not be proven against him unless conspiracy is first proved. These overt acts were therefore struck off.¹¹⁶

The 11th overt act, affected accused 7 and 9. The court found no evidence linking the two accused to the conspiracy. Even if there was evidence of the existence of the arms, there was no evidence that accused 7 took any arms to Chilanga farm. The court therefore found that this overt act had not been made out.¹¹⁷

On the totality of the evidence the learned judge on the 25th of August 1982 found that:

Edward Jack Shamwana, Valentine Musakanya, Goodwin Mumba, Thomas Mulewa, Deogratias Symba, Albert Chilambalile and Rodger Kabwita together with Pierce Annfield on dates between 1st April and 16th October 1980, in Lusaka, conspired to overthrow the Government of Zambia as by law established.¹¹⁸

Edward Jack Shamwana, Valentine Musakanya and Goodwin Mumba, together with Pierce Annfield between 1st April and 31st July 1980 at the house of Edward Jack Shamwana at Kabulonga in Lusaka endeavored to persuade Christopher Kabwe to make

¹¹⁵ Ibid 41

¹¹⁶ Ibid 42

¹¹⁷ Ibid

¹¹⁸ Ibid

arrangements which would result in the plane carrying the president of the Republic of Zambia landing at an unauthorized place so that the president would fall into the hands of armed persons who would force him at gun point to sign a declaration renouncing his office as president of the Republic of Zambia.¹¹⁹

Albert Chimbalile, Thomas Mulewa, and Rodgers Kabwita between the 1st April and 14th October 1980 in the Mwinilunga district of the North Western province of the Republic of Zambia collected about 65 persons and conveyed them to Chilanga farm with the intention of forming an illegal army for the purpose of overthrowing by unlawful means the Government of the Republic of Zambia.¹²⁰

Deogratias Symba was in command of the said illegal army stationed in Chilanga farm in Lusaka which illegal army was intended to be used to overthrow by unlawful means the Government of the Republic of Zambia.¹²¹

Anderson Mporokoso had a case to answer on a charge of misprision of treason contrary to section 44 (b) of the penal code, particulars of offence being that he did not give information thereof with reasonable dispatch to the President, Minister, a junior Minister, or a police officer or use other reasonable endeavors to prevent the commission of the offence.¹²²

The following accused persons had no case to answer, namely Mundia Sikatana, Macpherson Mbulo, Patrick Mkandawire, and Godfrey Miyanda and in terms of section

¹¹⁹ Ibid 43

¹²⁰ Ibid

¹²¹ Ibid 44

¹²² Ibid

206 of the then criminal procedural code, they were acquitted of the charge of treason and set free.¹²³

In the judgement, Musakanya, Shamwana and Mumba were found guilty and condemned to death. The offence of treason carries a mandatory death sentence in Zambia. The treason trials had dominated the headlines in daily newspapers from 1981 to 1984. The idea of a conspiracy made interesting news and the newspapers sold like hot cakes. There was another reason for the sustained public interest in the treason trial. People felt that Musakanya, Shamwana and Mumba had advocated a popular cause albeit in the unlawful manner that justified the intervention of the state.¹²⁴ The ruling party had become unpopular after the introduction of the one party system. Many people found that the rules and practices governing elections to Parliament favored members of the ruling class. The much talked about 'participatory democracy' was meaningless to non members of the ruling class. In September 1981, approximately one year after the eight men were arrested and detained for treason and other charges, another lawyer (Goefrey Hamandu) and an air force warrant officer (Christopher Chawinga) made an abortive attempt to rescue the detainees who were held in prison in Lusaka. Their efforts to release the detainees although unsuccessful, demonstrated the widespread sympathy among members of the public for the plight of the detainees.¹²⁵

The frustrations of the people continued due to harsh conditions prevailing in the country. The widespread feeling of distrust of UNIP and the government among the people remained throughout the period of the treason case from 1980 and 1985. Therefore not surprisingly, another coup plot was uncovered in June 1983. It is reported to have been

¹²³ Ibid

¹²⁴ Supra see footnote 24 p 170

¹²⁵ Ibid 171

organized by Zambian dissidents backed by mercenaries from South Africa and Zaire. The authorities did not confirm the identities of the coup plotters but some observers suspected a mixed group of soldiers and civilians who had conspired to overthrow the government.¹²⁶

3.2. b. Miyanda and others

Then in 1988, another allegation of a coup attempt by Lieutenant General Christon thembo was reported.¹²⁷ At the time of his arrest the General was Zambia's ambassador to Germany in Bonn. During his trial the government suffered some embarrassment because of his popularity with the public and with the soldiers in the lower ranks in the army. He was described by many observers as the most popular army commander ever in Zambia.

3.2. c. Mwamba Luchembe and others

However, after 1980, the most serious allegation of a coup plot was that of Army Lieutenant Mamba Luchembe on 30 June.

Army Lieutenant Luchembe went on radio for about 03:00 hours on Saturday 30 June announcing that he had toppled Kaunda's government.¹²⁸ Thousands of youths, men and women raced into the city centre to cheer the apparent down fall of Kaunda's unpopular

¹²⁶ Ibid

¹²⁷ Ibid

¹²⁸ Ibid

government. This coup was however short lived and at about 07:00 am, almost four hours after Luchembe's voice was heard, another voice was heard on the radio announcing that the army had regained control. Soldiers loyal to Kaunda had assumed complete control of the situation. Luchembe was arrested at the Mass Media Complex and taken away to Lusaka Central police station.¹²⁹

After this, the National Interim Committee for Multi Party Democracy was formed in July 1990. In December 1990, parliament finally removed article 4 of the 1973 constitution, which enshrined the one party state and guaranteed UNIP the status of sole legal party. This thus put an end to the implied unity between the UNIP party and the government.¹³⁰

¹²⁹ Ibid

¹³⁰ Ibid 176

CHAPTER FOUR

4.0. The Grundnorm as the starting point

This is the starting point of the chain of legal means in any society according to Kelsen's pure theory of law.¹³¹ Kelsen is the 'purist' of legal theory. He excluded sociological and psychological investigation and anything else which might be constructed as foreign to the essence of law and maintained the division between law and morals¹³².

The Grundnorm is at the apex of the hierarchy of legal norms and is the original source of authorization for decisions and actions taken throughout the system down to its lowest level. The Grundnorm validates and authorizes the creation of all legal rules. The Grundnorm is not the same as a Constitution. In the first place, because the Constitution is itself a norm, the Grundnorm operates from a higher point – or one step further back – and gives validity to the Constitution. In the second place, it is important to note that the historically first Constitution to which the Grundnorm gives validity may involve a number of Constitutional amendment, but not revolutionary discontinuity. Should revolutionary discontinuity occur, a new Constitution will be established. Historically the first Constitution is thus the starting point of the Constitution order by virtue of being written upon a political *tabula rasa* or by the enforced fresh beginning of a revolutionary overthrow.

¹³¹ H Kelsen, 1967, 'The purity theory of law', M Knight, London, 221-222

¹³² Mario Jori 'International library of essays in law and legal theory legal positivism', London, p 117- 118

4.1. Efficacy

The validity of the Grundnorm is assumed as long as the norms constituting the legal order remain effective.¹³³ If the judge obeys the norms to pass sentence and the jailer obeys the norm to turn the key, the observation of the norms of the system leaves us in no doubt that the grundnorm from which those norms were derived is presupposed. Therefore, the validity of individual norms depends upon the validity of the 'higher norm' while the validity of the grundnorm depends upon its efficacy.¹³⁴

4.1.a. Efficacy in revolutionary situations

When people revolt, they defy the law, take to the streets and openly attack the 'kings and soldiers'. If the soldiers return the attack and bring the rebels before the courts where the judges order the execution of the revolutionaries, the legal system is seen to be efficacious.¹³⁵ However, if the soldiers have not the heart to fire, or the judge's refrain from severe penalties, then the law is no longer efficacious. The officials have ceased to obey their directions and to subscribe to the Grundnorm. It no longer has effect. The orders directed to officials are no longer obeyed.¹³⁶ Situations are seldom so clear-cut, an uprising may take months to quell, for sporadic resistance usually continues in outlying areas. Therefore, when is it possible to determine if the laws of a revolutionary regime are effective? To a large degree, this issue must not be determined by jurisprudence, but

³ Adrienne E Van Blerk, 1966 'Jurisprudence: an intorduction', Butterworths, Durban, p 49

⁴ Ibid

⁵ Ibid

⁶ Ibid 50

by military and political reality, and at a certain point it will become apparent that the laws of a new regime are efficacious.¹³⁷ As noted earlier, Kelsen believes that the success of a revolution results in a new Grundnorm. Once a regime has been overthrown, and the laws of the new regime are observed, it follows that the Grundnorm will now be that 'the Constitution set in place in place by the new regime be obeyed. It is unlikely that the Constitution and the laws of an overthrown regime would survive a successful revolution, regardless of the fact that their loss of efficacy has not been formally sanctioned or anticipated by the old order itself.¹³⁸ It would be senseless to accept the validity of decrees made by an expelled ruler, who may have fled into exile and be living on a mackerel in a wooden shack on some far distant island- in other words, an utterly powerless ruler.¹³⁹ It is the practical efficacy of the new order which leads to the presumption of a changed Grundnorm which then authorizes a new chain of norms.

Revolutions present judges with dilemmas. A judge who carries out the directions of a new regime assists its efficacy, and if those directions happen to be morally reprehensible, such a judge also violates his conscience. However a judge who refuses to cooperate with the decrees of a new regime with to inspiring fellow judges of the old order to resist the new regime and hinder the growth of its power places himself in a dangerous position.¹⁴⁰ Revolutionary regimes are often indifferent to the disapproval of the judiciary, and if the judiciary should prove accommodating, they are simply replaced- by one means or another- with more compliant members of the profession. Dias says, 'judges sitting under the power of a regime have little alternative but to accept it as legal;

¹³⁷ Ibid

¹³⁸ H Kelsen, 1945, 'General theory of law and state', A Wedberg, London, 118

¹³⁹ Ibid

¹⁴⁰ Ibid

and those who refuse to accept will be replaced, or their judgments nullified.’¹⁴¹ There may be alternative choices, but they are not likely to be very pleasant. No revolutionary regime has ever surrendered its new-won power for the sake of a judge’s unhappy conscience. It is of course, possible, as Riddall also points out, that a judge may prefer the new order to the old, or that his approach to law may be pragmatic. In the latter case he may see himself as a dispassionate technician whose craft is that of interpreting the law of the state(whatever it may be) and its moral content is therefore of no particular consequence to him no more than a ‘train driver is concerned with the moral character of his’ passengers.’¹⁴² His job is to administer the law whether he personally agrees with it or not. Regardless of the change Grundnorm, such a judge may follow this course of action or he may feel compelled to resign. Whatever the decision he makes, will be dictated by reasons of loyalty, conscience and an assessment of the value of the new regime.¹⁴³ In practice, the revolutionary change of a Grundnorm does not mean that all laws of the earlier regime (even though their validity was derived from the old Grundnorm) have changed. They may indeed, be changed on a large scale when a government of a very different character takes over – for example, when a left wing government replaces one which was right wing. However, it is common for the main body of the laws to continue unchanged. There may, for example, be no loss of continuity in the civil and criminal law after a coup d’etat. That is not to say that the grundnorm likewise continues unchanged. It has been altered to the following “all laws that the new government decrees together with all laws that the new government impliedly decrees (by not revoking the old laws) ought to be obeyed.

¹⁴¹ RWM Dias, 1985, ‘Jurisprudence’, London, 366

¹⁴² JG Riddall, 1991, ‘Jurisprudence’, London, p 114

¹⁴³ Ibid

The courts have had recourse to Kelsen's theories on a number of occasions in order to assist them in ascertaining the legality of obligations imposed by such revolutionary regimes as Pakistan and Uganda. Likewise, the judges appointed by the British crown in Rhodesia after Ian Smith's declaration of independence from British colonial rule in 1965 faced the same issue in R vs Ndlovu¹⁴⁴ The appellate division of the Rhodesian high court found that the secession or revolution had been successful by virtue of the fact that the laws of the new regime were efficacious and recognized as valid within the country.

4.2. Constitutional implications

The basic principles and features which underlie the constitution are; the rule of law, democracy and accountability; separation of powers and checks and balances; cooperative government and devolution of power.¹⁴⁵ The principles are all justifiable in the sense that any law or conduct that is inconsistent with them may be declared invalid. Constitutionalism is the idea that government should derive its power from a written constitution and that its powers should be limited to those set out in the constitution.¹⁴⁶ The fundamental problem that is addressed by the writing of a constitution is to establish a government with enough power to govern but where that power is structured and controlled in such a way as to prevent it being used oppressively.¹⁴⁷ The first principle, Constitutional supremacy dictates that the rules of the Constitution are binding on all branches of the government and have priority over rules made by the

¹⁴⁴ 1968 4 SA 207 515 (RA)

¹⁴⁵ Johan de Waal, 2001, 'The bill of rights hand book', Juta and company, South Africa, p 8

¹⁴⁶ Ibid 7

¹⁴⁷ Ibid

government. Any law or conduct that is not in accordance with the constitution, either for procedural or substantive reasons will therefore not have the force of law.¹⁴⁸ Section 2 of the South African Constitution gives expression to the principle of constitutional supremacy. It states that the Constitution is the supreme law of the Republic; law and conduct inconsistent with it is invalid, and its obligations must be fulfilled. The Constitution is a democratic pre-commitment to a government that is constrained by certain rules, including the rule that a decision of the majority may not violate the fundamental rights of an individual. The Constitution is not only enforced through litigation but through a number of other democratic means. The principle of democracy means that citizens are entitled to lobby and pressurize the government to give effect to their rights.¹⁴⁹ The importance of a free press in ensuring the government keeps to its commitments and that it does not abuse its powers should not be underestimated.

4.2.a. The rule of law

The idea of constitutionalism is bolstered by the specific entrenchment of the rule of law in the founding provisions of the Constitution. As originally conceived by the English Constitutional lawyer AV Dicey more than a century ago, the purpose of the rule of law was to protect basic individual rights by requiring the government to act in accordance with pre-announced, clear and general rules that are enforced in accordance with fair

¹⁴⁸ Executive Council of the Western Cape Legislature v President of the Republic of South Africa 1995 (4) SA 877 (CC) para 62

¹⁴⁹ Supra see footnote 145, p 9

procedures.¹⁵⁰ However, in the twentieth century the meaning of the rule of law has been considerably developed and argued over. Some have used the term to advocate respect for civil and political rights or even social and economic rights.¹⁵¹

4.2.b. Democracy and accountability

The Constitution also requires the government to respect the principle of democracy. Once it has been accepted that no person or institution has a divine right to govern others, it follows that government can only be legitimate in so far as it rests on the consents of citizens. Therefore in a democratic system of government, the relationship between the state and the citizen is not simply a power relationship. Rather than state power, the consent of the governed is the defining characteristic of the relationship. Law or state conduct inconsistent with the constitution is invalid.

4.2.c. Separation of powers and checks and balances

The doctrine of separation of powers requires the functions government to be classified as legislative, executive or judicial and that each separate function is performed by separate branches of government. In other words, the functions of making law, executing the law and resolving disputes should be kept separate and in principle should be performed by different institutions and persons.¹⁵² The purpose of separating functions in

¹⁵⁰ AV Dicey, 1959, 'An introduction to the study of laws of the Constitution', xcvi-cli

¹⁵¹ A Matthews 1962, 'Law, order and liberty in South Africa', Acta Juridica,

¹⁵² Supra see footnote 145 p 20

this manner is to prevent the excessive concentration of power in a single person or body like what happened in Zambia upon the introduction of the one party state. Some Judges of the Constitutional court have recognized that a delicate balance must be developed between the need on the one hand to control the government by separating powers and enforcing checks and balances, and, on the other hand, to avoid diffusing power so completely that the government is unable to take timely measures in the public interest.¹⁵³

4.3. Political rights

Political rights are most often infringed by political rivals. When the transgressing rival happens to be in the government, the severity of the infringement is greater but its nature remains the same.¹⁵⁴ The freedom to make political choices include the right to form a political party, the right to campaign for a political party or cause are all political rights that are protected by the Constitution. The right to free and fair elections gives content and meaning to the right to vote. As the Constitutional court held, 'the right to vote is indispensable to, and empty without, the right to free and fair elections.'¹⁵⁵ Every citizen therefore has a right to vote in free and fair elections.

A Coup D'état removes this fundamental right that is afforded to every citizen. The Constitution has set out the guidelines for the election of governments through free and fair elections. The ballot box is the only way to ensure that the will of the people is respected. Coups may not necessarily be the will of the majority but may be merely the

¹⁵³ Ibid

¹⁵⁴ Supra see footnote 145 p 349

¹⁵⁵ Ibid

will of the minority. So when the coup occurs it is forced upon those people who did not want it in the first place. This then infringes on the political rights of the individuals. As mentioned earlier, any law that is inconsistent with the Constitution should be declared void. Coups are unconstitutional in that they are not in line with the spirit of the Constitution.

CHAPTER FIVE

5.0. Summary and conclusion

The dual political aspects of natural law are the revolutionary and the conservative. The positivists claim that in the past, natural law has served the conservative purpose of validating the existing power relations. They see natural law as first and foremost an ideology produced by statesmen, jurists, and clergy-men to legally entrench their authority. Moreover, while natural law may, initially be revolutionary, it may become conservative when the social classes whose interests it asserts are in a dominant position. This was simply illustrated by the individualist and liberalist natural law which led to the American Revolution. Assumed principles of natural law involving ownership and economic growth in America in the early nineteenth century were transformed in the second half of the century into a conservative force which protected the advantages of the propertied classes and slowed the progress toward social, equality and social welfare. On the other hand say natural lawyers, the successful rise of Nazism and the debasement of the German legal system, colonialism and the defense of slavery-even by the anti-slavery- can be attributed, at least in part, to the positivisms of separating laws and morality. They claim that by excluding the pivotal question of moral criteria to which state regulations must conform, the positivists prepare the way to tyranny. This argument had important implication for a critical examination of South African jurisprudence under apartheid. According to critics, of the South African bench, the non-activist position

assumed by the South African judiciary could be attributed to their belief in a 'vulgar' archaic of creed of Austinian positivism.

It is difficult to find common cause for the prevalence of coup attempts in so many Sub-Saharan countries. Can the high prevalence of coups and coup attempts be explained merely by the fact of widespread poverty leading to general discontent of the populace? Is it that too much power hungry men are impatient to wait for a long time to succeed the incumbent of their country's top post by unconstitutional means? Of course, such an eventuality is impossible in countries with undemocratic constitutions. It is perhaps the unfair distribution of wealth that drives men to conduct coups. In the opinion of Blair Hayden¹⁵⁶, many leaders of Sub-Saharan African countries become greedy in office and become completely blind to poverty in their midst. He says 'they legitimize themselves and perpetuate their reigns not by serving their countries but by consuming them.'

All coups in Zambia failed except Mwamba Lucembe's on 30 June 1990. It was short lived. In a television interview at the beginning of 1993, Yorum Mumba gave reasons why he participated in the coup plot in 1980. He said that the coup plotters had over the years become disillusioned with the undemocratic nature of the government under the one party system. Under the one party system, it had become difficult, almost impossible, for people to change an unpopular government through the usual democratic process. In the first Republic, it was virtually a one man show. Mumba argued that there would have been no need for the coup attempt if democratic means of changing government were available to the coup plotters.

In order to consolidate political stability in Zambia, as indeed in other countries, people should adopt constitutions that spell out detailed checks and balances among legislative,

¹⁵⁶ Author Africa: dispatches from a fragile continent W.W Norton & co

judicial and executive branches of government. Future constitutions should prescribe in detail inalienable human rights for the protection of all the people, the poor and the rich, the weak and the strong in society. Above all, the constitution should make provisions for regular elections. They should ensure that 'the supreme power' to toss out leaders is left in the hands of the people. In this way, there is assurance that the people are being governed by a leader of their choice, one whom they put in power. When a coup d'etat occurs, it has been observed that the groups of people who execute it are most of the time voicing the desires of the general public for a change. As can be seen in all the coups discussed in this paper, the general populace was extremely discontent with the current government to the extent that the coups were welcomed.

Interference with individual freedoms is clearly likely to happen in a dictatorship. On the one hand it is argued that the multi party system is foreign to African governments in which problems are traditionally discussed among all concerned until a consensus is reached. There have never been groups' competing for the right to govern, that right was vested in traditional rulers. Where there are no ideological differences, a multi party system is inappropriate in such a society. On the one side, it is argued that traditional government by monarchs and feudal chiefs is unsuitable in the modern world and is no basis for a modern form of government. It is healthy to have an alternative, even lacking different ideology, to act as a government in waiting and to highlight the inadequacies of the present one. The people should have more than one choice of candidate committed to implement the party policy; they should have the right to criticize that policy outside the party structure.

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