

## CHAPTER EIGHT

### MULTILATERAL REGIONAL AND BILATERAL INSTITUTIONS AS CATALYSTS OF CONSTITUTIONALISM:

#### 8.1.0. Introduction:

The external catalysts of constitutionalism cannot be discussed in isolation, without alluding to the immediate post-colonial period. At their independence, Zambia and other African countries inherited foreign exchange reserves as the colonial economy was geared to cater for a small white population. Expenditure on the black population was low. There were no schools or hospitals. The Zambian pound was at par with the pound of its former colonial master. However, inherited was an economic environment which was discriminatory in nature. The indigenous people did not have the economic and political rights which were enjoyed by the white settlers.

It therefore became imperative that the new rulers had to redress past-injustices in terms of providing social and economic justice. They had to provide infrastructure like schools and health centers. Education and consumption had to be subsidized, which was a significant subvention on the foreign exchange reserves. The 1973 Israeli – Arab War, led to the dramatic increase in oil prices. At that time, copper prices had fallen, which caused serious foreign exchange shortage. The conflict found a weak Zambian economy. There was a lot of mismanagement. Oil crisis led to more problems because countries borrowed heavily to buy oil. This was the genesis of the sovereign debt crisis. Zambia heavily borrowed from the western banks, which debts could not be repaid at the appropriate times. The International Monetary

only get international financial assistance and donor support if they were compliant with those conditionalities.<sup>4</sup>

This was the beginning of international restraint on unconstitutional and undemocratic conduct of most third world regimes. Human rights observance became part of this global agenda. Good governance therefore gained international recognition and significance. 'Developmental Aid' was conditioned on good democratic credentials. However, to paint a clear picture, it is necessary to discuss the period when there were two super powers namely, the Soviet Union and the United States (The Cold War Era). This was a period when countries were supported for their strategic importance. After the collapse of the Soviet Union and the United States became the only super power, strategic importance ceased to be the criteria for financial assistance, but rather democratic tenets.

#### **8.1.1. The Cold War Era:**

At the end of the Cold War, there was more focus on governance. The developed countries were no longer looking for allies. There was increased relationship between governance and development.

At no time in recent history has the period been so eventful as during those not so distant days of the Cold War. China and the Soviet Union on the one hand and the United States on the other, were using money to buy influence in developing countries. This was a period of ideological rigidity. Regimes were supported for their strategic importance and not for their democratic tenets. A time of two political and economic ideologies and two camps – the capitalist bloc under the auspices of the United States, and the Communist bloc under the auspices of the Chinese and Soviet Union – with each camp seeking to win the allegiance of the greatest number.

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<sup>4</sup> Paul Nugent, *Africa Since Independence*, op cit, pp 326 - 327.

This was the time when loans to countries and regions shot up in direct proportion to their perceived geopolitical influence or ideological loyalties and when loans were used as a means of securing powerful allegiances and ensuring political stability.<sup>5</sup> In 1960, for example, when South Asia and the Far East were perceived as the main 'red threats', fifty per cent of all US loans and grants were given to the key 'domino' countries in Asia, like South Korea, Vietnam, Thailand, India, Pakistan and Iran. Between 1945 and 1952, when the Soviet penetration of Europe was perceived by the Americans as their greatest threat, Europe received \$13.3 billion in US aid.

The 'Bay of Pigs' fiasco, in which the US attempted and failed to overthrow the communist regime of Fidel Castro, moved Latin America onto America's list of preferred borrowers. The Soviets' lending to decolonized Africa in the late 1950s and early 1960s unsettled Washington. Initially this had nothing to do with Cold War rivalry between Moscow and Washington. Nor was this a benevolent act, instead it was a direct outcome of an intensifying competition with the Chinese for the leadership of the international communist and national liberation movements.<sup>6</sup> The West soon got involved in the patronage of Africa, because the Chinese and the Soviets threatened it. A British Foreign Office document in 1959 sent a strong message,<sup>7</sup> that unless African countries got support from the West, they may turn to the communists, which will harm the West's security interests.

With that looming threat, Washington launched a dual strategy to provide 'friendly' African regimes with weapons and also channel funds to them through United States Aid for International Development (USAID), along with the International Financial Institutions.<sup>8</sup> In Angola for example, the Soviet Union provided loans to the Movement for the Popular

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<sup>5</sup> Noreena Hertz, *The Debt Threat and Why We Must Diffuse It* (London: Harper Perennial, 2004) p.28.

<sup>6</sup> *Ibid.*, p.30.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*

Liberation of Angola (MPLA), who were enemies of UNITA. The latter purchased weapons with American dollars. The World's super-powers played significant roles in laying the foundations for future sovereign debt crisis, insecurity and instability in Africa and other 'Third World Countries'.

This the foreign powers did in two ways. First, their prolific lending actively helped to enhance the debt mountain, so that the 'Third World Countries', owed loans at levels way above what many of these countries could realistically service, sowing the seeds of the sovereign debt crisis the developing world currently faces. Secondly, by frequently bank-rolling the tyrannical, corrupt, or self-seeking regimes, which were not sustained in power by the vote, but by coercive power, the regimes never made populist investment decisions and their legacies increased levels of domestic poverty, conflict and civil strife.<sup>9</sup>

The corrupt regime of Mobutu Sese Seko in Zaire, now the Democratic Republic of the Congo for example, received half of all US aid to black Africa in the late 1970s. Zaire's favoured borrowing status persisted even after a damning internal memorandum which was made public in 1978 by Karin Lissakers, later to become US Executive Director of the IMF. The memorandum did not mince its words: "the corruptive system in Zaire with all its wicked manifestations, is so serious that there is no prospect for Zaire's creditors to get their money back."<sup>10</sup>

Yet, despite the absolute clarity of the 1978 IMF memorandum and the progressive worsening of Mobutu's spending, in 1987 the US, through the IMF, pushed through yet another loan in exchange for Mobutu making his territory available for covert action against

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<sup>9</sup> Noreena Hertz, *The Debt Threat and Why We Must Diffuse It*, op cit, p.32.

<sup>10</sup> Ibid.

neighbouring Angola. Today, the people of the Democratic Republic of Congo are spending 37 per cent of government revenues servicing their debt.<sup>11</sup>

### **8.1.2. The Post-Cold War Era**

After the collapse of the Soviet Union, the World became unipolar, meaning there was only one super power, the United States and the allegiance of strategically important 'Third World Countries,' was suddenly perceived unnecessary. Loans were called in overnight, and new lending was either restrained, or provided under far less generous or far more conditional terms.<sup>12</sup> Countries were borrowing when their production was not increasing. This exacerbated the sovereign debt crisis.

Moscow, in its new post-Soviet guise, and now suffering its economic collapse, asked for repayment of outstanding loans, having rescheduled them in the past. The inability of the Soviet Union to continue giving grants and loans to Third World Countries and their calling in of existing loans, drove these countries into a 'Sovereign Debt Crisis'. They run out of foreign exchange for their imports. They could not turn to private banks as they had defaulted on existing loans.<sup>13</sup>

### **8.2.0. Multilateral Institutions IMF, World Bank and the UN**

The traditional functions of the IMF, were surveillance crisis prevention/crisis resolution and technical assistance. The IMF acted as an International Referee overseeing the fixing of exchange rates and monetary policies generally. The financial position of Third World countries, in particular, worsened as they were drowning in levels of debt to service. The lack of

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<sup>11</sup> Noreena Hertz, *The Debt Threat and Why We Must Diffuse It*, op cit. p.32

<sup>12</sup> *Ibid*, p.34.

<sup>13</sup> *Ibid*, p.32.

convertible currencies to support imports impacted negatively on economies of developing countries.<sup>14</sup>

The IMF had to provide balance of payments support in order to save the International Banks and Institutions which were creditors to 'Third World Countries'. The IMF had to impose conditionalities in return for balance of payment support. The governments of poor countries were increasingly becoming inclusive due to IMF conditionalities. They introduced Multi-Party political systems which enhanced popular participation in political and economic development. The conditionalities imposed were democracy, Rule of Law and observance of human rights.<sup>15</sup> Zambia is currently negotiating with the IMF for US\$200 million for balance of payment support. This has been caused by the recession in the United States, Europe and Japan which countries have reduced the demand for Zambian copper.<sup>16</sup>

The World Bank was the largest multilateral donor in the world before it was overtaken by China. Its main objective is to balance world development. The Bank is especially involved in the financing of large projects in developing countries, which private banks find too risky to finance. Such big projects are vulnerable to corruption which may negate the intended objective. The World Bank therefore believes Good Governance as an important element of sustained economic growth, which is key to reducing poverty and the vulnerability of the poor.<sup>17</sup>

The United Nations has made a variety of interventions in 'Good Governance', based on its Charter,<sup>18</sup> the Universal Declaration of Human Rights,<sup>19</sup> International Covenant on Economic,

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<sup>14</sup> Raghuram G. Rajan, Industrial Reform and Sovereign Debt Crisis Cato Journal, Vol. 25 No.1 of Winter 2005) p.17.

<sup>15</sup> Paul Nugent, Africa Since Independence (New York: Palgrave Macmillan, 2004) p.28.

<sup>16</sup> Statement by the IMF Managing Director, Zambia Daily Mail, 24<sup>th</sup> April 2004.

<sup>17</sup> The World Bank Group, Poverty Matters/Governance worldorg/intl/erdr/go/governance 29/11/2005, p.9.

<sup>18</sup> Charter of the United Nations (1945).

<sup>19</sup> Universal Declaration of Human Rights (UN, 1948).

Social and Cultural Rights,<sup>20</sup> which instruments have been enacted pursuant to the charter.<sup>21</sup>

Article 1(3) of the Charter is couched in these terms:

*“To achieve International co-operation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for all without distinction as to race, sex, language or religion, and to be centre for harmonizing the actions of nations in the attainment of these common ends”.*

It is clear that the human rights fundamentals contained in the Universal Declaration of Human Rights, which is customary international law and other UN protocols have propelled constitutionalism. The self-determination by many former colonial territories was not only anchored on these protocols, but materially and logistically supported by the United Nations.

### **8.2.1. The European Union, African Union and SADC**

The European Union’s policy initiatives in Zambia and other developing countries in supporting constitutional rule is based on that regional body’s Human Rights Convention. Members of the Council of Europe, adopted the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10<sup>th</sup> December 1948, whose provisions were substantially incorporated in Part III of our Constitution. These provisions were incorporated in the European Convention of Human Rights.<sup>22</sup> The Member States reaffirmed these values in these terms:

*“Members of the Council of Europe, profoundly believing in the fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by common*

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<sup>20</sup> International Covenant of Civil and Political Rights.

<sup>21</sup> Charter of the United Nations.

<sup>22</sup> European Convention for the protection of Human Rights and fundamental freedoms adopted by the Council of Europe on 4<sup>th</sup> November 1950.

*understanding and observance of the human rights upon which they depend.”*<sup>23</sup>

The Convention informs the member states support of democracy and institution of elections all over the world.

The African Union has repudiated Article 3(2) of the Organization of African Unity which stated that, “there should be non-interference in the internal affairs of another state.”<sup>24</sup> The Charter said nothing on democracy, human rights or ‘Good Governance.’ Its successor, the Constitutive Act of the African Union, has enumerated lofty ideals. The African Union’s relevant objectives under the Act, are to promote and protect human and People’s Rights and other relevant human rights instruments; promote democratic principles and institutions, popular participation and good governance.

The African Charter on Democracy, Elections and Governance espouses: Respect for Human Rights and Democratic Principles; Access to and exercise of state power in accordance with the constitution of the state and the principle of the rule of law, promotion of a system of government that is representative; Holding of regular, transparent, free and fair elections; Separation of powers; Promotion of gender equality in public and private institutions; Effective participation of citizens in democratic and development processes and in governance of public affairs; transparency and fairness in the management of public affairs, condemnation and total rejection of acts of corruption, related offences and impunity; condemnation and total rejection of unconstitutional changes of government; strengthening political pluralism and recognizing the role, rights and responsibilities of legally constituted political parties including political parties,

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<sup>23</sup> European Convention for the protection of Human Rights and fundamental freedoms.

<sup>24</sup> Charter of the Organization of African Unity (1963).

which should be given a status under national law.<sup>25</sup> It has to be seen, whether this is aspirational rhetoric or concrete accomplishments in a constitutional democratic sense.

Among the institutions created are the Court of Justice, as a Court of general jurisdiction and the Pan-African Parliament. An African Court on Human and People's rights was set up with specific jurisdiction to deal with human rights violations and private citizens have the right to sue their governments.<sup>26</sup> The African Union Act of 2000/2001,<sup>27</sup> realized that it was not feasible for the region to watch human rights violations or unconstitutional and undemocratic practices being perpetuated in a Member State and do nothing about it. The Member States were not only accountable to national institutions of accountability and transparency, but to supra-national institutions as well.

In 2001, the African Union made a NEPAD Declaration, which underscored the importance of democracy, political and economic corporate governance as values and objectives of governance in member countries. In 2002, the African Union Heads of State and Government adopted the Declaration.<sup>28</sup> The Southern African Development Conference (SADC) which is a sub-regional body, and part of the African Union (AU) equally adopted these values and objectives of the continental body. This was a laudable initiative in Africa in terms of consolidating constitutional democracy.

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<sup>25</sup> African Charter on Democracy, Elections and Governance Adopted by the Eighth Ordinary Session of the Assembly, held in Addis Ababa Ethiopia, 30<sup>th</sup> January 2007, Article 3.

<sup>26</sup> Constitutive Act of the African Union (2000/2001).

<sup>27</sup> Ibid.

<sup>28</sup> Heyns Christof and Der Van Morné Linda (editions), *Compendium of Key Human Rights Documents of the African Union* (Centre for Human Rights, University of Pretoria, 2004) p.247.

### 8.2.2. Bilateral Donors as Catalysts of Constitutionalism

The IMF/World Bank and other Multi-Lateral and Bilateral countries are grouped under the auspices of the Paris Club.<sup>29</sup> The difficulty of these relationships is that, when the IMF/World Bank cancel their programmes with a country, most other bilateral donors follow suit. If not redressed, it could lead into the recipient country experiencing a severe economic and political crisis that could result in political instability, which could be responded to by repression by the State.<sup>30</sup> The bilateral conditionalities are therefore formulated within the broader context of the 'Bretton Woods' conditionalities or agenda.

The bilateral donors discussed are, the United States, United Kingdom, Sweden, Germany, Norway, Denmark and Finland. The United States, through USAID mission plan, is to build a prosperous democratic Zambia. The view has been that Zambia's development challenge is to unravel the legacy of the One-Party State.

The United States Strategic objective is based on the development hypothesis that transformation of Zambian society will occur when the rule of law replaces the rule of man.<sup>31</sup> Because of enormous powers of the President and through him, the Ruling Party, Zambia remained a One-Party-Dominant-State. The Multi-Party reforms of 1991 require implementation at many levels, before all Zambians can benefit. The constitution making process must rebalance these all-encompassing powers exercised by the President, so as to prevent future corruption and abuse of office.

Zambia, having been a British Protectorate, Britain as a donor feels more obligated than other donor nations to ensure that there is 'Good Governance.' Bearing in mind that there is a

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<sup>29</sup> Chitala Mbita, Constraints on Public Debt Management in Zambia, (University of Zambia Phd Thesis unpublished, 2008) p.139.

<sup>30</sup> Ibid, p.141.

<sup>31</sup> Ibid.

co-relationship between 'Good Governance' and economic development,<sup>32</sup> the British Government has supported executive accountability. The Swedish government, on the other hand, like many Western donors, has premised Sweden's relations with Zambia on progress in the area of governance.<sup>33</sup> The Swedish International Development Agency (SIDA), though agreeing that there are many factors which make a country poor, in Zambia's case, weak political and economic governance, have been singled out as the main reasons. Sweden also supports media and women rights.

Norway, through the Norwegian Agency for Development (NORAD), has supported democratic reforms and human rights by promoting access to justice.<sup>34</sup> Germany, through the German Technical Assistance Agency (GTZ) supports local governance, decentralization, democracy, accountability, human rights, civil society and institution building. As can be seen, Germany supports almost all aspects of constitutional governance.<sup>35</sup> Denmark focuses on democracy and human rights.<sup>36</sup> Finland, like Norway, has focused on democracy and human rights.<sup>37</sup>

### **8.2.3. Accountability and Transparency**

'Good Governance' is expressed as the responsible and transparent management of public affairs and resources. This relates both to the levying of funds (fair taxation policy, efficient tax administration, debt policy), and to the use of funds (rational budget planning, deployment of funds by political priority, budget implementation), as well as the monitoring by parliaments and national audit offices. In developing countries, there is often absence of functional management of public finances and thus of the basic prerequisites for the planning and

<sup>32</sup> Zambia, DFID country Assistance (2004/05/07) p.12.

<sup>33</sup> SIDA, Zambia Country Analysis, (2003-2007).

<sup>34</sup> Norwegian Development Cooperation <http://Nord.No.default.asp?item.iD.1620>, p.20.

<sup>35</sup> German Technical Cooperation [www.GTZ.del/en/aktueu/607/htm](http://www.GTZ.del/en/aktueu/607/htm), p3.

<sup>36</sup> Danish International Development Agency [www.Danidadeuforum.um DK](http://www.Danidadeuforum.um.dk) p.j.

<sup>37</sup> Department for International Development Cooperation (FINNIDA) <http://www.safemotherhood.org.smrj/Agencies/bibi>.

implementation of development-oriented governance.<sup>38</sup> In the Zambian case, donors have complained about theft of public resources and corruption. These deprive the state the ability to provide much needed finance for development and provision of basic social services.<sup>39</sup>

The IMF and the World Bank have co-ordinated in this area. The two institutions have put at the heart of their development agenda the problem of corruption in their client countries. The International Financial Institutions have institutionalized accountability as an aspect of constitutional governance. 'Good Governance' and Transparency are important elements of sustained economic growth, which is key to reducing poverty, which may be a cause of political instability.<sup>40</sup> The IMF and World Bank are much more nuanced when it comes to structural adjustment and conditionality. In theory, they engage countries on economic arguments. They tell them what they see as problems and ask them to come with a proposal. The IMF recently came to the aid of Ireland and Greece. However, one may say the developed countries are given aid on more favourable terms than African countries. The problem in Africa is negotiation capacity to effectively engage IMF and World Bank economists effectively.

Governance concerns are also being mainstreamed into the preparation of Poverty Reduction Strategy Papers (PRSP) by the IMF and World Bank for Zambia. In addition, the World Bank Public Sector Board, has prepared analytic tool kits to highlight the links between governance and poverty to help guide analysis in individual country settings.

Four of every five Country Assistance Strategy Documents now discuss how corruption affects governance. The IMF and World Bank have regarded transparency and governance as absolutely necessary to the client country's developmental process. This is mirrored by the

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<sup>38</sup> The World Bank Group, *Poverty Matters /Governance*, op cit, p.11.

<sup>39</sup> An interview with Mr. Martin Phillips, IMF Desk Officer Ministry of Finance on 10<sup>th</sup> January, 2004 at Lusaka.

<sup>40</sup> Aljazeera, 1<sup>st</sup> April 2009, TV programme by Ritz Khan.

government's ability to create a more open and flexible society which gives voice to the people and benefits to all.<sup>41</sup>

The two regional groupings, the European Union (EU) and African Union (AU) and the sub-regional grouping SADC are recipients of donations from member states. The EU is the richest of the three, but even then its financial resources are not adequate to invest money in third world institutions of accountability. The other regional bodies are therefore not active in that area.

The United States Government has tied its aid to the enactment of the Constitution that will reduce Presidential powers in order to reduce corruption and abuse of power. The donor has stated that Parliament and other institutions must become watchdogs, that the "social movement" that will inspire and motivate Zambians over the next decade in eliminating corruption, and a successful fight against corruption, will significantly improve Zambia's economy.<sup>42</sup> The United States principal objective is to see an accountable government, as the strategic plan illustrates.

The British government has focused on improving governance by making the government accountable. In that direction, she has provided structures like a four story building which houses the Anti Corruption Commission, supplemented the salary of the Chief Prosecutor at the Anti Corruption Commission to ensure they attract a properly qualified lawyer.<sup>43</sup> Sweden adopted a special strategy through the Swedish International Development Agency (SIDA) in May 2000.<sup>44</sup> The strategy identifies strengthened accountability and transparency by supporting anti-corruption initiatives and ethical expenditure of government resources.

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<sup>41</sup> Human Rights Watch, International Response, [www.hrw.org/reports/1997/zambia](http://www.hrw.org/reports/1997/zambia).

<sup>42</sup> USA, Country Strategic Plan, op cit, p.8.

<sup>43</sup> An interview with Mr. Nixon Banda, Director General Anti-Corruption Commission, 7<sup>th</sup> May 2006 at Lusaka.

<sup>44</sup> SDA, Zambia Country Analysis, op cit, p.17.

The Federal Republic of Germany 'Good Governance Promotion Project' to the Zambian government emphasizes combating of corruption.<sup>45</sup> The relevant passage is couched in these terms:

*“Corruption hinders transparent and rule-oriented government activity and affects particularly the poor, because, for example, access to public goods and services is unequal. Responsible use of political power and public resources, as a basic prerequisite for reducing poverty, requires an environment in which taking bribes and corruption can be consistently combated. In our measures, we focus on systematic institutional changes of a preventable nature. We strive to strengthen transparency and internal as well as external accountability at all levels of government leadership. We work to prevent corruption, not only in key areas of state modernization, but particularly in sectors that are allocated government resources and in sectors with special importance for poverty reduction (anti-corruption mainstreaming). GTZ supports the formation of an international cooperation authorities who plan and carry out anti-corruption activities”.*

The policy of the German Government on corruption is coherent and detailed. Norway in her quest to support accountability and transparency, has supported infrastructural and human resource development in the Auditor General's Office. Provincial audit offices have been constructed by Norway. The Norwegian government has funded training programmes for accountants in the Auditor General's office in order to create capacity in that office to ensure that those who receive public funds do not abuse those funds.<sup>46</sup>

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<sup>45</sup> GTZ, Good Governance, op cit, p.21.

<sup>46</sup> An interview with Ms. Anne Chafungulwa, Auditor General, 10<sup>th</sup> June 2006 at Lusaka.

#### 8.2.4. Promoting Democracy

The IMF and the World Bank have included conditionalities in loans and grants to their clients, which ensure that their client's policies are democratically legitimized. They believe that development has real chance if the activity of government institutions is evaluated according to democratic principles and citizens have influence on and participate in government activity. The conditions in a client country must be essential for an active dialogue between the population, private sector and state agencies. There must be a functioning parliament and an all-active population that participates in a democratic decision-making process. In the quest to deepen democracy, the United Nations Organization (UNO) has embarked on a global campaign to institute participatory governance through decentralization,<sup>47</sup> which has been discussed in Chapter Six.

The United States perceives civil society rather than government or political opposition as drivers of change. Former American Ambassador to Zambia, Arlene Render put it thus:

*“Political stability is essential to economic viability. The building blocks of political stability in Zambia were put into place with your multi-party democratic election in 1991. Maintaining democracy is a continuous growth process. Freedom of expression, tolerance of differences, respect for the principle of inclusion and the rule of law are pillars for the democratic base. Often these pillars are attacked from one quarter or another, but under no circumstances must we allow them to fall.”<sup>48</sup>*

The statement underscores the unrelenting support of democracy and its values by the United States Administration. The United Kingdom has supported civil society like the Catholic Commission for Justice Development and Peace, who are stakeholders in the democratic

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<sup>47</sup> UN-HABITAT, Local Authorities Decentralization Guidelines, [www.unhabitat.org](http://www.unhabitat.org), p.3.

<sup>48</sup> The Post, 10<sup>th</sup> June 1998.

process.<sup>49</sup> The United Kingdom persuaded Zambia to accede to the African Union's New Partnership Africa Peer Review Mechanism Agreement for Development (NEPAD).<sup>50</sup> By so doing, Zambia has submitted herself to be audited in terms of management performance by other African Union Members in areas of governance, democracy, transparency and accountability.

Sweden, under the Democratic Governance Project, seeks to see that there is broader political participation. Sweden recognizes that democracy can only flourish if there is a free press. The Swedish Ambassador was outraged by the proposal for the enactment of the Media Council Bill in 1996, which she thought would go against 'Good Governance'. She stated that:

*"Good Governance is one of the conditions attached to aid especially the balance of payment but the Media Council Bill, is a clear violation of this condition. As one of the major donors we welcome the establishment of a permanent Human Rights Commission and the new Anti-Corruption team, but we are definitely opposed to the Media Council Bill. The government should just put it in a drawer and forget about it."*<sup>51</sup>

Despite the fact that media regulation itself may be important to safeguard the rights of others, pressure was unrelenting, and the government was forced to back down by suspending consideration of the 'Bill'. The 'Bill' has not seen the light of day.

Germany, has clearly set out her democracy agenda for Zambia. The overall objective is to ensure that:

*"There is democratic legitimization of policies. Development has a real chance, if the activity of government institutions is evaluated according to democratic principles and citizens have influence on and participate in government activity. Therefore, our activities focus on those institutions and framework conditions that are essential for an active dialogue between the population/the private sector and state agencies; a functional parliament; independent*

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<sup>49</sup> Zambia, DFID Country Assistance, op cit, p. 12.

<sup>50</sup> Ibid.

<sup>51</sup> Ibid, p.17.

*media; which can disseminate high-quality political information and finally an active population that participates in a democratic decision-making process.*"<sup>52</sup>

Germany did withhold aid in 1996 in terms of balance of payment support in order to encourage democratic reforms. Norway followed the Germany example in withholding balance of payment support and went further to freeze project aid in order to protest the constitutional changes that barred former President Kaunda from participating in the Presidential race in that year.<sup>53</sup>

Danish aid is premised on democratic consolidation, while Finland's focus is poverty alleviation in order to sustain democracy. Poverty alleviation mitigates political instability. The EU has conditioned its aid on democracy and human rights. The EU withheld the balance of payment support for Zambia in 1996 due to the exclusion of Kaunda from standing for the presidency by the government amending the Constitution.<sup>54</sup> The rationale was that the people of Zambia had been deprived of the right to choose a leader of their own choice. This point of view finds some authority in the case which was taken before the African Commission of Human and People's Rights by a Zambian Non Governmental Organization (NGO) in *Legal Resources Foundation V Zambia*.<sup>55</sup> The NGO was challenging the constitutionality of Article 34(3) barring Kaunda from contesting the 1996 Presidential elections.

The Commission found that Zambia had violated Articles 23(1) and 13 of the African Charter. Zambia was strongly urged to take necessary steps to bring its laws and Constitution in

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<sup>52</sup> GTZ Good Governance, Political Reforms @ [GTZ.den/en/theme/political-reform/88](http://GTZ.den/en/theme/political-reform/88) htm.

<sup>53</sup> Norwegian Development Cooperation, op cit, p.20.

<sup>54</sup> Human Rights Watch Report, [www.hrw.org/worldreport99/Africa/Zambia](http://www.hrw.org/worldreport99/Africa/Zambia), p.1, see also Article 34 (3) of the Constitution.

<sup>55</sup> (2001) AHRCR 84.

conformity with the African Charter. Since then, Zambia has taken steps to repeal this constitutional provision.<sup>56</sup>

The African Union has put on its agenda promotion of democracy and democratic institutions in Africa by adopting the following NEPAD principles: (i) Member States should adopt democratic institutions; (ii) they should embrace constitutional supremacy anchored on the doctrine of 'Separation of Powers'; (iii) tolerance of civil society; (iv) tolerance of opposition politics.

From the SADC front, a SADC military force led by South Africa moved into Lesotho to go and restore democratic rule, after a mutiny by soldiers in 1999 which overthrew the elected Prime Minister. The South African government sent troops to Lesotho. This was the first time in the history of the Organization of African Unity (OAU) and SADC, when a sovereign country was invaded to restore democracy.<sup>57</sup>

#### **8.2.5. Community Participation in Governance**

The UN has recognized that sovereign power resides in the people, and is exercised directly by them or by representatives elected by them. The UN has been promoting local governance through the UN-Habitat Democracy Project. The project document has urged all member countries to legally commit themselves to decentralization.

GTZ has assisted in the design of decentralization policies and processes. The donor emphasizes improving transparent fiscal policy decision-making in the public sector. This entails local community, private sector and civil society participation in control of public sector

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<sup>56</sup> Mung'omba Draft Constitution 2005.

<sup>57</sup> The Author's interview with Chief Buthelezi, the then Minister of Home Affairs and the then Acting President during the military intervention, who was the Chief Guest, during the International Refugee Judges Conference on 15<sup>th</sup> July 2001 in Pretoria.

revenues and expenditure, joint formulation of conditions for local economic development and improving public services. A detailed discussion is in Chapter Six.

### **8.2.6. The Electoral Process**

The UN has constituted 'Transitory Authorities' in countries which have emerged from conflict. Despite imperfections, elections have breathed life into democracy. A key role was played by the UN in the founding election in Namibia in 1989.<sup>58</sup> Cambodia was a showcase of how the UN can get involved in an electoral process to ensure that the elections are free and fair. The UN leveled the playing field in a country like Cambodia and East Timor with undeveloped democratic political culture. Access by both competitors to the state-run media was ensured by the UN. They set up an alternative radio station and distributed 350,000 second-hand radios in the rural areas, thereby ensuring that opposition parties could compete on the airwaves.<sup>59</sup>

In the Zambian case, in the 2001 general elections, the Electoral Commission imposed a K10,000 fee on monitors. The majority of monitors could not afford, as most of them were volunteers. The United Nations Development Programme (UNDP) offered to pay for the monitors.<sup>60</sup> Although the outcome of the elections was contentious, it would have been more contentious in the absence of independent monitors.

In the quest to contribute towards a free, fair and transparent elections, the EU intervention exposed, and possibly reduced, the amount of unfair practices in Zambia's 2001 elections. Public facilities such as national television and radio became more regularly accessible to political contestants through sponsored programmes. The EU mitigated the K10,000 accreditation fee imposed by the ECZ, which would have disqualified thousands of

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<sup>58</sup> Richard W. Soudriette, President International Foundation for Election Systems, paper presented at the Constitutional Design 2000 Conference, University of Notre Dame Center for Continuing Education 9 – 11<sup>th</sup> December 1999, p.2.

<sup>59</sup> Center for the Study of Violence and Reconciliation, <http://www.csur.org.za/articles/artsimp2.htm>, p.2.

<sup>60</sup> An interview with the then Electoral Commission Chariman Justice Bobby Bwalya on 3<sup>rd</sup> January 2002.

monitors.<sup>61</sup> Without such monitors, the electoral process would have been perceived as fraudulent. The losing parties would have been less desirous to resolve issues through the legal process, which would have resulted in political instability.

The African Union has implored member states to hold free and fair elections. The SADC, recognizing the importance of elections in a democracy, has weighed in heavily on the electoral process. The body has formulated principles of election management, monitoring and observation in the region. The principles of transparency, funding of political parties, intra-party democracy, among others, set out in the SADC Electoral Handbook, are imperatives for the entrenchment of a working democracy in the region and in particular, the holding of free, fair, legitimate and credible elections. This is the key pre-requisite for the nurturing and consolidation of democracy, which is an important facet of constitutionalism.<sup>62</sup>

Apart from bilateral donors from the EU supporting democracy in broad terms, there has been no sharp focus on the institution of elections by individual member countries. Understandably, this is because the Regional body the EU, actively participates in elections monitoring, as alluded to earlier in this Chapter. Individual participation by EU countries would be duplication and a waste of resources.

### **8.2.7. Human Rights**

At Multi-lateral level, the IFIs, the IMF and World Bank do not focus on the implementation of the democracy and human rights projects, but on fiscal accountability. They merely prescribe those concepts and conditions for balance of payment support and project finance and institutional building support respectively. The UN mainly promotes self-determination and overseeing the observance of human rights.

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<sup>61</sup> The Tripartite Elections in Zambia, Lessons for the future (Panos Institution of Southern Africa, 2004) p.11.

<sup>62</sup> Principles of Electoral Management, and observations in the SADC Region, Southern African Electoral Forum Conference, 11<sup>th</sup> -14<sup>th</sup> June 2000, Windhoek Namibia.

The UN has made a variety of interventions in this area, based on its Charter. Article 1(3) of the Charter, among other objects of the Charter, is couched in these terms:

*“To achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for all without distinction as to race, sex, language or religion, and to be a centre for harmonizing the actions of nations in the attainment of these common ends”.*<sup>63</sup>

Pursuant to the Charter, the UN enacted the Universal Declaration of Human Rights which contained human rights fundamentals. The right to equality, to life, not to be enslaved, not to be tortured, not to be subjected to arbitrary arrest, the right to be presumed innocent until proven guilty, the right to privacy, the right to movement and residence within the borders of a state, the right to seek and to enjoy in other countries asylum from persecution, the right to nationality, the right to found a family.<sup>64</sup>

The Universal Declaration of Human Rights, precipitated the struggles for independence in most colonial and dependent territories, especially in Africa. These rights were embodied in emerging states Constitutions. In the Zambian case, that became part III of our Independence Constitution.<sup>65</sup> The UN realized that, putting these rights in the Constitution was not sufficient, they had to be given substance.

The UN High Commissioner for Human Rights, in order to further promote human rights, sponsored a third human rights conference of African Jurists on ‘Strengthening Human Rights Protection Systems in Africa: The Role of the Judiciary and Parliament’ in Nairobi

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<sup>63</sup> Universal Declaration of Human Rights (1948).

<sup>64</sup> Ibid.

<sup>65</sup> The Independence Constitution (1964).

Kenya.<sup>66</sup> This was in recognition of the lack of familiarity among judges, lawyers and parliamentarians regarding both, regional and international human rights protection mechanisms, which fact was admitted by conference participants.<sup>67</sup> The UN Commission for Human Rights sponsored a judicial colloquium in Nairobi on the domestic application of International Human Rights norms for judges in the SADC region.<sup>68</sup> Zambia was represented by the Chief Justice. It is evident that the UN has created capacity among Judges as guardians of the Constitution. Efficient constitutional adjudication, especially dealing with 'Bills of Rights', enhances and promotes human rights, which is an important aspect of constitutionalism.

The EU condemned the October 1997 coup attempt in Zambia and issued a statement calling on the government to fully respect human rights of all political detainees in accordance with internationally agreed standards. The Union condemned the torture of detainees. The pressure exerted on the Zambian government led to the appointment of the Japhet Banda Commission, whose report stated that the coup plot suspects were actually tortured by security wings and the Commission ordered six hundred and fifty million kwacha compensation to the seventy suspects.<sup>69</sup> The Report has been extensively alluded to in Chapter Seven.

The African Commission on Human and People's Rights, following the European Union example, has established a principle that, where it is necessary to restrict rights, the restriction should be as minimal as possible and not to undermine fundamental rights guaranteed under the law. This was in the case of *Amnesty International and Others V Sudan*.<sup>70</sup> The Commission was dealing with a variety of violations of the Charter by the Government of Sudan, following

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<sup>66</sup> African Dialogue III, 'Strengthening Human Rights Protection systems in Africa: The Role of the Judiciary and Parliament,' final report, 6<sup>th</sup> – 8<sup>th</sup> December, 2004.

<sup>67</sup> Ibid.

<sup>68</sup> Ibid.

<sup>69</sup> Report of the Commission of Inquiry into allegations of Torture, Abuse or Violation of Human Rights of Persons Suspected of Involvement in the attempted coup of 28<sup>th</sup> October 1997, 31<sup>st</sup> March 2000, Lusaka.

<sup>70</sup> (2000) A HRLR 297.

the coup d'état of 1989. The violations included failure to protect civilians during the civil war, and violations of freedom of religion and speech. The Commission cited the case of *The Bar Association V Nigeria*,<sup>71</sup> where the Commission said, "any restrictions on rights should be the exception". The Government, it was held, imposed a blanket restriction on the freedom of expression, which constituted a violation of the spirit of Article 9 (2) of the African Charter.<sup>72</sup>

Though the EU, AU and SADC lack resources to significantly influence constitutional developments in Zambia, these institutions cannot be dismissed as ineffectual in propelling constitutionalism, they have scored some successes in that area.

Invariably, all bilateral donors have conditioned their aid on the observance of human rights. The United States insists that there is a co-relationship between the 'Rule of Law' and human rights observance. Human rights cannot be sustained in a State where leaders are put beyond the pale of the law or where there is the 'Rule of Man.'<sup>73</sup> The United Kingdom Country Assistance Project includes human rights promotion as one of the conditionalities.<sup>74</sup>

Sweden has been more vigorous in human rights promotion in Zambia under a special strategy adopted in May 2000. Among the objectives of Swedish support is, equal access to justice, strengthened freedom and independence of the media. It was not surprising that Sweden opposed the 'Media Council Bill', in April 1996, which Council was going to regulate the Media. Its composition was of people who were not predominantly professional journalists. And yet self-regulation had not failed. The perception was that media freedom was going to be suppressed, which would have impacted negatively on freedom of expression which is a human right.

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<sup>71</sup> (2000) HRLR 186.

<sup>72</sup> Ibid.

<sup>73</sup> USA, Country Strategic Plan, op cit, p.8.

<sup>74</sup> Zambia, DFID Country Assistance, op cit, p.12.

The German government has been more practical in promoting human rights in Zambia, especially women rights. The donor has engaged in teaching human rights to Magistrates running the local courts in Zambia for the past eight years. The German government through GTZ has also been funding the Legal Resources Foundation of Zambia, which benevolently takes up cases of a constitutional and human rights nature on behalf of the indigent persons. The Legal Resources Foundation in defence of human rights, successfully took Zambia to the African Commission of Human and Peoples' Rights after former President Kaunda was barred from standing for the Presidency as his parents hailed from Malawi,<sup>75</sup> which case has been discussed earlier in this Chapter. The German government is of the view that, "today, it is internationally recognized that promotion and improved protection of human rights are indispensable parts of human development.

If human rights are guaranteed, civil society and especially the disadvantaged population groups are able to take initiative and present their concerns. The German government understands human rights to be those contained in the Universal Declaration of Human Rights and the seven other Universal Instruments.<sup>76</sup> Therefore, for the GTZ, commitment to human rights means, above all, the promotion of institutions of accountability and transparency. The overall objective of promotion is to enable the state and its institutions to respect, protect and fulfill human rights.<sup>77</sup>

Norway finances projects that promote human rights in developing countries. A classical case of a human rights-related project is Norway's financing of the construction of a twenty four

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<sup>75</sup> *Legal Resources Foundation V Zambia, (2001) AHRLR 84.*

<sup>76</sup> International Covenant on Economic, Social and Cultural Rights (UN, 1966), International Covenant on Civil and Political Rights (UN, 1966), Optional Protocol to International Covenant on Civil and Political Rights (UN, 1966), Second Optional Protocol to the International Covenant on Civil and Political Rights (UN, 1989), Procedure for Dealing with Communications relating to Violations of Human Rights and Fundamental Freedoms (ECOSOC Resolution 1503), (UN, 1970), High Commissioner for the promotion and protection of all Human Rights (UN, 1993), Principles relating to the status of national institutions for the promotion and protection of human rights (Un, 1993).

<sup>77</sup> GTZ, Good Governance, op cit, p.20.

courtroom magistrates' complex in Lusaka. The project was intended to decongest prisons by expediting justice delivery through provision of the badly needed court-room space.<sup>78</sup> Norway invests in human rights by incorporating this issue into all forms of developmental co-operation, regardless of level, sector, or cooperating parties.<sup>79</sup>

Besides being one of the main focuses of development cooperation, the promotion of human rights is also one of the primary objectives to be achieved as a result of Norway's aid to Zambia. Norway has clarified the rules governing private sector assistance. There is growing recognition in Norwegian business and industry that Norwegian companies which establish operations abroad, have an independent responsibility to promote human rights.<sup>80</sup> Labour rights have been included as one of the conditions for Norwegian companies to participate in the donor funded projects. The donor has a holistic approach, by incorporating human rights in its development cooperation and extending human rights promotion to its private sector participating in development assistance projects.

Denmark, through the Danish Aid for International Development (DANIDA), has focused on the 'access to justice' aspect of human rights. DANIDA is training our local courts justices in human rights values. The donor has provided modern cupboards in High Court registries and put up structures for storing records at the Commercial Court.<sup>81</sup> Finland, like Norway, believes that there is a co-relation between human rights and development. Without human rights, you have an inert people who cannot actively participate in the political and developmental processes.

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<sup>78</sup> The author as Chief Administrator of the Judiciary signed the contract on behalf of the Judiciary and the Norwegian Ambassador signed on behalf of Norway in August 2001.

<sup>79</sup> Norwegian Development Cooperation, op cit, p.22.

<sup>80</sup> Ibid, p.23.

<sup>81</sup> An interview with Mr. Peter Mwamfuli, Chief Administrator of the Judiciary, 5<sup>th</sup> December 2008 at Judiciary Headquarters.

### 8.3.0. Institutional Building:

The World Bank has engaged in institutional building in client countries. When institutions supporting constitutional democracy like the Judiciary are dysfunctional, constitutionalism may be under threat. Depending on the degree of being dysfunctional, a state may be said to be a failed state, which means the 'Rule of Law' has broken down.

As complementary to its project financing and balance of payments support, the Bank places great emphasis on assisting client countries to reform their legal and judicial systems. Apart from the Bank providing material resources to the legal and judicial systems, the Bank provides financial resources of scholarships for human resource development. The Zambian Judiciary was provided with motor vehicles, computers and money for court rehabilitation. Fifteen scholarships worth USD450,000 were provided for judges and magistrates to do Masters programmes in Commercial Law, in order to build up the capacity of the Judiciary to respond to litigation arising from privatization and other commercial transactions and globalisation.<sup>82</sup>

Undoubtedly the IMF, World Bank and the UN have propelled constitutional rule. The former two have used balance of payment support and project finance as tools to impose liberal social, economic and political conditionalities.

On 1<sup>st</sup> May 1987, Zambia unilaterally abandoned the IMF/World Bank package of economic reforms. The 'Bretton Woods' reforms were replaced with a locally designed programme, that lacked the financial and technical support from IMF/World Bank and other donors. The Government complained that the conditions attached to the programme were too onerous and difficult to implement such as, stopping the subsidization of necessary social services like education, health and goods like the staple meal. It was apparent that these

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<sup>82</sup> The Author was Chief Administrator and Chief Accounting Officer for the fund and was a member of Cabinet Office Steering Committee, which was negotiating with the World Bank. The Steering committee was the supervisory body of the technical committee of the Public Service Capacity Building Project.

measures would not only be opposed by the people, but could destabilize the State.<sup>83</sup> The difficulty of disregarding conditionalities of these two financial institutions is that when the two institutions cancel their programmes with a country, most other bilateral donors follow suit. There is the domino effect which if not redressed, could lead into the recipient country experiencing a severe economic and political crisis that could lead to political instability, as discussed earlier in the Chapter.<sup>84</sup>

The International Financial Institutions (IFIs) assumption is and has been that religious compliance with the dictated conditionalities would not only consolidate good governance but also achieve Zambia's developmental objectives. However, an analysis of Zambia's relationship with the IFIs from 1991 – 2001 indicate that, in 1991, the IMF and World Bank asked Zambia to reduce numbers of employees in the Civil Service and to initiate privatization. In 1992, the IMF directed the Zambian government to pay arrears to International Creditors. In 1995, the IMF demanded that the Zambian government restructure the Civil Service; in 1996, the World Bank directed the Zambian government to implement the Land Act, formulate policy for NGOs to deliver social services; in 1999, the World Bank directed Zambia to reform the Civil Service; in 2000, the IMF and World Bank directed that all public enterprises be privatized; in 2001, IMF demanded that the Zambia National Commercial Bank (ZANACO) and Zambia Electricity Supply Corporation (ZESCO) be privatized.

Further, the IMF wanted the energy sector deregulated, an intervention in exchange rate market and limiting government expenditure.<sup>85</sup> It is clear that some reforms impacted negatively on constitutional rule and respect of contractual rights and sovereignty of the borrowing states.

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<sup>83</sup> IMF and World Bank Conditionalities for Zambia 1991-2004, p.7.

<sup>84</sup> Ibid, pp.246 - 247.

<sup>85</sup> Ibid, p.5.

The reduction of the size of the civil service meant the variation of the terms of contracts of employment of the affected civil servants, as they had to be retired earlier than they contracted.

The Supreme Court in *Zambia Oxygen, ZPA V Paul Chisakula & Others*,<sup>86</sup> *Ngandwe & Others V Zamox Limited & Another*<sup>87</sup>, *Kabwe V BP Zambia Limited*<sup>88</sup> has consistently said:

*“Conditions of service already being enjoyed by the employees cannot be altered to their disadvantage without their consent nor can this principle depend on whether the employees are continuing in employment or they have separated. The principles for the safeguarding of the terms of the contract already being enjoyed cannot be varied in the manner proposed.”*

The principle in these cases has been recently restated in *National Milling Company Ltd V Simataa & Others*,<sup>89</sup> where it was said that the alteration of a basic condition if consensual and probably beneficial to the employee, would result in bringing about a replacement contract different from the original contract. Early departure by civil servants affected, which was not consented to, was a disadvantage to those employees and therefore an impermissible variation.

The retrenchments in the civil service at the direction of the IMF and World Bank, violated the employment contracts of the civil servants concerned, as they did not consent and the variations were not beneficial to them. They were being thrown out of work when they were energetic to work. The retrenchments violated the Constitution and were contemptuous of the highest court in the land, which undermined the ‘Rule of Law’ as the IFIs were put beyond the pale of the Zambian justice system.

Privatization led to job losses, unmitigated by the social security which did not exist at the time. The restriction on government expenditure incapacitated government from providing

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<sup>86</sup> (2000) ZR 27.

<sup>87</sup> SCZJ No.13 of 1999.

<sup>88</sup> (1995 – 19997) ZR 218.

<sup>89</sup> (2000) ZR 9.

social services, especially to the vulnerable and the poor in Zambia. The Zambian Government's fiscal position was worsened by the IMF demand that Zambia pay arrears of the International debt, leaving the country in such social and economic distress. Skeptics of IMF and World Bank conditionalities have said:

*"Donors have supported IMF and World Bank economic programmes that have brought much suffering, reducing national capacity and peoples access to basics like water and sanitation, food, health, education, energy, transportation and employment and incomes. The programmes have increased corruption, environmental degradation, social disharmony, and worked against the integrity of life"*<sup>90</sup>

One may agree that the IFIs' conditionalities have diminished the state's capacity to provide basic social needs. Popular participation as well has been drained by the centralization of policy making and monitoring, which has been discussed in Chapter Six. The policies of these institutions breed poverty, which breeds corruption, political instability and may attract repression, which may violate human rights. It is an undeniable fact that the IFIs as lenders of last resort, have hegemony over governments and have been more effective in propelling constitutionalism than the regional or bilateral institutions. Pilger calls them, 'The New Rulers of the World.'<sup>91</sup> In any event, if you disagree with the Bretton Woods Institutions, then you have disagreed with every donor or lender in the Western World. That notwithstanding, the conditionalities have had an overall positive impact on consolidating constitutional rule.

#### **8.4.0. Conclusion**

By the late 1980s, the solution to Zambia's economic downturn in particular and Africa in general was buttressed within the Washington Consensus. It had become apparent that socialism as a social and economic concept had collapsed. It was therefore clear that what was

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<sup>90</sup> Banda Gabriel, can Structural Development Programmes Spur Development, writing in the Post, 8<sup>th</sup> May 2009.

<sup>91</sup> Pilger John, The New Rulers of the World. (London: Verso, 2002) p.3.

needed was for Zambia and Africa to embrace the market as the only alternative to sustainable economic recovery, and that multipartyism was the best political structure to ensure the right conditions for any economy. The autonomy of the individual, the society and the economic institutions as entities separate and distinct from the state had to be embraced, which meant limiting the scope of state intervention in the economy. Privatization of existing state enterprises had to be undertaken.

The analysis of Africa's failure to develop had moved away from a focus on the world economy to a critical examination of the state. The African state was said to be bloated, vampire-like in its activity and oppressive to civil society, which was supposed to restrain its worst excesses.<sup>92</sup> The alternative for Africa was the construction of the liberal state, in particular the link between State and civil society.<sup>93</sup>

An additional pressure for economic reform came as the end of the Cold War brought the realms of politics squarely within the influence of the IFIs and Bilateral donors. Ostensibly this has justified the assertion that the political context provides an enabling environment for all economic activity.

Donors who had held off from exerting political pressure on corrupt and undemocratic regimes, because of the strategic importance in Cold War terms, now exerted political pressure freely as there was no alternative source of support. There was unipolar supremacy, as the Soviet Union had collapsed. In their flush of enthusiasm, and the rush to put forward political conditions for future loans, western governments and the IFIs articulated and continue to articulate a rag-bag of principles, visions and assumptions about good governance, good government and the connection between democracy and development.

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<sup>92</sup> Zack-Williams Tunde, Frost Diane, Thomson Alex, *Africa in Crisis, New Challenges and Possibilities* (London: Pluto Press, 2002) p.20.

<sup>93</sup> *Ibid.*

Washington has factored thirty-one billion nine hundred million dollars (US\$31.9bn) in the national budget for international operations in support of democratic processes abroad.<sup>94</sup>

To underscore the effectiveness of conditionalities on Chiluba's (The second President of Zambia) human rights abuses, the international response to abuses during the Chiluba regime was:

*"The International donor community would squander much of the leverage it has available to convince the Chiluba government to improve its human rights performance, it were to suspend conditionality for balance of payments support in the immediate or short-term. The pressure applied this far has generated some positive response, but serious and deep-seated problems remain. Lifting the aid freeze before real change has been effected would remove the incentive toward further, sustainable improvement. The continued strategic and targeted use of this dimension of the aid package to ensure compliance is of critical importance"*<sup>95</sup>

The passage illustrates or underscores the primacy of aid as an instrument to propel constitutional rule in Zambia. After the National Assembly passed a bill to regulate the media which was going to curb freedom of expression earlier discussed in the Chapter and Sweden threatened to withdraw aid, President Chiluba was forced not to sign the bill into law.

The Chinese policy is nuanced. The Chinese clearly are looking for raw materials and markets. It is often stated that China does not care about investing in countries where there are violations of human rights. However, when it comes to oil, it is not only China doing that. The Americans were in Angola even when the civil war was raging. American companies are in the Delta, Nigeria and in Equatorial Guinea. There are serious human rights violations in these regions.

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<sup>94</sup> Zack-Williams Tunde, Africa in a crisis, New Challenges, op cit, p.20.

<sup>95</sup> Ibid.

However, there is neutralization of the effectiveness of conditionalities by China, which has become Africa's third largest trading partner after the United States and France and ahead of the United Kingdom. China gets some of its oil from Sudan, Chad, Nigeria, Angola, Gabon, Libya, Algeria and Equatorial Guinea. The majority of these countries, except for Nigeria, have doubtful democratic and human rights credentials. China has embraced Zimbabwe's authoritarianism by signing energy and mining deals with that country worth £700 million. China has supplied arms, including fighter planes, to Sudan, which have been used in Darfur, where genocide is being committed by the Khartoum regime. She has supplied arms to Ethiopia and Eritrea, fueling the war between the two countries.<sup>96</sup>

China, as a non-democratic country with a poor human rights record and desirous of becoming a world economic power, has put its economic interests first. Russia and China's acquired economic status have made them regain their pre-Cold War status as predators of constitutional development in Africa.

However, despite Russian and Chinese foreign policy of embracing authoritarianism, it is clear that constitutional developments in Zambia and beyond have been propelled by external forces, without which, maybe there would have been no 'Third Republic'.

If the Washington Consensus and the EU did not impose sanctions on Zimbabwe and its leader, Mugabe, he would not have been brought to his knees. He agreed to a power-sharing agreement because there was hyper-inflation in the country and soldiers mutinied in December 2008. The Zimbabwean nation was on the brink of becoming a failed state.

The skeptics argue that SAP paint all economies with one brush. Structural Adjustment Programmes are a risk/benefit analysis. The benefit is the inflow of balance of payment support,

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<sup>96</sup> The Chinese Embassy Charge de Affairs in Zambia, Zhao Zhanbian said the Chinese Government will give Zambia and other developing countries unconditional aid in line with its foreign policy on non-interference in sovereign states, Mail and Guardian of South Africa 23<sup>rd</sup> – 29<sup>th</sup> June 2006.

institutional strengthening and project finance. SAP may actually deepen the inequality between the rich and the poor and may be a source of political instability. SAP is therefore a double edge sword.

The paternalistic development policies formulated by donors, to whom recipient governments account, undermine the recipient countries' accountability to their own electorate and institutions and consequently undermines popular sovereignty. Policies, opinions and wishes of ordinary people are ignored by SAP, which undermines democratic rule.

To emphasize, the 'Washington Consensus' and bilateral donors hegemony over governments of 'Third World Countries,' Pilger as earlier noted calls the donors, 'The New Rulers of the World.' He goes on to state that through the agencies of Washington-run institutions, SAP has secured an indebted imperium greater than the British Empire at its height.<sup>97</sup>

Globalization does not mean impotence of the state, wrote the Russian Economist and dissident, Boris Kagarlitsky, "but the rejection by the state of its social functions, in favour of repressive ones, irresponsibility on the part of governments and the ending of democratic freedom".<sup>98</sup>

There has been skepticism as to the sustainability of democracy brought about through the 'Washington Consensus' and other donors' political and economic conditionalities as it is not homegrown. Additionally, you can export the liberal legal framework, but you may not export the spirit. The most unpredictable challenge is from the economic turmoil and decisions that globalization has generated among the majority of humanity. In 1991, the plight of the Less Developed Countries (LDCs) was grim. They were almost becoming, 'failed states' in the new

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<sup>97</sup> Pilger John, *The New Rulers of the World* op cit, p.116.

<sup>98</sup> Ibid.

jargon of donor countries.<sup>99</sup> Regardless of the skepticism, donor support and the accompanying conditionalities is a necessary evil. Zambia's return to the IFIs and Bilateral donors, after abandoning their programmes in 1987, bears the assertion that homegrown economic programmes are unsustainable. There is however skepticism on the durability of donor pressured liberalization for two reasons. One, the global economic downturn means the donors may not have enough resources to pressure Third World Countries to democratize further; two, the emergence of Russia and China as economic powers has accelerated these countries' aid inflows into 'Third World Countries'. There appears to be the potentiality of reverting to the Cold War Era of competing for geopolitical influence.

The next Chapter discusses internal catalysts to constitutionalism.

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<sup>99</sup> Pilger John, *New Rulers of the World*, op cit, p.116.

## CHAPTER NINE

### INTERNAL CATALYSTS TO CONSTITUTIONALISM

#### 9.1.0. Introduction:

Chapter eight discussed how the external pressure by multilateral, regional and bilateral institutions propelled constitutionalism. This Chapter on the other hand discusses the role of the internal actors in that process. In a country like Zambia, with weak opposition political parties, the participation of civil society in consolidation of constitutional democracy is an imperative.

“Society” under section 2 of the Societies Act, means any club, company, partnership or other association of ten or more persons whatever its nature or object, formed or established in Zambia or having its headquarters or chief place of business within Zambia. Society also includes, any company registered under the provisions of the Companies Act, or any building society, a trade union registered under the provisions of the Industrial and Labour Relations Act.<sup>1</sup>

The internal catalysts, usually consisting of NGOs, Churches and Trade Unions, have propelled constitutionalism in Zambia. The three institutions have stepped into the political arena, when the opposition political parties, who are the traditional opponents of the regime appear to be ineffective in ensuring that the regime acts in a transparent manner and is accountable to the electorate.

Zambia’s civil society has been shaped by a history of authoritarian traditions, first during the colonial era, later on during the One-Party rule. For several decades, therefore, civil society was largely restricted to activities within the agendas and control of the State. Still, some membership-based organizations and institutions, with well established traditions managed to consolidate and live up to their respective mandates. They eventually formed the nucleus of a

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<sup>1</sup> Chapter 105 of the Laws of Zambia.

powerful citizen's movement, that eventually led to a peaceful transition to Multi-Party Democracy in 1991.<sup>2</sup>

In this process, the Christian Churches and the Trade Unions came out most strongly as driving forces, supported mainly by a gender sensitive movement that owed its emergence in the 1980s to global influences during the 'UN Women's Decade'. From there on, the new multi-party democracy framework, favourable donor priorities, and worrying social trends, gave a boost to civil society in Zambia. In addition to established key players, a plethora of new organizations, umbrellas and formal or informal networks have been entering the scene. By 2003, in a country of some ten million people, about ten thousand civil society organizations had been registered.<sup>3</sup>

It had become clear that civil society with its broader agenda, had become an effective opponent of the regime, unlike opposition parties whose agenda was and is to seize political power.<sup>4</sup> Romdhane Ben Mahmoud, commenting on constitutionalism and social movements in Tunisia and the indispensability of civil society in establishing a liberal regime, states: "Tunisia constitutional experience is edifying in more than one sense. Backed by nearly one and half centuries of history, and in spite of being the vehicle for national liberation movement, constitutionalism in Tunisia shows the extent to which the absence of an active civil society and the absence or weakness of its democratic social movements can constitute a major handicap in establishing a liberal regime founded on individual and public liberties, the separation of powers and popular sovereignty".<sup>5</sup>

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<sup>2</sup> Sabine Fredler-Conradi, civil society in Zambia, study conducted to inform a Local Area Strategy paper, March 2003, p.5.

<sup>3</sup> Ibid.

<sup>4</sup> Romdhane Ben Mahmoud, In Shivji G. Issa's State And Constitutionalism, An African Debate On Democracy (Harare: Sapes 1991)p.235.

<sup>5</sup> Romdhane Ben Mahmoud, State and Constitutionalism, op cit, p.237.

Historically in Liberia, Latin America, and elsewhere, the Catholic Church had been associated with the local establishment, the land owning oligarchy, and authoritarian government.<sup>6</sup> However, between 1962 and 1965, the Second Vatican Council, mandated the Catholic Bishops, Priests and Laity to help the poor, have responsibility to pass moral judgments, even on matters of the political order and whenever basic personal rights make such judgment necessary.<sup>7</sup>

With the accession of Pope John Paul II, the Vatican moved to central stage in the Church's struggle against authoritarianism. In March 1979 in his first Encyclical, John Paul II, denounced violations of human rights and explicitly identified the Church as the 'guardian' of freedom, which is the condition and basis for the human person's true dignity. He was quite explicit in supporting local churches in their struggles against authoritarian governments.<sup>8</sup>

Christianity offered a surer doctrinal and institutional basis for opposing political repression. Huntington says, "Christianity, as one South Korean put it, made a difference, because it promotes the idea of equality and respect of some authority independent of the state, while Buddhism, Confucianism and Islam are authoritarian."<sup>9</sup>

The opposition parties usually have a different agenda from that of the ruling regime and will usually be at daggers-drawn. However, opposition parties in 'Third World Countries' and Zambia in particular are fragmented and ineffectual. Zambia, with a population of ten million, has thirty-four political parties, while the United States with a population of more than two hundred million people has two mainstream political parties, namely Democrats and Republicans. There is lack of cohesion amongst opposition parties in Zambia. What opposition

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<sup>6</sup> Huntington P. Samuel, *The Third Wave, Democratization in the Late Twentieth Century*, op cit, p.78.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid.

politicians are pre-occupied with is to become presidents at all costs. Pre-occupied with such a blind ambition, focus on national issues is lost.<sup>10</sup>

The ineffectiveness of opposition political parties is because of their partisan posture, while civil society's primary objective is service and not to wrestle power from the incumbent. It is for that reason that the World Bank in 1999 imposed a conditionality that Zambia formulate policy for NGOs to deliver social services, which has been discussed in Chapter Eight.

### **9.2.0. Non-government Organizations as Propellant to Constitutionalism:**

Conventional wisdom characterizes civil society as essentially anti-authoritarian and confrontational in its operations. Matanga argues that there are situations when civil society collaborates with the powers that be, to further entrench and consolidate authoritarian and undemocratic regimes. Civil Society can therefore be a progressive or reactionary force.<sup>11</sup> In the Zambian case, Chiluba set up National Organisation for Civic Education (NOCE) to counter-balance the Oasis Forum, which was opposed to his amendment of the Constitution to allow him go for a 'Third Term' of office as Republican President.

NOCE was bankrolled by President Chiluba to support his 'third term bid'<sup>12</sup>. Such division or disagreement in civil society was and is opportunistic rather than based on principle. That notwithstanding in the Zambian case, the absence of a focused, determined and strong opposition to the amendment of the Constitution would have led to the extension of presidential terms from two five year terms to as many terms as possible.

Dr. Fedler-Conradi characterizes this, as a case that brought civil society into prominence. Organizations and individuals from all walks of life came together with churches

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<sup>10</sup>As Professor Moomba observes, there are no ideological differences among political parties to justify the existence of so many parties. This raises questions about the meaningfulness of alternative choices presented to voters at election time. Moomba Jotham, *Political Parties And The Quest For Democratic Consolidation In Zambia* (Johannesburg: Eisa, 2006) p. 33

<sup>11</sup>Matanga Khachina Frank, *Civil Society and Politics in Africa. The case of Kenya* [www.istr.org/conferences/dublin](http://www.istr.org/conferences/dublin) 1/17/2006, p. 2.

<sup>12</sup>An Interview with Amos Malupenga, news editor The Post Newspaper on 13<sup>th</sup> February 2006.

and politicians at the now legendary Oasis Restaurant to discuss the implications, and ways of preventing this to happen. The Oasis meeting kicked off a spontaneous highly mobilizing and efficient campaign country wide, which was supported by international donors who had come to recognize good governance as an absolute necessity to Zambia's future.<sup>13</sup>

The Oasis Forum again organized during Mwanawasa's Presidency, a march to the National Assembly on 1<sup>st</sup> November 2005, which attracted civil society in its entirety, the Churches, the Unions and the opposition political parties to force Parliament to enact a law establishing a Constituent Assembly.<sup>14</sup> When the Bill, sponsored by Kabwata MP, Given Lubinda, was defeated by a majority of 62 to 56, the Oasis Forum published names and photographs of MPs who voted against the Bill in the press.

Members of Parliament felt threatened when the Oasis Forum promised to decampaign them and demanded that the Oasis Forum Chairman, Reverend Japhet Ndhlovu be sanctioned for assailing parliamentary privileges. However, President Mwanawasa bowed down to the people's wishes and agreed that the new Constitution will be adopted by a Constituent Assembly, though the process is costly.<sup>15</sup>

Another area where civil society recently assumed, and consequently enhanced its own role in the shaping of Zambia's destiny is in the formulation of PRSP.<sup>16</sup> The government and donors agreed that the only way poverty can be alleviated is firstly through the judicious use of resources, secondly that re-distributive policies are important for reducing poverty, thirdly that growth and equity do not necessarily conflict. The resolve was to approach poverty reduction through the 'broad-based growth' approach, which is more transparent. It is in this context that

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<sup>13</sup> Conradi Fredler Sabine, *Civil Society in Zambia*, op cit, p.18.

<sup>14</sup> See Verbatim Record of the Oasis Forum Constitutional Debates on the possible Amendment of the Republican Constitution to provide for a Third Term of office for the Incumbent President Chiluba on 21<sup>st</sup> February 2001, p.9.

<sup>15</sup> Ibid.

<sup>16</sup> Republic of Zambia, *Zambia Poverty Reduction Strategy Paper*, Ministry of Finance and National Planning 2002-2004.

government, together with civil society, both provided valuable input during the consultative and inclusive PRSP preparatory process. The paper placed priority on developing agriculture to sustain growth to provide livelihood to the majority of the poor, through assured food security and as a source of decent incomes to meet their basic needs. The government and civil society agreed that poverty reduction is not an option, but an imperative, for under such high poverty conditions, the social and political stability that is so pivotal for the renewal of the country's growth and prosperity becomes vulnerable to the resultant societal tensions.<sup>17</sup>

The document has become the official national PRSP of Zambia and has been hailed as exemplary in Africa, with regard to its comprehensiveness, accuracy and stakeholder involvement. Although conservative in its overall approach to structural issues, the document profoundly expresses the interdependence of poverty and governance, recognizes the importance of 'Good Governance' and prioritizes measures to enhance transparency, accountability, and justice.<sup>18</sup> These are critical elements of constitutionalism, democracy and political stability.

### **9.2.1. Christian Churches as a Propellant:**

The often reigning controversy is whether the church should participate in politics. The Church has been consistent in its insistence that they are close to the people and know the issues affecting society better. Bishop Mwale of Jerusalem Ministries justifies the involvement of the Churches in clearing out erring politicians from power.<sup>19</sup> The church cannot be neutral.<sup>20</sup> The bible talks about the Churches fighting against injustices and there is an element of fighting against men and women who have yielded themselves to the darkness of this world.<sup>21</sup>

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<sup>17</sup> Republic of Zambia, Zambia Poverty Reduction Strategy Paper, op cit, p.11.

<sup>18</sup> Ibid, p.20.

<sup>19</sup> Mwale notes, on how the mighty men coagulated around David in exile at Ziklag, as he prepared to take over from ungodly Saul, Israel's first King. David was also joined by Levites and Amorites or priests. An interview with the Bishop on 29<sup>th</sup> January 2006 at Lusaka.

<sup>20</sup> Ibid.

<sup>21</sup> Mwale, Jerusalem Ministries, Interview of 29<sup>th</sup> January 2006 at Lusaka.

Dr. Matandiko, the Seventh-Day Adventist Church (SDA) Union Conference President states that, "the House of God should not be used for selfishness and politics,"<sup>22</sup> the Churches led Oasis Forum, maintained and still maintains that decampaigning Members of Parliament who voted against the Constituent Assembly was justified, despite parliament finding a *prima facie* case against the former Chairman of the Oasis Forum, Reverend Japhet Ndhlovu. Bishop Mususu, the succeeding Chairman in his reply said:

*"The article attributed to the past chairperson Japhet Ndhlovu was correctly attributed to him and that it was not in any way contemptuous of Parliament. The comment was pursuant to the right of expression as guaranteed and protected by the Constitution of Zambia".<sup>23</sup>*

This was a spirited assertion by the Church on freedom of expression. The Churches and Law Association of Zambia led the Oasis Forum, went on to open an account, in which citizens could start making their contributions towards the noble cause of fundraising for a Constituent Assembly.<sup>24</sup> This was a challenge to government's assertion that money cannot be found for the Constituent Assembly. President Mwanawasa was pressured to agree that the new Constitution will be adopted by a Constituent Assembly, though he branded this Assembly as the National Constitutional Conference (NCC).

The Churches, recognizing that poverty and democracy are interrelated, strongly spoke out against poverty. The then Archbishop Co-adjutor of Lusaka, Telesphore Mpundu, urged government to reduce the gap between the rich and poor. He said there can be no reconciliation if government, opposition parties, and civil society and the Church are not willing to enter into negotiations.<sup>25</sup> While the Catholic Commission for Justice and Peace (CCJP) coordinator in

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<sup>22</sup> The Times of Zambia, 27<sup>th</sup> February, 2006.

<sup>23</sup> The Times of Zambia, 12<sup>th</sup> January 2006.

<sup>24</sup> Ibid, but there was no money deposited in the account until the National Constitutional Conference was constituted.

<sup>25</sup> The Post, 20<sup>th</sup> December 2005.

North-Western Province, Fredrick Nabanda says, 'the Church is geared to give massive civic education to the people so that they are not cheated by politicians.'<sup>26</sup>

The Churches in Zambia have risen to the occasion to challenge attempts to manipulate the existing Constitution and of manipulating the constitutional making process. The Churches triumph over Chiluba's 'third term bid', and the triumph over President Mwanawasa's bid, to defy the wishes of the people, to have a Constitution enacted by a Constituent Assembly, are unparalleled, striking political victories in the struggle against the State. The reason why the Churches in Zambia have led not only the Oasis Forum, but assumed the role of opposition parties has been summed up by Dr. Fiedler-Conradi when he states:

*"The major Christian churches i.e. churches under the Evangelical Fellowship of Zambia (EFZ), the Christian Council of Zambia (CCZ), and the Zambia Episcopal Conference (ZEC) constitute civil society broadly represented and active in all regions right down to community level. More than eighty percent of Zambians regard themselves Christians, and church life is the most common part of social life in Zambia, in rural and urban areas alike. Despite their rather hierarchical structures, some churches, especially the Catholic Church, are making a serious effort to monitor living conditions and channel information from bottom up in order to analyze it for advocacy purposes."*<sup>27</sup>

The Catholic Church has the resources to gather information and also to mount para-legal training in civic and human rights,<sup>28</sup> which has made the Church more effective in monitoring government in the administration of public affairs.

### **9.2.2. Trade Unionism as a Propellant:**

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<sup>26</sup> The Post, 9<sup>th</sup> January 2006.

<sup>27</sup> Conradi Fredler Sabine, Civil Society in Zambia, op cit, pp.23-24.

<sup>28</sup> The author was a resource person, when the Ndola Catholic Archdiocese mounted a paralegal course in December, 2000 at the Zambia Institute of Advanced Legal Education for two weeks in human rights.

The Civil Society segment of trade unionism in Zambia contributed to the achievement of political and economic victories in the struggle against the state. The MMD, which rose as a political force in Zambia, was led by former UNIP Finance Minister, Arthur Wina and ZCTU Chairman General, Frederick Chiluba. In fact, Chiluba was made Vice Chairman for operations and mobilization, which position, he later used to be elected to the helm of the MMD, when it was transformed into a political party.

The repeal of Article 4 of the 1973<sup>29</sup> Constitution, which proscribed the formation of other political parties other than UNIP, re-established a Plural-Party system in Zambia. This was an initiative in which the Trade Union played a significant role because of the massive numbers of their members. The early 1991 witnessed the ZCTU officially transfer its support and allegiance to the MMD. Trade union offices all over the country immediately became recruiting centers for the Movement, while Trade Union leaders openly campaigned for the defeat of Kaunda and the UNIP.

The MMD established organizing centers in cities, towns, provincial and district capitals and all public institutions with trade union branches becoming major organizing centers for the MMD. The leaders of mineworkers openly declared their support for the MMD and did everything possible to discredit UNIP and Kaunda.<sup>30</sup>

Much later after the downfall of the Kaunda administration, ZCTU joined the Oasis Forum in condemning former President Chiluba's 'third term bid'. Chiluba mistakenly believed that having ordained his protégé Fackson Shamenda, as his successor as ZCTU President, when he became Republican President, he had neutralized the unions. He therefore thought the unions

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<sup>29</sup> Act No. 27 of 1973.

<sup>30</sup> Ihonvbere O. Julius, *Economic Crisis Civil Society And Democratization The Case Of Zambia* (Trenton: Africa World Press, Inc, 1996) p. 117.

could not act as a check on government, Chiluba was surprised when the unions strongly opposed his proposed amendment of the Constitution to go for a third term.<sup>31</sup>

When general elections were being held in 2001, the relationship between the MMD and the unions was frosty. The UPND appeared to have garnered support in the entire Southern Province, and in some provinces, that it was unwise for the unions to support a particular party, they therefore decided to remain neutral.<sup>32</sup> MMD won the 2001 elections without the support of unions. It has therefore been easier for the unions to play confrontational politics during Mwanawasa's tenure, especially regarding the constitution making process.

The Zambia Congress of Trade Unions and the Federation of the Trade Unions of Zambia (FETUZ) and their affiliates joined the Oasis Forum in a demonstration to petition parliament to enact the Constituent Assembly Bill.<sup>33</sup> ZCTU President Hikaumba, addressed a rally organized by the Oasis Forum on 10<sup>th</sup> December 2005, demanding for a Constituent Assembly as a mode of enacting a new Constitution.<sup>34</sup> In the Zambian polity, trade unions played a pivotal role in the introduction of multi-party politics because of a strong constituency at its disposal, namely, the workers. It was therefore not surprising that the ZCTU former boss became the first President in the 'Third Republic'.

One significant challenge that traditional civil society faces is the rivalry of State sponsored civil society. This was mentioned earlier in the Chapter. It is the state's desire to diminish the influence of traditional civil society, that does not conform to the vision of government. There was an allegation of government sponsored conspiracy, comprising senior government officials from Cabinet Office, the Ministry of Justice, the Ministry of Labour and

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<sup>31</sup> Shamenda Fackson said, 'it was not a question of affinity, when I did not support Chiluba's third term bid, but it was a question of principles and putting national interest first. An interview with former ZCTU President Shamenda on 10<sup>th</sup> August 2005 at Lusaka.

<sup>32</sup> An interview with Shamenda Fackson, of 10<sup>th</sup> August 2005.

<sup>33</sup> The Post, 2<sup>nd</sup> November 2005.

<sup>34</sup> The Sunday Post, 11<sup>th</sup> December 2005.

Social Security, the Copperbelt Provincial Administration, a few selected former and current branch, district and national leaders of the Zambia Union of Financial Institutions and Allied Workers (ZUFIAW) and the Federation of Free Trade Unions of Zambia, to ensure that Ms. Nonde and her Vice President, Mr. Terza Nchinga are removed from their elected positions before the general election in 2006, because they were considered anti-government.<sup>35</sup>

Bishop Mususu, Chairman and spokesperson of the Oasis Forum, when reacting to threats of deregistration of the Forum by Home Affairs Minister, Namuyamba said: “the Oasis Forum was tired of threats from government, which only come after a demonstration, petitioning or prayer rally”.<sup>36</sup>

The Civil Society that collaborates with the state have access to State Media, which is used to discredit anti-authoritarian forces. This segment of civil society is compromised and bought off by the patrimonial state, to counter-balance progressive civil society, thereby weakening and diluting progressive Civil Society’s overall strength. In February 2006, the Anti-Voter Apathy (AVAP) Vice President decampaigned the opposition Matero FDD MP, when he said, “it was unfortunate that the people of Matero had to settle for Kabaghe as their area MP. The Constituency lacks good roads.”<sup>37</sup> The attack came after Kabaghe had been dropped as Deputy Minister of Agriculture.

The Non-governmental Organization Co-ordinating Council (NGOCC) Chairperson, Lucy Muyoyeta, received a threatening telephone message. She was being blackmailed with bomb threats for her support for a Constituent Assembly.<sup>38</sup>

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<sup>35</sup> The Post, 9<sup>th</sup> December 2005, Nonde and Nchinga have been ardent critics of government over the constitution making process.

<sup>36</sup> The Post, 27<sup>th</sup> December 2005.

<sup>37</sup> The Monitor and Digest 14-16<sup>th</sup> February 2006.

<sup>38</sup> The author’s interview with Muyoyeta Lucy, at NGOCC Secretariat on 28<sup>th</sup> December 2005 at Lusaka.

It was clear that the message came from the opponents of the Constituent Assembly as a mode of enacting the Constitution. These were suspected to be state agents or MMD cadres, as these are the opponents of the Constituent Assembly, which has brought them in conflict with the Oasis Forum. The Chairperson of the Forum, Bishop Mususu, said, “no amount of threats would deter the Forum from fighting for what is constitutionally right”.<sup>39</sup>

The Bishop of the Church of God, Ndashe, condemned all opposition political parties campaign tactics, which he characterized as insulting. He said it was too late to call for a Constituent Assembly to enact the Constitution before the 2006 elections.<sup>40</sup> The Church supporting government, the Independent Churches of Zambia (ICOZ), cautioned stakeholders not to be irrational over the constitution-making process, warning that shortcuts could spell doom for the country. He instead, urged that the Electoral Reform Technical Committee final report should be presented to Parliament so that new laws suitable for 2006 elections should be enacted.<sup>41</sup>

This civil society, supporting authoritarianism, was valiantly criticized by the Chairman of the Human Rights Commission, Mr. Mumba Malila when he said: “NGOs have engaged in political squabbles when they were formed to promote human rights. Human rights organizations missed an opportunity to present cases to the African Commission of Human and Peoples Rights. There was poor representation of Zambian NGOs at international meetings dealing in human rights.”<sup>42</sup>

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<sup>39</sup> The author’s interview with Muyoyeta Lucy, on 28<sup>th</sup> December 2005 at Lusaka.

<sup>40</sup> The Sunday Times of Zambia, 15<sup>th</sup> January, 2006.

<sup>41</sup> Times of Zambia, 28<sup>th</sup> December 2006.

<sup>42</sup> The Sunday Times, 15<sup>th</sup> January, 2006.

### 9.3.0. Conclusion

Despite the existence of Churches, civil society and Unions supporting government in Zambia, pressure has been put on government to respond to demands for a liberal economic and political order. The domestic factors have played a significant role in constitutional reform and good governance. The 1991 Constitution which legalized Multi-party politics was mediated by the Church at the Cathedral of the Holy-Cross in Lusaka in July 1991.<sup>43</sup> The Oasis Forum stopped Chiluba from amending the Constitution to allow him go for a 'Third Term' in office. The Oasis Forum has forced Mwanawasa to bow down to the people's wishes to enact the Constitution by a more inclusive process, the NCC.

The domestic actors contribution to constitutionalism and good governance in the 'Third Republic' has been remarkable. History has shown that despite the existence of reactionary Churches, Civil Society, and Unions and threats from the State, they have been undeterred in achieving major constitutional changes. The successes scored by the Zambian Civil Society are unparalleled in Commonwealth Africa.

The next Chapter is the anchor chapter which justifies the thesis that there exist a semblance of constitutionalism which is mostly donor driven.

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<sup>43</sup> Chiluba Frederick J.T. Democracy, The Challenge Of Change (Lusaka: Multimedia Publications, 1995) p.66.

## CHAPTER TEN

### CONSTITUTIONALISM AND GOOD GOVERNANCE IN THE THIRD REPUBLIC

10.1.0. The Chapter is anchored on four broad pillars supporting constitutional democracy, namely, a law governed state, equality and justice, market-oriented economy and a society permeated by a libertarian democratic ethic and ethos.<sup>1</sup> The constitutive elements of constitutional democracy refer to elements constituting its essence. That is to say, elements essential or indispensable, not merely necessary, in its definition. They are, principles and processes integral, not external, to it as pertaining to its essence, and without which it cannot meaningfully exist. The most basic of these institutions and principles include: the institution of popular control of the decision-making processes of government, exercised through such devices as free and fair elections at periodic intervals of time, representative governmental bodies, free speech, public assemblies and processions. Others are protection of civil and political rights as legal claims enforceable by the individual against the State and accountability of rulers to the people.<sup>2</sup>

The argument whether Zambia has failed to pass the test of a 'constitutionalism in the 'Third Republic' will be premised on the above definition. It is quite clear that the constriction of freedom of speech and freedom of association in Zambia's single-party political system for seventeen years made Zambia a non- constitutional state. Can the 'Ruling Elite' in the 'Third Republic' make a claim to morality, good governance, democracy and constitutionality, is the important question. Prempeh states and argues that:

*"I have not set out to prove that constitutionalism has become firmly or irreversibly implanted in any of Africa's reforming states.*

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<sup>1</sup> Nwabueze Ben, Constitutional Democracy in Africa Volume 3 ( Lagos: Spectrum Books Limited, 2004) p.1

<sup>2</sup> Ibid.

*My more modest goal has been refuting the pessimistic (indeed fatalistic) thesis that would rule out constitutionalism as infeasible in Africa on account either of past experience or of Africa's "dismal" socio-economic condition. I have thus set out to prove only that a new context has emerged that represents a significant new opportunity for constitutionalism to take root in Africa"*<sup>3</sup>

Prempeh's statement is optimistic that while reforming states including Zambia have not achieved perfect constitutionalism, the countries are travelling on the path of perfecting the imperfections. However, it is the nature of constitutionalism that it never stands still. The lack of any significant development in Zambia is worrying when most of the developing world has displayed unprecedented constitutional dynamism.

The primary flaw of constitutionalism in Zambia is the non-democratic nature of the constitutional making process. The process itself is inherently unrepresentative and is dominated by politicians; it is not designed to build consensus and produce a constitution which can stand the test of time, it is not guided by any constitutional principles; it has shown disdain for the views of the people by rejecting the public's views as reflected in various Constitutional Review Commissions. A constitution, as a device for limiting power, may be notionally supreme, but it cannot, logically or in point of actual physical power relations, be superior to or above the people who make it and bestow on it the force of law. By the famous definition of it by Thomas Paine in his Rights of Man 1789, which is generally acknowledged as valid, "a constitution is not an act of government, but the people constituting a government." If a constitution is a source from which government derives its existence and power, it cannot, logically, be an act of the

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<sup>3</sup> Prempeh Kwasi, H, Marbury in Africa: Judicial Review and the Challenge of Constitutionalism in Contemporary Africa, op cit, p.52.

government, government cannot create itself as the act by which a frame of government is constituted for a people, a constitution has to be an act.<sup>4</sup> This has been extensively discussed in Chapter Three.

It is unwise for citizens to entrust constitutional making to the legislature of the day as members of the legislature have vested interests in the existing status arrangements, which they invariably wish to protect and defend in the new constitution and will oppose any change which has the potential to hurt those vested interests. The people should have a final say because their support gives legitimacy to a Constitution. A Constitution should not be an instrument of power and domination.

#### **10.1.1. The Constitutional Making Process**

In chapter three, the constitution history of this country was extensively discussed. It was clear that the constitutional- making process has not been democratic. If the Constitution as Professor Hansungule has described it is 'the word of the people,' then the people must actively participate in its formulation through a Constituent Assembly elected for that purpose. They should not be spectators.<sup>5</sup> The process of adopting a constitution is as important as its substance. A constitution serves as an all time Charter of government and not an instrument of power. This is because it is made to serve all the people of all governments. The clamour for a new constitution since independence in Zambia is based on the public justified unhappiness of the misuse of presidential powers by successive Presidents.

A democratic Constitution must be distinguished from a democratic government. A constitution must both be adopted by a democratic process and establish a democratic frame of government to be truly a democratic constitution. Zambia, since independence, has never

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<sup>4</sup> Nwabueze Ben, *Constitutional Democracy in Africa*, volume 2 (Lagos: Spectrum Books Limited) p.101.

<sup>5</sup> Verbatim Record of the Oasis Forum Constitutional Debate on the Possible Amendment of the Republican Constitution to provide for a Third Term of Office for the Incumbent President Chiluba of the Republic of Zambia, 21<sup>st</sup> February 2001, p.75.

enacted a democratic constitution. Constitutions have been enacted by self-interested ruling elite. The failure to realize constitutionalism and good governance is rooted in the basic law. Zambia's democratic government, as enshrined in the Constitution, is not in fact the choice of the people, expressed by means of referendum or election of a Constituent Assembly for the purpose. The sovereignty of the people has been undermined, as they have been excluded from the constitutional making process. Consequently, the basic law does not mirror society's philosophical values and standards. The President and his Cabinet, under the Inquiries Act,<sup>6</sup> veto the wishes of the people. There has been no political will to enact an enduring constitution since independence. The constitution-making process has been a scheme for self-preservation and political in-breeding as nobody outside the ruling elite is allowed to ingress the political arena.

#### **10.1.2. The Constitutional Allocation of Power**

The President at independence inherited the powers and functions of the Governor, but did not inherit all the checks on that power. The Governor had to consult the Secretary of State for Colonies in certain matters like appointment of the Deputy Governor. The President, having been elected by the people of Zambia, had nobody above him. These vast presidential powers were to be abused later by successful Presidents.

The hegemony of the Executive over the other organs of State, is rooted in the Constitution. The Executive, headed by the Executive President who is Head of State and government, has enormous powers which have not been diminished by the introduction of multi-party politics. Any suggestion to reduce presidential powers has been perceived as being subversive. The deconstruction of the doctrine of 'Separation of Powers' was then powerfully appearing to facilitate socio-economic transformation and redress past injustices.

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<sup>6</sup> Chapter of 16 of the Laws of Zambia.

The power of the President was enhanced after the referendum which abolished all referendums and enabled the Legislature to amend any part of the Constitution minus the 'Bill of Rights' by two thirds majority. In a Dominant- One-Party State, it is easy for the ruling party to amend the Constitution single-handedly as it happened in 1996.<sup>7</sup> The Constitution was amended to exclude Kaunda from standing for the presidency<sup>8</sup> and the United National Independence Party boycotted the 1996 elections. This was an enactment based on the ambitions of a few politicians and not based on principles of democracy, participation, accountability and transparency.

### **10.2.0. Separation of Powers**

The primary weakness of our structure of government is that there is no balance of power. The presidency has wide discretionary powers and retained hegemony over the legislature in all the constitutions enacted since independence. The dual membership of the Executive and the Legislature has neutralized the legislature's watchdog role over the Executive. No institution can check itself within the context of the classic doctrine of 'Separation of Powers'. The majority of Petitioners to the Mung'omba Commission submitted that Cabinet should be appointed from outside the National Assembly.<sup>9</sup>

It was argued that this would enhance the 'Separation of Powers' and thereby strengthen the role of Parliament in providing checks and balances.<sup>10</sup> The rationale of this argument is that Members of Parliament would no longer clamour for ministerial appointments, which compromises the effectiveness and independence of Parliament.<sup>11</sup> Other reasons advanced by the

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<sup>7</sup> Act No. 18 of 1996.

<sup>8</sup> Article 34 (3) of the Constitution.

<sup>9</sup> Matibini Patrick, Separation of Powers, A paper presented to the Zambia Centre for Interparty Dialogue (ZCID) Lusaka Regional Platform, held at Mulungushi International Conference Centre Lusaka on 10<sup>th</sup> May 2008, p.10.

<sup>10</sup> Ibid.

<sup>11</sup> Ibid, p.10.

Mung'omba Commission included the need to promote professional competence and efficiency among Ministers and to enable members of parliament concentrate on parliamentary duties.<sup>12</sup>

### 10.3.0. The Electoral Process

The 1996 elections which UNIP boycotted were not declared free and fair and as a result Zambia's cooperating partners withheld balance of payment support. The 2001 elections were characterized by a low turn-out of voters. Out of 4,687,997 registered voters, only 2,604,761 turned out, representing 55 percent of eligible voters. There was an uneven playing field as a result of:

- (a) inequitable access to the public media by the opposition parties;*
- (b) discriminatory application of the Public Order Act by the police to the disadvantage of opposition political parties; and*
- (c) the use of District Administrators who are civil servants to campaign for the ruling party<sup>13</sup>*

There was widespread bribery of voters by most of the political parties. There was failure by the political parties to observe, and the Electoral Commission to enforce the Electoral Code of Conduct as well as electoral regulations. There was disfranchisement of voters, as only 2,604,761 were registered out of the projected figure of 4,687,997. The rest were not availed facilities to register, because they had no National Registration Cards. This has been discussed in Chapter Five.

Part of the failure to exercise a democratic right to vote for a candidate of their own choice, is the chronic poverty of both the urban and rural populations. The mood in Zambia has been one of resignation, as most people seem to be too busy struggling to cope with their dwindling purchasing power. This is as a result of a weakening economy, stagnant wages, rising

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<sup>12</sup> Matibini Patrick, Separation of Powers, op cit, p.8.

<sup>13</sup> Chanda Alfred, The 2001 Election Results and Lessons for Political Parties, paper presented at a Friedrich Ebert Stiftung Conference on the theme, "The Situation after the 2001 Elections in Zambia – Respective of the Multi-party System", held at Pamodzi Hotel, Lusaka on 18<sup>th</sup> and 19<sup>th</sup> April 2002, p.2.

prices of fuel and basic consumer goods and high unemployment. Poor education has perpetuated this phenomenon. Poverty, in terms of elections, breaks the poor's resolve to make informed choices. Nwabueze observes that there is substantial element of truth in the point that popular consent in government is in the context of Africa, "a façade" behind which the real rule is exercised by the elite. Mass illiteracy and ignorance presently prevailing in Africa today constitutes therefore, perhaps, the biggest single factor undermining the reality of popular consent in government.<sup>14</sup> The elections in Zambia have not therefore given the ruling elite the legitimacy it very much seeks.

It is not an exaggeration to state that Zambian politicians are contemptuous of their voters and snobbish towards their rivals. They do not work for posterity. Posterity is now for them and money and wealth are the greatest inspirations in the world for them. A country seemingly so blessed with natural resources i.e. minerals, water, arable land and yet the leaders in the 'Third Republic' have been reckless about its future. The emphasis on economic development has not been as it should be, due to corruption, nepotism, ethnicity and tribalism. Merit has not been the criteria in making appointments.

The participation of the Office of the President (Special Division) in elections has created suspicion and fear. The ECZ has exhibited incompetence. These flaws continued to mar the 2006 elections. The will of the people has not been the basis of government, as there have been glaring instances of electoral malpractices. The thugs of the ruling party are aided and given the shelter of the law by the Police. It is important to end this part by mentioning that in relation to Africa and Zambia in particular, the contribution to development by the ruling elite has tended to be more rhetoric than practical.

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<sup>14</sup> Nwabueze Ben, *Constitutional Democracy in Africa*, Volume 5 op cit, p.337.

#### 10.4.0. Popular Participation

It is however, necessary to situate post-colonial tendencies in historical perspective, in order to understand why decentralization has remained an illusion. From the early days of independence until recently, the post-colonial leaders justified the centralization of power as being necessarily the best way of attending to nation-building and development. Central control of governance was justified further as less wasteful and as guaranteeing the political stability badly needed for rapid development and for catching up with the West. Generally, governments claimed that once their States had become more mature and stable, they would deconcentrate, delegate and devolve power to local government, but in the Zambian case that has never been, forty five years after independence.

Decentralization fulfills the notion that the government is truly of and by the people. Democracy is a government of the people, by the people and for the people. If there is no devolution of power to local government, then the people are not sovereign. Contemporary constitutionalism is based on popular sovereignty. "The People" is the locus of "Sovereignty", the will of the people is the source of authority and the basis of legitimate government. The people alone can ordain and establish the Constitution and a system of government. The people remain responsible for the system which they establish.<sup>15</sup>

With popular sovereignty have come related ideas, namely, government ruled by law and governed by democratic principles. Constitutionalism therefore requires commitment to political democracy and to representative government. Even in times of national emergency, the people remain sovereign. Constitutionalism excludes government by decree, except as authorized by the Constitution and subject to control by democratic political institutions.<sup>16</sup> The non-democratic

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<sup>15</sup> Nwabueze Ben, *Constitutional Democracy in Africa*, Volume 5 op cit, p.337.

<sup>16</sup> Ibid.

nature of our local government system has been a source of concern. The people have been concerned about concentration of power in the Executive, highly centralized system of governance, excessive control by the centre, with limited capacity to govern.

The meaning and significance of decentralization has been underplayed in Zambia's constitutional making process. It confuses decentralization of the center with devolution of power to local communities.

It leaves the people a powerless collective as to how they should be governed or their resources expended. There should be real decentralization of power if the concept of sovereignty of the people has to be realized.

#### **10.5.0. Institutions Supporting Constitutional Democracy**

Institutions supporting constitutional democracy are sometimes called watchdog institutions and these are the Investigator General, Auditor General, Anti-Corruption Commission, the Tribunal on Parliamentary and Ministerial Code of Conduct, the Human Rights Commission and the Media. These institutions advise, investigate, or adjudicate on matters relating to public officers in an effort to ensure the realization of the 'Rule of Law', which is a constituent of constitutionalism.

Strengthening watchdog institutions basically means increasing their capacity to monitor government and hold government accountable for failure to fulfill its legal responsibilities in accordance with the law. It means recognizing and acting upon the fact that watchdog institutions are critical in a democracy because government is made up of individuals who can and do abuse or manipulate their positions in order to gain personal benefits rather promote public interests. It also means ensuring that watchdog institutions by themselves are legitimate and transparent in their operations.

The oversight functions of watchdog institutions can only be fulfilled if these institutions were autonomous, impartial and above reproach. They must be independent from the executive and they must be led by persons of proven integrity, which is not the case in Zambia, as most of these are nominated single-handedly by the President. Even though they are ratified, ratification is a matter of course in a One-Party-Dominated-Legislature. The role of civil society is and should be to ensure that watchdog institutions are given legal autonomy and the resources to exercise independent judgment, as well as the necessary power to exact compliance with the rule of law. In a country perceived to be as corrupt as Zambia, there is a lot of political will needed to revitalize watchdog institutions and this is and has been a major challenge to successive governments.

There has been no political will to strengthen autonomy of all watchdog institutions as free standing entities or defining their relationship with each other in the most cost-effective and efficient way possible. In order to ensure transparency, watchdog institutions should incorporate representatives of NGOs in their Executive boards. Watchdog institutions should not act under the direction of anyone because such direction may compromise the 'Rule of Law'. An example is the Investigator General who is directed by the President. The emphasis should be on letting the law take its course. Reforms should ensure that institutions have autonomy over recruiting and remuneration of officers.

Watchdog institutions should as much as possible be assured of funding as a direct debit from the national treasury, eliminating any room for manipulation by government which may force such institutions to toe the line.

There should be a nation-wide education campaign on the contents and meaning of the Parliamentary and Ministerial Conduct Act, to make the general public more alert to abuse of

office. Strong checks-and-balances institutions are key to a sustainable, well-functioning national governance system. They help keep executive arm of government focused on the public purpose. They are vital in fighting corruption, for ensuring that state actors at all levels use public resources efficiently and effectively, and for helping to ensure that citizens perceive state institutions to be legitimate.<sup>17</sup>

In Zambia, these institutions have a deficient legal framework and their functions are contained in Acts of Parliament, which can easily be amended. Had there been the will to make these institutions autonomous, their functions should have been contained in the Constitution.

Because of the weak legal regime, these institutions have been captured by the Executive. Those that are politically connected to the ruling party do not pay a price for corruption and theft, but get a prize, as discussed in Chapter Four. Mr. Mabenga, whom the Supreme Court determined to have abused public funds, was promoted in the party to Vice Chairman, later Chairman with the approval of President Mwanawasa.

#### **10.6.0. Undermining Constitutionalism by Constitutional Means**

The flexibility of amendment of the Constitution, could lead to its undermining by constitutional means. This has been demonstrated in Chapter Two by the constitution amendments between 1964 and 1972. This is what the Zambian Constitution became after the referendum which abolished all referendams. The Constitution Amendment Act No. 10 of 1969,<sup>18</sup> by deleting subsection 3 of Article 72 of the Constitution, made the alteration of the Constitution flexible, including the 'Bill of Rights' and the part dealing with the Judiciary, parts III and VII respectively of the Independence Constitution.

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<sup>17</sup> Levy Brian, *Governance Reform, Bridging Monitoring and Action* (Washington: World Bank Publication, 2007) p.26.

<sup>18</sup> Constitutional Amendment Act, No. 10 of 1969.

Consequent to that amendment, Act No. 33<sup>19</sup> was passed which abrogated the Barotseland Agreement and right and obligations lapsed and did not accrue. This amendment undoubtedly abrogated vested rights, liabilities and obligations. The President as the fountain of justice, ought not to have initiated the amendment, which violated the spirit of Articles 12 and 44 of the existing Constitution, as those rights and obligations ought to continue. In matters of compulsory acquisition of land by the state, the National Assembly was the final determinant of the compensation, the court's jurisdiction having been ousted.<sup>20</sup>

In terms of fundamental rights and freedoms, those in preventive detention under the Independence Constitution<sup>21</sup> could have their detentions renewed after a month. However, under the amendment, the detainees had to wait for a year in detention before they make a request for their detention to be reviewed by an Independent Tribunal. The lapse of the declaration if not renewed, was five days under the Independence Constitution. It was increased to twenty eight days by the amendment.<sup>22</sup> This potentially watered down the right of access to a tribunal as soon as practicable. By extending the period of review, the amendment impacted negatively on the right to freedom under the 'Bill of Rights.'

The Act reduced the number of years an advocate had to practice before being appointed a judge. It used to be seven years, but was reduced to five years. This was intended to zambianize the Judiciary at the time when the relationship between the then President Kaunda and the expatriate dominated judiciary was cold.<sup>23</sup> Inevitably, this watered down judicial independence, as judges who would not qualify for appointment under the Independence

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<sup>19</sup> Section 3, Constitutional Amendment Act No. 33 of 1969.

<sup>20</sup> Section 4, Constitutional Amendment Act No. 33 of 1969.

<sup>21</sup> Independence Constitution 1964.

<sup>22</sup> Section 7, Constitution Amendment Act No. 33 of 1969

<sup>23</sup> Section 12 of Act No. 33.

Constitution, were now eligible for appointment. They had to show gratitude to the appointing authority, who had to amend the Constitution to facilitate their appointment.

The elevation of the Secretary General of the party to the vice presidency, hitherto a Chief Executive of the United National Independence Party,<sup>24</sup> and the elevation of the Central Committee above Cabinet, created a monolithic party.<sup>25</sup> The party was at the apex of the state structure. The amendment of the constitution in 1996 excluded former President Kenneth Kaunda from standing for the presidency in that year. The Movement for Multi-Party Democracy were unsettled that if Kaunda joined the presidential race, they would inevitably lose the elections. The economic hardships experienced during the MMD rule made the people of Zambia nostalgic about the Kaunda days when he distributed free mealie meal and generally subsidized consumption.

A scheme had to be conceived to bar Kaunda, by amending the Constitution to introduce a qualification that specifically barred him. A presidential candidate under the amended Article 35,<sup>26</sup> had to have both his parents Zambians by birth or descent. Both Kaunda's parents were born in Malawi.

In some of the recent constitutions developed in Africa, an article has been included evidencing the legitimacy of the processes undertaken in developing the constitution. They state that the citizens and/or armed forces of each country are required to defend the Constitution, calling upon them to be accountable for upholding the document they themselves contributed to its formulation.

Future constitutions for the Republic of Zambia should emulate Article 84 of the Nauru Constitution (Nauru is an Island in the Pacific) which states that:

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<sup>24</sup> Section 2, Constitution Amendment Act, No. 10 of 1980.

<sup>25</sup> Section 2, Constitution Amendment Act No. 22 of 1980.

<sup>26</sup> Article 35, Constitution Amendment Act No. 18 of 1996.

*“Future amendments to the constitution should be the result of a process that is legitimate, inclusive that has empowered civil society to be able to participate, is open and transparent, is accessible to all Naurans and is organized by a constitutional committee who can be held accountable to the people.”<sup>27</sup>*

The involvement of civil society is crucial. The Ghanaian political scientist Ebo Hutchful testifies to the growing influence of African civil society, his observation of a new “Constitutionalism from below” emerging in contemporary Africa, involving a movement “broad and socially diverse, predominantly urban, in their composition, drawn from virtually all significant social strata; students, professionals, labour and community organizations, peasants and urban employed, who are activated by the economic crisis, by the abuse of human rights and political exclusion, and encouraged in their struggles by external pressures for democracy.”<sup>28</sup>

The people of Zambia may want to see these principles entrenched as requirements for all activities of the legislature. For example, Section 59 of the South African Constitution,<sup>29</sup> obliges the legislature to ensure effective public participation in ongoing legislative processes.

#### **10.7.0. The 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 manipulation or reprisal. The grant of judicial independence in modern African constitutions does not, however, suggest elite precommitment or fidelity to the principle. 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 regime “presentability.” In practice, judicial independence remains

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<sup>27</sup> Nauru Constitutional Review CHRI submission by the Commonwealth Human Rights Initiative, November 2006, p.4.

<sup>28</sup> Prempeh Kwasi H, Marbury in Africa: Judicial Review and the Challenge of Constitutionalism in Contemporary Africa, 2 Tulane Law Review (Vol. 80), p.3.

<sup>29</sup> Act No. 108 of 1996.

vulnerable to political control.<sup>30</sup> Professor VonDoepp has demonstrated in a research undertaken in Malawi, Namibia and Zambia, that the Supreme Courts in these countries rule in favour of governments in cases where the interest of government is very high.<sup>31</sup>

This perception is a carryover from the periods of authoritarianism, when the courts were unable to countervail governmental power. It is a perception made worse by a widespread belief that judges are corrupt or otherwise easily corruptible. Problems with judicial independence in post authoritarian Africa are, however, not merely imagined or perceived, they are also real. And they exist at both institutional and the decisional level. At the institutional level, Africa's new constitutions honor conventional separation-of-powers principles by organizing the courts into a separate, self-managed branch of government, with exclusive function and jurisdiction. In practice, however, the judiciary, lacking the power of the purse, must depend on the legislative and executive branches for the resources with which to operate.<sup>32</sup>

#### 10.8.0. Conclusion

Saito Fumikuko discussing challenges of decentralization in Uganda in the 21<sup>st</sup> Century says:

*“The Ugandan Human Rights Commission remarked that all Ugandan institutions, including the family had a pervasive lack of ‘internal democracy.’ In the commission’s view, this breeds people who from childhood, are nurtured to violently repress people’s rights”<sup>33</sup>*

You may have a very admired Constitution, but morality, decency and tolerance come from human beings, not from laws or institutions. These values and other constitutional precepts must be written in the hearts of leaders and its people. The nation could not be said to have

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<sup>30</sup> Prempeh Kwasi H, Marbury in Africa, op cit, p.7.

<sup>31</sup> Von Doepp Peter, Judicial Politics in New Democracies, Cases from Southern Africa, University of Vermont, 2008) p.5.

<sup>32</sup> Prempeh Kwasi H., Marbury in Africa, op cit, p.66.

<sup>33</sup> Saito Fumikuko, Decentralization in Uganda: Challenges for the 21<sup>st</sup> Century, Ryukaku University, Japan 2000, p.6.

achieved constitutionalism, until people are allowed the fullest participation in governance. There must be devolution of power and unencumbered expression and access to the well funded and circulated public media, otherwise we are in danger of stifling democracy. Like Kaunda believed when he was setting up the One-Party State, that the first step of political progress was to crush and destroy scholars and intellectuals of every sort.<sup>34</sup> In such an environment, the control of the media, which is used as the ruling party's propaganda machinery, is strict and the persecution of journalists of the independent media is heightened. This has continued in the Third Republic. Views which do not reflect the ruling party's objectives are never reported in the public media.

Zambia's constitutional history which has been adequately discussed in Chapter two, has been marred by the desire for leaders to hang on to power. Consequently, the constitutional making process has been designed in such a way that Presidential powers have remained the same, if not enhanced since independence. It is these vast Presidential powers which have bred nepotism and patronage. Persons who are not competent and unscrupulous have been given State jobs, because they are relatives, friends to the President or because they are on the right side of the political divide. These persons are insulated against public accountability, because of their connection to the Presidency. Merit or suitability has thus been sacrificed to political consideration.

This group is protected because the institutions of transparency and accountability are undermined as alluded to in Chapter Seven and earlier in this Chapter. The political control of heads of ACC, DEC, the partiality of the police and intimidation of the private media in their principled defence of accountability, is indeed an outrageous assault on the nation's institutions supporting constitutional democracy. As Nwabueze observes, 'there is plain abuse of office,

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<sup>34</sup> Ihonvbere O. Julius, *Economic Crisis, Civil Society*, op cit, p.47.

whose extreme perversity seems to suggest that none of our institutions is safe from the battering rain of politics.<sup>35</sup>

The clinging to power at all costs is for reasons of personal aggrandizement or where the individual has no inclinations for accumulation, just for the love of power. The egoism of African leaders, who would do anything to stay in power forever, has of late reversed democratic gains. This is done by holding flawed elections. Free and fair elections touch on the real substance than form of constitutional democracy. It has been truly said that elections are the “vehicle of democratization” as well as the life blood of democracy, just as competition, which constitutes part of the nature of democracy, is the life of all progressive human societies. Flawed elections are retrogressive to constitutional democracy.<sup>36</sup>

Zambia has been hailed as a role model for conducting peaceful polls in Africa by the Institute of Security Studies and that other countries should emulate her example. However, that is true in respect of the first elections after the country reverted to a multi-party political system, but subsequent elections have not been credible. The peaceful elections in Zambia cannot be credited to the desire of the ‘Ruling Elite’ to hold free and fair elections, but to the peaceful nature of the Zambian people. There is no deep-rooted ethnicity in Zambia because of inter-marriages and the Zambians peaceful nature generally. President Mwanawasa once said, he was privileged to preside over a country that is peaceful, respects the rule of law and holds periodic elections without any cantankerous behavior.<sup>37</sup>

Those who aspire to power are more interested in sharing resources than service to the masses. There has been a ‘Nepotistic Political Culture,’ under which the ‘Ruling Elite’ with

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<sup>35</sup> Nwabueze Ben, *Constitutional Democracy in Africa* Vol. 4 (Lagos: Spectrum Books Limited, 2004) p.146.

<sup>36</sup> *Ibid*, p.151.

<sup>37</sup> *Zambia Daily Mail*, 21<sup>st</sup> June 2008.

their cronies have not shared the agony and anguish of all citizens over the extreme hardships that they have endured in the 'Third Republic'.

To perpetuate this culture, successive Presidents have arrogated excessive power to the Presidency, which is omnipresent in every institution of government. Institutions of transparency and accountability which are supposed to support constitutional democracy, have not been spared. The President is omnipotent as he radiates 'an aura of mystical majesty' which has diminished executive accountability and transparency in the running of affairs of state.

The Legislature and the Executive not being truly separated, has impacted negatively on ensuring there is executive accountability. While the Auditor General puts in public glare the financial malpractices which are committed by the Executive, there is no follow-up action.<sup>38</sup> All institutions of government, including parastatals, are subservient to the President as he is the job giver in all government and quasi-governmental Institutions. There was a democratic reversal under the Chiluba Presidency, accountability and transparency were non-existent. Though President Mwanawasa has not achieved the fundamental conditions of constitutionalism, significant steps in the areas of transparency and accountability of public funds and the fight against corruption have been undertaken. Mwanawasa had, for the first time in this country's constitutional making history, embarked on a democratic constitutional making process by enacting the National Constitutional Conference Act,<sup>39</sup> which is a more representative body, though not elected. His democratic credentials had been enhanced by his condemnation as the SADC Chairman of political violence in Zimbabwe. One may observe that within the 'Third Republic' under the Chiluba regime, there was no political will to conform to formal requirements of constitutional democracy. Under the Mwanawasa regime, there had been

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<sup>38</sup> This has led to reports by Transparency International that, 'Parliament may be a major culprit in encouraging plunder and misappropriation of public funds by government officers' Today 25-31 December 2002.

<sup>39</sup> The National Constitutional Conference, Act No.19 of 2007.

substantial conformance. Personalization of power, due to lack of mechanisms for accountability has been the hallmark of our constitutional history.

The author's diagnosis of Zambia's constitutional landscape is buttressed by the portrait painted by USAID Chief Governance Advisor when he stated:

*“Zambia’s key political issues are constitutional reform (meaning electoral reform), combating corruption (grand and petty), decentralization. Many Zambians perceive the present Constitution to be a constraint, in particular in its broad authorities vested in a presidency with “fair checks and balances”. Parliament struggles to assert itself, following decades of subjugation to the Executive branch. A poorly funded judiciary seeks to strengthen the independence and efficiency of the legal system. Weak accountability and financial integrity in public office and civil service in general exacerbates corruption. The lack of effective and inclusive local governance impedes Zambia’s democratization and broad-based economic growth”<sup>40</sup>*

The thesis has graphically demonstrated that Zambia is still grappling with firstly enacting a democratic constitution, which is ‘Formal Constitutionalism.’ Secondly, the governors and the governed are not wedded to constitutional principles, which is ‘substantive constitutionalism’ or the ‘spirit of constitutionalism’.

Prempeh observes that:

*“The future 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 project in Africa is essentially concerned with juridical constitutionalism, with its emphasis of judicial enforcement of bills of rights in the context of privately initiated litigation. Structural constitutionalism – consisting in the installation of credible checks and balances between the political branches (parliament and president), strong and independent agencies of horizontal accountability, and meaningful devolution*

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<sup>40</sup> [www/bo-gov/index](http://www/bo-gov/index).

*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. The preoccupation with juridical as opposed to structural constitutionalism in Africa's current constitutional reform project suggests that the lessons from failed constitutionalism of the early post-colonial period have not been fully appreciated.*"<sup>41</sup>

The Zambian Constitution has inbuilt juridical constitutionalism, that is the judicial enforcement of the 'Bill of Rights' alluded to earlier in the Chapter, but one major single factor which has significantly militated against constitutionalism and good governance in the constitutional structure is the vast powers bestowed on the Presidency. The Presidency is at the apex of the state structure. When presidential power is used to undermine the 'Rule of Law', as demonstrated in Chapter Four, constitutional rule is in danger.

At another level one can see that subtle changes and re-affirmations have taken place: Civil society has flourished, democratic elections are still relevant and hard fought, with many parties contesting and represented in parliament. It may be contended that not enough is being done to combat corruption.

The next Chapter deals with conclusions and recommendations.

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<sup>41</sup> Prempeh Kwasi H, Marbury in Africa, op cit, p.9.

## CHAPTER ELEVEN

### CONCLUSIONS AND RECOMMENDATIONS

#### 11.1.0. Conclusion

The Thesis has examined whether there is constitutionalism and good governance in the 'Third Republic'. The Thesis has not been presumptuous that because there is a liberal Constitution in place, then there is constitutionalism. The study has been diagnostic. It has been demonstrated that there is scope to consolidate constitutional democracy. The First Chapter deals with an overview of the thesis. The Second Chapter deals with Zambia's constitutional history in the immediate pre and post colonial era. The essence of that Chapter is to show factors that led to the development of the Constitution in a certain direction in a given era. The Chapter discussed various Constitutional Commissions that have been set and how progressive recommendations have been rejected. What is evident is that Zambia has been robbed of a durable Constitution because of using the Inquiries Act, as a process of constitution-making. Under the Act, government can accept or reject recommendations of Commissions of Inquiry. The mode of constitution-making determines the content. The content has always been manipulated by perpetuation of self-interests.

The Third Chapter defines constitutionalism and good governance. Constitutionalism is not just having a liberal Constitution in place. It is an active and varied reception of the principles underlying a 'Constitutional State'. There must be internalization of constitutional precepts by the ruling elite. The Chapter has incorporated the modern additions to the definition of constitutionalism, for example, the efficient management of public resources, and the 'Rule of Law,' as being the enactment and enforcement of laws that reflect the philosophical values of a

given society. Integrity, decency and morality come from human beings rather than from laws and institutions.

The Fourth Chapter discussed the doctrine of 'Separation of Powers'. The Zambian Constitution prescribes separate Executive, Legislative and Judicial functions. The fact that the Legislature has Ministers and Deputies as Members, has diluted the capacity of the Legislature to be an effective check on the Executive. The Chapter argues that though the parliamentary committee system is in place and inquires into the conduct of public officers, the Standing Orders do not prescribe sanctions. The Chapter justifies the deconstruction of the classical theory of the doctrine of 'Separation of Powers', in order to carry through the emerging State's development agenda. However, with the evident abuse of power by the Presidency, it has been suggested that the doctrine of 'Separation of Powers' be reconstructed to balance power between the three organs of state.

The Fifth Chapter analyses the electoral system in Zambia. The strengths, weaknesses and opportunities for reform are discussed in the Chapter. The recommendations of the ERTC are alluded to. The Chapter concludes that the lack of enforcement power by the ECZ has rendered the political field uneven. The non-disclosure of campaign funds by political parties, especially the Ruling Party has fueled electoral corruption, which is profound, ongoing and multi-layered. It is found at every level of the electoral process, be it local government, Parliamentary or Presidential elections.

The Sixth Chapter defines 'Local Government' and examines the legal framework for local government, which reposes excessive discretionary power in the Minister. This is in comparison with some countries within the region and beyond like Botswana, Namibia, Zimbabwe, South Africa, Bolivia and the Philippines, which have devolved power to local

governments. The Chapter concludes that Zambia has a highly centralized system of government, which impacts negatively on grassroots participation.

The Seventh Chapter discusses institutions supporting constitutional democracy namely, the Investigator-General (Ombudsman), the Auditor General, the ACC, the Tribunal on Parliamentary and Ministerial Code of Conduct, the Human Rights Commission, and the media. What emerges from the discussion is that there is a lack of legal framework to facilitate the autonomous operation of these institutions. The Investigator-General effectively reports to the President, instead of the National Assembly, which makes operations of the Office not transparent. He/she cannot investigate the President, and yet the abuse of power in a nation flows from the vast presidential powers. The Auditor General's reports are not taken seriously as they are perceived as merely advisory to the Public Accounts Committee (PAC). There is also lack of professional accounting staff to effectively carry out the auditing function. The ACC prosecutions are subject to the authority of the Director of Public Prosecutions, who can refuse to sanction the prosecutions or discontinue the criminal prosecution at any stage without giving reasons. The Tribunal on Parliamentary and Ministerial Code of Conduct has proved to be more effective relative to these other institutions.

The private media is harassed by arrests and prosecutions, which have a chilling effect on media freedom. The failure by government to loosen its hold on the public media has turned this section of the Media into propaganda tools of the ruling party. There being no Freedom of Information Act, makes news gathering more onerous and perilous. Those with opposing views are not given democratic space to market them.

The Eighth Chapter discussed the political and economic conditionalities of international financial institutions and how they have promoted constitutionalism in Zambia. Discussed

further is how the UN, the EU, the AU and the SADC and other regional groupings and other donor nations have propelled constitutionalism. The political and economic conditionalities are cross-cutting. The conclusion is that they have been an effective tool in propelling constitutionalism. However, globalization skeptics like Herzt, Pilger and Uujuko who have been discussed in the Chapter, call the IFIs as the 'New Rulers' of the World. They say they have served an indebted imperium greater than the British Empire at its height. The indebted imperium are 'Residual Sovereigns'. The states have rejected their social functions in favour of repressive ones, dictated by IFIs. The most unpredictable challenge is from the economic turmoil and divisions that globalization has generated among the majority of humanity.

Chapter Nine discussed the internal propellants. These are NGOs, the Church, Opposition Political Parties and the Unions. The contributions of each category have been itemized and reasons for such significant and dismal contribution fully explained. It has been concluded that these institutions greatly contribute to the consolidation of constitutional rule. Chapter Ten is the anchor chapter as it answers the seminal question, whether Zambia could be said to be a 'Constitutional State?' and if not, why?. And this Chapter deals with recommendations and conclusions.

#### **11.2.0. Conclusions and Recommendations**

Arising out of the Study undertaken, a number of measures have to be taken in order to enhance and promote constitutionalism and good governance in Zambia.

(i) it is concluded that Zambia's constitutional making process has not been democratic. The people have been sidelined in the constitutional making-process as no Assembly has been elected for that purpose.

It is recommended that the Inquiries Act, should not be used to facilitate constitution-making, as this gives the President latitude to dictate the process and the content of the Constitution. Successive Presidents, have rejected very progressive recommendations, as they are not obliged to accept them under the Inquiries Act. There should be enacted a Constituent Assembly Act, as a vehicle, to facilitate the amending, repealing or enacting of the Constitution. If a Constitution has to establish democratic values, social justice and fundamental human rights, it must be people driven and people's views should account for the content or predominate, not those of the Executive or Legislature. Zambia has had four Constitutional Review Commissions (CRC), in forty years, an average of one every ten years and yet no durable Constitution has been enacted to date. The manner in which a Constitution is finally adopted is crucial in determining its legitimacy, popularity and acceptability.

(ii), presidential powers are enormous and susceptible to abuse, especially that the President enjoys immunity from civil and criminal actions while in office.

It is therefore recommended that there should be reduction in presidential powers, if the doctrine of 'Separation of Powers' has to be effective. The imperial nature of presidential powers has resulted in its abuse, which has sometimes resulted in human rights violations. There has been grand corruption, nepotism and selective justice, which have undermined the 'Rule of Law'. This conduct has conflicted with the often-repeated rhetoric of accountability and being servants of the people. The Head of State should be separated from the head of government. Presidentialism in Africa has significantly contributed to misrule, because of excessive powers given to the President.

(iii) the National Assembly does not effectively check the Executive as a significant number of its members are members of the Executive as well.

It is recommended that to enhance the doctrine of ‘Separation of Powers, Cabinet must be appointed outside the National Assembly. This will also enhance the quality of the appointees and the effectiveness of the National Assembly as a check on the Executive. Permanent secretaries should be appointed by the Public Service Commission on the basis of professionalism, merit and experience, to enhance performance in the civil service. Ratification of Members of Cabinet and Permanent Secretaries by the National Assembly will ensure that only professionally qualified people run ministries. Some appointments are currently based on nepotism and political patronage.

(iv) the Executive is not bound by National Assembly resolutions, which weakens the role of Parliament.

It is recommended that, National Assembly resolutions be binding on the Executive. In that regard, every motion passed by two-thirds majority must be binding on the President and failure to obey it must be a ground for impeachment.

(v, Court orders are disobeyed by the President with impunity. The Constitution does not provide sanctions for such conduct.

It is hereby recommended that, to strengthen the Judiciary, Zambia should emulate the Gambian and Ghanaian constitutions which have created a ground for the removal of the President and the Vice President for disobeying Court orders. This is “executive lawlessness”, of which disobedience of court orders is a manifestation. The Gambian and Ghanaian constitutional provisions are compellingly indicative of the Executive deference to court orders and judgments.

(vi) the appointment of Members of the ECZ is not transparent and the Commission has no enforcement powers.

It is recommended that the ECZ should be appointed by stakeholders in the electoral process and should announce the date for elections. This should be in the Constitution and not as the case currently is, whereby it is the President, who is an interested party, who announces the election day. The ECZ should have enforcement powers, when electoral law and Regulations are breached.

(vii) there is so much electoral corruption, as political parties do not account for their sources of finance and how they spend it.

It is recommended that the source of funds be disclosed. Citizens donating to various political parties should not be victimized. The Auditor General and ECZ should have access to the accounts of political parties.

(viii) There have been political directions to expend public resources on electoral campaigns for the ruling party, as has been revealed in presidential petitions. To avoid Public Officers being used by a President to siphon public funds, it is recommended that public officers should be insulated by the Constitution from following unlawful instructions. An example would be making payments contrary to the Finance Control and Management Regulations for political campaigns illegal.

(ix) Local government is not democratic as people do not participate in project planning and implementation.

It is recommended that there should be devolution of power to the districts as administrative units and to the Chiefs. Decentralization should be modeled on the UN-Habitat sponsored legislation in Bolivia, the Philippines and South Africa. There should be popular participation in project selection, implementation and monitoring. There should be autonomy in the collection and expending of resources within a given local government area. The Minister of

Local Government should not have power to dissolve democratically elected councils or to unilaterally annul by-laws. The current practice undermines the tenets of democracy.

(x) There is interference in the function of institutions supporting constitutional democracy.

It is recommended that the institutions supporting constitutional democracy i.e, the Investigator-General, Auditor General, ACC, Human Rights Commission, and the media, should have their duties, functions and powers spelled out in the Constitution. This will obviate political interference. The Investigator-General (Ombudsman) and the Human Rights Commission should have enforcement powers. The Human Rights Commission, like the Ghanaian and Ugandan ones, must have power to order the release of those whom the Commission determines to have been illegally detained. The Commission for Investigations sitting as a tribunal, should open hearings to the public. The 'Open Justice' principle is a fundamental right. These institutions should report to the National Assembly annually. The President should not be excepted from investigation by the Commission.

(xi) Statutory regulation of the Media undermines the exercise of freedom of expression. The Media freedom should not be negated by clawback clauses. The derogations should be proportionate and justifiable in a democratic society. There should be enacted a Freedom of Information Act and Section 69, which is defamation of the President, should be repealed as it has been used by successive Presidents to fend off political criticism. Contempt of Court, having a chilling effect on the Media, makes it imperative to enact a statutory defence of 'Public Interest.' If the Media are commenting on a matter of public interest, even if such a matter is pending in court they should not be held in contempt of court, as provided for by section 5 of the English Contempt Act of 1981. Further, the Media should be self-regulating.

(xii) It has been observed in Chapter Four that the Judiciary is not accountable to any other organ if in violation the Constitution, as demonstrated in Chapter Four.

It is recommended that a Constitutional Court at the same level as the Supreme Court be established, which should adjudicate over any constitutional matter and hold any of the three arms of government accountable. The Court will be an umpire or referee surveiling the exercise of power given to any of the three governmental organs. For instance, it should overrule 'Judicial legislation' or 'legislation from the bench', as the legislature is the repository of the legislative function. If government has to function constitutionally, it is imperative for each organ including courts to keep within its powers. The need for such prudential restraint is greater in the case of an unelected body, like a court, exercising critical governmental power. The Constitutional Court can also protect institutions supporting 'Constitutional democracy' from Executive interference.

(xiii) The manner in which treaties and loans are contracted is not transparent. The Executive may enter into treaties and contract loans which are not in the 'Public Interest'.

It is recommended that to ensure there is ethical use of external as well as internal borrowings, a Parliamentary Committee should approve treaties and loans. The legislature, as allocator of resources, should monitor the inflows and outflows of these resources. This will help in poverty reduction. Parliament should ratify the treaties the Executive has entered into. This will restrain the Executive from the creation of a debt mountain. Some of the internal and external debts contracted have been for projects which turn out to be white elephants. Unethical expenditure of resources is bad governance and may result in political instability.

(xiv) progressive or critical civil society operate in a perilous environment as they demand accountability from government. They are threatened with deregistration and imprisonment.

It is recommended that, to create a vibrant civil society and opposition political parties, an appropriate democratic environment should be created. The functions, duties and rights of civil society and opposition political parties should be spelled out in the Constitution. They should not be registered under the Societies Act, which Act, the Minister of Home Affairs superintends. These institutions should be regulated by an independent and autonomous body i.e. the Investigator General ; Electoral Commission of Zambia and Registrar of Societies..

The role of civil society and opposition political parties has been perceived as reactionary and yet civil society, in an emerging state, is as important as free elections and free markets to internalize democratic values in citizens' hearts, minds and everyday lives.

(xv) Access to justice is a human right, but Zambian court procedures are complicated for laymen, which is a denial of access to justice.

It is recommended, the **locus standi** rule should be abolished. If the country is to be governed in accordance with the provisions of the Constitution, then the courts in whom is vested jurisdiction to interpret the Constitution should not shy off, but accept on a broad principle, jurisdiction to interpret the Constitution. This will undoubtedly enhance the realization of the human rights regime. In India, in constitutional matters, a letter can suffice as originating process.

(xvi) The donor conditionalities are not formulated within the constitutional limits of governmental power.

It is recommended that the donor conditionalities be formulated within Zambia's constitutional principles. Otherwise, forcing the Executive and Legislature to act outside their constitutional mandate, as discussed in Chapter Four, erodes the 'Rule of Law'.

### **11.3.0. Prospects for the Future**

It will be recalled that the Zambian society has had no faith in the constitutional making process, spearheaded by the Executive. The perception has been that the whole scheme is merely facilitative of self-perpetuation. On 17<sup>th</sup> April 2003, when President Mwanawasa appointed the fourth Constitutional Review Commission, headed by lawyer Willa Mung'omba, the President asked the Zambian people not to judge him by the standards of his predecessors.

He promised that he was ready and willing to abide by the people's views and wishes. His comments were a response to civil society and the Churches' concern that he may disregard the people's wishes as Kaunda did when establishing a One-Party State in 1973. Chiluba, in 1996, rejected progressive recommendations contained in the Mwanakatwe Constitutional Review Commission. The whole exercise was intended to bar Kaunda from standing for the Presidency. There was a backlash from multilateral, regional and bilateral donors who suspended the balance of payment support.

As recommendations of the Mung'omba Constitutional Review Commission started filtering in, namely that the Constitution be adopted by a Constituent Assembly and the President be elected by fifty plus one percent, Mwanawasa pre-emptively rejected those recommendations. He called it irresponsible for the government to spend seven hundred billion kwacha on the constitution-making process, when that money could go to poverty alleviation. His figure was disputed by the Churches and civil society, who offered to fundraise and opened an account to

finance the Constituent Assembly. A civil society inspired bill on establishing a Constituent Assembly was presented by Given Lubinda, an opposition Member of Parliament.

However, Mwanawasa had instructed his MMD Members of Parliament who were in the majority, to reject the bill, which was narrowly defeated by 62 to 56 votes. Civil Society threatened to decampaign the 62 members of Parliament who voted against the 'Bill' and published their photographs in the Press. Civil Society had held a demonstration at Parliament on 1<sup>st</sup> November 2005 and a prayer meeting on 10<sup>th</sup> December 2005. Levy Mwanawasa agreed to enact the Constitution through the Constituent Assembly, just as his predecessor Chiluba backed down over the amendment of the Constitution to allow him go for a 'Third Term.' The insistence by the Oasis Forum, which is an aggregation of civil society, Churches, Law Association of Zambia (LAZ) and opposition parties, was that the process determines the content of the Constitution. The process must therefore embrace all stakeholders.

It is clear that the Zambian civil society has scored successes in terms of constitution making. They prevented the manipulation of the Constitution by Chiluba and by Mwanawasa. While Mwanawasa was admired by donors for fiscal discipline and ethical expenditure of resources, which is an aspect of constitutionalism, he was intolerant to criticism and given a weak civil society, would have been a dictator or autocrat. While his predecessor, Chiluba's greatest legacy lies in privatization of the state, whose resources he plundered at will, Mwanawasa's greatest legacy lies in his adoption of an arrogant attitude towards national affairs.. The prospects of enhancing constitutionalism in Zambia are brightened by the viability of its civil society.

The prospects for an enduring constitutional democracy, for its consolidation and success in Zambia and Africa in general, pessimists argue is problematic. The tragic consequences of

Africa's colonial heritage are: the illegitimacy of the state created by colonialism; the lack of legitimacy of the colonial legal order; the character of the State; its powers and institutions in the context of the backward societies of Africa. The State in Africa has been perceived as an instrument of arbitrary, dictatorial power, and of organized violence and oppression. For example, State-sponsored violence during the Zimbabwean 2008 elections. The State is further looked at as an instrument of exploitation and discrimination based on race, ethnicity, political affiliation, for example, the conflict between North and South Sudan. These were all inherited from colonialism.<sup>1</sup>

In the post-colonial State, there has been weak civil society; the lingering incidence of mass illiteracy and ignorance which, have militated against making informed choices in the democratic process. The majority of the electorate are easily bribed by rich candidates to vote for them. These are people whose vision they do not share with. The entrenched position of the elite and 'Elitist rule' with all its evils; inadequacy of a middle class truly so-called; and absence of a libertarian democratic ethic and ethos permeating the society, in particular, the ethic of free and fair elections, the ethic of public probity and accountability, the habit of obedience to the laws, especially the law of the Constitution<sup>2</sup>. The media largely controlled by the State or other sectional interests, do not mirror the views of society on important national issues. These factors which have been discussed extensively in Chapters Four, Five, Seven and Ten, have impacted negatively on constitutional rule in Zambia.

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<sup>1</sup> Nwabueze Ben, *Constitutional Democracy in Africa Volume 5* (Lagos: Spectrum Books Limited, 2004) p.222-223, op cit.

<sup>2</sup> Ibid.

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