

aspect would be a federation....Each country would have its own parliament, but a federal government would be established with Dominion status, to which members from each individual state would be elected.<sup>23</sup>

Arrangements were put in train to call a conference of political leaders at Victoria Falls in February 1949. At the insistence of Huggins, no Africans were allowed to attend.<sup>24</sup>

In 1949, a conference was held at Victoria Falls which produced a workable scheme. It was revised by civil servants in 1951. Agreement was reached and a referendum for the purpose was held in Southern Rhodesia and Northern Rhodesia joined.

On 28<sup>th</sup> July 1953 the Federation of Rhodesia and Nyasaland (Constitution) Order-In-Council 1953 was passed in the House of Lords.<sup>25</sup> In the December of 1953, the Federation of Rhodesia and Nyasaland elections were held. Voters elected 35 members of a unicameral Federal Assembly; fourteen from Southern Rhodesia constituencies, eight from Northern Rhodesia constituencies and four from Nyasaland.<sup>26</sup>

### **2.2.0. The Pre-Independence and Post-Independence Constitutions**

This Study is country-specific and will therefore not discuss the Federal Constitution of 1953 in detail, which was the Constitution for the three territories of Northern Rhodesia, Southern Rhodesia and Nyasaland. Northern Rhodesia reverted to a territorial Constitution in 1959. From then until Independence there was a Constitution enacted annually except in 1961.

The 1959 Constitutional Order entailed imperial government control of the colonial government. Northern Rhodesia had no mandate or authority to deal with its external matters.

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<sup>23</sup> Hall Richard, Zambia, op cit, p.126.

<sup>24</sup> Ibid.

<sup>25</sup> Federation of Rhodesia and Nyasaland (Constitution) Order-In-Council 1953. Hansard 1803 – 2005, HI Deb 28<sup>th</sup> July 1953 Volume 183 CC953 – 94.

<sup>26</sup> Federation of Rhodesia and Nyasaland election, 1953 Wikipedia, the Free Encyclopedia, p.1.

The Crown could disallow any legislation made by the territorial Legislature if contrary to British legislation and policy.<sup>27</sup> Constitutional changes had been given impetus by Article 99 of the Federal Constitution,<sup>28</sup> which provided for the renewal of the Constitution not less than seven and not more than nine years from the inception of the Federation. The review had to take place not earlier than 23<sup>rd</sup> October 1960 and not later than 23<sup>rd</sup> October 1962.

The British government appointed a Commission headed by Viscount Monkton to advise on the preparations necessary for the 1960 Constitutional Review Programme within Northern Rhodesia. The appointment of the Commission was a controversial issue. The then African political parties, the African National Congress and United National Independence Party boycotted the proceedings of the Commission largely because it was not empowered to consider the dissolution of the Federation. The Commission noted in its report that "the dislike of the federation among the Africans was widespread, sincere and of long standing, it was also pathological. Of significance to Northern Rhodesia was the recommendation that a new constitution for the territory was necessary and needed to be put in place without awaiting the full revision of the federal "constitutional structure."<sup>29</sup>

The 1962 Constitution took a step further in democratizing governance of the Territory, by constituting the Executive Council, whose members were called Ministers. Under the 1962 Constitution, a legislature was created to enact laws for the Territory. The Territory was slowly moving towards self-governing. The Governor had enormous powers to hire and fire public servants. He could delegate these powers to the public and police and prison service commissions, whose members were his appointees. He could also divide Northern Rhodesia into

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<sup>27</sup> Act 26 of Northern Rhodesia (Legislative Council) Order in Council 1959.

<sup>28</sup> Federation of Rhodesia and Nyasaland Act, 1953.

<sup>29</sup> Hall Richard, Zambia, op cit, p.196.

provinces. Under the 1962 Constitution there were two types of constituencies, the upper and lower franchise constituencies. The Territory was divided into sixty five main roll constituencies and ten reserved constituencies. You had settler voters, who due to their affluence were registered under the higher franchise constituencies. While those registered under the lower franchise, were indigenous natives who could not stand in higher franchise constituencies because they were not affluent.<sup>30</sup> This provision gave the colonial settlers an advantage of standing in both constituencies, which advantage the indigenous people were denied, as most of them were not educated or propertied, to register under the higher franchise roll.<sup>31</sup> Educational qualifications were difficult to meet by most Africans, consequently they were disenfranchised.

In terms of the Judiciary, to qualify for appointment as a judge, one should have been a judge of a court having unlimited jurisdiction in civil and criminal matters in some part of the Commonwealth or the Republic of Ireland or a court having jurisdiction in appeals from any such court or has been qualified for not less than five years to practice as an Advocate or Solicitor in the Commonwealth or Republic of Ireland.<sup>32</sup>

High Court judges were to retire at sixty-two years of age. A retired judge could however have his period of service extended beyond sixty-two years. When a question of removing a judge for inability or misbehaviour arose, the Governor appointed a Tribunal. The Tribunal could recommend that the question of removing the judge from office should be referred by Her Majesty to the Judicial Committee of the Privy Council. The Judicial Committee

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<sup>30</sup> The 1962 Order-in-Council.

<sup>31</sup> *Ibid*, Section 64.

<sup>32</sup> *Ibid*.

of the Privy Council could advise that the Judge ought to or ought not to be removed from office.<sup>33</sup> An independent Judiciary had been created at High Court level.

The 1963 Constitution paved the way for Northern Rhodesia's independence. The Governor's absolutism was diluted. The Constitution deconcentrated power from the Governor appointed by the Crown to elected officials, by the creation of an elected Legislature and independent Judiciary. The Constitution for the first time in Northern Rhodesian history incorporated the 'Bill of Rights'.<sup>34</sup> The Constitution did not grant Northern Rhodesia sovereignty. All that it did was to grant Northern Rhodesia self-government, but under the Crown. Structures to facilitate self-governing like the Executive, the elected Legislature and the Court of Appeal for the Territory were created.

One important innovation of the 1963 Constitution which was significant to constitutional democracy, was the establishment of a Legislative Assembly, which was electable and whose functions became distinct from those of the Executive. The Speaker of the Assembly was to be elected by members of the Legislative Assembly and not appointed by the Governor. In terms of franchise the 1963 Constitution extended the franchise to many indigenous persons as property and education, which were fundamental to qualify as a voter under the 1962 Constitution,<sup>35</sup> were no longer required. The constitutional structure of the 1963 constitution entailed the separation of Executive, Legislature and Judicial functions.

The 1963 Constitution<sup>36</sup> brought fundamental changes to the structure of the Judiciary. The Judicial Service Commission, chaired by the Chief Justice was created. Members of the Commission were the Chairman Public Service Commission, and a justice of the Court of

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<sup>33</sup> Section 67, 1962 Order-in-Council.

<sup>34</sup> The 1962 Order-in-Council.

<sup>35</sup> Section 12, The 1962 Order-in-Council.

<sup>36</sup> Section 66, 1963 Order-in-Council.

Appeal or puisne judge, designated by the Governor in consultation with the Chief Justice. In the performance of its functions, the Judicial Service Commission was not to be subject to the direction and control of any person or authority. The Judicial Service Commission appointed and terminated appointments of personnel on the lower bench, that is all classes of Magistrates and the Registrar of the High Court and his/her deputies. The Governor did not interfere with the functions of the Judicial Service Commission, which was important in preserving judicial independence.<sup>37</sup>

Another fundamental structural change was the creation of the Court of Appeal. This delinked the Northern Rhodesia High Court from the Federal Supreme Court. From the Court of Appeal, appeals lay to the Judicial Committee of the Privy Council.<sup>38</sup> Both Judges of the Court of Appeal and High Court were appointed by the Governor on the recommendation of the Judicial Service Commission. The qualifications for appointment, tenure and removal remained the same as those contained in the 1962 Constitution.<sup>39</sup>

The Constitution<sup>40</sup> by incorporating a Bill of Rights, created an independent Judicial Service Commission and took a significant step in enhancing judicial independence, 'Separation of Powers' and the protection of fundamental rights and freedoms.

At independence, Zambia was bequeathed with a Constitution which contained a lot of rights and freedoms. The Constitution encouraged political competition. The Zambia

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<sup>37</sup> 1963 Order-in-Council, sections 74-76 allowed the Governor, to discipline public officers, but nowhere in the Constitution could he assume disciplinary powers of the Judicial Service Commission, since no provision in the Constitution gave him power to overlord the Judiciary, according to section 1(3) of the Constitution, he could not exercise that power, if it were not specifically allocated to him.

<sup>38</sup> Section 67, 1963 Order-in-Council.

<sup>39</sup> Section 68, 1962 Order-in-Council,...

<sup>40</sup> 1963 Order-in-Council.

Independence Act,<sup>41</sup> paved the way in establishing Northern Rhodesia as a Republic, within the Commonwealth.

The Zambia Independence Act,<sup>42</sup> was the new Republic's power map and was a turning point in terms of sovereignty, while the dissolution of the Federation of Rhodesia and Nyasaland was the harbinger.<sup>43</sup>

The Independence Constitution, validated Northern Rhodesian laws until they were repealed or amended and excluded enactments which automatically applied to Northern Rhodesia as a Protectorate.<sup>44</sup> One other symbol of sovereignty was that the British Nationality Act,<sup>45</sup> which after independence only applied to those that retained British citizenship, ceased to apply to one who became a citizen of Zambia as one could not retain both British and Zambian citizenship.<sup>46</sup>

The independence Constitution<sup>47</sup> made minor changes to the structure of the Judiciary. However, they were significant in terms of constitutional governance. Under the 1963 Constitution,<sup>48</sup> the Chief Justice was appointed by the Governor in consultation with the Prime Minister, while justices of the Court of Appeal and puisne judges were appointed by the Governor in consultation with the Judicial Service Commission.<sup>49</sup> Under the independence Constitution,<sup>50</sup> the President single-handedly appointed the Chief Justice and the Court of Appeal judges, while puisne judges were appointed by the President on the advice of the Judicial Service

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<sup>41</sup> The Independence Constitution, 1964.

<sup>42</sup> Section 3 of the Independence Constitution.

<sup>43</sup> Ibid.

<sup>44</sup> Ibid.

<sup>45</sup> Ibid.

<sup>46</sup> Ibid.

<sup>47</sup> Ibid.

<sup>48</sup> Section 56, 1963 Order-in-Council.

<sup>49</sup> Ibid, section 57.

<sup>50</sup> Article 99 (1), Independence Constitution.

Commission.<sup>51</sup> This change was significant, in that appointments of the Chief Justice and the Justices of Appeal became less professional, as the Judicial Service Commission made no input to such appointments. The appointment process was therefore susceptible to political manipulation.

The President was now the only authority, subject to findings of the Tribunal to remove judges. While previously, the removal of Judges was more bureaucratic, there was a Tribunal appointed by the Governor, thereafter if the Tribunal found some substance in the allegations, the matter was referred to the Judicial Committee of the Privy Council, which finally advised Her Majesty in Council, whether the judge ought to be removed or not.<sup>52</sup>

The power of the Judicial Service Commission was watered down. The previous Constitutions were emphatic on the Commission not being subject in the performance of its functions to the direction and control of any other person or authority.<sup>53</sup> However, under the Independence Constitution, the President could give to the Judicial Service Commission or to any person to whom the powers of the Commission were delegated, such general directions, with respect to the exercise of the functions of the Commission. The President could request that a matter under consideration by the Commission be referred to him for a final decision.<sup>54</sup> This provision was so intrusive in the appointment of the judges and other staff.

After the enactment of the One-Party State Constitution, the Judicial Committee of the Privy Council ceased to be the final Court of Appeal for Zambia.<sup>55</sup> The Court of Appeal was renamed the Supreme Court of Zambia and became the final Court of Appeal.

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<sup>51</sup> Article 99 (1) 1963 Order-in-Council.

<sup>52</sup> Section 66.1963 Order-in-Council,

<sup>53</sup> Section 99 Independence Constitution.

<sup>54</sup> Ibid, section 115 (1).

<sup>55</sup> Article 107, One-party Constitution.



The Independence Constitution dealt a severe blow to the Barotseland protectorate by her Majesty's government abrogation of any agreement which conferred rights, or imposed obligations on Her Majesty or the Government of Northern Rhodesia.<sup>56</sup> The Barotseland Agreement had given the Litunga power to veto certain laws applicable to Barotseland. It was a semi-autonomous region within a unitary State. The Barotseland was amended to take into account, the unitary nature of Northern Rhodesia at Independence was signed on 19<sup>th</sup> May 1964 between Kaunda as Prime Minister, the Litunga Mwanawina Lewanika III and Duncan Sandys, Principal Secretary of State for Commonwealth Relations and for Colonies. This one too was abrogated at independence. Had the 'Barotseland Agreement' survived the granting of independence, that would have ran counter to Zambia being a sovereign Republic. This meant that the Litunga had to renegotiate the rights and obligations which existed under the preceding Constitution. What was being avoided was to grant independence to a divided country.

One remarkable innovation brought about by the Independence Constitution was the deepening of the doctrine of 'Separation of Powers'. The amendment of the Constitution was long-winded. This was intended to entrench acquired settler rights. Each organ of State was allocated specific primary functions under the Constitution, i.e. the Executive, policy-making, the Legislature, law-making, the Judiciary, interpreting the law. That notwithstanding, there was no absolute 'Separation of Powers', as Cabinet Ministers and their Deputies, who were Members of the Executive were also Members of the National Assembly.<sup>57</sup>

The creation of Zambia as an independent sovereign state in the Commonwealth meant that the umbilical cord, in terms of policy formulation, legislation and in the area of the Governor's special responsibilities, in external affairs, was cut off, as these were transferred to

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<sup>56</sup> Section 22, Independence Constitution.

<sup>57</sup> Section 44 (2), the Independence Constitution.

an Executive President. The first President, Kenneth Kaunda, was hand-picked in the Constitution.<sup>58</sup>

Kaunda had been elevated to the post of Prime Minister as a result of his party's triumph at the polls in January 1964. All political parties saw no need for another election in the same year. An agreement was reached that the Independence Constitution should name him as the first President. Kaunda assumed more power as Executive President than the Governor had, as the Governor had to consult the Secretary of State for Colonies in certain matters like appointment of the Deputy Governor.<sup>59</sup> These vast presidential powers were to be abused by Kaunda later.

### **2.3.0. The Search for an Autochthonous Constitution**

The Independence Constitution,<sup>60</sup> did not address the historic neglect of the natives in the colonial era. Understandably, the Constitution was drafted in Whitehall. This was a British document which was acquiesced to, by the then elite, who were at the pinnacle of the independence struggle. The Constitution,<sup>61</sup> did not address the inherited inequalities, but entrenched those inequalities in the social and economic spheres. The Independence Constitution was<sup>62</sup> later perceived as an obstacle to UNIP's exercise of power. They were cynical of the legal order's ability to serve as an instrument of socio-economic transformation.

It is this distrust, which generated a search for a constitution, which could create an environment where correct policies can be adopted to develop the country. The deceptively simple concept of 'development' was born. The post-independence State was presented as the

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<sup>58</sup> Section 32, Independence Constitution.

<sup>59</sup> Section 3 (3), 1963 Order-in-Council.

<sup>60</sup> 1964 Constitution.

<sup>61</sup> Ibid.

<sup>62</sup> Ibid.

harbinger of development and social improvement. The objective therefore underlying the search for a new Constitution, was to establish social democracy or an egalitarian society.

### **2.3.1. The Precursor to the Referendum Bill**

Serious and honest analysis of Zambia's colonial history, suggested that the strategy of development based on an essentially liberal free-market ideology could thwart post-independence distributive justice. This argument surfaced during the preparation of the pre-Independence Reconstruction and Development Programme for South Africa as well.<sup>63</sup> The incoming rulers shouldered a heavier burden, in terms of socio-economic transformation. They had to deliver goods and services hitherto undelivered by the colonial rulers, as they had to close the gap between the settler community and the indigenous people fairly rapidly.<sup>64</sup>

There was the burning desire to remove encumbrances in constitutional amendment, alteration and enactment. A referendum to abolish all referenda was the answer. The 'Bill of Rights', which thwarted the redressing of the past socio-economic inequalities, could now be amended without a referendum. The failure of liberal constitutions to socially and economically transform emerging states, made 'Constitutional Autochthony' appealing and led to the enactment of left-leaning constitutions in Zambia and Africa generally. The only significant amendment to the constitution for the purpose of this study was the reposing in the president power to create and abolish posts. This amendment as we shall see, created a bloated executive within the legislature, which diluted the legislature's ability to check the Executive as most

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<sup>63</sup> Hein Marais, *South Africa, Limits to Change the Political Economy of Transformation* (Cape Town: University of Cape Town Press) p.179.

<sup>64</sup> Marais' view is reinforced by Sinjela, who perceives the independence Constitutions as unsuitable to bring about development, and distributive Justice when he says, 'the developing countries' Constitutions were expected to carry a much heavier burden. They had to foster a new nationalism, create national unity out of diverse ethnic and religious communities, prevent oppression and promote equitable development, inculcate habits of tolerance and democracy and ensure capacity of administration. "Mpazi Sinjela, *Constitutionalism in Africa, Modern trends*, in Ad'Ama Deng's, *The Evolving Africa Constitutionalism* (International Commission of Jurists, 1998) p.28.

backbenchers were appointed Ministers, which tied them to the doctrine of 'collective responsibility'.<sup>65</sup>

### **2.3.2. The Referendum to Abolish All Referendams:**

The Bill proposing the holding of a referendum to repeal sub-section 3 of section 72<sup>66</sup> of the Independence Constitution, was tabled in the National Assembly by the then Vice President Simon Kapwepwe, on 16<sup>th</sup> April 1969. The objective of the Bill, was to remove the referendum clause from the Constitution. Any future alterations to any part of the Constitution, could be made by Parliament with the support of two-thirds majority on the second and third readings of all Members of the National Assembly. Vice President Kapwepwe, put up a spirited argument in supporting the Bill.<sup>67</sup> Mr. Liso, an opposition Member of Parliament from the African National Congress, on the other hand accused government of deception.<sup>68</sup>

The voting was on party lines and seventy Members of the ruling party (UNIP) of the National Assembly supported the motion, while eighteen ANC members opposed it. The government had obtained more than two thirds majority and proceeded to hold a referendum two months later. UNIP, decisively won and future referendams were abolished. The government had impressed upon the electorate that it was in their interest to vote 'yes' as that would facilitate a fair share of the nation's wealth. In any event, the struggle for independence was premised on social and economic inequality. This was the genesis of constitutional manipulation and failure by the Zambian elite to enact an enduring constitution.

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<sup>65</sup> Act No. 1 of 1969 to Amend the Constitution.

<sup>66</sup> Independence Constitution, section 72 (3) (a) (b) (c).

<sup>67</sup> Parliamentary debates, 16<sup>th</sup> April 1969, p.2168.

<sup>68</sup> Ibid, p.2169.

#### 2.4.0. Constitutional Amendments after the Removal of the Referendum Clause

Significant constitution amendments were made to the Independence Order, 1964 and the Independence Constitution, after the removal of the referendum clause.

Constitution amendment Act No. 10 of 1969, deleted subsection (3) of Section 72. This made the alteration of the Constitution flexible. There was no longer a referendum required to amend the Bill of Rights (Chapter III) and the chapter dealing with the Judicature (Chapter VII).<sup>69</sup> Act No. 33 of the same year amended the Constitution by reducing the number of years of practicing before one was appointed a judge from seven years to five years. This was intended to Zambianise the Judiciary when the relationship between President Kaunda and the expatriate-dominated Judiciary was cold.<sup>70</sup> The President after the amendment of Section 99 of the Constitution, single-handedly appointed the Justices of Appeal (now Supreme Court). Before that, he acted on the recommendation of the Judicial Service Commission. This watered down judicial independence and the doctrine of separation of powers.<sup>71</sup>

The Constitution amendment Act of 1970, in terms of fundamental rights and freedoms had a negative impact. Under the Independence Constitution, those in preventive detention could have their detentions reviewed after a month by an Independent Tribunal. Under the 1970 Constitution amendment, detainees had to wait for a year, at their own request, that is when the detentions can be reviewed by an Independent Tribunal. The lapse of the declaration if not ratified by the National Assembly, was increased from five days to twenty eight days. This did not take into account the period when parliament is dissolved.<sup>72</sup>

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<sup>69</sup> Constitution Amendment Act No. 1 of 1969, 12<sup>th</sup> February.

<sup>70</sup> Constitution Amendment Act No. 33 of 1969 Amending the Constitution.

<sup>71</sup> Constitution Amendment Act No. 58 of 1970, increased the President's powers in terms of making high judicial appointments.

<sup>72</sup> Constitution Amendment Act, No. 58 of 1979, 20<sup>th</sup> October.

In 1970, under Constitution Amendment Act No. 44, Barotseland was renamed Western Province and the definition of a chief included the Litunga who had hitherto been excluded from that definition. Under the same amendment No. 44, the presidential powers to discipline and appoint those in the Teaching Service were enhanced. The President could ask for a matter under consideration by the Teaching Service Commission to be referred to him for determination. This politicized the appointment and disciplinary process of the teaching profession.<sup>73</sup> It would have been legally difficult to enact the one-party constitution before the referendum as this touched on freedoms contained in the 'Bill of Rights'. The overall effect of the removal of the referendum clause was that the Bill of Rights could very easily be altered at the will of the Executive.

#### **2.4.1. The Creation of a One-Party State**

Chikwudie Wiredu, remarks that, "decision making in traditional African life and governance was, as a rule, by consensus". Like all generalizations about complex subjects, it may be legitimate to take this principle with a pinch of prudence. But there is considerable evidence that decision by consensus was often the order of the day in African deliberations. So it was not a deliberate exaggeration, when President Kaunda said, "in our original societies we operated by consensus". An issue was talked about in the solemn conclave until such time as agreement could be achieved."<sup>74</sup> Nyerere, retired President of Tanzania, also said, "in African society the traditional method of conducting affairs is by free discussion". He quoted Guy-Clutton-Brock with approval to the effect that "elders sit under the big tree and talked until they agree."<sup>75</sup> Ironically, both pronouncements were made in the course of defence of the One-Party

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<sup>73</sup> Constitution Amendment Act, No 44 of 1970..

<sup>74</sup> Wiredu Chikwudie, *Post-Colonial African Philosophy, a Critical Reader* (Oxford: Blackwell Publisher, 1997) p.75.

<sup>75</sup> *Ibid*, p.172.

political system.<sup>76</sup> In Zambia, however it is important to note the change from a multi-party to a one-party political system came at a time when UNIP's popularity was on the wave and the economy had taken a down turn.

In 1972, on 15<sup>th</sup> December, the National Assembly enacted Act No. 27, which outlawed the existence and formation of any political party apart from the United National Independence Party. The enactment undermined two fundamental rights and freedoms in the then existing Constitution, the freedom of expression and freedom of assembly and association. The Central Committee, hitherto a party organ, was elevated above Cabinet.<sup>77</sup> The concept of 'Party Supremacy' was born. The leadership code was introduced, which was premised on creating an egalitarian society. The provisions of the leadership code offended property rights of the men and women, who were spouses to senior party and government employees by subjecting these spouses to the leadership code as if they were employees of the party and government.<sup>78</sup>

In 1980, the Constitution was amended elevating the Secretary General of the Party to the Vice Presidency, and creating positions of Prime Minister and Secretary of State for Defence and Security. Much earlier The Chief Justice was relegated from number three to number five in the government hierarchy.<sup>79</sup>

In terms of parliamentary democracy, in 1983, the Central Committee was empowered to adopt National Assembly candidates before they could stand for an election. Those whom the Central Committee deemed their candidature inimical to the interests of the State, could not be

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<sup>76</sup> Wiredu Chikwudie, *Post-Colonial African Philosophy*, op cit, p.303. Another reason advanced in support of Single-Party political systems in Zambia and elsewhere in Africa is based upon the understanding that in Africa, and probably elsewhere as well, rival political parties in emergent countries were not based on policy. If anything, these parties were mainly based on tribe, religion and region. It was argued that for this reason, it is necessary that there should be no multiplicity of parties, since they have no new ideas to offer. This is because Africa cannot afford the luxury of opposition political parties, simply based on power struggles alone

<sup>77</sup> Constitution Amendment Act, No. 44 of 1970, 24<sup>th</sup> December.

<sup>78</sup> Constitution Amendment Act, No. 10 of 1972.

<sup>79</sup> Constitution Amendment Act, No. 10 of 1980.

allowed to stand.<sup>80</sup> People in the defence and security forces, public service and parastatals could not stand as candidates of the National Assembly.<sup>81</sup>

#### 2.4.2. The Enactment of a One-Party State Constitution

The President, under Section 2 of the Inquiries Act,<sup>82</sup> issued Statutory Instrument No.46 of 1972 appointing a commission of inquiry, consisting of twenty members drawn from mostly the ruling party. The Commission was headed by Mainza Chona, the then Vice President of Zambia, Humphrey Mulemba, the then Minister of Mines and Secretary General of UNIP, was its Vice Chairman. The President did appoint to the Commission, the President and Vice President of the African National Congress, Nkumbula and Mundia respectively.

The Commission's terms of reference were to consider among other things:

*“The change in the Constitution of the Republic of Zambia, the practices and procedures of the government of the Republic and the Constitution of the United National Independence Party, necessary to bring about and establish One-Party Participatory Democracy in Zambia”.*<sup>83</sup>

This terms of Reference, it may be argued, was itself unconstitutional in that it stifled debate for or against a One-Party-State. The introduction of the One-Party State violated the existing Constitution which entrenched the freedom of expression, assembly and association.<sup>84</sup>

The President and the Vice President of the African National Congress declined their appointments as Commissioners. In their view, a decision had already been made to establish a One-Party-State, without consulting the Zambian people. The composition of the Commission

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<sup>80</sup> Constitution Amendment Act, No. 1 of 1983.

<sup>81</sup> Constitution Amendment Act, No. 3 of 1986.

<sup>82</sup> Statutory Instrument No.46 of 1972.

<sup>83</sup> Wiredu Chikwudie, Post-colonial African Philosophy, op cit, p.303.

<sup>84</sup> Independence Constitution, Articles 22 and 23.

was executive weighted. The terms of reference were partisan. A wider compact paradigm was not employed in the formulation of the One-Party-State Constitution. The two petitioners unsuccessfully challenged the constitutionality of the introduction of the One-Party-State in the High Court and Court of Appeal.<sup>85</sup> It is seriously doubted whether the High Court and Court of Appeal would have upheld the establishment of the One-Party-State Constitution in the current global democratic environment.

The constitutional provisions that changed Zambia's political landscape were couched in these terms:

*“(1) There shall be one and only one political party or organization in Zambia namely, the United National Independent Party (in this constitution referred to as “the party”) the Constitution whereof is annexed hereto for information.*

*(2) Nothing contained in this constitution shall be construed as to entitle any person lawfully to form or attempt to form any political party or organization other than the United National Independence Party, or to belong to, assemble or associate with or express opinions or do anything in sympathy with, such political party or organization”.*<sup>86</sup>

It was very clear that, the new provisions annulled the fundamental rights contained in the ‘Bill of Rights’, of the then existing Constitution. This was an overthrow of that Constitution with the agreement of the Judiciary.

#### **2.5.0. Constitution Amendments after the One-Party-State**

One most important introduction in the one-party Constitution,<sup>87</sup> was the ‘Supremacy of the Party’, whose policies became superior to those of Cabinet. The President remained at the

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<sup>85</sup> *Nkumbula V Attorney-General* 1972 ZR 111, ZR 204.

<sup>86</sup> Article 4(1) (2) One-Party Constitution Act No. 27 of 1973.

<sup>87</sup> Article 12(3) The Constitution of UNIP, Act No. 27 of 1973.

helm of the Party and its government. The Secretary General of UNIP now became number two in the state structure.<sup>88</sup> This was achieved by incorporating the Party Constitution into the Republican Constitution, with the result that the Executive organ was bloated. The Secretary-General performed the functions of the President in his absence, and in the absence of the Secretary General, a Member of the Central Committee elected by the Central Committee performed the functions of President.<sup>89</sup> The Central Committee hitherto a 'party organ,' had been elevated above cabinet. Paramount Chiefs and Commanders of the Security Forces were co-opted into the Central Committee.

There were structural changes made to the composition of cabinet after the elevation of the Central Committee. The Secretary-General of the Party became a member of cabinet. The Offices of Prime Minister, Ministers and Junior Ministers were created and were appointed from among Members of the National Assembly by the President. The President presided over cabinet meetings, in his absence, the Prime Minister, in the Prime Minister's absence, a Minister designated by the President.

There was the Central Committee, whose duties were partly executive and political in nature. The Central Committee which included commanders of the security forces initiated government policy and performed government functions as directed by the President. At the same time there were full-time Members who had offices at the National Headquarters of the Party.<sup>90</sup>

The Central Committee had various sub-Committees which were eight in number. The Central Committee dealt with defence and security, political, constitutional, legal and foreign

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<sup>88</sup> Section 2 of the Constitution Amendment Act No. 10 of 1980.

<sup>89</sup> Section 15, The Constitution of UNIP, Act No 27 of 1973.

<sup>90</sup> Section 13 (1), One-Party State Constitution.

affairs, economic, finance, social and cultural, elections and publicity, appointments and discipline, rural development, youth and sport. The Central Committee consisted of up to twenty five Members.<sup>91</sup>

The power to formulate policy had moved from the Cabinet to the Central Committee. Party functionaries had been integrated into the executive arm of Government. The party also co-opted Members of the Executive notably the heads of security wings into the party's policy-making-body, the National Council.

It was clear that by co-opting Members of the security forces into the nation's supreme policy-making-body, Kaunda had achieved three objectives. Firstly, by including security wings in policy formulation, they became co-owners (with the party and its government) of the policies of the Party and Government; secondly, the ability to overthrow those policies was thwarted as the security wings were party to these policies; thirdly, Kaunda cultivated in them a sense of resentment of those that opposed those policies and were therefore ready and willing to defend these policies against Kaunda's political opponents. This explains the ruthlessness with which the security forces suppressed dissent and explains the excesses of the one-party era. There was legalized brutality by abusing preventive detention under Regulation 33(6) of the Preservation of the Public Security Act.<sup>92</sup>

### **2.5.1. The Enactment of the 1991 Constitution**

Every constitution making process is generated by the need to reconfigure power sharing in a polity. The supremacy of the Party under the One-Party Constitution was contrary to the doctrine of 'Separation of Powers' in a classical sense, extensively discussed in chapter four.

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<sup>91</sup> Article 16 (1), One-Party State Constitution Act No.27 of 1973.

<sup>92</sup> The then, Chapter 106 of the Laws of Zambia, now Chapter 112.

There was politicization of the security apparatus, where, the Commanders of the Army, National Service, Airforce, Inspector General of Police and the Director General of Intelligence became Members of the Central Committee of the ruling party. This was the highest policy making body in the country. This set up was not permissive to diversity and dissenting views. Dissent was ruthlessly repressed by the politicized security wings. The seeds for the re-introduction of plural politics had been planted. The economy had deteriorated due to political economic mismanagement.

The churches, businessmen, politicians and students had come to a firm conclusion that the One-Party political system, cannot socially and economically be sustained. Externally, Zambia was under pressure from its moneylenders, notably the multilateral institutions, to liberalize politically and economically in order to attract foreign investment. The political and economic conditionalities will be extensively discussed in Chapter eight as external propellants to constitutionalism in the Third Republic.

The conditions were ripe for change of the political system in the absence of a democratic system for a violent takeover of power, but this was obstructed by top security brass. As mentioned earlier, Kaunda had co-opted them in the UNIP Central Committee. However, a lower ranking Army Officer, Lieutenant Mwamba Luchembe, made an attempt to overthrow the Government on 30<sup>th</sup> June 1990. This became a major catalyst for political and constitutional reform in Zambia, whose impact on political reform was deeper than the 1988 attempted coup led by General Christon Tembo, who later became Vice President in the Chiluba Government.

### **2.5.2. The Mvunga Constitution Commission**

President Kaunda informed the nation that the party and its government had decided that the Country should revert to a multi-party democracy. This was during his opening address to the

The composition of the National Assembly was enlarged to 150 Members, but nominated Members were reduced to 8.<sup>97</sup> Article 75 which provided for primary elections prior to the actual National Assembly elections, was repealed as this was undesirable in the new political dispensation. This was only relevant in a one-party political system, where there were no competing parties.

Given the totalitarian environment the Mvunga Commission operated under, the recommendations were courageous and pragmatic and Kaunda magnimously accepted almost all recommendations.

#### **2.6.0. The Mwanakatwe Constitution Review Commission**

Upon coming into office, after convincingly defeating the Kaunda administration in the 1991 elections, President Chiluba appointed a Constitution Review Commission. This Inquiry was headed by a distinguished educationist, former Cabinet Minister in the Kaunda government, and lawyer, John Mwanakatwe.<sup>98</sup> It was quite clear then, that Chiluba was democratically spirited and was desirous of giving the Zambians a neo-liberal Constitution, in which the fundamental rights and freedoms were going to be sacrosanct. The foundation of the struggle for multi-partyism by Chiluba and his colleagues was premised on the establishment of a constitution which will respect fundamental rights and freedoms.

Mwanakatwe, was convinced that Chiluba and his colleagues had the political will to enact a liberal Constitution, especially that Chiluba had just completed his Masters thesis in democratic studies. It later became apparent that Chiluba's attachment to constitutional dogmas

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<sup>97</sup> Article 44 of the Constitution of Zambia.

<sup>98</sup> Statutory Instrument No.151 of 1993.

was without compassion. He purported to be a democrat upon assuming office, but he rejected the very progressive recommendations of the Commission.

It turned out that the whole exercise was premised on barring Kaunda to stand for the presidency,<sup>99</sup> knowing very well that Kaunda's parents hailed from Malawi. The failure of the MMD to respond to people's expectations in the socio-economic sphere, made people feel nostalgic about the Kaunda era, where the government distributed free mealie meal. Unrealistic privatization had led to job losses which were not mitigated by any 'social safety net'. In such an environment, Kaunda's willingness to contest the presidency constituted a serious threat to continued MMD rule. A constitutional scheme to bar him had to be conceived. The ruling party pushed the amendment through Parliament in 1996, rather than providing for the recommendations to be agreed by a Constituent Assembly and subject to a referendum, as the Mwanakatwe Commission had recommended.

However, the resultant constitution amendment was disappointing as none of the progressive recommendations was incorporated in the Constitution. Only the recommendation for the presidential candidate to have both his parents Zambian by birth or descent<sup>100</sup> was accepted by government. This provision was discriminatory. It undermined the very essence of the constitution-making process, that of enhancing fundamental rights and freedoms. The amendment did not add value to the existing Constitution.

The Mvunga Commission, was very cautious in its recommendations as they knew they were dealing with an overbearing regime. The Mwanakatwe Commission thought they were dealing with a democrat. It was the Mvunga Commission's caution which led to the acceptance

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<sup>99</sup> Report of the John Mwanakatwe Constitution Review Commission 16<sup>th</sup> June 1995.

<sup>100</sup> Constitution Amendment, Act No.18 of 1996, Article 34 (3).

of most of their recommendations. The Mwanakatwe Commission's misconception led to the rejection of most of their recommendations. As the Mwanakatwe Commission observed, the Mvunga Commission's recommendations appear to have leaned heavily in favour of the President's address to the National Council.<sup>101</sup>

Structurally, the 1991 Constitution abolished the post of Prime Minister and created that of Vice President. His functions were, to act as President when the incumbent is incapacitated or absent from office or has died.<sup>102</sup> In the latter event, he may act as President for a period of not more than 90 days, until the elections are held. He was to be advisor to the President. There was a requirement for the President to declare his assets and liabilities for scrutiny before elections. The rationale was to forestall the President using his position to enrich himself. Powers and duties of the President remained the same, save his functions under the UNIP constitution were severed from governmental functions. Cabinet became the policy formulator and advisor to the President, who could refer some matters which he deemed fit to Cabinet for advice.<sup>103</sup>

The Mwanakatwe Commission recommended the retention of the Executive Presidency. Innovative were the recommendations that a date for elections be set in the Constitution, a thirty day transition period for a smooth transfer of power by the outgoing to the incoming President. The outgoing President was to be responsible for the day to day administrative duties of the Office of the President. The outgoing President would make decisions only with the consent of the President-elect on important matters. In particular, the outgoing President should neither initiate policy measures nor make important appointments to public offices. In addition,

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<sup>101</sup> Mwanakatwe Constitution Review Report, 1995.

<sup>102</sup> Article 50, Constitution of Zambia.

<sup>103</sup> Ibid.

provisions relating to war, state of public emergency or threatened emergency should only be invoked with the consent of the President elect.<sup>104</sup>

The Judicial Service Commission was enlarged by including the Attorney-General, the Secretary to the Cabinet and Chairman of the Public Service Commission, who were Members of the Executive. A judge of the Court of Appeal or Puisne Judge was removed from membership of the Judicial Service Commission. The Commission became Executive weighted,<sup>105</sup> which made appointment of judges susceptible to ulterior considerations for example, political leanings.

A Provision, which allowed the President to appoint High Court Commissioners, who enjoyed the powers and benefits of High Court judges, was introduced.<sup>106</sup> These did not have security of tenure and their appointments were revocable at the instance of the President, which compromised their independence as they served at the President's pleasure.

One fundamental flaw was the survival of Article 108, which allowed the President to appoint Supreme Court judges single-handedly without the advice of the Judicial Service Commission. The President could appoint a person as Supreme Court judge even if he/she did not meet the qualifications enumerated in Article 112.<sup>107</sup> This was intended to neutralize the expatriate dominated Judiciary by appointing Zambians as judges, who at the time had not reached seven years post-qualification experience.

The 1991 Constitution was innovative in that it provided for the autonomy of the Judiciary.<sup>108</sup> The Constitution also provided for the appointment of the Chief Justice, Deputy Chief Justice, Supreme Court judges and High Court judges by the President subject to

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<sup>104</sup> Mwanakatwe Constitutional Review Commission, op cit, p.103.

<sup>105</sup> Article 115 (1), One-Party-State Constitution.

<sup>106</sup> Ibid, Article 110..

<sup>107</sup> Ibid.

<sup>108</sup> Article 91 (3) Constitution of Zambia..

ratification by the National Assembly.<sup>109</sup> Ratification made the appointment of judges transparent. However, a recommendation that the Chief Justice who had hitherto enjoyed security of tenure was going to serve at the pleasure of the President contravened the then existing Constitution. The conditions of service were to be altered by amending Article 113(1)<sup>110</sup> which is couched in these terms:

*“Subject to the provisions of this Article, a person holding the office of a judge of the Supreme Court or the office of judge of the High Court shall vacate that office on attaining the age of sixty-five years”*

Apart from such a recommendation violating the then existing Constitution, the fundamental question was, can a Chief Justice who does not have security of tenure be truly independent?. As Chief Justice and Chairman of the Judicial Service Commission, his position would have been susceptible to prejudice. The Chief Justice, having close connection with the Executive and the Judicial Service Commission being Executive-dominated, the nominees for judgeship would more likely be partisan.

The proposal to have Supreme Court and High Court judges ratified by Parliament enhanced independent-mindedness, as judges did not feel that they owed their appointments to the President.<sup>111</sup> The composition of the Judicial Service Commission consisted of the Chief Justice, a Supreme Court Judge, Attorney-General, Secretary to the Cabinet, Solicitor General, Chairman of the Public Service Commission, Dean School of Law, a representative from the Law Association of Zambia and a representative of Parliament was more executive-weighted. The Executive have four representatives, Attorney General, Solicitor General, Secretary to

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<sup>109</sup> Article 93 (1) (2) 95 (1), Constitution of Zambia.

<sup>110</sup> Mvunga Commission Recommendation, op cit, 7.1 (a).

<sup>111</sup> Mwanakatwe Constitutional Review Commission Report, op cit, Recommendation 6.1 (1).

Cabinet, Chairman Public Service Commission. The Judiciary had two representatives, the Chief Justice and a Supreme Court judge, Parliament and the Law Association had one representative each. With such a composition which is Executive dominated, it is doubtful that the appointed judge would be from an independent background.

The Mwanakatwe Commission recommended the restructuring of the Judiciary by creation of a Constitutional Court below the Supreme Court.<sup>112</sup> The Commission took on board the Judiciary's opposition to the creation of a Constitutional Court at the same level with the Supreme Court, as recommended by the Mvunga Commission. The Constitutional Court's jurisdiction was to adjudicate upon executive acts or conduct or threatened administrative acts, to test retroactively the constitutionality of any law and to adjudicate upon disputes among organs of Government.

With introspection, the Commission would have realized that this was unworkable. Legislation would have been moving at the pace of the Constitutional Court and the Supreme Court to which the appeals would have been filed. If it took five years to dispose off a dispute or matter, that would have meant that proposed legislation would not have seen the light of day. Similarly, if there is an allegation that the act or threatened act is unconstitutional, the wheels of the Executive and Legislative organs would have grounded to a halt.

The invalidation of past legislation on the ground of unconstitutionality, would have opened a Pandora box jurisprudentially. Legislation to be impugned would have conferred rights and obligations. Accrued rights cannot be taken away. The point that is being made is that legislation taking away rights cannot have retroactive application. The Supreme Court discussed

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<sup>112</sup> Mwanakatwe Constitutional Review Commission Report, op cit, p.150.

this legal position in *Moobala V Muwezwa*.<sup>113</sup> This proposal would have been caught up in a legal web.

The Mwanakatwe Commission proposed the broadening or widening of the scope and regime of rights and freedoms in order to consolidate democracy and secure more liberties. It was the Commission's view that rights of women, children and disabled persons should be given prominence. In some instances, the Commission recommended that certain rights that were previously being dealt with, as aspects of other rights should be treated as new rights that are capable of standing on their own. For example, the freedom of residence, religion and conscience were to stand on their own.

The Commission recommended the broadening of provisions dealing with the enforcement of the 'Bill of Rights'. It was proposed that Article 28 be revised to enable an aggrieved person adequate means to obtain redress. The current view is that, there is need to fuse Civil Rights Rules with Judicial Review, as both processes are used by those that claim that their rights have been violated by servants of government.<sup>114</sup>

Under the Civil Rights Rules,<sup>115</sup> the Petitioner, petitions against the violation of his fundamental rights under part III of the Constitution, while the latter procedure is used to obtain administrative justice, by way of prerogative writs of certiorari, mandamus and prohibition. This is where a servant or servants of government have committed an administrative wrong against the individual or where there has been an omission to act, which omission is prejudicial to the individual. It is critical that in constitutional matters the concept of standing is broadened as

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<sup>113</sup> *SCZJ No.3 of 1991.*

<sup>114</sup> This is the view of the Judiciary, after observing that in other Jurisdictions like Trinidad and Tobago, which have only one Act (The Judicial Review Act) dealing with petitions under the Bill of Rights and any administrative wrong doing. In Zambia, we have parallel processes, the civil rights rules for a petition against the violation of fundamental rights and freedoms and Order 53 of the Rule of the Supreme Court of England for judicial review for other administrative wrongs.

<sup>115</sup> S.I. No. 156 of 1969.

these are matters of public interest. The remedies should include injunctions against the State and Section 16 of the State Proceedings Act, which prohibits injunctions against the State should be repealed.

Most of the countries with modern Constitutions like Canada, India, South Africa and the United States, use Judicial Review, to realize rights and freedoms guaranteed under the Constitution . It would be less costly to litigants if the procedures were fused. This would enhance access to Justice, which is a human right as the procedure would be simplified. During Charter rule, there were no governmental structure nor was there separation of powers. This was rule for the BSA Company by the BSA Company and for the BSA Company while colonial rule was for the settlers by the settlers and for the settlers. After independence, there was an attempt to create an egalitarian society by enacting an indigenous constitution. However, there was no constitution enacted which could stand the test of time.

#### **2.7.0. Conclusion:**

Zambia's constitutional history has been marred by constitutional manipulation by the ruling elite. During charter rule, only institutions that facilitated the BSAC's commercial interests were set up. In the colonial period, government institutions like the Executive, Legislature and the Judiciary were set up. These institutions served settler interests. In post-Independent Zambia, the constitution making process has been elitist. Constitutions have not been products of consensus, hence the frequency of making and remaking of Constitutions. The diagnosis by the Constitutional Review Commissions in the Third Republic, about what aspects negate constitutional democracy, has by and large been correct. What has been flawed is the prescription i.e. the resultant legal framework. The Office of the President has dictated both the

process and the content. Professor Mvunga, observes on how the method of adoption of the Constitution is essential to constitutional democracy when he says:

*“The manner in which a constitution is finally adopted is crucial in determining its legitimacy, popularity and acceptability. Since independence, Zambia has been using undemocratic means of adopting its constitutions. The government has always appointed members of the Constitution Review Commissions to make-believe that the Constitution was being made through people’s consensus. The government would then turn around and make its own recommendations through the white paper accepting, rejecting and modifying some of the people’s wishes”.*<sup>116</sup>

Kaunda used the above method to abolish Multi-Partyism when his regime’s legitimacy was waning. He reintroduced multi-party politics using the same method. He did so under domestic and international pressure and after the realization that socialism as a social, economic and political concept could not be sustained.

Given the polarization of the political landscape by Kaunda’s unwillingness to voluntarily enact a liberal constitution until it became apparent that he could not contain internal as well as external forces, the Mvunga Commission would not have done any better. The Commission was torn between UNIP stalwarts (conservatives) who were the appointing authority and the intellectuals.

It is clear that Chiluba’s Government, having ascended to power on a liberal platform, gave false hope to the people of Zambia. When this ruling elite occupied government positions, they started plotting their perpetual retention of their positions. They could only do this by strengthening the Executive Branch of Government at the expense of the other organs of State.<sup>117</sup>

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<sup>116</sup> The Post, 7<sup>th</sup> December 2008.

<sup>117</sup> The Sunday Mail, 26<sup>th</sup> December 2004.

It is very clear that in Zambia and most African countries, the battle over the Constitution is centered on presidential powers, as the latest example in Kenya illustrates. This explains why in Zambia the Executive and the Executive-dominated Legislature, do not want other stakeholders, namely, opposition political parties, civil society, among others to equally participate by way of a Constituent Assembly in the constitution making process. The successive Presidents have taken advantage of the One-Party-Dominant-State to exercise complete control over Members of Parliament, with the resultant rubber-stamping of all statutes proposed by the Executive.

In the Second and Third Republics, the Inquiries Act,<sup>118</sup> which gives the Government power to veto any recommendation they do not like, has been used. Currently, the political landscape is polarized as the battle on how and when the Constitution should be enacted rages. The President casting his position in concrete, civil society and opposition parties saying they are ready to be imprisoned, rather than let Mwanawasa enact a constitution as has been done in the past and hold elections in 2006 under the present Constitution.<sup>119</sup> Despite the appointment of four Constitutional Review Commissions, Zambia has not enacted an enduring Constitution.

However, Kenya has enacted one of the modern constitutions. The Constitution of Kenya Review Act, obligates every citizen to respect, uphold and defend the Constitution. The organs of state, when interpreting the Constitution, enacting, applying<sup>120</sup> or interpreting any law, making or implementing public policy decisions, are bound by natural values and principles of governance. The values and principles are devolution of power, the rule of law, democracy, human dignity, equity, social justice, equality, human rights, good governance, integrity,

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<sup>118</sup> Chapter 41 of the Laws of Zambia.

<sup>119</sup> The Post, 28<sup>th</sup> December 2004.

<sup>120</sup> Article 3, Constitution of Kenya Review Act, 2008 (No. 9 of 2008).

transparency and accountability and sustainable development.<sup>121</sup> The Constitution Review Act, casts a duty on the State Organs to facilitate the enjoyment of fundamental rights and freedoms by promoting, observing, protecting and fulfilling the fundamental rights and freedoms. The state is obligated to demonstrate international human rights instruments.<sup>122</sup> The right to institute proceedings have been broadened in two senses in enforcement of the Bill of Rights. The rule of sufficient interest has been done away with, the Court can entertain proceedings on the basis of informal procedure, and there are no fees chargeable.<sup>123</sup> The Constitution Review Act, depoliticizes the civil service by subjecting principal secretaries, high commissioners, ambassadors to ratification by the National Assembly.

The next Chapter defines constitutionalism.

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<sup>121</sup> Article 10, Constitution of Kenya Review Act.

<sup>122</sup> Ibid, Article 21.

<sup>123</sup> Ibid, Article 27.

## CHAPTER THREE

### CONSTITUTIONALISM

#### 3.1.0. What is a Constitution?

In every country, a national constitution articulates the vision of a society, defines the fundamental principles by which the government is organized and distributes power within it and plays an important role in nation-building and consolidating the nation state. The idea of a constitutional democratic government, or constitutionalism, connotes a government defined, regulated and limited by the Constitution. Constitutional democracy is founded upon the notion of checks and balances, namely that different institutions – the legislature, the judiciary and the executive – while operating independently of one another, act to check each other's operations and balance each other's power. In essence, all three institutions are duty-bound to uphold the rule of law. This necessitates the precise definition of the roles of each institution and that of public officials.<sup>1</sup>

In the absence of role definitions, decisions are either not taken, or they are taken by persons without authority to do so, or else by the top leadership of the state apparatus, who know little or nothing about the situation.<sup>2</sup>

A nation's constitution should be its most valued document and preparing it is a weighty undertaking that should not be done in isolation of the people. Nothing is more important in the political culture and history of a nation than the constitution by which its citizens are ruled and there is a growing view that the new process-led constitutionalism is reminiscent of the anti-colonial struggle.

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<sup>1</sup> Ndulo Muna, *Democratic Reform in Africa, Its Impact on Governance and Poverty Alleviation* (Oxford: James Currey) p.2.

<sup>2</sup> *Ibid.*

The constitution-making process should ideally observe the basic principles of legitimacy, inclusivity, empowerment of civil society, openness and transparency, accessibility and accountability. This is only feasible if a constitution commission is independent, otherwise the constitution which is a product of a partisan body will not be enduring. The Independence constitutions were drafted in Lancaster and lacked the basic principles, and a case was made out by the post-colonial rulers for altering and amending those constitutions. In relation to the Cyprus Constitution of 1960, Justice Vassiliades remarked upon what he called, 'the sin of ignoring time and human nature in the making of our constitution.' 'Time moves on continuously,' he said, 'man is, by nature, a creature of evolution and change as time moves, time and man moved on, while the constitution remained fixed, the inevitable crack came – perhaps a good deal sooner than some people may have thought – with grave and far reaching consequences'. In the case of Zambia, the introduction of a one party state led to a phenomenal abuse of power.<sup>3</sup> But a constitution may also be used for other purposes other than a restraint upon government. It may consist to a large extent of nothing, but lofty declarations of objectives and a description of the organs of government in terms that import no enforceable legal restraints. Far from imposing a brake upon government, such a constitution may indeed facilitate or even legitimize the assumption of dictatorial powers by the government.

### **3.1.1. Nature and content of the restraints on Government**

Professor de Smith has prescribed what he considers the minimum restraint necessary for constitutionalism, as follows:

*“A contemporary liberal democrat, if asked to lay down a set of minimum standards, may be very willing to concede that constitutionalism is practiced in a country where the government is genuinely accountable to an entity or organ distinct from itself*

<sup>3</sup> Nauru Constitutional Commonwealth Human Rights Initiative Review CHRI Submission, November 2006, p.2. [Cecilia@humanrightsinitiative.org](mailto:Cecilia@humanrightsinitiative.org).

*where elections are freely held on a wide franchise at frequent intervals, where political groups are free to organize in opposition to the government in office and where there are effective legal guarantees of fundamental civil liberties enforced by an independent Judiciary; and he may not easily be persuaded to identify constitutionalism in a country where any of these conditions is lacking.*"<sup>4</sup>

Professor de Smith's definition of constitutionalism lays emphasis on separation of powers, democratic elections and human rights enforceable by an independent Judiciary.

Nwabueze observes that:

*"This is also the prescription of Professor Macllwain who maintains that all that is required is the ancient legal restraint of a guarantee of civil liberties enforceable by an independent court and the modern concept of the full responsibility of government to the whole mass of the governed. There can be no doubt that the core and substantive is the limitation of government by a constitutional guarantee of individual civil liberties enforceable by an independent tribunal. Delivering from the fundamental values of society, values which, articulated in public opinion, express a society's way of life and uphold its members' personality, individual civil liberties are indeed the very essence of constitutional government."*<sup>5</sup>

It may be argued that by and large, Professor de Smith and Macllwain appear to associate constitutionalism with a written constitution, which delimits governmental power, by allocating primary functions to each organ of state not performable by another organ, which is formal constitutionalism. Additionally, their definitions emphasize juridical constitutionalism, with its emphasis on judicial enforcement of bills of rights in the context of privately initiated litigation. Professor Whittington's definition of constitutionalism is broader. He defines constitutionalism as:

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<sup>4</sup> Nwabueze B.O., *Constitutionalism in the Emergent States*, London C. Hurst & Company, p.5.

<sup>5</sup> *Ibid*, p.2.

*“The constraining of government in order to better effectuate the fundamental principles of the political regime. It can be argued in a sense (often associated with Aristotle) every country has a constitution. That is, every country has a governmental framework that can be described and categorized. Alternatively, constitutions might be identified specifically with a written document that formalizes the framework of government. But it has been strongly argued that “constitutionalism” should be distinguished from the mere possession of a constitution, whether in an Aristotelian or a written sense. Written constitutions may provide few effective constraints on government or may be ignored, and governments may be effectively constrained without a written constitution, with Great Britain being the classic example.”<sup>6</sup>*

The emphasis of Professor Whittington is the spirit of constitutionalism. That is the real meaning or intention of the constitution as opposed to its strict verbal interpretation. Barnett defines constitutionalism as:

*“The doctrine which governs the legitimacy of government action. By constitutionalism is meant – in relation to constitutions written and unwritten – conformity with the broad philosophical values within a state. Constitutionalism implies something far more important than the idea of ‘legality’ which requires official conduct to be in accordance with pre-fixed legal rules. A power may be exercised on legal authority, however, that fact is not determinative of whether or not the action was ‘constitutional.’ The doctrine of constitutionalism suggest, at least the following:*

- (a) that the exercise of power be within the legal limits conferred by Parliament on those with power – the concept of ultra vires –and those who exercise power are accountable to law;*
- (b) the exercise of power – irrespective of legal authority – must conform to the notion of respect for the individual and the individual citizen’s rights;*
- (c) that the powers conferred on institutions within a state – whether legislative, executive, or judicial – be*

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<sup>6</sup> Whittington Keith E, Kelemen R. Daniel, Caldeira Gregory A, The Oxford Handbook of Law and Politics, Oxford University Press, 2008, p.281.

*sufficiently dispersed between the various institutions so as to avoid the abuse of power; and (d) that the government, in formulating policy, are accountable to the electorate on whose trust power is held.”<sup>7</sup>*

In summary, constitutionalism suggests the limitation of power, the separation of powers and the doctrine of responsible accountable government. Barnett’s definition is expansive. He states that there can be substantive constitutionalism (the spirit of the constitution) with formal constitution (a single written document called a constitution). Further he argues that constitutionalism is more than legalism. Here he means constitutionalism can be undermined through constitutional means. Hatchard has demonstrated this scheme in the Zimbabwean case.

Since independence in 1980, the Constitution of Zimbabwe has been amended on thirteen occasions. Given the circumstances of its birth, some amendments were inevitable and entirely desirable. The same cannot be said for some of the others. Thus constitutional amendments have, amongst other things, specifically sought to oust the jurisdiction of the courts to prevent the Supreme Court from hearing a case relating to the scope of the fundamental rights provisions, and to overturn its decision thereon.<sup>8</sup> For example, in 1990 in *Chelya V The Supreme Court*, the court asked for full arguments on the issue of whether the use of hanging constituted inhuman or degrading treatment or punishment contrary to Section 15(1) of the Constitution and a date was set for hearing. The response of government was immediate. Shortly before hearing, a constitution amendment Bill was published which included a provision specifically upholding the constitutionality of executions by hanging. The Minister of Justice, Legal and Parliamentary Affairs told parliament that any holding to the contrary ‘would be untenable to government

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<sup>7</sup> Barnett Hilaire, *Constitutional and Administrative Law*, Second Edition, London: Cavendish Publishing Limited, 1998, pp.5-6.

<sup>8</sup> Hatchard John, *Undermining constitutions by Constitutional means. Some thoughts on the New Constitutions of Southern Africa XXVIII CILSA 1995*, pp.22-23.

which holds the correct and firm view that Parliament makes the laws and the courts interpret them'. He added that the abolition of the death sentence was a matter for the executive and legislature and that 'government will not and cannot countenance a situation where the death penalty is de facto abolished through the back door'.<sup>9</sup>

Such amendments were constitutionally permissible. The Zimbabwean experience highlights the problem of relying on the legislative as the major safeguard on constitutional changes. Firstly, Zimbabwe, in line with several other African States such as Zambia and Namibia, has one dominant political party so that of the 150 members of Parliament, there are only three non-government supporters. This inevitably means that the enhanced parliamentary majority has limited practical value.<sup>10</sup>

**3.1.2.** The meaning of constitutionalism and good governance is one of the rapid evolving subjects. This is a subject whose meaning keeps on expanding as both the developed and developing democracies seek to restructure the state in order to control the state. No one group could be said to have sufficiently defined constitutionalism and good governance, as each group places emphasis on the aspect which has more appeal. Some theorists emphasize the controlling of the state, the Rule of Law, some emphasize human rights, some liberal democracy. In terms of good governance, some theorists emphasize decentralization while others emphasize accountability and transparency and the supporting of institutions supporting constitutional democracy. As poverty starts causing political instability, the definition of good governance has come to include ethical expenditure of resources and poverty alleviation.

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<sup>9</sup> Hatchard John, *Undermining the Constitution by Constitutional Means*, op cit, pp.22-23.

<sup>10</sup> Ibid.

### 3.2.0. The Rule of Law and Constitutionalism

The starting point of the rule of law is separation of powers. The organs of government, that is the Executive, Legislature and Judiciary, must function within their constitutionally sanctioned mandate. The Executive must obey the laws enacted by the legislature, while the legislature must enact laws in conformity with the constitution. The Judiciary must interpret the laws enacted by the legislature and should not make laws as a primary function. In that way, the rule of law tames or controls the state. This state of affairs is thus contrasted with a regime of caprice or arbitrariness in which acts or omissions are traceable to the whims of a particular man (or woman) in power at a given time.

Ndulo observes that:

*“The rule of law connotes the use of state power, through rules of law for the establishment of the economic and social system agreed upon by the people via constitutionally sanctioned representative institutions or other acceptable surrogates. Typically the decision and regulation of state power is established through the national constitution. In this sense a national constitution is a charter of government. It is a body of fundamental principles by which society organizes a government for itself, defines and limits its powers, and regulates the relations between the state and its citizens.”<sup>11</sup>*

The aim of the rule of law is to limit State power, thereby checking the arbitrary oppressive, and despotic tendencies of power and to ensure the equal treatment and protection of all citizens irrespective of race, class, status, religion, place of origin, or political persuasion. It implies the legal framework that is fair, that is enforced impartially and that legitimizes state actions. Authority is legitimate if there is an established legal and institutional framework, and if

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<sup>11</sup> Ndulo Muna, Democratic Reform in Africa, Its Impact on Governance and Poverty Alleviation, op cit, pp.1-2.

decisions are to be taken in accordance with the accepted institutional criteria, processes and procedures.<sup>12</sup>

While the rule of law symbolizes legalism, Lord Woolf, the former Chief Justice of England argues that the laws must reflect the society's philosophical values, for the rule of law to be said to be firmly entrenched. At the dawn of the twenty-first century, nations of virtually every region in the World recognize the role of the rule of law and the protection of human rights in their own political legal systems as a critical factor in nation-building and good governance.<sup>13</sup> Supremacy of the law in itself does not mean that there is constitutionalism.

Hatchard observes that:

*"South African Judges, because of the system of parliamentary and executive sovereignty, had to follow a crude positivistic approach. This was an intolerable position in which they were put by the unjust legislation of parliament and executive decrees was clearly recognized by these Judges."*<sup>14</sup>

Hatchard cites a judgment in the Transvaal court in 1979 of, *S V Adams*, where King J. stated:

*"An act of parliament creates law but not necessarily equity. As a Judge in a court of law, I am obliged to give effect to the provisions of an Act of Parliament. Speaking for myself and if I were sitting as a court of equity, I would have come to the assistance of the appellant. Unfortunately, and on an intellectually honest approach, I am compelled to conclude that the appeal must fail. (That is, he had to apply the strict letter of the law)."*<sup>15</sup>

Jurisprudentially there was supremacy of the law, but the laws were unjust as they did not reflect philosophical values of the South African Society, but the values of the minority, self-

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<sup>12</sup> Ndulo Muna, *Democratic Reform in Africa*, op cit, p.3.

<sup>13</sup> Paper presented to the Commonwealth Magistrates' and Judges' Association, Triennial Conference, Mangochi Malawi, 22<sup>nd</sup> - 30<sup>th</sup> August 2003, p.1.

<sup>14</sup> Ndulo Muna, *Democratic Reform in Africa*, op cit, p.3.

<sup>15</sup> Hatchard John, Slinn Peter, *Parliamentary Supremacy and Judicial Independence, A Commonwealth Approach*, London: Cavendish Publishing Limited, 1999, pp.57-58.

interested ruling elite and consequently there was no constitutionalism.<sup>16</sup> To some, the rule of law calls for the elimination of wide discretionary powers from government processes. To others, the rule of law means the existence of formal rules which do not involve a choice between particular ends or particular people, and which are there for the use of everyone for the purpose of which will decide to use them.<sup>17</sup>

### **3.2.1. Democracy and Constitutionalism**

Authoritarian governments are by their very nature unconstitutional. Such governments think of themselves as above the law, and therefore see no necessity for the separation of powers or representative governance. Constitutionalism is however, primarily based on the notion of people's sovereignty, which is exercised – in a limited manner – by a representative government. Thus, there is a very important and basic link between democracy and constitutionalism.

Just as mere constitutions do not make countries constitutional, several Asian countries have been termed 'illiberal democracies,' for while they have periodic elections, they are not governed by the rule of law and do not protect the rights and liberties of their citizens. India and Sri Lanka are examples of such countries, where the politicization of public institutions is common, where the politicians and government officials are deemed to be above the law and where there is significant violence against minorities and marginalized groups.<sup>18</sup>

The South African apartheid system disenfranchised the majority. The minority white government denied the black majority basic human rights. The minority government was not representative of the majority population, which rendered the notion that people are sovereign to be illusory.

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<sup>16</sup> Asian Legal Resources Centre, *Constitutionalism and Human Rights in Asia, Thailand's Struggle for Constitutionalism* Journal, Vol. 6 No. 03, June 2007, p.1.

<sup>17</sup> Johann Kriegler in (Muna Ndulo's ed) *Democratic Reforms in Africa, Its Impact on Governance and Poverty Alienation*, op cit, p.12.

<sup>18</sup> *Constitutionalism and Human Rights in Asia*, op cit, p.13.

Genuine democracies rest on the sovereignty of the people, not the rulers. Elected representatives are to exercise authority on behalf of the people, based on the will of the people. Without genuine democracy there can be no constitutionalism. Elected representatives can only gain legitimacy if they are a product of free and fair elections which subject is extensively discussed in chapter five. Some African intellectuals argue that “when considering democratic reform in Africa, the first basic proposition is that such reform must be and must manifestly be seen as African – by Africans for Africans.”<sup>19</sup> This was the argument used in establishing one-party political systems in Africa. That the multi-party political system was alien to Africa as it was divisive – Africans were to use consensual democracy. It is evident that one-party political system could not sustain development and human rights.

### **3.3.0. Human Rights and Constitutionalism**

Human rights are defined as rights that belong to an individual as a consequence of being human. The term came into wide use after World War II, replacing the earlier phrase ‘natural rights’ which had been associated with the Greco-Roman concept of natural law since the middle ages. As understood today, human rights refer to a wide variety of values and capabilities reflecting the diversity of human circumstances and history. They are conceived as universal, applying to all human beings everywhere, and as fundamental, referring to essential or basic human needs. Human rights have been classified historically in terms of the notion of three “generations” of human rights. The first generation of civil and political rights, associated with the enlightenment and the English, American and French revolutions, includes the rights to freedom of speech and worship. The second generation of economic, social and cultural rights associated with revolts against predations of unregulated capitalism from the mid-19<sup>th</sup> Century, includes the right to work and the right to education. Finally, the third generation of solidarity

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<sup>19</sup> Johann Krieglner, in (Muna Ndulo’s ed) Democratic Reform in Africa, op cit, p.12.

rights, associated with the political and economic aspirations of developing and newly decolonized countries after World War II, includes the collective rights to political self-determination and economic development.<sup>20</sup>

The concept of human rights has evolved over time and various countries have emphasized different aspects of human rights principles and policy. The Commonwealth Africa Independence Constitutions emphasized traditional civil and political rights (both individual and collective), whereas post-colonial rulers like communist and socialist regimes emphasized the concept of economic and social rights in their quest to create equitable societies. The designers of post-colonial constitutions, downplayed negative rights or made them subservient to positive rights. And yet these rights are enjoyed concurrently in developed democracies like the USA, UK, Germany among others.

The human rights movement emerged in the 1970s, especially from former socialists in eastern and western Europe, with major contributions also from the United States and Latin America. The movement quickly jelled as social activism and political rhetoric in many nations put it high on the world agenda. By the 21<sup>st</sup> Century, Morgan has argued the human rights movement expanded beyond its original anti-totalitarianism to include numerous causes involving humanitarianism, social and economic development in the third world.

Many of the basic ideas that animated the movement's development in the aftermath of the Second World War, culminating in the adoption by the United Nations General Assembly in 1948, espouses fundamental rights and freedoms contained in most countries bill of rights. Freedom of expression, assembly, movement, freedom from inhuman treatment and torture

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<sup>20</sup> Human Rights West Encyclopedia of American Law (Full Article) [www.answers.com/topic/human-rights](http://www.answers.com/topic/human-rights), p.3.

equality before the law, among others.<sup>21</sup> This is the instrument which was a rallying point for the struggles for self-determination of the colonial subjects.

For genuine democracies, constitutions consist of overarching arrangements that determine the political, legal and social structures by which society is to be governed. Constitutional provisions are thereof considered to be paramount or fundamental law. All other laws within a country must abide by and follow the principles of the constitution. Under these circumstances, if constitutional law itself is inadequate, the nature of democracy and rule of law within a country is affected. This will affect citizen's human rights, which can only be realized and protected under the rule of law framework.<sup>22</sup>

Prempeh calls the protection and enforcement of the bill of rights by the Judiciary in the context of private initiated litigation as juridical constitutionalism.<sup>23</sup>

#### **3.4.0. Good Governance**

Good governance can only be properly defined if its evolution is discussed first. For the post colonial constitutional designers, the ruling elite downplayed negative rights or made them subservient to positive rights. Understandably, post-colonial constitutions heavily borrowed from the then Soviet Union and Chinese constitutions. In the case of China, the National People's Congress is the supreme organ of state power, unchecked in theory at least by the other branches of government. It operates at the apex of the state pyramid, which is the position the United National Independence Party occupied after the enactment of the one-party state constitution.<sup>24</sup>

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<sup>21</sup> Universal Declaration of Human Rights, 1948.

<sup>22</sup> Discussion of constitutionalism and its relationship to human rights, a project of the Asian Human Rights Commission [www.hrschool.org/doc/mainfile.plup/lesson/49/187](http://www.hrschool.org/doc/mainfile.plup/lesson/49/187), p.1.

<sup>23</sup> Prempeh Kwasi H, Marbury in Africa: Judicial Review and the Challenge of Constitutionalism in Contemporary Africa, 2 Tulane Law Review Vol 80, p.56.

<sup>24</sup> Act No. 27 of 1973.

As a legal document, the Chinese Constitution has generally been viewed in the West as static, primarily hortatory, and largely irrelevant. The individual rights provisions of the Chinese Constitutions are, in theory implemented through National People's Congress Legislation; in practice, these rights provisions, especially those that can be viewed as protecting "negative rights," including the basic rights to speech, association, and assembly are viewed by many in the West as a little more than empty promises. The Chinese Constitution has been viewed by many as primarily a political document, one that instead of stating legally-binding norms, serves as a vehicle for the enunciation of the government's political philosophy.<sup>25</sup>

Among many challenges to the universality of human rights, none have been more persistent than those related to economic development. In no place has this challenge been more consistently advanced than in East Asia. Both scholars and ordinary citizens have confronted the claim that authoritarianism is an essential component of East Asian's "economic miracle". Those who advance this thesis, argue that western style democracy and human rights are dispensable and sometimes may prove positively harmful to the development effort. They allege that the price of human rights is development.<sup>26</sup>

This argument informed the post-colonial rulers' constitutional making processes in Africa. When one-party political systems were established, the constitutions were loaded with an unbalanced supremacy of the party, the executive and the Head of State. With such constitutions, human rights were drained from the one-party democratic process, as the party and its government, in the case of Zambia, operated at the apex of the state pyramid.

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<sup>25</sup> Kelliog E. Thomas, *Constitutionalism with Chinese Characteristics?*. Constitutional Development and Civil Litigation in China, Indiana University Working Paper 1, February 2008, p.2.

<sup>26</sup> Michael C. Davis, *The Price of Rights: Constitutionalism and East Asian Development* Human Rights Quarterly, Vol. 20, No. 2 May, 1998, p.1.

While such authoritarianism may have been essential in turning Asian economies into vibrant economies, this was not the case in most of Africa. The economic mismanagement under these constitutions without effective checks and balances was enormous. The promised social and economic democracy, which would have led to economic development due to state intervention in the economy, became mere rhetoric. The potentially benevolent power of the state to redistribute wealth was not forthcoming. This is notwithstanding the fact that some Asian countries which achieved 'economic miracles,' their per capita income was below that of Zambia at independence. Socialism as a socio-economic concept, was roundly discredited after the economic collapse of the Soviet Union and Eastern Europe.

The failure of crude capitalism and socialism to propel development, especially in developing countries, generated the desire to diagnose and rebrand constitutionalism. There was also need for multilateral organizations, including the United Nations Development Programme and the World Bank to take the initiative of reflecting on the elements of good governance and their relationship to democracy and economic development.

Good governance nowadays does not only occupy a central stage in the development discourse, but is also a strategy. However, apart from the universal acceptance of its importance, differences prevail in respect of theoretical formulations, policy prescriptions and conceptualization of the subject itself. Governance as a theoretical construct, separate from the theory of state, is not only in an embryonic stage, but its formulation also differs among researchers depending on their ideological convictions.

Policy analysis, based empirically on the historical experiences of governance, gives prominence to government failures to deliver, leading to propositions for downsizing or rightsizing, while policy prescriptions for good governance take an evolutionary view of the

matter, questioning relevance of public sector management of certain activities in a changed context. Good governance is the term that symbolizes the paradigm shift of the role of governments.<sup>27</sup>

United Nations Development Programme, defines good governance as:

*“The exercise of economic, political and administrative authority to manage a country’s affairs at all levels. It comprises mechanisms, processes and institutions through which citizens and groups articulate their interests, exercise their legal rights, meet their obligations and mediate their differences. Good governance is, among other things, participatory, transparent and accountable, effective and equitable, and it promotes the rule of law. It ensures that political, social and economic priorities are based on broad consensus in society and that the voices of the poorest and the most vulnerable are heard in decision-making over the allocation of development resources.”<sup>28</sup>*

According to the World Bank, governance is “the manner in which power is exercised in the management process, involving both the public and the private sector. It encompasses the function and capability of the public sector, as well as the rules and institutions that create the framework for the conduct of both public and private business, including accountability for economic and financial performance and regulatory frameworks relating to companies, corporations and partnerships. In broad terms, then, governance is about the institutional environment in which citizens interact among themselves and with government agencies/officials.<sup>29</sup>

The World Bank, emphasizes the management of a country’s economy and social resources for development as good governance. Understandably, the core function of the World Bank is to ensure that there is balanced global development. Insofar as the World Bank is

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<sup>27</sup> Abdellatif M. Adel, Good Governance and Its Relationship to Democracy and Economic Development, UNDP Global Forum III on Fighting Corruption and Safeguarding Integrity, Seoul 20<sup>th</sup> - 31<sup>st</sup> May 2003, p.3.

<sup>28</sup> Ibid, p.4.

<sup>29</sup> Abdellatif M. Adel, Good Governance and Its Relationship to Democracy, op cit, p.5.

concerned, its interest in governance stems from its concern with the effectiveness, sound development management, in the broadest sense of the phrase, for ensuring adequate returns and efficacy of the programmes and projects financed, and for World Bank's underlying objectiveness of helping countries reduce poverty and promoting sustainable growth. Hence, the World Bank's emphasis in interventions to overall country context (i.e the governance climate) within which those interventions take place. In doing so, it has been guided by the nature of its negotiations and the opportunities for action that these offer.<sup>30</sup>

Accordingly, the key dimensions of governance identified by the World Bank are:

- *public sector management;*
- *accountability;*
- *legal framework for development, and*
- *transparency and information*<sup>31</sup>

The UNDP in its report, Governance for Sustainable Human Development, acknowledges the following as core characteristics of good governance: participation, rule of law, transparency, responsiveness, consensus, accountability and strategic vision.<sup>32</sup>

The General Assembly adopted its first explicit resolution on "Promoting and Consolidating Democracy" to provide means for consolidating democracy through: promoting pluralism, promoting, protecting and respecting all human rights, strengthening the rule of law, developing, nurturing and maintaining an electoral system that provides for the free and fair expression of the people's will through genuine and periodic elections, creating and improving the legal framework and necessary mechanisms for enabling the participation of all members of civil society in the promotion and consolidating of democracy, strengthening democracy through

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<sup>30</sup> Abdellatif M. Adel, Good Governance and Its Relationship to Democracy, op cit, p.5.

<sup>31</sup> Ibid, p.6.

<sup>32</sup> Ibid, p.5.

good governance, strengthening democracy by promoting sustainable development, enhancing social cohesion and solidarity.<sup>33</sup>

A truly democratic government cannot occur unless individuals have guaranteed civil and political rights. This means they can freely express their views without fear of being arrested, tortured or discriminated against as it were in apartheid South Africa. Effective public sector institutions should be developed through good government policy, but they cannot be administered effectively unless the staff has access to economic human rights, such as adequate pay. Adequate pay enables people to support themselves properly and reduces corruption. This improves governance, as it enables government to provide social services to the poor cheaply.<sup>34</sup>

The primacy of the rule of law and an impartial legal system protects the civil rights of all people in relation to their property, personal security and liberty. The legal and judicial system should be independent of the government so that it can serve the interests of its citizens rather than a particular political party. In this way, it protects the civil rights of its citizens against a predatory state.<sup>35</sup>

A strong civil society is about people contributing to the governing of their country through participation in the community. It is difficult to participate if you are poor, unemployed, hungry, homeless and uneducated. People who live under these conditions are being denied their economic, social and cultural rights. Good governance cannot truly occur until these rights are guaranteed by a government willing to take responsibility for the social security of its people.<sup>36</sup>

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<sup>33</sup> UN Resolution adopted by the General Assembly, A/RE/55/96 on Promoting and Consolidating Democracy.

<sup>34</sup> Ibid, p.26.

<sup>35</sup> Ibid p.5

<sup>36</sup> Ibid, p.5.

There must be priority on investing in people. Investing in people means creating a skilled workforce. This cannot occur unless basic economic and social human rights are met, including the right to adequate education, health services, food and shelter.

There must be careful management of the national economy. A government which does not manage its economy well will not have enough resources to guarantee basic human rights. However, if these rights are not met, it is difficult to create the accountable and transparent institutions so vital to good governance and to sustainable development.<sup>37</sup>

### **3.5.0. Conclusion**

Classic constitutionalism was concerned with the allocation of powers and functions to the three organs of state, by a document called the constitution which is formal constitutionalism. Further, constitutionalism was or is concerned with the manner in which that power is exercised or the management performance of the regime which is substantive constitutionalism or the spirit of constitutionalism.

The designers or architects of liberal independence constitutions who were right-leaning, emphasized negative rights, like right to property among others which were contained in the Bill of Rights of most emerging states. The post-colonial constitutional designers enacted left-leaning constitutions intended as it were, to emphasize economic rights which was developmental constitutionalism. But later it was clear that this was rhetoric. The multilateral institutions under the good governance project, the United Nations and World Bank have placed much emphasis on expanding the state's responsibilities in areas of democracy and economic development. The state has to be responsive to its citizens, by shaping the needs of the sovereign people who freely elect those officials to formulate policy and make laws. Then the citizens are

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<sup>37</sup> Abdelallatif M. Adel, Good Governance and Its Relationship to Democracy, op cit. p.7

participating in governance. The governors are transparent, responsive, effective, efficient, accountable and have a strategic vision.<sup>38</sup>

First of all, democracies allow populations to peacefully and regularly oust inept, inefficient and corrupt government administrations, while allowing people to keep more efficient, successful regimes, thus tending to make the quality of governance average higher in the long run.<sup>39</sup>

On the other hand, authoritarian regimes may randomly provide high-quality governance, but if they do not, they can be changed by force, which may take years or decades longer than undemocratic institutions. As Sen summarises in considering the effects of democracy relative to authoritarian regimes:

*"We have to consider the political incentives that operate on governments and on the persons and groups that are in office. The rulers have the incentive to listen to what people want if they have to face their criticism and seek their support in election"*<sup>40</sup>

There is a high cost of sustaining poor government policies under authoritarian regimes.

Goetzmann noted this in relation to recent financial crisis:

*"Suppose bankers lend to a dictatorship, as Indonesia was ... suppose further that the debt piles up, and the government of the borrowing country cannot service its obligations ... This is in fact what has happened. Tens of millions of people in emerging markets have recently fallen into poverty. Without a democratic voice, they had no control of the risks their governments assumed. Even more, without transparent political institutions and a free press they had no way to understand these risks ... Some would call this taxation without representation. In fact, is filled with examples of non-democratic governments causing great harm to their citizens"*<sup>41</sup>

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<sup>38</sup> Abdelalltif M. Adel, Good Governance and Its Relationship to Democracy, op cit.p.7

<sup>39</sup> Ibid.

<sup>40</sup> Sen, Amartya, Development as Freedom (New York: Alfred A. Knopf, 2000), p.152.

<sup>41</sup> Goetzmann, William "Democracy Before Debt," The New York Times, October 22, 1999, p.A18.

Indeed, democracy is not strictly essential for good governance, just as well as bad governance is quite possible under formal democratic structures. However, it considers that, free, fair and competitive elections do make it possible to remove bad or corrupt leaders. Thus they encourage leaders to govern more effectively, in the public interest. Democracy also gives citizens, associations, movements, the media electoral means to monitor officials and participate in policymaking. In addition, leaders in democracies have stronger incentives (and more institutional means and obligations) to explain and justify their decisions and to consult a broad range of constituencies before making decisions. Such participation and debate give the public a strong sense of policy ownership. As a result, policies are more sustainable and government is more legitimate.<sup>42</sup>

And investment flows into the country, attracted by the low transaction costs associated with government transparency and legitimacy and the rule of law. In these circumstances, economies grow, human welfare improves, trade expands, political stability and capacity deepen, and countries become more responsible and resourceful members of the international community. In chapter 4, the principle of separation of powers will be examined. At another level one can see that subtle changes and reaffirmations have taken place: civil society has flourished, democratic elections are still relevant and hard fought, with many parties contesting and represented in parliament. It is contended not enough is being done to combat corruption. The next Chapter discusses, separation of powers, rule of law and constitutionalism.

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<sup>42</sup> USAID, Foreign Aid in the National Interest: promoting freedom, security and opportunity, <http://www.usaid.gov/fan>.

## CHAPTER FOUR

### SEPARATION OF POWERS, RULE OF LAW AND CONSTITUTIONALISM

#### 4.1.0. Introduction

The rule of law can be said to exist in any a nation if there is separation of powers. You cannot have constitutionalism, if the constitution-makers do not configure and distribute power equitably. Kwasi Prempeh, argues that, ‘apart from democratizing politics, the contemporary constitutionalism project in Africa, is essentially concerned with juridical constitutionalism, with its emphasis on judicial enforcement of the ‘Bill of Rights’ in the context of privately initiated litigation. Structural constitutionalism consists in the installation of credible checks and balances between the political branches for instance (Parliament and the President). Strong and independent agencies of horizontal accountability, and a meaningful devolution of power to the local level – has been left largely unexplored by Africa’s constitutional designers.<sup>1</sup> This deficit of structural constitutionalism must be confronted in order to consolidate progress toward credible constitutionalism. The point Prempeh makes is, you cannot have the rule of law, or horizontal accountability if the constitutional structure does not allocate power equitably to the three organs of government, namely the Executive, Legislature and the Judiciary.

Rebecca Bill Chavez states that, “over the past decade, much of the literature dealing with the construction of the rule of law in new democracies argues that independent courts arise from the strategic choices of relevant actors. Rulers abide by the law only when the cost of disobeying the law outweigh the benefits. According to the separation of powers approach, the rule of law becomes possible when no single actor or group of actors has sufficient power to dominate.”<sup>2</sup> If the rule of law is the supremacy of the law and the Judiciary is the guardian of the

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<sup>1</sup> Prempeh Kwasi H, *Marbury in Africa: Judicial Review and Challenge of Constitutionalism in Contemporary Africa*, p.56.

<sup>2</sup> *Ibid*, p.57.

constitution and interpreter of law, then judicial independence and autonomy is critical to its sustenance and the sustenance of constitutionalism.

Chavez links judicial independence to democracy when she says, ‘evidence from both the federal level and the provincial level in Argentina shows that party competition creates a climate in which an independent judiciary can emerge.’ Chavez goes on that, ‘the global shift toward judicial empowerment stems from the self-interested behavior of strategic actors. According to her theory of hegemonic preservation, when a ruling party foresees its replacement, it is willing to transfer power to the courts and to enact constitutional reforms that will constrain those who will replace it. As the threatened political elites see their popular support begin to erode, they seek to look in their policy preferences by transferring policy-making power to the courts.’<sup>3</sup>

This chapter is devoted to consideration of the separation of powers, rule of law and constitutionalism. The chapter will consider how the three organs of State have performed in the Third Republic. Has the rule of law been maintained as an element of constitutional democracy in the period from 1991 to date?.

#### **4.2.0. What is the Doctrine of Separation of Powers?**

The doctrine of ‘Separation of Powers’ is perceived by political scientists and constitutional lawyers as an invaluable precept in the science of politics and constitutionalism.<sup>4</sup> For instance, the Constitution of the United States of America reflects a fundamental conviction that governmental “power” is of an encroaching nature, and that it ought to be effectively restrained from passing the limit assigned to it.<sup>5</sup> In order to safeguard liberty, therefore, the Constitution creates three distinct branches of government – Executive, Legislature, and the

<sup>3</sup> Rebecca Bill Chavez, *The Role of law and Courts in Democratizing Regimes* in Whittington Keith E, Kelemen Daniel, Caldeira Gregory A, *The Oxford Handbook of Law and Politics*, op cit, p. 270.

<sup>4</sup> Clement Walker, a member of the Long Parliament in 1648, saw distinctly enough the kind of arbitrary, tyrannical rule, against which the governed had to be protected. The remedy he thought, lay in a separation of governmental functions cast in terms of “the governing power”, “the legislative power” and “the Judicative power.” Federalist paper No. 47/48.

<sup>5</sup> *Nixon V Administrator of General Services* 433 US 425, 443 (1977).

Judiciary---- and assigns to them differing roles in the exercise of governmental power. Some authors call this political fragmentation framework.<sup>6</sup>

The resulting division of government authority is not a mere set of housekeeping rules indicating which branch presumptively performs which functions. It is, rather, a fundamental means by which the Constitution attempts to ensure free, responsible, and democratic government.<sup>7</sup> The ultimate purpose of this 'Separation of Powers', is to protect the liberty and security of the governed. The constitutional 'Separation of Powers' advances this central purpose by ensuring full, vigorous, and open debate on the great issues affecting the people. By placing both substantive and procedural limitations on each branch and by maintaining a system of checks and balances among the three branches,<sup>8</sup> the government is accountable to its people. The rule of law therefore is the observance of the legal limits placed on each branch of government and individuals in those branches.

However, Montesquieu, a French scholar, was one of the early writers to rationalize the doctrine and later writers have extensively drawn from his rationalization.<sup>9</sup> Dr. Paul M. Johnson, one of the early writers on the doctrine in England, states that,<sup>10</sup> "the workable, separates that which will articulate what are Executive, Legislative and Judicial functions. Those functions must be primarily performed by the organ of State allocated such power. For instance, under the doctrine, a Minister cannot preside over a civil or criminal trial, though he may exercise quasi judicial functions by appointing a Tribunal to inquire in a certain matter of public interest."<sup>11</sup>

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<sup>6</sup> Rebecca Bill Chavez, *The Rule of Law and Courts in Democratizing Regimes*, op cit, p.70.

<sup>7</sup> *Federalist Paper*, op cit, pp.6-7.

<sup>8</sup> *The founders of American Constitution, Separation of Powers*, press pubs.uchicago -edu/founders/documents.

<sup>9</sup> Kapur, *Principles of Political Science*, op cit, p.471.

<sup>10</sup> Wikipdelia, the free encyclopedia, <http://en.Wikipedia.org/wk>, p.7.

<sup>11</sup> *The Founders of American Constitution, Separation of Powers*, op cit, p.7.

John Trenchard, one of the early English contributors to the doctrine in 1698, stretches Nedham's separation of persons further. One might say that without separation of persons, there cannot be a meaningful 'Separation of Powers.'<sup>12</sup> The weakness of Trenchard's argument is that he does not draw a distinction between 'Separation of Powers' on the one hand, and mixed or balanced government on the other hand.

The doctrine of the 'Separation of Powers', said Justice Brandeis of the U.S. Supreme Court in a dictum quoted and repeated by successive justices of the same Court:

*"The Doctrine was adopted by the convention of 1787, not to promote efficiency, but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy."*<sup>13</sup>

There will always be friction between the three organs of government, that is inevitable. But what has to be avoided is for the friction to degenerate into a showdown that may cripple the entire machinery of government. Admittedly, by its nature, the Executive function is inherently prone to arbitrary use, but its propensity to arbitrariness would be greatly accentuated, where the function of law-making and adjudicating are all reposed in the same hands.

The chapter will consider whether the doctrine in its classical context is suitable for an emerging State. Arguably, the prevailing socio-economic conditions, the structure and responsibilities of governments in the eighteenth century, when Montesquieu and his colleagues postulated the doctrine are different. The doctrine was formulated in an era of authoritarianism. The early formulators of the doctrine were also the prime initiators of the American struggle for independence. They were the propertied class who objected to over-taxation by the British

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<sup>12</sup> The Founders of American Constitution, Separation of Powers, op cit, p.7.

<sup>13</sup> Nwabueze Ben, Constitutional Democracy in Africa Vol. I (Lagos: Spectrum Books Limited 2004) p.246.

government. They perceived government intrusion in their social and economic pursuits as impermissible.<sup>14</sup> It is not surprising therefore that the classic doctrine was perceived as aristocratic by an emerging State, whose rulers came to power on the platform of socio-economic transformation.

The Communists, with their opposite ideology to capitalism, rejected this theory because it would go against their belief in the dictatorship of the proletariat. African States, in looking to the East for a model, were being opportunist. It provided ideological justification for dictatorship. The 'Separation of Powers,' it was argued, belonged to a political era in which political unity was reduced to a minimum in the interest of an autonomous bourgeoisie society. However, national and ethnic unity and oneness demand that all political powers be gathered in the hands of one leader, so the argument goes.

The Constitutions of western States were there to reinforce capitalism, and these were transported or bestowed on the newly independent nations. The question that troubled the post-independence ruling elite, was whether within the context of liberal constitutionalism, the inherited socio-economic inequalities could be addressed. It was necessary that there should be a rise and growth of socio-economic legislation in the emerging states, entrusting to the Executive, wide discretionary powers to interfere, not so much restricted by legislative and judicial control. This was a period when political and economic liberalism or market fundamentalism, as embraced by the western capitalist States, was rejected. Travelling on a social democratic path was an absolute necessity.

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<sup>14</sup> Kapur notes that, "That government was deemed best which governed least as it existed to protect and restrain not to foster", Kapur A.C., Principles of Political Science (New Delhi : S. Chand & Company Limited, 2000) p.480.

#### 4.2.1. Allocation of Power under the Zambian Constitution

Although the doctrine of 'Separation of Powers' is so familiar to students of politics and constitutionalism, the Zambian Constitution does not refer to the doctrine. However, the framework of government, outlined in the Constitution, presupposes the existence of the doctrine of 'Separation of Powers.' The functions of the President are enumerated in Article 44<sup>15</sup> of the Constitution, among them are to dissolve the National Assembly; negotiate and sign international agreements and delegate the power to do so; appoint such persons as are required by the Constitution or any other law to be appointed by him; and the initiation in so far as he considers it necessary and expedient, laws for submission and consideration by the National Assembly.

Article 50<sup>16</sup> places the formulation of policy of the government in the Cabinet, which also advises the President. The Cabinet as a collective is accountable to the National Assembly.<sup>17</sup> The legislative power of the Republic of Zambia is vested in the National Assembly by Article 62.<sup>18</sup> The independence and autonomy of the Judiciary is provided for in Article 91.<sup>19</sup> The functions, composition and appointment of Supreme Court judges is provided for in Articles 92 and 93.<sup>20</sup> Article 94 provides for the jurisdiction of the High Court and security of tenure for High Court judges. From the above structure, it is clear that the doctrine of 'Separation of Powers' exists in Zambia. The theory has great democratic appeal.

However, the doctrine is ambiguous, because by using the word power, it presupposes that all the three organs are repositories of coercive power. Coercive power, which is repositied in the Executive organ, plays an insignificant role as it comes at the end of the tail of its functions.

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<sup>15</sup> Constitution of Zambia, Chapter 1 of the Laws of Zambia.

<sup>16</sup> Ibid.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid, Article 51.

<sup>19</sup> Ibid.

<sup>20</sup> Ibid.

The major function of the State is to formulate social and economic policies and execute those policies for the benefit of the citizenry. State power is called in to maintain law and order, when there has been defiance.<sup>21</sup>

The doctrine of 'Separation of Powers' anchors the supremacy of the Constitution, the 'Rule of Law' and protection of basic rights. If the power allocated to each organ of State by the Constitution is exceeded, that conduct becomes unconstitutional. If Parliament makes laws that are contrary to the Constitution, the courts must strike down such statutes.<sup>22</sup> The Legislature and the Judiciary through having less power than the Executive, should be vigilant by making the Executive accountable.

#### **4.2.2. Absolute Separation Impossible:**

It is impossible to have absolute or total separation in any polity, even in the United States of America, where the doctrine is refined. Nwabueze observes that, "in most of Africa Executive monopoly of the legislative initiative is complete, to an extent that most legislators simply take it for granted that the initiation of legislation is the exclusive prerogative of government, and that they themselves have no role in the matter at all."

Nwabueze rationalizes the current position when he states:

*"In the days before the emergence of the positive welfare State, the matters that needed to be regulated by legislation were few and simple – domestic relations, land, criminal offences, etc. These were easily within the initiative of individual legislators. The concern of the government was mainly with foreign relations, the maintenance of law and order, and execution generally. Modern*

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<sup>21</sup> Kapur, Principles of Political Science, op cit, p.286 rationalizes, the characterization of the word "power" as ambiguous when he says, the governments have certain functions to perform in order to serve the purpose of the state. If functions are taken as powers, then, the idea of service entirely disappears and the organs of government become invested with power. Wherever there is power there is force. A government having its foundation on power becomes an engine of force. The use of the term power is most unfortunate and accordingly the cause of so much confusion.

<sup>22</sup> *re Mumba 1984 ZR 38*, A High Court Judge struck down section 53 (1) which compelled an accused person charged under the Corrupt Practices Act No.14 of 1980 to give evidence on oath if he elects to make a statement as unconstitutional as it amounted to self-incrimination.

*government has an infinitely wider concern, involving active intervention in the life of society with a view to improving its quality. This, as has just been observed require legislation with high policy content. But policy is essentially an executive function.*"<sup>23</sup>

In the United States, until the later part of the 19<sup>th</sup> Century, Congressional control over the initiation of legislation was total and exclusive. There was then nothing like 'Bills' initiated by the Executive and sent to Congress.<sup>24</sup>

The emergence of a welfare state, with its demands of more action and services from government, has led to the establishment of various Commissions and Tribunals, though executive appointed and staffed, they perform adjudicatory functions.

The decision of these Commissions and Tribunals are of an administrative and adjudicatory nature and are not in strict accord with the classic theory of the separation of powers.<sup>25</sup>

In the Zambian polity, where Ministers are appointed among members of the National Assembly, they have dual membership i.e., being Members of the Executive as Ministers and being Members of the National Assembly as elected or nominated Members of that Assembly. Thus you have Ministers, who are Members of the Executive and other governmental agencies who are legislative agents.<sup>26</sup> Under section 76 of the Local Government Act,<sup>27</sup> a Council may make by-laws for the good running of Local Government in its area, while under section 83(1),<sup>28</sup> the same by-laws may be amended and revoked by the Minister.

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<sup>23</sup> Nwabueze Ben, *Constitution Democracy in Africa* Vol. 1 (Lagos: Spectrum Books 2004) pp.260-261.

<sup>24</sup> *Ibid*, p.263.

<sup>25</sup> Kapur, *Principles of Political Science*, op cit, pp.478-479.

<sup>26</sup> Sections 82 (1), Local Government Act, Cap 281 of the Laws of Zambia.

<sup>27</sup> *Ibid*.

<sup>28</sup> Local Government Act.

It is clear that the Legislature's agents are Members of the Executive Arm of Government. For the Judiciary, where there is a lacuna in the law, it may fill in the gaps by interpretation, but that is where the meaning of the section or phrase is ambiguous. Where it is clear, they must pronounce the intention of the Legislature. To that extent, judges perform a legislative function.<sup>29</sup>

The United States Supreme Court has rejected as "impracticable the view that the 'Separation of Powers' requires three airtight departments of government. In doing so, the Court has noted that such a view is "inconsistent with the origins of the doctrine", as well as with "the contemporary realities of our political systems."<sup>30</sup> Thus, the concept of 'Separation of Powers' in its traditional analysis, has been impossible to realize in any complete way.

In the common law jurisdictions including the United States, the separation of powers is between three organs of government, namely the Executive, the Legislature and the Judiciary. The Government of the Republic of China, for example, has five branches; the Executive Yuan, Legislative Yuan, Judicial Yuan, Control Yuan and Examination Yuan. One would expect that, where there are five branches, there will be lesser power exercised by any of the five. In practice, all these branches are subjects of the all powerful Communist Party. Some European countries have rough analogies to the Control Yuan in the form of Ombudsmen, which are separate from the Executive and the Legislature.<sup>31</sup>

#### **4.3.0. Classical Doctrine Deconstructed**

The discussion of deconstructing the classical doctrine of 'Separation of Powers' can only be adequately discussed by noting the conditions under which a liberal Constitution was

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<sup>29</sup> Kapur, Principles of Political Science, op cit, pp.478-479, see also *Attorney General Vs Lewanika and Others 1993/1994 ZR 164.*

<sup>30</sup> Ibid.

<sup>31</sup> Ibid.

imposed on independent Zambia. The primary objective of the Independence Constitution was to grant independence, and a secondary objective of protecting what the settler community had acquired in terms of wealth and property. It is this latter objective which made the Constitution a liability to democratic development or socio-economic transformation.

The Independence Constitution was not trusted by politicians and society at large. There were doubts and cynicism as to the legal order's ability to serve as an instrument of social transformation or to address the historical disadvantages of the indigenous people.

The Independence Constitution was not freely agreed to by the representatives of the country concerned. If it were so, it would have been said to be socially and economically relevant in content. The Zambian people, like other societies emerging from colonialism, were a dependent people, about to be granted independence. They had no real choice in the framing of their Independence Constitution. The British Government construed its responsibility, when enacting the Independence Constitution of Zambia, as the protection of racial and tribal minorities, by diffusing Executive power,<sup>32</sup> which was a paradigm shift from the colonial legal order. The deconstruction of the doctrine can only be adequately discussed by alluding to the post-independence period when the process of deconstructing the doctrine began, from the periods constituting the First Republic (1964-1972) and Second Republic (1973-1991).

In 1968, barely four years after independence, Zambia embarked on the process of repudiating the imposed Constitution, by putting in place plans to hold a referendum in 1969, which would abolish all referendams. Chapter two has discussed this subject in detail.

The argument that the Independence Constitution was the State's most serious liability to carry out rapid economic development was sound at the time. There was need for centralization

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<sup>32</sup> Nkrumah said, "Government accepted the constitution as drawn up in the United Kingdom with greatest misgivings. We were, however, faced with a situation where independence might well have been delayed, if we refused to accept the text which was presented to us". Kapur, Principles of Political Science, op cit, p.476.

of power in the Presidency.<sup>33</sup> It was argued, that a fragmented power, would pose severe drawbacks to central planning, financial coordination, matters such as health, education and agriculture.<sup>34</sup> The Independence Constitution, was not developmental in character, as it did not address the past injustices. It sought to frustrate the goals of equity and faster delivery of services, which the attainment of independence, was expected to facilitate. By focusing mainly on the allocation of power, in the post-colonial State, it had failed to address society's expectations. It permitted the importation of undesirable political ideas alien to and incompatible with the African way of life. Nyerere refuted the concept of the 'Constitution standing the test of time' or it being an enduring document.<sup>35</sup>

The post-colonial State ruling elite, had not only rejected the Independence Constitution as socially irrelevant, but the supremacy of the Constitution, and consequently the notion of constitutionalism. The black Zambians were deprived of opportunities to participate in the economic mainstream for decades. The post-colonial whites continued to benefit from the vantage point that the colonial system facilitated for them.<sup>36</sup> The Independence Constitution was part of the negotiated settlement, it was not a product of a sovereign people. The Constitution endorsed the existing inequalities in terms of constitutionally protected land ownership and property rights. Limited social change had to be induced inside this legally binding legal framework. These inequalities represented a threat to national cohesion, peace and political

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<sup>33</sup> Sinjela perceives the independence constitutions as unsuitable to bring about development and distributive justice when he says, "the independence constitutions were expected to carry a much heavier burden. They had to foster a new nationalism, create national unity out of diverse ethnic and religious communities, prevent oppression and promote equitable development, inculcate habits of tolerance and democracy and ensure capacity of administrations, Mpazi Sinjela Constitutionalism in Africa modern trends, in Deng Adama's *The Evolving African Constitutionalism* (International Commissions of Jurists, 1998) p.28.

<sup>34</sup> Shivji G. Issa, *State and Constitutionalism, An African Debate on Democracy* (Harare: Sapes, 1991) p.11.

<sup>35</sup> Nyerere forcefully said, "we refuse to adopt the institutions of other countries even where they have served those countries well, because it is our conditions that have to be served by our institutions. We refuse to put ourselves in a straight-jacket of constitutional devices – even of our own making. The constitution of Tanzania must serve the people of Tanzania. We do not intend that the people of Tanzania should serve the constitution". Kapur, *Principles of Political Science*, op cit, p.476.

<sup>36</sup> It was not unusual to hear the post-colonial whites telling black Zambians that, the country is yours, but the economy is ours.

stability.<sup>37</sup> The pre and post independence social and economic structures needed a flexible Constitution, which reposes power in the President, to enable him socially and economically transform post-independent Zambia. The entrenched protection of property, especially land as a factor of production, impacted negatively on the socio-economic transformation process in the immediate post-independent period.

This developmental rhetoric was powerfully appealing to the poor majority, who were yearning for distributive justice. Initially, Kaunda had managed with the inherited financial reserves to build hospitals, schools, roads, railways, and subsidized consumption. This populist style of governance turned him into a great leader. It was later to become clear that the money that was spent on consumption ought to have been spent on development projects.

After the referendum which has been discussed at length in Chapter Two, the Constitution amendment procedure became flexible. The advent of independence had immediately placed an additional and urgent dimension to law review and the alignment of statutes with the developmental agenda. Kaunda arrogated to himself power to compulsorily acquire land barely a year after the referendum. The Independence struggle in Zambia and other former British dependencies was triggered by repossession of land from white settlers. In any event, the search for land was what brought about colonialism. The independence Constitution insulated the seizure of idle land, thereby entrenching the most sensitive inequality inherited from the colonial period.

Kaunda, therefore enacted the Lands Acquisition Act,<sup>38</sup> which allowed him to compulsorily acquire land from anybody. Section 3 of the Act was couched in these terms:

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<sup>37</sup> Thabo Mbeki, The South African President, which nation is said to have a neo-liberal constitution in the world, has been accused by the unions, that his government has fueled and sustained an economic system, under which the economic benefits largely go to capital not to labour and the poor, two million unionized workers to go on strike demanding better conditions of service – Sunday Times of South Africa, 27<sup>th</sup> May 2007.

<sup>38</sup> Chapter 189 of the Laws of Zambia.

- (3) *subject to the provisions of this Act, the President may, whenever he is of the opinion that: it is desirable or expedient in the interests of the Republic to do so, compulsorily acquire any property of any description.*

The President's powers to acquire land were absolute as the decision to acquire was subjective. Although if a dispute arose under Section 11 of the Act, one could take the President to Court, it would be difficult to succeed, as the test was subjective. It had therefore become apparent from Section 3 of the Act, that the vast presidential powers would accelerate development. The roll-out of land acquired was developmentally welcome, given the historic neglect; persistent and deep levels of poverty, and inequality occasioned by the unfair colonial social and economic regime.

It is argued that a constitution should create a system of governance which is transparent and accountable. The expectation is that, a government of that nature will adopt the right economic and social policies. This may prevent political instability.<sup>39</sup> The notion therefore that there can be equality between the three arms of government is illusory.

#### **4.4.0. The Functioning of the Doctrine of the Separation of Powers in Zambia:**

The doctrine of Separation of Powers is not absolute nor does it insist that there should be three institutions of government each operating in isolation from each other. Indeed, such an arrangement, even in a constitutional State is not workable. It is essential that there be sufficient interplay among the organs of the State. For example, the Executive function, for the most part, is to propose legislation for Parliament's approval. Once passed into law, Acts of Parliament are

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<sup>39</sup> The modern South African constitution (Act No.108 of 1996) has failed to accommodate, the social and economic inequalities of the apartheid era. The unions have taken on government, accusing it of rewarding capital at the expense of labour and the poor. The ANC is now proposing to strengthen the state's legal right to appropriate property for purpose of equality; develop regulations to limit land ownership by foreigners, intervene in industry and residential property market to curb high prices, to consider free education for all. These are issues that can only be addressed after amending the constitution, which will give the executive more powers, Mail and Guardian, 22 to 28 June 2007.

interpreted by the Judiciary. A complete separation of the three organs could result in legal and constitutional deadlock. Other than a pure 'Separation of Powers,' the concept insists that the primary functions of the State be clearly allocated to each organ. There should be checks and balances to ensure that no institution encroaches significantly upon the function of the other.<sup>40</sup>

In today's globalization, you can hardly find a State with no 'Separation of Powers'. Such totalitarianism belongs to the past. The United States governmental system comes nearer to pure separation. For instance, the same persons do not belong to more than one organ of the State. Thus, a member of Congress, is not a member of the Executive, while the Judiciary is left more distant from the other two organs. Mixed government and weak 'Separation of Powers' is the category to which the Constitution of the United Kingdom and its former British colonies, including Zambia subscribes to, despite most of these countries adopting the presidential system of Government.<sup>41</sup>

In Zambia and elsewhere today, you cannot talk of pure separation, that is illusory. The Executive has Ministers as its members, who are also members of the National Assembly, performing a legislative function. The Executive appoints tribunals to perform quasi judicial and judicial functions as alluded to earlier in the chapter. The Judiciary also makes law in the course of interpreting statutes. There was and has been, the development of political behaviour that has weakened or removed constraints on the exercise of presidential power and consequently undermining the rule of law.

Our Constitution cultivates this behaviour by giving excessive power to the President to control the people, and the use of the Inquiries Act,<sup>42</sup> though the National Constitutional Council Act has been enacted, which has partially democratized the constitutional making process, but

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<sup>40</sup> Wikipdedia, Separation of Powers, op cit, pp.93-97.

<sup>41</sup> Ibid.

<sup>42</sup> Chapter 41 of the Laws of Zambia.

has not made the constitutional making process participative and inclusive as it should be. The majority of the members of the bodies that design the Constitution are not elected. The method of enacting the Constitution allows the President and Cabinet to veto the people's views. Herein lies the uneven distribution of governmental functions or powers between State organs, and consequently the National Assembly and the Judiciary have been turned into a disempowered collective.

#### **4.4.1. The Functioning of the Executive**

The hegemony of the Executive over the other organs of the State is rooted in the unfair allocation and distribution of functions 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 various constitutional amendments or the re-introduction of a Multi-Party political system. The result is that the President has dominated the constitutional making process and approves the process and content, by appointing the Constitutional Commission and by him and his Cabinet rejecting the people's views which they do not like by issuance of a White Paper. The ruling elite have perceived any suggestion to reduce presidential powers as being subversive. The organs of State have become subservient to his person. The ruling party and Government are held together not by identical ideas, but by disguised coercion based on presidential powers.<sup>43</sup>

There has not been political will to enact an enduring constitution since independence. The constitutional 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.<sup>44</sup> A Constitution which is referred to as 'formal constitutionalism' has been a defective document in

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<sup>43</sup> Nwabueze Ben, *Constitution Democracy in Africa*, Vol. 5, op cit, pp.115-117.

<sup>44</sup> Ibid.

the Second and Third Republics. The Independence Constitution was more liberal, because it was not enacted by a self-interested elite, but was bequeathed to Zambia by the British Government.

The functions of the Executive are performed by the President or his delegate. He/she cannot delegate most of the functions assigned to him/her by the Constitution i.e. those contained in Article 44,<sup>45</sup> which have earlier been discussed in the Chapter.

#### **4.4.1.(i) The Exercise of Presidential Powers:**

The genesis of the abuse of presidential powers is the nature and character of the inherited Governor's powers. The Governor, as discussed in chapter two, had vast powers, but these were externally checked by the Secretary of State for Colonies. The Executive President inherited these powers without external checks as Zambia had now become a sovereign State.

The Zambian multi-party system was supposed to bring an end to authoritarianism as a system of rule, in all its characteristics. Third Republic Presidents Chiluba and Mwanawasa did not administer or practice constitutional and democratic politics, due to lack of genuine conviction in constitutional and democratic values. They were accustomed to authoritarian rule, moderated to some extent by the new democratic environment. State lawlessness subverted the Constitution.<sup>46</sup> Chiluba lacked in particular a sense of integrity and moral rectitude. Morality had been completely jettisoned from public life under the Chiluba and Mwanawasa Presidencies, dissent was perceived as subversive.

At the end of his 'Second Year Term of Office', Chiluba wanted to amend the Constitution to go for a 'Third Term.' And when his Vice President General Tembo opposed the

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<sup>45</sup> Constitution of Zambia.

<sup>46</sup> Chiluba's unethical expenditure of state resources, which he gave to friends, for which he was prosecuted and acquitted for the theft of USD500,000 is a glaring example.

move and resigned, and several ministers, rumours started circulating that the State was intending to deport him to Malawi, just because his village was near the border with Malawi.<sup>47</sup>

In an insightful revelation by Mbita Chitala, founder member of the MMD and former Deputy Secretary General, then Deputy Minister of Finance and later Deputy Minister at State House states, among other major corruption scandals:

*“An investigative team set up by the Minister of Finance, Mr. Kasonde and myself which included officers from the British Board of Trade, prepared a report which showed in clear detail the management in the Zambia Industrial and Mining Corporation (ZIMCO companies including Zambia Consolidated Copper Mines (ZCCM) and made recommendations on how the scourge of thefts and embezzlement could be stopped and how the management could be improved. Mr. Kasonde and myself were surprised when we presented the report to President Chiluba. He told us to lock the Report and the Report remains locked at the Ministry of Finance.”<sup>48</sup>*

Ephraim Chibwe, alleged uncle of President Chiluba, who was Minister of Works and Supply, involved himself in direct purchases of furniture for State House. Out of the seven million Rands spent, three million Rands could not be accounted for. The report of a bi-partisan committee chaired by Mr. Bennie Mwiinga, which dealt with this issue was forced to be withdrawn from Parliament.<sup>49</sup>

Chiluba, privatized the State and its resources. When the Zambian Privatization Agency defied him to sell Ndola Lime Company at a give away price to his co-business partners, Socomer of Belgium, he was outraged. The then Chairman of the Opposition Party Forum for Democracy and Development (FDD) finance committee, Dipak Patel said:

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<sup>47</sup> The Post, 29<sup>th</sup> January 2001.

<sup>48</sup> Chitala Mbita, Not Yet Democracy, The Transition of the Twin Process of Political and Economic Reform in Zambia (1991-2001) (Lusaka: Zambia Research Foundation, 2006) pp.97-100.

<sup>49</sup> Ibid.

*“The defiance signaled an end to an illegal transaction. It is clear that ZPA are now out of the clutches and shackles of the abuse of office by Chiluba. There had been increased pressure on them to finalize the sale of Ndola lime before the end of Chiluba’s term of office to Socomer, a Belgium based company, in which former President Chiluba was suspected to have interest.”*<sup>50</sup>

In a supporting disclosure, Chiluba’s former wife Vera in her application for maintenance alleged in a sworn affidavit that she had evidence Chiluba had a lot of money in an offshore account.<sup>51</sup> The only inference this statement can account for, is theft and corruption. Chiluba’s government had moved the purchase of fuel from the National Tender Board to State House. They allocated shares to an international Petroleum Company (Total), domiciled in France without the sanction of the Zambia Privatization Agency, which by statute was mandated to do so!<sup>52</sup>

The damning indictment of Chiluba’s fraternization with drug traffickers came from his former Drug Enforcement Commissioner, later employed by the United Nations, Dr Kamoyo Mwale, who stated:

*“I am a living witness as Commissioner of Drug Enforcement Commission. In 1991 I received a letter from some members of the MMD, NEC, in which they said, Commissioner we are worried although we are members of the NEC, we don’t know where the money is coming from, I said the money was coming from drug dealers. I said it was wrong to the country to be mortgaged and to sell the sovereignty of the nation”.*<sup>53</sup>

The then Forum for Democracy and Development (FDD) President, Lt General Tembo said that:

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<sup>50</sup> The Post, 27<sup>th</sup> March 2002.

<sup>51</sup> The Post, 6<sup>th</sup> March 2002.

<sup>52</sup> The Post, 17<sup>th</sup> March 2002.

<sup>53</sup> The Post, 20<sup>th</sup> November 2001.

*“Drug barons and foreigners funded Chiluba and the MMD Presidential campaign in 1990. This is just a tip of the ice-berg. There are many instances of Chiluba soliciting for money from drug barons and other foreign financiers. In 1990, he got money from Apartheid South Africa and bought 79 vehicles. In 1996, when I was serving as Minister of Mines, I introduced Chiluba to a South African businessman of Italian origin, who gave him US\$1.5 million and he only surrendered to the Party US\$250 and the South Africans took over Medical Stores and this generated the controversy over the sale of Medical Stores. In 1990, the Indian drug Baron Goswani later executed in Dubai contributed K3 million to MMD and gave Newstead Zimba Minister of Home Affairs (internal security) a vehicle. Chiluba later got actual cash.”<sup>54</sup>*

It is evident that Chiluba did not care whether Zambia became a narco-State, a State whose institutions are captured by criminal gangs especially drug barons. Such a situation may lead to a failed State.

Chiluba, his Ministers and assistants undermined the Anti-Corruption Commission by creating a climate of fear. When his special assistant Richard Sakala was under investigation for corruption, Sakala asked the Anti-Corruption Commission to apologize<sup>55</sup> and when they refused, the Chiluba government did three things. Firstly, they sent MMD cadres to Times of Zambia, a government controlled paper to protest against the Anti-Corruption Commission investigation against Chiluba’s Special Assistant for Press. Secondly, he then sent them to the then Anti Corruption Commission (ACC) Director General and Director of Operations, Justice Kapembwa and Mr. Malumbe’s offices respectively. The cadres went to demonstrate at the ACC offices and demanded the two officers’ resignations. Thirdly, he infiltrated the ACC with cadres.<sup>56</sup>

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<sup>54</sup> The Post, 19<sup>th</sup> November 2001, Although Tembo seems to be indicting Chiluba flirting with drug dealers, he was a co-adventurer, save that they differed over Chiluba going for a third term and 21 of his ministers of whom Tembo was one of them broke away and formed FDD of which Tembo became President. His statement should be taken with a pinch of prudence.

<sup>55</sup> The Post, 6<sup>th</sup> November 2001.

<sup>56</sup> The Post, 13<sup>th</sup> February 2001.

Rodger Chongwe, a former Minister of Legal Affairs in Chiluba's government and a founding member of MMD had this to say:

*"The excesses committed by the party on the people of Zambia include, the installation of a fraudulent electoral process; virtual legalization of corruption, virtual legalization of drug dealing, theft of national resources in the guise of presidential fund, assassination and harassment of political opponents, hijacking institutions of State, to the extent that the majority of those in leadership are compromised. Destruction of all institutions of State and these include the National Assembly, the Judiciary, the Police, the Army and the Intelligence. The public media has been hijacked."*<sup>57</sup>

Chief Bwalya Mponda of Samfya district, accused President Chiluba and his Ministers of being thieves and not democrats and urged other Chiefs to team up and dislodge MMD before the national resources are depleted.<sup>58</sup>

It was quite clear that Chiluba privatized the State and its resources which he disbursed at will, to friends and cronies. He was suspected to have engaged in grand corruption for which he was prosecuted<sup>59</sup> and acquitted. He however, has been found liable in a London Civil Court to have stolen USD44 million, which is a colossal sum for a small economy like Zambia. Chiluba embraced drug traffickers as they bank-rolled his politics of survival. Chiluba was not beholden to the Constitution and its fundamental values. His leadership was without a conscience. He had made it difficult to be democratically and constitutionally ousted.

When Mwanawasa succeeded Chiluba as President, there was hope that as a lawyer who specialized in constitutional law, he was going to be wedded to constitutional dogmas. That was not to be the case. President Mwanawasa undermined the Speaker as head of the Legislature,

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<sup>57</sup> An interview with Dr. Rodger Chongwe State Counsel on 15<sup>th</sup> March 2001, which statement appeared in the Post of 31<sup>st</sup> May 2001.

<sup>58</sup> The Post, 13<sup>th</sup> February 2001.

<sup>59</sup> *The People Vs FTJ Chiluba and Others SSP/124/2004.*

when he appointed an ardent critic and the then Secretary General of the Opposition United Party for National Development, (UPND) and Member of Parliament for Solwezi Central, Ben Tetamashimba as leader of the opposition. Embarrassing to the President was the refusal by Tetamashimba to take up the position as the appointment was irregular. The Speaker had not recognized the Party as an official opposition.<sup>60</sup> The President called a bi-partisan parliamentary motion to fund political parties as irresponsible. He was reminded by an opposition Member of Parliament, Nakatindi Wina, that he had no powers to dictate to Parliament.<sup>61</sup>

In President Mwanawasa's quest to neutralize Parliament, he appointed three vibrant Forum for Democracy Development (FDD) Members of the National Assembly as Ministers. He was fertilizing divisions in the opposition. In a poor country like Zambia, can an opposition Member refuse a ministerial appointment?. If critical voices from the opposition are co-opted into the Executive, that profoundly neutralizes the Legislature's watchdog function. The opposition party Leaders, Ben Mwila of Zambia Republican Party (ZRP), Christon Tembo of FDD, Anderson Mazoka of United Party for National Developmental (UPND) and Tilyenji Kaunda of United National Independence Party (UNIP), expressed concern at President Mwanawasa's lack of adherence to the doctrine of 'Separation of Powers.' They stated that:

*"There have been efforts by President Mwanawasa to harangue the Judiciary and ignore or contradict parliament. We strongly advise the President that the separation of powers, which exists, even if the current Constitution is flawed, should be scrupulously adhered to as that is an important tenet of democracy."*<sup>62</sup>

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<sup>60</sup> The Post, 13<sup>th</sup> February 2003.

<sup>61</sup> The Post, 26<sup>th</sup> March 2003.

<sup>62</sup> The Post, 31<sup>st</sup> March 2003.

President Mwanawasa in turning down a request by former first lady Vera Chiluba, to give her back two houses which were seized by the Drug Enforcement Commission for suspected money laundering said:

*“In any suit which you might be advised upon, I regret that all issues will be highlighted, my advice is that it is you who will end up bruised. You may wish to know that, I have so far refused to nod the demand that, you should be prosecuted for forgery, obtaining a certificate by false pretences”.*<sup>63</sup>

The President interfered in the operations of the Drug Enforcement Commission. He abetted selective justice and abdicated his duty under Article 44(1)<sup>64</sup> of the Constitution, which is couched in these terms:

*“As the Head of State, the President shall perform with dignity and leadership all acts necessary or expedient for, or reasonably incidental to, the discharge of executive functions of Government subject to the overriding terms of this Constitution and the laws of Zambia, which he is constitutionally obliged to protect, administer and execute.”*

By the President shielding the former first lady Vera Chiluba from prosecution and later appointing her Deputy Minister of Environment, he violated the Constitution which he is obliged to defend and protect. By putting the former first lady beyond the reach of the law, he undermined the rule of law. This conduct drew a sharp reaction from Mr. Dean Mung’omba, ZADECO President who lamented:

*“If Levy does not break from the past and let the law take its course, he is as good as the President who never was. Mwanawasa was sustaining both Vera and Chiluba by holding on to their files containing their criminal activities whilst in State House. The predicament that Levy finds himself in, is one of trying to owe*

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<sup>63</sup> The Post, 31<sup>st</sup> March 2003.

<sup>64</sup> Constitution of Zambia, Act No. 1 of 1991.

*loyalty to the people who anointed him, whose values and past conduct is criminal and at variance with his pronouncements.*"<sup>65</sup>

The conduct of the President was not only at variance with his pronouncements and supposedly long-held views, but those of his Ministers. Kunda, Minister of Legal Affairs said, "if officers shy away from a prosecution merely because a high profiled individual is involved, they will not be contributing to the 'Rule of Law.' The Policy of Government is to strengthen institutions which contribute to 'Good Governance' like the Anti-Corruption Commission, Drug Enforcement Commission and the Human Rights Commission."<sup>66</sup>

A case of disregard or not deferring to the doctrine of 'Separation of Powers' and the 'Rule of Law,' by President Mwanawasa, is when a former Defence Minister, Michael Mabenga, whose election to the National Assembly was nullified on the ground of corruption and theft, which the Supreme Court held had been proved beyond the balance of probability. Upon being removed as Defence Minister, he was appointed Vice Chairman of the ruling party (MMD) and subsequently Chairman. This was sending a bad signal.<sup>67</sup>

President Mwanawasa's collaboration in Chiluba's abuse of power can be epitomized by using public funds from the intelligence account to buy 150 vehicles for the MMD campaign, which his anointed successor Mwanawasa, won by twenty nine percent. President Mwanawasa abetted this abuse and theft. Firstly, the Presidency interfered in the Task Force questioning of Mr. Hutwiller from whose company the intelligence bought 150 vehicles for the MMD campaign. Secondly, after the Supreme Court adjudged that the vehicles were bought from government funds, President Mwanawasa did not release the vehicles to government, thereby

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<sup>65</sup> The Post, 9<sup>th</sup> May 2002.

<sup>66</sup> The Post, 10 March 2002.

<sup>67</sup> *Michael Mabenga V Sikota Wina, et al* (2003) ZR 110.

disobeying a court order.<sup>68</sup> The conduct undermined the President's constitutional functions and was contemptuous of the Supreme Court and a violation of Article 44 of the Constitution. The individual excesses illustrated, support the view that there has been abuse of presidential power with impunity.

One factor that has induced presidential abuse of power in a one-party-dominant-state is that impeachment of the President is an impossible task. Party discipline entails that an MP must back the Party position or he risks being expelled from the Party. When he is expelled from the ruling party, there is the possibility that he loses an opportunity of one day becoming a Minister, which is a revered position in government as it involves access to a lot of governmental resources. An opposition MP may lose his seat, which is also a loss of income. It is seriously doubted that a Speaker elected in office by the ruling party, in a one-party-state, can easily put the impeachment process in motion.

#### **4.5.2. The Legislature as a Check of the Executive**

The Legislature is the 'Law Maker' or 'Law Giver'<sup>69</sup>. The Legislature allocates resources to various ministries and governmental institutions. Through the Public Accounts Committee, it ensures that the allocated resources are spent for the purpose the resources were allocated for. Through various Committees, the Legislature monitors government performance.

#### **4.5.3. The Functioning of the Legislature in Zambia's One Party Dominant State**

The Zambian Legislature's inability to play its constitutional role, as a check of the Executive, is rooted partly in the Constitution itself. The Constitution states that Ministers shall be appointed amongst Members of the National Assembly.<sup>70</sup> The import of Article 46(2) is that Members of the Legislature are co-opted into the Executive and given prestigious positions with

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<sup>68</sup> *Anderson Mazoka et al V Levy P. Mwanawasa et al (2005) ZR 138.*

<sup>69</sup> Article 62, Constitution of Zambia.

<sup>70</sup> Article 46 (2), Constitution of Zambia.

privileges i.e, access to a house, a car, international travel and an opportunity to access bribes from the wicked.

The power of the President to create positions within the Executive branch under Article 61 of the Constitution<sup>71</sup> strengthens his ability to co-opt as many Members of Parliament as he wishes, including the opposition by creating cabinet positions. This fertilizes divisions in the opposition and consequently undermines the role of the opposition as a check on the government. Cabinet positions have been turned into a reward for uncritical loyalty to the ruling party President, who is also Republican President. Once appointed, no amount of dereliction of duty could affect the position of a Minister. On the other hand, not being in good terms with the President means removal from office. With the result that more often than not, mediocre men are left to run the country.

Poverty affects the functioning of the National Assembly as a check on the Executive. The defections of opposition Members of Parliament to the ruling party creates a perception that they are lured by ministerial appointments<sup>72</sup> and other material benefits.

This single factor has significantly weakened the Legislature in Zambia's under-performing economy. The debates have been premised on opportunism. One other factor for toeing the Party line is the threat of expulsion from the party, which results in the loss of a National Assembly seat. MPs do not vote with their conscience, but on Party lines.<sup>73</sup> The President is the job-giver and in the general course of human nature, 'a power over a man's subsistence amounts to a power over his will'. There has been a grave and deliberate incursion by the Presidency into the functioning of the National Assembly. Threats by the late President

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<sup>71</sup> Constitution of Zambia.

<sup>72</sup> In the middle of 2006, the President created a position of Minister for Gender and was filled by an MP who had defected from UNIP, Rose Banda.

<sup>73</sup> Ibid, during the debates of the Public Order Act and the Broadcasting Act, UPND Secretary General warned, any UPND MP who supports a bill that the opposition had agreed to reject would be disciplined. The Monitor, 8-11 February 2002.

Mwanawasa to MMD Members of the National Assembly over their reluctance to support the Local Government Bill, which sought to extend the term of councilors to five years, buttresses the point that the Legislature in Zambia's one-party-dominant-state is ineffective.<sup>74</sup>

#### 4.5.4. The Legislature's Violation of the Constitution

While the *Zambian Parliament* is constituted by the *Zambian Constitution* and its powers are given to it by the *Constitution*, in theory and in practice Parliament sometimes follows the *British parliamentary practice* which recognizes the supremacy of Parliament.

This has been epitomized in Parliament usurping judicial power to adjudicate and impose indefinite prison sentences on those perceived to have violated its privileges. In the case of *Mmembe and Others V the National Assembly*,<sup>75</sup> the *Post Newspaper Journalists* wrote a scathing article about the conduct of Members of the National Assembly in the House. A Committee on privileges proposed their imprisonment and an indefinite prison term was imposed. The High Court held that the National Assembly had no adjudicatory functions under our Constitution, such powers are constitutionally lodged in the Judiciary.

This was a contumelious disregard of the independence of the Judiciary enshrined in the Constitution. When the Supreme Court Judgment in *Mulundika V the People*,<sup>75</sup> which has already been discussed in this Chapter held that Section 5(4) of the public Order Act was unconstitutional, the Legislature undermined judicial integrity, the 'Rule of Law' and judicial independence. The then Deputy Minister of Information and a confidant of President Chiluba, Mr. Valentine Kayope accused the judges of abusing their security of tenure. He further alleged

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<sup>74</sup> After they were threatened to lose gratuity if they were expelled from the party, they supported the Local Government Amendment Bill. All MMD members of parliament voted in favour. This runs counter to the core values of separation of powers and was inappropriate control, manipulation or interference in legislative function. *Times of Zambia*, 6<sup>th</sup> August 2004.

<sup>75</sup> 93/HP/147. under Article 94 of the Constitution, the High Court has unlimited jurisdiction to determine any civil or criminal proceedings under any law, which means any criminal proceedings arising under the National Assembly powers and privilege Act.

<sup>75</sup> (1995/1997) ZR 119.

that, “the Chief Justice and other senior members of the Supreme Court Bench, were foreigners from Nyasaland (Malawi) hired to come and convict Mr. Musakanya and Mr. Shamwana of treason. Notwithstanding their security of tenure, they can be removed, the way Chief Justice Skinner was constructively removed by United National Independence Party (UNIP) cadres when they stormed the Supreme Court and broke furniture with impunity”.<sup>76</sup> The Vice President, General Miyanda called the judges friends of the former regime.<sup>77</sup> And yet there was no relationship between treason committed in 1980 and the unconstitutionality of section 5 of the Public Order Act.<sup>78</sup>

The failure by the Speaker to summon Parliament, after a motion of impeachment of President Chiluba was signed by 65 Members which was more than a third of the Members as required by Article 37 of the Constitution, displeased most Zambians.<sup>79</sup> The Speaker violated the Constitution under which he took the Oath of Office.

#### **4.6.0. The Judiciary as a Bulwark of Executive and Legislative Accountability**

The Constitution creates an independent Judiciary<sup>80</sup> and the oath of office taken by judges and magistrates obligates them to follow the Constitution and administer the law without fear or favour. The question that does often arise is whether the local courts, the High Court and the Supreme Court as a final court of Appeal, have performed in a manner consistent with judicial independence. Given the power of the Courts to undermine the policy objectives and the staying in power of those in government, most governments use a variety of means to control

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<sup>76</sup> Official Verbatim Report of the Parliamentary Debates of the fifth session of the Seventh National Assembly 27<sup>th</sup> February 1996, pp.1313-1340.

<sup>77</sup> Ibid.

<sup>78</sup> Chapter 113 of the Laws of Zambia.

<sup>79</sup> Phiri B.J. Banda C.J, Haantobolo GHN, Protecting the Reputation and Standing of the Institution of Parliament and Parliamentarians: A Study of perceptions, Realities and Reform in Zambia (Commonwealth Parliamentary Association Headquarters Secretariat, University of Monash Australia, 2004) p.63.

<sup>80</sup> Article 91 (3), Constitution of Zambia.

judiciaries. Professor Von Doepp in his study of judicial politics in emerging democracies, which study included Zambia states:

*“Studies of judicial politics in emerging democracies indicate that elected officials have been quite eager and often effective in enfeebling judicial institutions to the point that they no longer represent such a threat. As most recognize, independent and assertive Judiciaries are critical for democratic consolidation”.*<sup>81</sup>

The independence of the Judiciary can be diminished by the way judges are appointed. Here the point being made is that professionalism may not be the sole criteria. The attitude of judges themselves, though independent, may not be very assertive. There is Executive interference to some extent and the tendency by the Executive not to obey Court orders. The disbursement of the resources to the Judiciary does not mirror the importance of the Judiciary in our constitutional system.

#### **4.6.1. The Judiciary’s Violation of the Constitution**

The Constitution reposes legislative power in the Legislature. Therefore where the language of a statute is plain and simple, the Judiciary as ‘Interpreter’ of the law must interpret the law as it is. The Supreme Court in Zambia, therefore in *Lewanika and Others V The Attorney-General*,<sup>82</sup> usurped the legislative authority of Parliament. In that case, Members of the ruling MMD resigned from the Party, but did not join another party, which was formed by their colleagues. Under the then existing constitutional provision, a Member of the National Assembly’s seat, could only be declared vacant by the Speaker if the MP resigns from one Party and joins the other Party. The Supreme Court read into the provision the words ‘vice versa’, in order to make those that resign and do not join any political party at all to be expelled. This was

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<sup>81</sup> Von Doepp Peter, *The Problem of Judicial Control in Africa’s Neopatrimonial Democracies: Malawi and Zambia in Comparative View* (Denton: University of Texas) p.3.

<sup>82</sup> (1993/94) ZR 206.

clearly 'Judicial legislation' and violated the Legislature's constitutional function of being the only law-giver.

It is doubtful that if the MPs resigned from an opposition party, the Supreme Court would have decided in that way. The general rule in interpretation, is what as a matter of ordinary English, do the words in the statute mean.<sup>83</sup>

The Supreme Court later in *The Minister of Information and Broadcasting Services and Another V Fanwell Chembo on His own behalf and on behalf of The Media Institute of Southern Africa and Others*<sup>84</sup> said:

*"The fundamental rule of interpretation of Acts of Parliament is that they ought to be construed according to the words expressed in the Acts themselves. If words of a Statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. It is not the duty of the Courts to edit or paraphrase the laws passed by parliament. The duty of the Courts is to interpret the laws as found in the Statute."*

Under Article 28 of the Constitution,<sup>85</sup> the Judiciary, specifically the High Court enforces the 'Bill of Rights.' Under our law, foreigners are not discriminated against in terms of enjoying fundamental rights and freedoms. In *Roy Clarke V Attorney General*,<sup>86</sup> the author as High Court Judge, decided that to deport an alien for writing satire articles about the President, when the same article was written by a Zambian and nothing happened to him, was discriminatory and contrary to the 'Bill of Rights' Article 23 in particular. The Supreme Court was of the view that since the violation of the Constitution was not pleaded, the trial Judge ought not to have considered discrimination. With due respect to the Supreme Court, this was failure to perform

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<sup>83</sup> See Mr. Justice Hoffman's dictum in *Norwich Union V British Railways Board* (1987) 2 EGLR 137.

<sup>84</sup> (1982) ZR 82.

<sup>85</sup> Constitution of Zambia, Chapter 1 of the Laws of Zambia.

<sup>86</sup> SCZJ No.4 of 2008.

the Judiciary's primary function as 'Guardian of the Constitution' which is constitutionally lodged in the Judiciary. The Court took a pro-ruling party position, it is submitted.

One would echo Nwabueze's observation when he underrates the intellectual ability of the present generation of African judges to perform effectively the more creative role demanded of them by constitutional adjudication when he says:

*"For their own part, the present generation of African judges is handicapped by the fact that their education in England and in the techniques of English law has insulated them from the values and needs of their own people. Their minds have become imbued with ideas about the unquestionability of parliamentary legislation under English law and about the perfect and symmetry of the common law as to render them almost incapable of performing effectively the more creative role demanded of them by constitutional adjudication under a written Constitution. They are unfamiliar with the constitutional decisions of courts in the United States and constitutional law, which have far greater relevance to the problems that are presented to them than the English decisions which are their stock-in-trade. Moreover, the African judges' political sympathies, conditioned as they are by his tribal identity and loyalty, often undermine their ability to approach constitutional cases impartially and objectively".<sup>87</sup>*

This unsatisfactory performance of the Courts in Zambia has produced among the people an inclination not to take political disputes to the Courts. The Judiciary should be a model of excellence in the realization of human rights, if it is to remain an appropriate guardian of those rights.

Nwabueze's observation reinforces and underscores the imperativeness of establishing a Constitutional Court recommended by the Mvunga, Mwanakatwe and Mung'omba

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<sup>87</sup> Nwabueze Ben, *Judicialism in Commonwealth Africa*, op cit, p.361.

Constitutional Commissions. The decision in *Lewanika & Others V The Attorney General*, would have been overturned by a Constitutional Court. But the appellants had nowhere to go as the Supreme Court is the final Court in all matters. The violation of the Constitution remains unremedied.

#### 4.6.2. The Predatory Conduct of the Executive

The Executive's predatory conduct may take various shapes. There may be attempts to incriminate a non-compromising judge or indeed to bribe him. The Head of State who cannot be cited for contempt, may publicly criticize a judgment.<sup>88</sup> When the author declared the deportation of Mr. Roy Clarke illegal for writing satire article, which was perceived insulting to the leaders of Zambia, the President criticized the Judge as he has immunity during his tenure of office.<sup>89</sup> He further said the government was going to test the law in the Supreme Court. The Supreme Court agreed with the author that, it was disproportionate to deport Mr. Clarke.<sup>90</sup>

The former Chief Justice was implicated in a rape case, which conspiracy was hatched in State House. The conspiracy was perceptively intended to neutralize the Chief Justice. The objective may have been to instill fear in the Judges, after the Supreme Court declared certain provisions of the Public Order Act, unconstitutional, which outraged the Executive.<sup>91</sup>

The lines of influence can entail more than direct payouts, and can involve the government providing and retaining the power to withdraw economic resources. In Malawi, several judges are alleged to hold government-allocated sugar distribution quotas that allow them to engage in the lucrative trade of the commodity.<sup>92</sup>

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<sup>88</sup> The Constitution of Zambia, op cit, Article 43 (2).

<sup>89</sup> *Roy Clarke V Attorney General 2004/HP/003*.

<sup>90</sup> *Attorney General V Roy Clarke SCZ No.4 of 2008*.

<sup>91</sup> The author was Special Assistant to the Chief Justice and chaired the press conference at which the Chief Justice refused to resign on 6<sup>th</sup> December 1997.

<sup>92</sup> Von Doepp Peter, *The Problem of Judicial Control in Africa's Neopatrimonial Democracies*, op cit, p.7.

It is quite clear that the Executive can dangle a carrot and stick and both have had a chilling effect on judicial independence. The democratic oversight institutions are stifled by the powerful Presidency.

#### **4.6.3. The Executive Disregard of Court Orders**

The tendency by the Executive to disobey Court orders has stretched into the ‘Third Republic.’ In the Second Republic, the Party constitutionally placed itself above the organs of State. There was party supremacy, which concept defined the relationship of the Party with other institutions. The classical case of disobeying a Court order was in *Shipanga V The Attorney General*,<sup>93</sup> when the government incapacitated itself from making a return to the Writ of Habeas Corpus, in respect of a South West African People’s Organization (SWAPO) dissident detained by the Zambian authorities. Instead of the government producing the body in Court, they surrendered the dissident to the Tanzanian government and pleaded that he was out of jurisdiction. They also pleaded that they could not make a return in the interest of the liberation struggle. The Supreme Court was not amused but was powerless.

In another matter when the Heritage Party leader Brigadier General Miyanda applied for an injunction to restrain the President from appointing Ministers from the opposition and the injunction was granted by Judge A. Nyangulu, the President ignored the injunction and went ahead to appoint the Three Ministers.<sup>94</sup> In Gambia and Ghana, disobedience of a Court order by the President and Vice President is a ground for removal from office. This means what President Mwanawasa did, would have been an impeachable offence. However, the Catholic Commission for Justice and Peace (CCJP) asked the judge to resign to save the Judiciary from embarrassment as he had diminished the integrity of the Judiciary by apologizing. The Commission also rebuked

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<sup>93</sup> (1977) ZR 71.

<sup>94</sup> *Miyanda (suing as President of Heritage Party) V Attorney General, HP/01/2003.*

President Mwanawasa's continued interference in the work of other arms of government.<sup>95</sup> By his conduct, the President was creating a climate of fear among judges, which was an assault on judicial independence.

It is suggested that it is imperative that presidential powers be vigorously checked. The Constitution of Kenya Review Act,<sup>96</sup> has just done that by casting a duty on the President to ensure the protection of human rights and fundamental freedoms and the rule of law. The President will retain the post of Commander-in-Chief and can declare war, the executive functions will be performed by the Prime Minister. The Prime Minister will nominate the Deputy Prime Minister, Ministers and their Deputies who will formally be appointed by the President. A powerful President can defy the will of the people, capture Parliament and the Judiciary.

A classical case is Malawi, where Mbingu Wa Mutharika, was sponsored by the United Democratic Front to stand as President. After being elected as President, he had differences with his predecessor and he formed his own Party and eighty Members of Parliament from other parties joined his Party. They did so for the sake of expediency, as there was no ideological motivation. The Speaker refused to declare the seats vacant. Despite the President's party not having Members of Parliament when it was formed, the Legislature could not pass a vote of no confidence, as the President's constituency is a national one.<sup>97</sup>

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<sup>95</sup> A letter written to the Chief Justice by the Catholic Commission for Justice and copied to the President and the Judge dated 10<sup>th</sup> December 2003, which came to the attention of the Author as a colleague.

<sup>96</sup> Article 131(2), Constitution of Kenya Review Act No. 9 of 2008.

<sup>97</sup> An interview with Professor Von Doepp, Associate Professor of Political Science, University of North Texas on sabbatical leave to the University of Zambia 10<sup>th</sup> April 2006.

#### 4.6.4. Reconstruction of the Doctrine of Separation of Powers

Among the elements of 'Good Governance' as defined in chapter two, is efficient and effective administration and programme delivery, ethical use of public resources and authority. It is undeniable fact that the European Colonial administrators positioned themselves as masters of the people with superior rights and privileges. The indigenous functionaries took over the colonial approach and patterned themselves on it. Nwabueze observes that, "that, I believe, is the origin of the absence of a sense of service and trusteeship that pervades public service in Africa. The concept of service and equally that of trusteeship is foreign to the African public servant. He is notoriously discourteous, disrespectful, arrogant, undevoted, unresponsive to the needs of the people, arbitrary, nepotistic and lacking in fidelity, probity and accountability".<sup>98</sup>

Nwabueze's statement demonstrates lack of socio-economic responsibility among the African post-colonial leaders. Further, the statement underscores the necessity of including socio-economic rights in the Constitution. Our Constitution should entrench both civil and political rights and socio-economic rights. These rights are inter-related and mutually supporting. When socio-economic rights are contained in the Constitution, they will be policed by the Judiciary as a guardian of the Constitution. This will enhance executive accountability to the people who are sovereign and enhance the role of the Judiciary and improve checks on Executive power.

The Mung'omba draft constitution included socio-economic rights. Sadly, the National Constitutional Conference (NCC) vetoed this provision on narrow grounds that the State does not have sufficient resources.<sup>99</sup> The provision was couched in these terms:

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<sup>98</sup> Nwabueze Ben, *Constitutional Democracy in Africa*, Volume 2 (Lagos: Spectrum Books Limited, 2004) p.360.

<sup>99</sup> An interview with Judge Doctor Matibini an NCC member on 10<sup>th</sup> January 2010.

*“Parliament shall enact legislation which provides measures which are reasonable in order to achieve progressive realization of the economic, social and cultural rights”.*<sup>100</sup>

There are similar provisions in the Indian and South African Constitutions. The provision in the Indian Constitution casts a duty on the State to secure a social order for the promotion of welfare of the people and is couched in these terms:

*“The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political shall inform all institutions of national life”.*<sup>101</sup>

The Courts when interpreting the realization of socio-economic rights use reasonableness and is understood in the context of the ‘Bill of Rights’, as a whole. “Nearly all modern States have legislation that the Courts enforce concerning housing, health, education and welfare”, states Judge Sachs.<sup>102</sup> In any event, the independence struggle was premised or predicated on provision of education, health and housing. Kaunda in the immediate Post-Independence period tried to provide these services with the inherited cash reserves, but progressively the State has been divesting itself of these responsibilities.

The provision of socio-economic rights as decided by the South African Constitutional Court have to be realized progressively within the State’s available resources.<sup>103</sup>

Given the abuse of national resources, which has been alluded to earlier in this Chapter, the inclusion of socio-economic rights in the State’s responsibilities to its citizens, is of critical necessity as they will have the right to enforce those rights. The rejection of the inclusion of

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<sup>100</sup> Article 63, Mung’omba Draft Constitution of the Republic of Zambia, 2005.

<sup>101</sup> The Indian Constitution Part IV Article 38 (1).

<sup>102</sup> Sachs Albie, *The Strange Alchemy of Life and Law* (Oxford: University Press, 2009)

<sup>103</sup> The Grootboom case cited by retired Constitutional Court Judge Sachs see Sachs Albie, *The Strange Alchemy of Life and Law*, op cit, pp.191-199.

socio-economic rights in the Constitution undermines the 'Will' of the people who petitioned the Mung'omba Constitution Review Commission to include them. Yacoob J said:

*"There can be no doubt that human dignity, freedom and equality, the fundamental values of our society, are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in the 'Bill of Rights.' The realization of these rights is also key to the advancement of equality and the evolution of a society in which men and women are equally and able to achieve their potential".*<sup>104</sup>

The five purposes of government are defence of the nation; to foster national identity; to represent the interests of the nation; to provide infrastructure such as roads, bridges, drinking water, electricity and communication networks; and social welfare, that is the provision of education, and health care to the underprivileged in the community".<sup>105</sup>

A compelling case for these rights to be provided in the Constitution can therefore not be denied in order to implement the full purpose of government. The Executive should not enjoy unbridled discretion in the implementation of these socio-economic programmes. The discretion should be subject to judicial supervision or scrutiny. The post-colonial rulers plea to the Zambian people when deconstructing the doctrine, was to carry out the developmental agenda, which they have lamentably failed to do. The reasons for reconstruction of the doctrine is not only to remind them of their socio-economic responsibilities and the national liberation 'Mission Statement', but to compel them to cultivate a sense of service and not to self-preserve themselves and line their pockets.

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<sup>104</sup> The Grootboom case cited by retired Constitutional Court Judge Sachs see Sachs Albie, *The Strange Alchemy of Life and Law*, op cit, pp.191-199.

<sup>105</sup> Pillai Maya, *What are the Five Purposes of Government* Buzzle.com Articles, p.1.

#### 4.7.0. Conclusion

To enhance the doctrine of Separation of Powers, Cabinet should be appointed outside the National Assembly. The Assembly should scrutinize all senior appointments in the Civil Service i.e. Permanent Secretaries, their Deputies, Directors, among others. These appointments should be based on professionalism, merit and experience in order to enhance performance in the Civil Service.

Parliamentary democracy enhances constitutional rule, because the Head of Government, the Prime Minister, is directly answerable to the National Assembly. International treaties and loans should be approved by the National Assembly before the Executive signs them. When the Prime Minister is Head of Government, the Executive is under constant scrutiny, by Members of the National Assembly. You have more executive accountability. It is therefore not surprising that the Parliamentary Reforms and Modernization Committee recommended that there be President's question time. The President should in his person answer for his actions in the National Assembly<sup>106</sup> as Head of State and Government.

Time has come in order to consolidate Constitutional Democracy, to reconstruct the doctrine of 'Separation of Powers.' The classic doctrine was deconstructed because, as claimed then, there was a pressing need to have a powerful Executive that can direct the socio-economic transformation agenda of the post-colonial society. Presidentialism in Commonwealth Africa has not consolidated constitutional rule due to enormous powers reposed in the Presidency, which have been abused. It has been very rare for a President to respect the 'Will' of the people or to leave office honourably, with a few exceptions of Ali Mwinyi and Mkapa in Tanzania, Chissano in Mozambique, Masiye in Botswana, and Kaunda in Zambia.

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<sup>106</sup> Republic of Zambia, Report of the Parliamentary Reforms and Modernization Committee for the Third Session of the National Assembly Appointed on 27<sup>th</sup> January 2004, p.5.

The reconstructed doctrine should take into account the recommendations of the Mvunga, Mwanakatwe and Mung'omba Constitutional Review Commissions. There should be a Constitutional Court which will ensure that each organ of state acts within its constitutional mandate.<sup>107</sup> There should be total separation between the Executive and the Legislature by appointing Cabinet outside the Legislature.<sup>108</sup> The current power structure has militated against constitutional rule due to ineffective checks and balances and has led to undermining of the 'Rule of Law' by the three Organs of State.

The next Chapter discusses the Electoral Legal Framework.

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<sup>107</sup> Republic of Zambia, Summary of Recommendations of the Mvunga Constitutional Review Commission of Inquiry, 1991 Recomm. 7.1 (a).

<sup>108</sup> Report of the John Mwanakatwe Constitutional Review Commission of Inquiry, 10<sup>th</sup> June 1995, p.103.

## CHAPTER FIVE

### ELECTIONS, POLITICAL PARTIES AND CONSTITUTIONALISM

#### 5.1.0. INTRODUCTION:

The past three decades have seen a dramatic global expansion of democracy, which has led to an extraordinary focus on the institution of elections. In countries around the world, elections have served to help resolve longstanding conflicts and to initiate or consolidate transitions to democracy. Free and fair elections have become increasingly a critical requirement for governments to have legitimacy in the eyes of the International Community and their own citizens. Electoral legitimacy and outcomes, in turn, greatly affect the prospects for effective governance.<sup>1</sup>

When political actors negotiate over a new electoral system, they often push proposals which they believe will advantage their party in the coming elections. However, this can often be an unwise strategy, particularly in developing nations, as one party's short-term success or dominance may lead to long-term political breakdown and social unrest. For example, in negotiations prior to the transitional 1994 election, South Africa's ANC could reasonably have argued for the retention of the existing First Past The Post (FPTP) electoral system, which would probably have given it, as by far the largest party, a seat bonus over and above its share of the national vote. It is argued that the ANC by agreeing to proportional representation (PR) electoral system, got fewer seats than it could have under FPTP. This was a testament to the fact that long-term stability was more desirable than short-term electoral gratification.<sup>2</sup>

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<sup>1</sup> Bjornlund Eric, Elections in a Democratizing World, [usinfo.state.gov/dd/eng](http://usinfo.state.gov/dd/eng).

<sup>2</sup> The New International Idea Handbook, International Institute for Democracy and Electoral Assistance 2005, p.162.

All groupings which wish to play a part in the democratic process should feel that the electoral system to be used is free and fair and gives them the same chance of electoral success as anyone else. The paramount aim of an electoral system should be that those who lose the election cannot translate their disappointment into a rejection of the system itself or use the electoral system as an excuse to destabilize the path of democratic consolidation. In 1990 in Nicaragua, the Sandinistas were voted out of government, but accepted the defeat in part, because they accepted the fairness of the electoral system. Cambodia, Mozambique and South Africa were able to end their bloody civil wars through institutional arrangements which were broadly acceptable to all sides.<sup>3</sup>

Voters should feel that elections provide them with a measure of influence over governments and government policy. Choice can be maximized in a number of different ways. Voters may be able to choose between parties and between candidates of the same party. They may also be able to vote under different systems when it comes to presidential, upper house, lower house, regional and local government elections. They should feel confident that their role has a genuine impact on the formation of a government, not just on composition of the legislature.<sup>4</sup>

Democracy is anchored on free and fair elections and there is broad consensus as to the nature of such elections. Jean Kirkpatrick, former United States Ambassador to the United Nations has offered this definition:

*“Democratic elections are not merely symbolic..... They are competitive, periodic, inclusive, definitive elections, in which the decision-makers in a government are selected by citizens who*

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<sup>3</sup> The New International Idea Handbook, op cit, p.161.

<sup>4</sup> Ibid.

*enjoy broad freedom to criticize government, to publish their criticism and to present alternatives”.*<sup>5</sup>

Diane Ravitch, scholar, author, and a former assistant U.S. Secretary of Education said:

*“When a representative democracy operates in accordance with a Constitution that limits the power of the government and guarantees fundamental rights to all citizens, this form of government is a constitutional democracy. In such a society, the majority rules, and the rights of minorities are protected by law and through the institutionalization of law. These elements define the fundamental elements of all modern democracies, no matter how varied in history, culture and economy. Despite their enormous differences as nations and societies, the essential elements of constitutional government... .. majority rule coupled with individual and minority rights, and the rule of law... .. can be found in Canada, Costa Rica, France, Botswana, Japan and India”.*<sup>6</sup>

Broadly, this definition includes freedom of the Press to publish criticism and access to the Press. Free and fair elections are at the heart of constitutional democracy and constitutional democracy is at the heart of constitutionalism or a very important characteristic feature of constitutionalism. It is within that context that the electoral process in Zambia will be evaluated.

Constitutionalism therefore is an embodiment of diverse concepts. There must be democratic elections, transparency and accountability, observance of human rights, ‘Separation of Powers’ or a ‘Limited Government’, an independent Legislature and Judiciary, freedom of expression and association, among many others. These values can only be sustained if the institutions supporting constitutional democracy like the Electoral Commission are fully independent. A written Constitution contains the most important laws, by which citizens agree to

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<sup>5</sup> United States Government International Information Programs Publication <http://usinfo.state.gov/products/pubs>, 7th January 2008, p.3.

<sup>6</sup> Ibid, p.4.

live, and it outlines the basic structure of their government. Thus democratic constitutionalism, based on ideals of individual freedom, community rights and united government power, creates the frame-work governing a democracy<sup>7</sup>.

The battle for democracy in pre-independent Africa was about enfranchising the natives. In the Post-Colonial or Post-Independence era, the democratic battle is about levelling the political terrain.

### **5.1.1. Normative Elements of an Efficacious and Democratic Electoral Process**

An efficacious electoral process is a critical necessity to the legitimization of the electoral outcome and can forestall political instability. 'Free and fair' elections increase the likelihood of a peaceful transfer of power as the losing candidate will accept the validity of the electoral result and cede power to the new government, where the incumbent has lost.

Transparency refers to the degree of openness in the election process. It is important in the conduct of elections in that it enables the public at large, political parties and candidates to be informed on a timely basis about developments concerning electoral matters, it is a confidence building measure.<sup>8</sup> A level playing field in the context of elections refers to a requirement that the election rules and regulations apply fairly to all political parties and candidates. It requires that the Electoral Commission deals openly and on equal terms with each of the political parties to enhance transparency. Whether elections are free and fair is a judgmental position on the whole process of conducting elections.<sup>9</sup>

The electoral process is 'free', where fundamental human rights and freedoms are respected, including: freedom of speech and expression by electors, parties, candidates and the

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<sup>7</sup> Principles of Democracy, United States Government Publication, [usinfo.state.gov](http://usinfo.state.gov).

<sup>8</sup> Common border, Elections in Latin America, what constitutes free and fair elections, [www.commonborder.org/free](http://www.commonborder.org/free), p.1.

<sup>9</sup> SADC Parliamentary Forum, Norms and Standards for Elections in the SADC Region, Recommendations adopted by the SADC Parliamentary Forum Plenary Assembly on the 25<sup>th</sup> March 2001 Windhoek, Namibia, p.16.

media; freedom of association; that is, freedom to form organizations such as political parties and NGOs; freedom of assembly to hold political rallies and to campaign; freedom of access to and by electors to transmit and receive political electoral information messages; freedom to register as an elector, a party or a candidate; freedom from violence, intimidation or coercion; freedom of access to the polls by electors, party agents and accredited observers; freedom to exercise the franchise in secret, and freedom to question, challenge and register complaints or objections without negative repercussions.

The 'fair' electoral process is one where the 'playing field' is reasonably levelled and accessible to all electors, parties and candidates and includes an independent, non-partisan electoral organization to administer the process, guaranteed rights and protection through the Constitution and electoral legislation and regulations; equitable representation of Electors provided through the legislation; clearly defined universal suffrage and secrecy of the vote; equitable and balanced reporting by the Media; equitable access to financial and material resources for party and candidate campaigning; equitable opportunities for the electorate to receive political and voter information, accessible polling places; equitable treatment of electors, candidates and parties by elections officials, the Government, the Police, the Military and the Judiciary; an open and transparent ballot counting process and election process not disrupted by violence, intimidation or coercion.<sup>10</sup>

### **5.2.1. The Electoral Legal Framework**

The Zambian Electoral Legal Framework is contained in the Constitution, various statutes and statutory instruments. It is critical that the most important features of the legislation are highlighted before the evaluation of the Electoral process. These provisions have been interpreted in judicial decisions discussed later in the Chapter.

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<sup>10</sup> Commonborders, Elections in Latin America, what constitutes Free and Fair elections [www.commonborders.org/free](http://www.commonborders.org/free), p.3.

### 5.2.1.(a) Constitution

A number of provisions in the Constitution deal with elections and the electoral process. Article 34<sup>11</sup> provides that the election of the President must be by direct universal adult suffrage and by secret ballot and must be held whenever the National Assembly is dissolved. A Presidential election must also be held when the incumbent dies, resigns, is removed on grounds of physical or mental incapacity, or impeached.

The Constitution lays down qualifications for the Presidency and Members of Parliament (MPs). Under Article 34(3)<sup>12</sup>, a Presidential candidate must:

- (i) be a Zambian citizen;*
- (ii) be at least thirty five (35) years of age;*
- (iii) be a member of, or sponsored by a political party;*
- (iv) be qualified to be elected as an MP;*
- (v) have been domiciled in Zambia for a period of at least twenty (20) years; and*
- (vi) have parents who are both Zambians by birth or descent.*

An independent candidate cannot stand for the Presidency in Zambia. The import is that a candidate for the Presidency is forced to associate himself/herself with a political party if he/she has to stand as a Presidential candidate. It may be argued that this forceable and expedient assembly with and association to a political party, whose manifesto he may disagree with, violates his freedom of assembly and association, which rights are guaranteed under the Constitution. The requirement that a candidate have parents who are both Zambians by birth or descent was perceived to have been put in the Constitution to bar Kaunda from standing in the 1996 elections. Its constitutional validity was challenged in *Legal Resources Foundation V*

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<sup>11</sup> Constitution of Zambia.

<sup>12</sup> Ibid.

**Zambia.**<sup>13</sup> The African Commission of Human and People's Rights found that Zambia had violated Articles 2, 3(1) and 13 of the African Charter. Zambia was strongly urged to take necessary steps to bring its Laws and Constitution into conformity with the African Charter and to report to the Commission. A Chief cannot stand for the presidency as chiefs are barred from standing as candidates for the National Assembly.<sup>14</sup> This provision may also be said to be discriminatory.

The Returning Officer in presidential elections is the Chief Justice.<sup>15</sup> The determination of the validity of election of the President is by a full Bench of the Supreme Court.<sup>16</sup> Article 41 casts two contradictory duties on the Chief Justice. He declares the President duly elected and swears him into office and when the President's election is challenged in the Supreme Court, he chairs the full Bench hearing the Petition.

The omission of the phrase, 'determination whether seat has become vacant', in Article 41 (2) of the Constitution regarding the election of the President was raised as a preliminary issue in *Mazoka and Others V Mwanawasa and Others*.<sup>17</sup> The respondents argued that, there is no express provision stipulating the grounds, upon which an election of the President may be nullified and specifying the remedies to be granted in the event of such nullification. The Supreme Court overruled the objection and said:

*"The meaning of the word 'determine' in the context it is used in Article 41 (2) called upon the Court to find out or establish precisely or decide whether a person was validly elected as President of Zambia and whether the applicable laws were followed"*

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<sup>13</sup> (2001) AHRLR 84.

<sup>14</sup> Article 65(3) and (4), Constitution of Zambia.

<sup>15</sup> Article 41 (1).

<sup>16</sup> Article 41 (2).

<sup>17</sup> (2005) ZR 138.

The Supreme Court concluded that Article 41 (2) of the Constitution confers on it the jurisdiction to decide whether or not a person has been validly elected President.<sup>18</sup>

The person elected as President is sworn in and assumes office immediately, but not later than twenty four hours from the time of declaring the election results.<sup>19</sup> The predecessor hands over immediately, and should complete the procedural and administrative handing over process within fourteen days from the date of swearing in the incoming President.<sup>20</sup> The Constitution provision dealing with election of the President is couched in vague terms and states:

41(2) Any question which may arise as to whether:

- (a) *Any provision of this constitution or any law relating to election of the President has been complied with;*
- (b) *Any person has been validly elected as President under Article 34, shall be referred to and determined by the full Bench of the Supreme Court.*

The Supreme Court acts as a court of first instance and final court in Presidential Petitions.

The National Assembly elections are held every five years, and whenever the National Assembly is dissolved either by the President or by a two thirds majority of Members resolving to dissolve the Assembly<sup>21</sup>. The qualifications of a candidate for the election to the National Assembly are that; he/she must be a Zambian citizen; at least twenty one years old; and literate and conversant with English. However, an incumbent President or a validly nominated candidate in a Presidential election is barred from standing for Parliamentary Elections.<sup>22</sup> A Chief is not

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<sup>18</sup> (2005) ZR 138.

<sup>19</sup> Article 34 (9), Constitution of Zambia.

<sup>20</sup> Article 34 (10).

<sup>21</sup> Article 88 (6).

<sup>22</sup> Article 6 (1).

qualified for elections as a Member of the National Assembly and if a Chief intends to contest elections, he/she must abdicate his/her chieftaincy before lodging his/her nomination.<sup>23</sup>

The MP vacates his seat, if he/she ceases to be a Zambian; if the MP conducts himself/herself contrary to the Parliamentary and Ministerial Code of Conduct,<sup>24</sup> if he/she crosses the floor i.e. resigning from a political party on whose ticket he/she was elected to Parliament; or if he/she was an Independent Member, joins a political party; if he/she assumes office of President; if he/she is sentenced to imprisonment by a Court in Zambia to death or to imprisonment for a term exceeding six months; and if any circumstances arise that, if the MP was not a Member of the National Assembly, would cause the person to be disqualified for election as such under Article 65 of the Constitution.<sup>25</sup>

Article 72(1) of the Constitution states:

*“The High Court shall have power to hear and determine any question whether:*

- (a) Any person has been validly elected or nominated as a member of the National Assembly or the seat of any member has become vacant;*
- (b) Any person has been validly elected as Speaker or Deputy Speaker of the National Assembly or, having been so elected, has vacated the office of Speaker or Deputy Speaker”*

Article 76 of the Constitution<sup>26</sup> provides for an autonomous Electoral Commission. Its functions are to supervise the registration of voters, to conduct Presidential and Parliamentary elections and the review of constituency boundaries. However, the Constitution does not provide

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<sup>23</sup> Article 65 (2), Constitution of Zambia.

<sup>24</sup> Article 65 (3) (4).

<sup>25</sup> Article 65 (1) (C).

<sup>26</sup> Chapter 1 of the Laws of Zambia.

for its composition, powers and functions. These provisions are found in the Electoral Commission Act.

### **5.2.2. (b) Other Statutes and Regulations**

The Electoral Commission Act<sup>27</sup> provides for the composition of a full-time Electoral Commission, as well as its internal organization and operations. The Commission comprises the chairperson and not more than four members, all of whom are appointed by the President, subject to ratification by the National Assembly. The chairperson should be a person who has held or is qualified to hold high judicial office. The qualifications for a Commissioner are not specified. A Commissioner serves for a period not exceeding seven years subject to renewal and the President may remove a Commissioner if:

*(i) she or he is insane or otherwise declared to be of unsound mind; or*

*(ii) she or he is declared bankrupt<sup>28</sup>*

The Commission appoints support staff headed by the Director and the Commission determines its own remuneration, subject to approval by the President.<sup>29</sup> This provision calls into question, the independence of the Commission if the President who is a candidate approves the Chairperson's, Commissioners' and staff salaries.

#### **(i) The Electoral Act, Chapter 13 of the Laws of Zambia**

This is the principal law on elections in Zambia. It makes provision for Presidential and Parliamentary elections, empowers the Electoral Commission of Zambia (ECZ) to make regulations providing for the registration of voters and for the manner of conducting elections. It

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<sup>27</sup> Chapter 13 of the Laws of Zambia.

<sup>28</sup> Ibid, Section 12 (3).

<sup>29</sup> Ibid, Section 15 (1).

also provides for offences and penalties in respect of elections and for the hearing and determination of election petitions. Section 13 of the Act provides that in the exercise of its functions under the Constitution, the ECZ shall not be subject to the direction or control of any other person or authority.

Under section 7<sup>30</sup> of the Electoral Act, the following are disqualified from voting or standing for Parliamentary elections:

- (i) persons who have been convicted of any corrupt practices or illegal practices within a period of five years preceding that election;*
- (ii) persons who have been reported guilty of any corrupt practice or illegal practice by the High Court upon the trial of an election petition within a period of five years preceding that election; and*
- (iii) persons who at the date of the election are in lawful custody or if their freedom of movement is restricted under any law in force in Zambia.*

Section 18 (2) of the Electoral Act<sup>31</sup> provides that the election of a candidate as a member of the National Assembly can only be challenged in the High Court and the result declared void on any of the following grounds which is proved to the satisfaction of the High Court upon trial of an election Petition:

- (i) that by reason of any corrupt or illegal practice committed in connection with the election or by reason of other misconduct, the majority of voters in a constituency were or may have been prevented from electing the candidate of their choice;*
- (ii) that any corrupt or illegal practice was committed in connection with the election by or with the knowledge and consent or approval of the candidate or his election agent or of his polling agents;*

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<sup>30</sup> Chapter 13 of the Laws of Zambia.

<sup>31</sup> Ibid.

*(iii) that there has been non-compliance with the provisions of the Act, relating to the conduct of elections, and it appears to the High Court that the election was not conducted in accordance with the principles laid down in such provisions and that such non-compliance affected the result of the election; or*

*(iv) that the candidate was at the time of his election a person not qualified or a person disqualified for election.*

Section 19 of the Electoral Act<sup>32</sup> provides that an election petition may only be presented by a voter, a candidate, potential candidate, a person claiming to have been a candidate at the election to which the election petition relates or the Attorney General. The Petition must be presented not later than thirty (30) days after the declaration of election results in accordance with section 21 (3) of the Act.

**(ii) Act No. 12 of 2006**

The Electoral Act that emerged from the Electoral Reform Technical Committee (ERTC), merely restated the existing grounds for annulling elections as almost all the progressive recommendations were rejected. This piece of legislation was hurriedly enacted to the extent where it deprived the High Court the discretion of determining the security for costs in election Petition. Section 98 (2) states:

*“After the prosecution of an election Petition, every Petitioner to it shall give such security for costs, not exceeding the sum of eight hundred fee units”*

**(iii) Electoral (General) Regulations Statutory Instrument No. 108 of 1991**

The Electoral (General) Regulations create a lot of electoral offences and are enforceable by the High Court and Supreme Court.

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<sup>32</sup> Chapter 13 of the Laws of Zambia.

In the case of *Levison Achitery, Mumba V Peter William Mazyambe Daka*<sup>33</sup> and *Michael Mabenga V Sikota Wina*,<sup>34</sup> the High Court nullified elections and the Supreme Court upheld those decisions for violating Regulation 53, which prohibits the provision of food, drink or entertainment during an election to the electorate.

The Regulations prescribe the various offences that are prohibited during elections. Corrupt and illegal practices as specified in Regulation 51 among other things, provides that bribery occurs where a person directly or indirectly by himself or any other person makes any gift, loan, offer, promise, procurement or agreement to or for any person in order to induce such person to procure and to endeavour to procure the vote of any voter at any election upon or in consequence of any such gift, loan, offer, promise, procurement or agreement, procures or engages, promises or endeavours to procure, the return of any candidate at any election or vote of any voter at any election; advances or pays or causes to be paid any money to or for the use of any other person with the intent that such money or any part thereof shall be expended in bribery at any election; before or during any election, receives or contracts for any money or loan for himself or for any other person for voting or agreeing to vote or for refraining or agreeing to refrain from voting at any election.<sup>35</sup>

Regulation 52 provides that personation may occur where a person:

- (a) *applies for a ballot paper in the name of some other person living, dead or fictitious;*
- (b) *votes more than once; or*
- (c) *votes despite knowing that he is not entitled to do so.*

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<sup>33</sup> SCJ No. 39 of 2003.

<sup>34</sup> SCJ No. 15 of 2003.

<sup>35</sup> S.I. No. 108 of 1991.

Regulation 53 provides that treating is committed where a person corruptly, either during or after an election, directly or indirectly provides or pays for any food, drink, entertainment, lodging or provision to voters in order to corruptly influence them to give or refrain from giving him their vote.

Regulation 54 (1) prohibits undue influence. Under Regulation 55, the penalty for the offence of bribery, personation, treating or undue influence is a fine not exceeding eight hundred (800) penalty units or imprisonment for up to two years or both.

Illegal practice under regulations 56 comprises publication of false statements; interfering with the nomination of candidates; disruption of public meetings; misleading broadcasts; unauthorized acquisition, possession or use of ballot papers and tampering with ballot boxes or of obstruction of voters.

Under Regulation 55 and 61 the penalty for this offence is a fine not exceeding eight hundred (800) penalty units or imprisonment not exceeding two years or both.<sup>36</sup>

**(iv) The Electoral (Conduct) Regulations (The Electoral Code of Conduct) S.I No. 179 of 1996**

The Electoral Commission of Zambia issued the Electoral (Conduct) Regulations pursuant to section 17 of the Electoral Act, in consultation with political parties and NGOs. The Regulations followed concerns by various stakeholders in particular, political parties, NGOs and Churches, that the political playing field was not level and did not provide a fair environment for the opposition political parties during electoral political campaigns.<sup>37</sup>

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<sup>36</sup> S.I. No. 179 of 1996.

<sup>37</sup> A stakeholder's workshop organized by the Electoral Commission of Zambia 15<sup>th</sup> – 20<sup>th</sup> February 1996.

The Electoral (Conduct) Regulations are therefore, among other matters, formulated to regulate the conduct of all stakeholders before, during and after elections. The Regulations set out duties and rights of individuals. For instance, Regulation 3 states that every person shall, during election campaigns and elections, promote conditions conducive to the conduct of a free and fair election. Further, Regulation 4 spells out the rights of every person which include the right to express their political opinions, debate and contest elections freely, canvass or hold public meetings and campaign freely.<sup>38</sup>

The Electoral (Conduct) Regulations may therefore be defined as a set of rules of behavior for political parties and their supporters relating to their participation in an election campaign, to which the parties ideally should voluntarily subscribe. Whereas the regulations attempt to promote conditions conducive to the conduct of free and fair elections and put forward conditions under which political parties and their supporters should operate, some of these duties and obligations are declaratory in character and are not enforceable. For example, Regulation 5 states: “that every political party shall establish and maintain effective lines of communication with the Commission and with other registered political parties at national and local levels, including the exchange of names, addresses and contact telephone and facsimile numbers of party election agents and other relevant bearers and representatives”.<sup>39</sup>

Such a provision is difficult to enforce. In any event, in Zambia, the electoral process is prone to violence. If one identifies himself/herself as a supporter of a rival candidate, he/she will be endangering his/her security. Regulation 5, if it were enforced, may violate freedom of association as it is forcing people of different opinions and ideologies to associate, which may be unconstitutional.

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<sup>38</sup> Section 4 Electoral (General) Regulations S.I. 179 of 1996.

<sup>39</sup> Ibid, Section 5.

The Regulations set out certain prohibitions, for instance Regulation 6 prohibits the coercion or intimidation of persons during election campaigns or elections. Regulation 7 restates the provisions of sections 56-60 of the Electoral (General) Regulations.<sup>40</sup> Regulation 9 provides for the equal allocation of air time to political parties by all television and radio broadcasters. The Electoral (Conduct) Regulations ought to play a critical role in reducing tension among political participants if it is enforced professionally. Most of the electoral disputes that Zambia has experienced during and especially after each general election, have been as a result of the weak enforcement of the Electoral (Conduct) Regulations.<sup>41</sup>

In South Africa, the Chief Electoral Officer may institute civil proceedings before a court, including the Electoral Court, to enforce provisions of the electoral law. In Mexico, for example, the Federal Electoral Institute and the Federal Electoral Tribunal are mandated to oversee the enforcement of election legislation, consider challenges and apply sanctions in cases of administrative error. Agencies that enforce the law, including electoral legislation, play an important part in safeguarding electoral integrity. Enforcement deters those thinking of subverting the system, and it identifies and punishes those who have broken the law.<sup>42</sup>

### **5.3.0. Evaluation of the Electoral Process**

Hitherto, we have considered the Constitution, the Electoral Act and the Regulations. However, there is no legislation governing the funding of political parties. Although we have these legal provisions, they do not sufficiently regulate the following matters that are critical in any electoral process of any State.

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<sup>40</sup> S.I. No. 108 of 1991.

<sup>41</sup> Republic of Zambia, Electoral Technical Committee Report, op cit, p.408.

<sup>42</sup> ACE Electoral Knowledge Network, <http://aceproject.org>, p.1.

### 5.3.1. Funding of Political Parties

The development and institutionalization of political parties requires resources. Such resources are not easily available to political parties due to several factors. Some of the major factors constraining the financial viability and sustainability of parties are:

- (i) “the widespread poverty in Zambia. With 80 percent of the population living below the poverty line of 1 dollar per day income, it is difficult for parties to raise funds from their supporters who can barely meet their own basic needs;*
- (ii) cultural constraints: Zambians have not yet developed the culture of supporting the parties of their choice. In fact, rather than supporting the parties, they expect the parties to give them handouts to win or sustain their support;*
- (iii) lack of the necessary infrastructure for effective fund raising including viable secretariats, proper documentation and marketing strategies;*
- (iv) all parties, with possibly the exception of the MMD and UNIP, are very young and have not yet established loyal supporters who can make substantial contributions to their finances; and*
- (v) the depoliticization of policy formulation by surrendering significantly policy formulation by the ‘Third World Countries’, including Zambia, to the International financially-aided technocracy, has blurred ideological differences between Political Parties. This diminishes the Zambians’ loyalty to Political Parties as there is no ideology to bind them to such parties”.*<sup>43</sup>

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<sup>43</sup> Public funding of Political Parties, Centre for Governance Development C.G.D, Friedrich Ebert Stiftung (FES) April 2002, pp.2-3.

Given the above constraints and the need to develop effective parties in order to secure Multi-Party democracy, it is imperative that political parties should receive public funding. Public funding is justified on the following grounds:

- (i) “it helps in safeguarding the various political parties against undue influence from private and foreign sponsors, since the interests of such sponsors often threaten the freedom and ability of the political parties to represent the will of the people. The phenomenon of rich people literally buying parties is well known;*
- (ii) availability of public finances ensures that diverse parties survive and defeats any moves towards single party authoritarianism through the use of financial muscle to obliterate parties that do not have rich financiers;*
- (iii) legal regulations governing public accountability for party funds discourage utilization of other state resources by the party in power;*
- (iv) public party financing boosts the capacity of different parties to develop and articulate their policies, thereby promoting competitiveness and quality of consultations between the power seekers and the electorate”<sup>44</sup>*

The Mung’omba Draft Constitution provided for funding of political parties. The purpose was to assist political parties disseminate their policies, organizing of civic education in democracy and the electoral process, for general administrative expenses of the Party, excluding emoluments and for any legitimate purpose approved by the Electoral Commission. The funds cannot be used to pay directly or indirectly, remuneration, fees, rewards or any other benefit to a member or supporter of the Party or any other purpose incompatible with promotion of Multi-Party democracy.<sup>45</sup>

This provision was laudable, as it could prevent parties from using public resources allocated to it to corrupt its supporters and the electorate in general. Further, such funds could

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<sup>44</sup> Republic of Zambia, Final Report of the Electoral Reform Technical Committee (ERTC), August 2005, p.293.

<sup>45</sup> Article 123, of the Draft Constitution, 29<sup>th</sup> June 2005.

not be used to undermine democratic values. The National Constitutional Conference has accepted this provision.<sup>46</sup>

Public funding of political parties is not a new phenomenon. Several countries around the world fund political parties. Germany, South Africa and Tanzania are examples of such countries.<sup>47</sup> There is less electoral corruption in countries where political parties are funded, the role of private money is limited and thus limits its potential for distortion of the democratic political process. When political parties are financed from private contributions, there is always perception that certain private interests, rather than general public interest, will come to guide the behavior of parties and elected officials.

Public funding relieves parties from having to satisfy their financial supporters and can therefore reduce the potentially excessive influence of private contributors at the expense of the population at large and having a diminishing effect on corrupt practices.<sup>48</sup> There is equality in political competition. The legal framework should specify the criteria used for distributing public funds to political parties. The criteria most frequently used is the number of votes cast for a party, the number of parliamentary seats of a party or a combination of the two. In Hungary, for example, 25 per cent of the state money for routine organizational activities is distributed equally among all parties that have obtained a seat in parliament, while the remaining 75 percent is distributed on the basis of the votes obtained in the first round of the parliamentary elections. This system proves slightly advantageous to smaller parties.<sup>49</sup> Every election in Zambia is alleged to be marked by electoral corruption.

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<sup>46</sup> Article 114, Final Report of the National Constitutional Conference 27<sup>th</sup> August, 2010.

<sup>47</sup> Republic of Zambia, Final Report of the Electoral Reform Technical Committee (ERTC), op cit, p.293.

<sup>48</sup> Biezen Van Ingrid, Financing political parties and election campaigns – Guidelines, University of Birmingham 2003, p.44.

<sup>49</sup> Ibid, p.23.

### 5.3.2. Use of Public Resources

In most countries, including Zambia, the ruling party and its government seek an unfair advantage over opposition parties through the use of public funds and assets for its political activities. In the 1996, 2001 and 2006 elections, there were allegations of abuse of public resources.

There was evidence during the hearing of *Lewanika and Others V Chiluba*<sup>50</sup> Presidential Petition, as the Supreme Court found as a fact that Ministers and the President donated public funds to public causes, which donations were widely reported in the Media. The donations took place before and during the elections.

The Supreme Court observed that:

*“It had anxiously examined the Regulations in which various kinds of conduct or misconduct is prohibited or made an offence. This was an attempt to see where the allegation in the petition and in the evidence of various political leaders donating to community projects might fit in, without success. Such philanthropic activity must have had some influence on the affected voters, yet the regulations are silent on such improper donations when not directed at individual benefit.”*<sup>51</sup>

This statement was reiterated in *Mazoka and Others V Mwanawasa and Others*<sup>52</sup> that there was evidence by Michael Chilufya Sata, Vernon Johnson Mwaanga former Secretary Generals of MMD, Xavier Franklin Chungu former Director General of Intelligence, that 157 motor vehicles the MMD distributed to constituencies for the election campaign in 2001 were bought from public funds drawn from the Zamtropol Account, which is a government account operated by the Zambia Intelligence Service. Bicycles were bought from public funds for the MMD and for printing election manifestos. The Supreme Court observed that from the evidence,

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<sup>50</sup> (1998) ZR at p.79.

<sup>51</sup> At p.79.

<sup>52</sup> (2005) ZR 138.

it was clear that some of the election posters were procured with funds from ZESCO, a Parastatal Company wholly owned by government.

There were recent revelations in the Post Newspaper, which published a letter to the Permanent Secretary Home Affairs from the MMD Deputy National Secretary, instructing the Permanent Secretary to pay K1,025,000,000 to MMD cadres. The cadres had supplied foodstuffs to the Ministry. The difference between the actual bills and the claimed amount was K179 million.<sup>53</sup> The cadres contribute to the MMD electoral finances. This episode proves the assertion that the Ruling Party is sucked in corruption and has been an embodiment of corruption and impunity.

The fact that government resources were used in the 2001 Presidential election was accepted by the Supreme Court. The Supreme Court accepted that the first respondent's wife donated ten drug kits from the government-owned Medical Stores. The timing of such philanthropic activity must have had some influence on the affected voters, yet the regulations are silent on such matters.<sup>54</sup> Despite the strong language in the two judgments *Lewanika and Others V Chiluba*<sup>55</sup> and *Others and Mazoka and Others V Mwanawasa*,<sup>56</sup> that "philanthropic activity" during elections has the potential of influencing voters, the Electoral Commission has not made regulations to regulate such activity.

The Supreme Court in *Lewanika and Others V Chiluba*, accepted that there were some polling stations established at premises belonging to party officials which was a malpractice. The Court further accepted that:

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<sup>53</sup> The Post, 24<sup>th</sup> February 2009.

<sup>54</sup> The Post, 24<sup>th</sup> February 2009..

<sup>55</sup> *Lewanika and Others V Chiluba* (1998) ZR 79.

<sup>56</sup> *Mazoka and Others V Mwanawasa*, (2005) ZR 138

*“The wife to an MMD chairman was marking the voters’ palms with a clock and gave them beer at a polling station established at her husband’s tavern. One complaint related to the initial results announced, which had five identical pairs of results from ten constituencies, provoking the suspicion or allegation that the results were pre-determined and cooked up or plucked from the blue. The second complaint related to non-identical results, but which were nonetheless altered. We accept that all this weakened confidence and belief in the system and did not rebound to the credit of those managing the electoral process. The third complaint we consider not to have been well-taken and this was that candidates got a similar number of votes in a variety of constituencies; suggesting that there was an allocation of predetermined figures which had been conjured up. The flaws of all types which we said were established, of course did not reflect well on those managing the electoral process. Many of them can and should be addressed in order to enhance our democratic profile and in order to engender greater confidence in the electoral process”*

Despite this strong language of condemnation, the Supreme Court concluded:

*“The bottom line, however, was whether, given the national character of the exercise where all voters in the country formed a single electoral college, it can be said that the proven defects were such that the majority of the voters were prevented from electing a candidate whom they preferred, or that the election was so flawed that the defects seriously affected the result which could no longer reasonably be said to represent the true choice and free will of the majority of the voters. We are satisfied, on the evidence before us, that the elections while not perfect and in the aspects discussed quite flawed were substantially in conformity with the law and practice which governs such elections”*

This was the same conclusion reached in *Mazoka and Others V Mwanawasa and Others*.<sup>57</sup> The Supreme Court paid lip-service to the malpractices, which were carefully planned and neatly executed. The President who is already advantaged by the use of state resources, is

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<sup>57</sup> Constitution of Zambia, Chapter 1 of the Laws of Zambia.

allowed to engage in malpractices with impunity. In such environment, it becomes difficult to democratically oust the incumbent President. With the greatest respect to the Supreme Court, they were oblivious that, tolerating such malpractices, makes it easier for the incumbent president to win, where the president is elected by simple majority. The proved allegations against the incumbent were so serious. He is obliged to uphold the Constitution and maintain the law in a dignified manner under Article 44 of the Constitution, which obligation he failed to perform with distinction.

The recent High Court Judgments, which have nullified the election of MMD Members of parliament on the ground of corruption, further illustrate how the ruling party has used bribery as a way to garner votes. The High Court has upheld the election of opposition members of Parliament.<sup>58</sup> This, it is suggested is the very reason why the MMD-led government vetoed a recommendation in the Election Technical Committee Report, to legislate the disclosure of sources of campaign funds. They would have been trapped by such legislation.<sup>59</sup> The only reason for denying disclosure of the source of Party funds for election campaigns, is that it is not clean money and it is intended to aid electoral corruption.

The effect of electoral corruption on the nation's accountability and transparency and its obscenity was clearly articulated by the then Chief Justice of India, Mr. Justice Jabharwal when he said:

*“Corruption in the electoral system of a country, which to my mind is the starting point and also the end point of all corruption, since it involves grabbing state power at any cost”<sup>60</sup>*

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<sup>58</sup> *Doniso Njeulu V Mubika Mubika 2006/HP/EP/0018, Inonge Mutukwa Wina V Mubita Mwangala 2006/HP/EP/001/, Evans Kaluba Musonda V Gaston Sichilima 2006/HP/EP/0015.*

<sup>59</sup> Government Reaction to the Electoral Reform, op cit.

<sup>60</sup> BBC World News, 10<sup>th</sup> May 2007.

allowed to engage in malpractices with impunity. In such environment, it becomes difficult to democratically oust the incumbent President. With the greatest respect to the Supreme Court, they were oblivious that, tolerating such malpractices, makes it easier for the incumbent president to win, where the president is elected by simple majority. The proved allegations against the incumbent were so serious. He is obliged to uphold the Constitution and maintain the law in a dignified manner under Article 44 of the Constitution, which obligation he failed to perform with distinction.

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<sup>59</sup> Government Reaction to the Electoral Reform, op cit.

<sup>60</sup> BBC World News, 10<sup>th</sup> May 2007.

The point the Chief Justice was making is, how can a regime propelled into power by corruption, have the political will to institute accountability and transparency, which are essentials to 'Good Governance', which is an important aspect of constitutionalism. The under-investment in institutions of accountability and transparency discussed in Chapter Seven is premised on this lack of political will. And the Electoral Commission's failure to regulate such conduct, has been a serious failing on the part of the Commission and it undermines its integrity and impartiality.

### **5.3.3. The Administration of the Public Order Act**

Freedoms of association and expression are a life blood to free and fair elections. The two rights are instruments for a candidate to market himself/herself in an election, whether it be the incumbent or the challenger. It is difficult to characterize an election as free and fair if a candidate or candidates are prevented from reaching out to the electorate. In *Supreme Court in Mulundika and Others V The People*,<sup>61</sup> the appellants challenged the constitutionality of certain provisions of the Public Order Act, especially Section 5(4) which required any person wishing to hold a peaceful assembly to obtain a permit in contravention of which was criminalized by section 7 of same Act. The challenge related to the requirement of a permit and prosecution based on the absence of such permit. The petition was based on the denial of fundamental rights and freedoms guaranteed under Articles 20 and 21 of the Constitution. A subsidiary challenge related to the exemption of certain offices from the need to obtain a permit which was said to be discriminatory, contrary to Article 23 of the Constitution. The power to grant permits was reposed in the Inspector General and officers appointed by him, in default the District Secretary or his assistant. The Supreme Court emphasized:

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<sup>61</sup> (1995) ZR 195.

*“There must be adequate guidelines for the enjoyment of the right to assemble so that the exercise of discretion by competent authorities should have the scope indicated and the manner of its exercise set out in the affected law with sufficient clarity. The court also pointed that there must be effective controls on the exercise of power to grant or refuse a permit and that there must be a procedure to allow an aggrieved person to challenge the decision. Such a procedure must be reasonable, fair and fast. Fundamental constitutional rights should not be denied to a citizen by any law which permits arbitrariness and is couched in wide and broad terms. The court’s supervisory function obliges it to pay utmost attention to the principles characterizing a democratic society”.*

In response to the Mulundika case, the objectionable features of the Public Order Act, were removed by the enactment of a new section 5. The Public Order Act<sup>62</sup> regulates meetings and processions. The salient provisions were couched in these terms:

*Section 5(1) The Inspector General of Police may, by gazette notice, appoint by name or office any police officer of or above the rank of sub inspector to be the regulating officer for the purposes of this section in respect of such areas as the Inspector General may, by the same gazette notice, define*

- (3) Any regulating officer may issue directions for the purpose of:*
- (a) regulating the extent to which music may be played or public roads and streets within this area on the occasion of festivities or ceremonies, or*
  - (b) directing conduct of assemblies and processions in any public place within his area, and the route by which and the times at which any procession may pass*
- (4) Every person who intends to assemble or convene a public meeting, procession or demonstration shall give police at least seven days notice of that person’s intention to assemble or convene such a meeting procession or demonstration.*

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<sup>62</sup> Chapter 113 of the Laws of Zambia.

*(5) Without prejudice to the generality of the provisions of the preceding subsection, the conditions which may be imposed under the provisions of the said subsection may relate to all or any of the following matters:*

*(a) the date upon which and the place and time at which the assembly, public meeting or procession is authorized to take place;*

*(b) the maximum duration of the assembly, public meeting or procession;*

*(c) in the case of assembly or public meeting the persons who may or may not be permitted to address such assembly or public meeting and the matters which may not be discussed at such assembly or public meeting;*

*(d) the granting of adequate facilities for the recording of the proceedings of such assembly or public meeting in such a manner and by such person or class of persons as the regulating officer may specify;*

*provided that such conditions may not require the convenor of the assembly or public meeting to provide equipment; and*

*(e) other matters designed to preserve public peace and order*

*(6) The provisions of subsections (4) and (5) shall not apply to any public meeting convened by or at the request of and intended to be addressed by the President, the Vice President or any Minister or junior Minister or the Speaker or Deputy Speaker of the National Assembly.*

Thus, it is no longer necessary to apply for a Police permit. Moreover, the Police are no longer empowered to decide who can address a Public meeting and what subject can be discussed. The amendment was characterized by acrimonious debate in the National Assembly. As already discussed, a Deputy Minister cast aspersions on the Chief Justice who presided over the Mulundika case and senior members of the bench who were accused of tracing their roots from Nyasaland (Malawi). This was an inflammatory and false allegation.<sup>63</sup>

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<sup>63</sup> This was a serious threat to judicial independence as these judges were not even Malawians, but come from a province bordering Malawi – see Parliamentary Debates of the Public Order (Amendment) Bill, 27<sup>th</sup> February 1996.

The Police conduct however, when it comes to being notified of an assembly is, to plead lack of manpower, if those intending to assemble are opponents of the ruling party or are demonstrating against government.

In *Resident Doctors Association V the Attorney General*,<sup>64</sup> the Resident Doctors gave written notification to the Police Commanding Officer of Lusaka that they would hold a procession on 27<sup>th</sup> April 2000, in order to raise public awareness on the pathetic situation prevailing in public hospitals and poor conditions of service for doctors. The Commanding Officer refused to grant them 'permission' as he had information that there was going to be a rival demonstration to disrupt the appellants' demonstration. He further said the Police did not have enough manpower to police the event. The Commanding Officer endorsed on the application the words: "the application is rejected on grounds that the demonstration will cause a breach of peace". He did not suggest any alternative date on which the demonstration could be conducted, despite the appellants asking for an alternative date.

Notwithstanding the refusal by the Commanding Officer, the Petitioners joined by 50 Marshals conducted the March on 27<sup>th</sup> April 2000. There was no incident contrary to public order.

The High Court had found that the regulating officer acted capriciously and oppressively. The trial Judge however, denied the Petitioners damages for false imprisonment, because the Judge said, they took part in the demonstration against the 'Will' of the Regulating Officer and breached Section 6 (7) of the Public Order Act. In this respect the petitioners appealed to the Supreme Court, which held:

*"(i) the rights to free speech and freedom to assemble are not only fundamental, but central and ideal to democracy;*

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<sup>64</sup> (2003) ZR 101.

*(ii) courts are final arbiters, when interpreting the Constitution and the laws thereunder, which confer the freedoms, there is need for the court to adopt an interpretation which does not negate the rights. Most jurisdictions adopt a generous and purposive construction of human rights instruments, so as to confer on a person the full measure in the enjoyment of rights;*

*(iii) the police flagrantly violated the Public Order Act, and consequently infringed the Petitioners' rights as enshrined in Articles 20 and 21 of the Constitution"*

This was strong language from the Court. It is axiomatic that the freedom of the people to assemble and express their views in public, on political and other social matters is generally an essential element in a free and open society. The freedoms of expression and assembly are recognized by the Zambian Constitution and upheld by our courts. It is incontrovertible that these rights cannot be enjoyed absolutely. The Constitution attempts to balance between individual liberty and social order. The problem is not so much with the legislation itself, but its partisan administration, which is rooted in the non-professionalism and lack of independence of the Police Force.

During the campaign to allow President Chiluba to go for to a Third Term, five Members of the UPND were arrested for contravening the Public Order Act.<sup>65</sup> They led a demonstration against the 'Third Term' from Chifubu to Times of Zambia in Ndola. UPND cadres were responding to a demonstration by MMD cadres, who demonstrated in support of a 'Third Term', who equally did not notify the police, but were not arrested.<sup>66</sup> The Police drew condemnation from Justice Lombe Chibesakunda, the chairperson of the Permanent Human Rights Commission

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<sup>65</sup> The Post 9<sup>th</sup> January 2001.

<sup>66</sup> The Post 22<sup>nd</sup> January 2001.

who said, "Police should give equal treatment to any group of people wanting to express their views through demonstrations."<sup>67</sup>

Civil society and other stakeholders in the democratic process, notably Members of the opposition political parties have condemned the police administration with regard to Public Order Act. Participants at a two day debate on the Public Order Act in Northern Province resolved that, the Act, in its present form be amended. In order to avoid intimidation and ensure professionalism in the administration of the Act, the tenure of Office of the Inspector General of Police should be secured like those of constitutional officers. His appointment should be done by a professional body. Police Officers who have been professional in administering the Public Order Act, should be protected from victimization. Some police officers have been punished or transferred at the behest of politicians for their professionalism. A police complainant's desk be set up where aggrieved officers could lodge their grievances. This would help protect the affected officers from unwarranted punishment.

The other criticism of the amended Act relates to the five years maximum custodial sentence for breaching the Act, where an event proceeds without notification. This has a chilling effect on democracy and should be reduced to three months.<sup>68</sup>

The findings of the Electoral Reform Technical Committee were that:

- (i) Zambia Police did not perform its duties independently and that the police succumbed to government pressure thereby disadvantaging the opposition and advantaging the ruling party; and*
- (ii) Zambia Police ignored reported malpractices during campaigns and elections especially where the ruling party was involved<sup>69</sup>*

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<sup>67</sup> The Post 22<sup>nd</sup> January 2001.

<sup>68</sup> Proceedings of Electoral Stakeholders Seminar held in Northern Province Reported in the Post of 22<sup>nd</sup> January 2001.

<sup>69</sup> Final Report of the Electoral Reform Technical Committee, (ERTC) August 2005, p.366.

There is unanimity among stakeholders that the opposition is disadvantaged by police partiality during elections.

#### **5.3.4. The Media**

A Free Press helps to create an informed citizenry, which is a necessary ingredient for the growth of any democracy. Without the help of the Media, citizens will be unable to participate effectively in governance issues. The public needs the Media as a forum to receive information from a diversity of sources, interests and individuals. In terms of governance the Media has a crucial role of supplying the public with correct information that will enable citizens to make leaders accountable and transparent in their operations.

Freedom of expression is essential to the conduct of genuine free and fair elections and is enshrined in Article 20 of the Constitution. The Media plays a crucial role in giving effect to this right in the electoral process. The Media disseminates information about the process and educates and informs the voting public about the alternative offered to them. In addition, the media has a duty to investigate claims of electoral misconduct and publicize them.<sup>70</sup>

The Electoral (Conduct) Regulations contain provisions that give effect to freedom of expression and the Media. Regulation 4,<sup>71</sup> provides that everyone has the right to express his or her political opinions, debate the content of the policies and programmes of other parties, canvass for membership and support from voters, distribute electoral literature and campaign materials, erect banners, placards and posters and campaign freely.

All these electoral rights hinge on freedom of expression and they rely heavily on independent reportage by the Media. In fact Regulation 8 of the Electoral (Conduct) Regulations enjoins the Media to give fair and balanced reporting of the campaigns, meetings, rallies, press

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<sup>70</sup> Report of the Electoral Reform Technical Committee, op cit., p.100.

<sup>71</sup> Ibid.

conferences and policies of all registered political parties during the period of campaigning. The Media is also required to provide news of the electoral process up to the close of the poll. The Regulations also impose a duty on the Media to report fairly and accurately and to refrain from making abusive editorial comments, encouraging racism, religious intolerance or hatred. Regulation 9 of the Electoral (Conduct) Regulations provides a legal requirement for all television and radio broadcasters to allocate equal airtime to parties for political broadcasts.

These provisions are laudable if they can be complied with and enforced. However, on the ground, the Public Media and independent newspapers do not comply. It has been observed that during the 1996 elections, the Times of Zambia, Zambia Daily Mail and the Zambia National Broadcasting Corporation (ZNBC), the State-controlled newspapers and electronic media respectively, gave uneven coverage to different political parties. According to the analysis by the Committee for a Clean Campaign (CCC), coverage was biased in favour of the ruling party which had over 48 percent of air-time and space, while other parties shared the remaining time and space in a country which had 32 registered political parties.<sup>72</sup>

Some political parties like UNIP and the Liberal Progressive Front (LPF) were denied air-time and space to put across their boycott campaign of the 1996 general elections. There was intimidation of staff members who featured articles or broadcast programmes that the government did not like. Zambia National Broadcasting controller of Television, Ben Kangwa was suspended for broadcasting Dr. Kaunda's election boycott Press Conference in 1996.<sup>73</sup>

Apart from the Government-controlled media which leaned towards the Ruling Party, the MMD had at least three pro-MMD private newspapers which reported positively on its activities. These newspapers included the Weekly Express, the Sun and the Confidential, which mounted

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<sup>72</sup> Presidential and Parliamentary Elections in Zambia, A Report by the Committee for a Clean Campaign, 1996, p.32.

<sup>73</sup> Ibid.

negative campaigns against opposition parties. A number of independent newspapers, notably the Post and the Chronicle, gave extensive coverage to the activities of the opposition parties, including those who boycotted the elections. The President extensively used the Media. The Republican President also abused his power by using the Media to propagate MMD propaganda instead of national issues.<sup>74</sup>

For instance, on the eve of the election day, the President's address was an MMD campaign speech rather than a national address, for he kept on calling upon the people of Zambia to vote for the Ruling Party for another term of office. In most of the instances where the President was supposed to use State Media to address national issues, he instead used the same to promote MMD ideals and castigated his political opponents.<sup>75</sup>

There was an attempt during the Mwanawasa Presidency to depoliticize the running of ZNBC. The ZNBC (Amendment) Act gave the Minister of Information and Broadcasting power to appoint a board subject to the recommendation of an Appointments Committee, which Committee was subject to ratification by the National Assembly.<sup>76</sup> This was intended to create an Independent Board, to appoint Members of Staff on merit. The Minister vetoed the nomination of the would-be Board Members, recommended by the Appointments Committee. Judicial review proceedings were brought against the Minister, to force her to appoint the Board as recommended by the Appointments Committee. The High Court agreed with the applicants that the Minister had violated the Act. The State appealed to the Supreme Court, the whole appeal turned on the construction of the word 'recommend'. The Supreme Court held that the Minister could accept or reject the recommendation.<sup>77</sup> With due deference to the Supreme Court, the

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<sup>74</sup> Presidential and Parliamentary Elections in Zambia, op cit, p.33.

<sup>75</sup> Ibid, p.33.

<sup>76</sup> Act No. 20 of 2002.

<sup>77</sup> *The Minister of Information and Broadcasting Services, Attorney General V Fanwell Chembo and Others (2007) ZR 82.*

judgment was based on the literal interpretation of the word, 'recommended' and not on purposive interpretation of the provision. The purpose was to facilitate the appointments of professional staff on merit.

The licensing power of radio and television stations enjoyed by the Minister under the Zambia National Broadcasting Corporation Act, had been removed and transferred to the Independent Broadcasting Authority.<sup>78</sup> Consequent to the Supreme Court judgment, both Acts have been repealed and the Minister has retained his original powers,<sup>79</sup> which regrettably strengthens state-control of the Media and disadvantages the opposition. Some of the Private Media, notably the Post Newspaper, is at war with government, which leaves those that are non-partisan with no Media outlet to air their views. The economy suffers as parties jostle for position rather than tackling the problems besetting the economy.

The ideal performance of Public Media can be illustrated by the British Broadcasting Corporation, which is governed by an independent board like that legislated for in Zambia in 2002 and discussed earlier. In the run-up to the 1987 elections, the BBC turned down airing a documentary that depicted Mrs. Thatcher, incumbent British Prime Minister, behaving heroically and compassionately during the Falklands War. This would have disadvantaged her opponents.<sup>80</sup> Balance at election time is critical so that a candidate is not disadvantaged. The Independent Television Commission is under a duty to do all it can to ensure that, due impartiality is preserved on the part of persons providing the service, as regards matters of political controversy or relating to current public policy.<sup>81</sup>

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<sup>78</sup> Independent Broadcasting Authority Act No. 17 of 2002 and the ZNBC (Amendment) Act No. 20 of 2002.

<sup>79</sup> The Zambia National Broadcasting (Amendment) Bill was passed by 85 votes for with 45 votes against and 2 absentions. See Parliamentary Debates of 10<sup>th</sup> March 2010.

<sup>80</sup> Robert Geoffrey and Nicol G.C. Andrew, *Media Law Second Edition Revised* (London: Penguin Books) p.407.

<sup>81</sup> Broadcasting Act 1990 section 6 (1).

### 5.3.5. Disenfranchisement

Disenfranchisement may be concealed, like not availing facilities to enable citizens to vote in a particular area, especially opposition strongholds. It has been argued that the issuance of National Registration Cards is discriminatory. The ruling party normally issues National Registration Cards in their strongholds, thereby preventing the would-be registered voters in opposition strongholds to vote, as the National Registration Card is a requirement for one to register as a voter.<sup>82</sup> It is outright deprivation of the right to vote as it is for prisoners in Zambia who are not allowed to vote.<sup>83</sup>

Mbita Chitala in his book, 'Democracy Not Yet,' explains how Chiluba committed electoral fraud in 1996 elections. He observes that:

*“Chiluba in November, 1995 signed a contract with Nikuv Computers Limited, an Israeli Intelligence Organization to register voters in Zambia. The contract was in excess of US\$18 million and was classified as secret. Chiluba wanted to raise campaign funds for the incoming elections. Nikuv's bid was far much higher than reputable companies from the USA, South Africa, England and the Nordic countries. The voters' registration was itself chaotic. Out of the government's acknowledged 4.6 million eligible voters, Nikuv was only able to capture and register 2.2 million voters. This meant more than 50 percent of eligible voters were willfully disenfranchised. The opposition parties, NGOs and donors including the USA and Nordic countries urged President Chiluba to adopt the National Registration Card as the voting document. The European Union even pledged to fund the whole exercise. The Electoral Commission itself under the Chairmanship of Supreme Court Judge Muzyamba recommended the use of registration cards. President Chiluba refused because he had other motives.”<sup>84</sup>*

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<sup>82</sup> An interview with David Mwitumwa former ZADECO Chairman on 15<sup>th</sup> November 2003.at Lusaka.

<sup>83</sup> Section 7(1) Electoral Act, Chapter 13 of the Laws of Zambia.

<sup>84</sup> Chitala Mbita, Democracy Not Yet, The Transition of the Twin Process of Political and Economic Reform in Zambia (1991-2001) (Lusaka: Zambia Research Foundation, 2004) pp.167-168.

It was alleged that Peter Mumba and Ronnie Shikapwasha, Permanent Secretary and Minister of Home Affairs respectively, and relatives of President Mwanawasa, took mobile registration facilities to Chibombo. President Mwanawasa hailed from that area as a Lenje. In such a small area, 100,000 pro-MMD people were registered as voters after obtaining National Registration Cards.<sup>85</sup> In a first-pass-the post Electoral System, that significantly disadvantages the other Presidential candidates and ensures that the incumbent is returned to power by this process of disfranchisement of the would-be voters residing in opposition strongholds.

Chitala's observation is a graphic illustration that free and fair elections is an illusory ideal, as incumbents are strongly resolute to manipulate the process, by disenfranchising the would-be voters, whom they suspect may not vote for them.

The Electoral Reform Technical Committee (ERTC) recommended that prisoners, save those under sentence of death or serving life imprisonment, be permitted to vote.<sup>86</sup> The government rejected this recommendation on narrow security grounds. In the Government's view the prisoners could escape. Yet the prisoners could vote inside the prison.

The Constitutional Court of South Africa rejected this argument when interpreting the 'meaning of the vote', when Sachs J said:

*“Universal adult suffrage on a common voters' roll is one of the foundational values of our entire constitutional order. The achievement of the franchise has historically been important both for the acquisition of the rights of full and effective citizenship by all South Africans regardless of race, and for the accomplishment of an all-embracing nationhood. The vote of every citizen is a badge of dignity and personhood. Quite literally, it says that everybody counts. In a country of great disparities of wealth and*

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<sup>85</sup> An interview with Mr. Edward Mumbi, then Patriotic Front Secretary General on 11<sup>th</sup> September 2006. At Lusaka.

<sup>86</sup> Report of the Electoral Reform Technical Committee ERTC August 2004, p.239.

*power it declares that whoever we are, whether rich or poor, exalted or disgraced, we all belong to the same democratic South African nation, that our destinies are intertwined in a single interactive polity. Rights may not be limited without justification and legislation dealing with the franchise must be interpreted in favour of enfranchisement rather than disenfranchisement”.*<sup>87</sup>

The deprivation of prisoners of their right to vote is a denial of their fundamental right and cannot be constitutionally rationalized and supported.

#### **5.4.0. Prospects for Reform**

The Electoral laws in Zambia should be harmonized, strengthened and an efficient enforcement mechanism provided. Everything admittedly cannot be provided for in the Constitution, but critical issues like the rights of voters, candidates and contributors to political campaigns should be enshrined in the Constitution. The independence of the Electoral Commission to set dates for elections; the security of tenure of the Inspector General of Police; the right to free and fair elections; the setting up of ad hoc tribunals to determine electoral disputes speedily which should have power to disqualify a candidate or order a re-run should also be in the Constitution. The emoluments of the Electoral Commission should be determined by an independent body. The composition of the Electoral Commission should be of people who have been apolitical, legally qualified and nominated by a committee, representative of stakeholders in the political process and recommended by the Judicial Service Commission.<sup>88</sup>

The Electoral Act<sup>89</sup> should be consolidated with the Electoral (General) Regulations<sup>90</sup> and the Electoral (Conduct) Regulations (The Electoral Code of Conduct).<sup>91</sup> The rationale is to

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<sup>87</sup> *August V Electoral Commission and Others (1991) 9BHRC 53.*

<sup>88</sup> Republic of Zambia, Report of the Electoral Reform Technical Committee (ERTC) August 2004, pp.52-57.

<sup>89</sup> Chapter 13 of the Laws of Zambia.

<sup>90</sup> S.I. No. 108 of 1991.

<sup>91</sup> S.I. No 179 of 1996.

elevate this subordinate legislation to an Act, passed by Parliament. The enforcement mechanism should be spelled out in that Consolidated Act of Parliament.

The Consolidated Act, should include, the Southern African Development Community norms and standards for elections and the Electoral Reform Technical Committee recommendations. These are discussed hereunder:

**(a) SADC Norms and Standards: Recommendations**

- (i) registration of voters should be a continuous exercise and not just to wait for elections;
- (ii) technical requirements/rules should be kept to the absolute minimum during the nomination process. The process should not be too technical as to be exclusive. The Electoral Commission should have powers to extend the time for particular nomination centre and prospective candidates should have the right to appeal to the High Court;
- (iii) the Electoral Commission and all stakeholders in the electoral process should therefore be required by law and empowered to ensure that political parties and candidates should denounce violence in elections in order to ensure:

- unimpeded freedom of campaign throughout the country;
- free and unimpeded access to Voters' Rolls;
- all government security forces should act impartially and professionally;
- presidential candidates must be provided with free and adequate security during the elections process;
- equal and free access to the state owned Media;
- a code of conduct developed through consensus from all political parties to guide behaviour in the conduct of campaigns; and
- reasonable safeguards of political meetings, rallies, polling stations and party premises.

The ad hoc is Electoral Tribunal to enforce these recommendations.<sup>92</sup>

**(b)The Electoral Reform Technical Committee Recommendations:**

The Secretary to the Cabinet appointed the Electoral Reform Technical Committee, to review the electoral process and make recommendations aimed at ensuring that the electoral process is free and fair. The Committee started its preparatory work on 16<sup>th</sup> September, 2003 and the assignment was completed on 3<sup>rd</sup> August, 2004. Under this part, the salient recommendations of the Electoral Reform Committee will be discussed.

The Electoral Reform Technical Committee recommended various amendments to the Electoral Laws, as mandated by their first term of reference, ‘to analyze and make recommendations regarding the legal framework of the electoral processes’.

The Committee reintroduced absolute majority in presidential elections, meaning a Presidential candidate has to score fifty percent plus one vote to win the Presidency.<sup>93</sup> The Presidential, Parliamentary and Local Government election dates were to be put in the Constitution.<sup>94</sup> Recommended was the repealing of the Presidential candidate’s parental clause, that parents of a Presidential candidate be Zambians by birth or decent.<sup>95</sup> This clause has always been perceived as having been introduced into the constitution by Chiluba in order to bar Kaunda from standing for the Presidency in 1996.<sup>96</sup>

The Offices of Inspector General and Police Commissioner should have security of tenure, like other constitutional officers i.e. judges of Superior Courts.<sup>97</sup> The rationale was to insulate them from receiving political directions in performance of their duties, especially in the

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<sup>92</sup> SADC Parliamentary Forum, Norms and Standards for Elections in the SADC Region 2001, p.19.

<sup>93</sup> Republic of Zambia Interim Report of the Electoral Reform Technical Committee, August 2004, p.23.

<sup>94</sup> Ibid.

<sup>95</sup> Ibid.

<sup>96</sup> Article 34, Constitution of Zambia Act No.1 Of 1991.

<sup>97</sup> Interim Report of the Electoral<sup>7</sup> Reform Technical Committee, op cit, p.23.

administration of the Public Order Act,<sup>98</sup> which affects the leveling of the political field. It was suggested that the President-elect whose election is being contested should not be sworn in until the election dispute is resolved.<sup>99</sup> The rationale was that once he has taken over the instruments of power, he can manipulate the outcome of the Petition. The Constitution had to provide a handover period during which all election disputes should have been resolved.<sup>100</sup> The right to stand, vote and free and fair elections were to be part of the 'Bill of rights'.

There was a suggestion to reconstitute the Electoral Commission so as to make Members of the Commission have security of tenure.<sup>101</sup> The Committee went further to enhance the independence of the Commission by making the Commission only subject to the Constitution, obligating other organs of state through legislative and other measures to assist and protect the Commission to ensure its independence, impartiality, dignity and effectiveness and to insulate it from interference by any person or Organ of State.<sup>102</sup>

This was uplifted from Article 181 of the South African Constitution, which insulates the Electoral Commission and other institutions supporting constitutional democracy from interference by any person or Organ of State.<sup>103</sup>

In order to strengthen the Regulations and make the electoral process more participative, the Committee suggested the inclusion of the following:

- (i) *the Commission be required by law to conduct continuous voter education;*
- (ii) *permanent residents who are fully-paid up rate-payers be permitted to stand and vote in local government election;*

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<sup>98</sup> Chapter 113.

<sup>99</sup> Interim Report of the Electoral Technical Reform Committee, op cit, p.133.

<sup>100</sup> Ibid.

<sup>101</sup> Ibid.

<sup>102</sup> Ibid.

<sup>103</sup> Constitution of South Africa, Act No.108 of 1996.

- (iii) *detailed provisions be made for the determination of Presidential, parliamentary and Local government elections petitions by special ad hoc tribunals;*
- (iv) *stiff penalties be stipulated for persons who unlawfully collect voters cards;*
- (v) *the Act, be harmonized with the Constitution and other related Acts;*
- (vi) *the Act, should provide for Zambians living outside the country to apply for registration as voters;*
- (vii) *the Act, should further provide for Zambians living outside the country to vote, in Presidential Elections at Zambia missions abroad*<sup>104</sup>

To enfranchise permanent residents, was merely reinstating the right that they had earlier. The last recommendation was pragmatic and would have had a positive impact of democratizing development at local government level, because you cannot pay rates and have no say through an elected representative on how the funds are used.

#### **5.5.0. Judicial Response to Electoral Malpractices:**

Judicial response to electoral malpractices has been robust in some cases and lukewarm in others, especially in Presidential Election Petitions. The High court hears and determines the validity of an election to the National Assembly, the election of the speaker and deputy speaker and the nomination to the National Assembly.<sup>105</sup> The appeal against such a determination lies to the Supreme Court on a point or points of law.<sup>106</sup> The validity of the election to the office of the President is heard by the Supreme Court. In that regard, the Supreme Court, acts as a Court of first instance and final Court.<sup>107</sup>

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<sup>104</sup> Report of the Electoral Reform Committee, op cit, p.170.

<sup>105</sup> Constitution of Zambia, op cit, Article 72.

<sup>106</sup> Ibid, Article 41 (2).

<sup>107</sup> Ibid.

The High Court has nullified an election where a candidate is guilty of illegal electoral practice and non-compliance with the electoral Act,<sup>108</sup> and where a corrupt practice or illegal practice is committed in connection with an election by a candidate or his election agent or of his polling agent.<sup>109</sup>

The courts have invalidated National Assembly elections, where there has been treating, contrary to Regulation 53, which is influencing a person to vote for the candidate or refrain from voting for another candidate.<sup>110</sup> Generally, the position taken by the courts is that, “the type of wrong doing or non-compliance that renders an election null and void is the wrong doing or non-compliance on a scale which has adversely affected the results in that voters did not vote a candidate of their own choice. The allegation should be proved between the balance of probability and beyond all reasonable doubt as allegations in an election Petition are usually of a criminal nature.”<sup>111</sup>

It has been strenuously argued by losers in Presidential Election Petitions that the Supreme Court is not robust enough to overturn the results of the incumbent President. In *Akashambatwa Mbikusita Lewanika and Others V Frederick Chiluba*,<sup>112</sup> the Supreme Court, Sakala CJ, then Supreme Court Judge, dissented against the majority decision to reject the Petitioners presenting DNA evidence at their cost. The Petitioners wanted to show that Chiluba was a son of a Zairean,

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<sup>108</sup> *Michael Mabenga V Sikota and Others* (2003) ZR 110.

<sup>109</sup> *Levison Achitenji Mumba and Peter William Mazyambe Daka SCZ No.39/2003*.

<sup>110</sup> *Ibid.*

<sup>111</sup> *Harry Sinkala, Electoral Commission of Zambia v Daudi M. Mukwasa, Appeal No.180 of 2002*.

<sup>112</sup> *Lewanika and Others V Fredrick Chiluba* (1998) ZR 79

now Congolese. The Petitioners presented to the Press the Congolese man with physical features matching those of the President. The rejection was based on very narrow privacy grounds, that coerced DNA test would violate his privacy. The Court downplayed the ‘Public Interest’ for Zambians to know, whether they were being ruled by a foreigner. And yet DNA was determinative of paternity. In the just delivered Presidential Petition judgment in the case of *Mazoka and Others V Mwanawasa and Others*, the opposition have called it a facade.<sup>113</sup>

The leading opposition candidate on the date of the judgment claimed they had presented the best evidence of the Respondent’s (President Mwanawasa’s) electoral malpractices to nullify his election. The Supreme Court found that President Mwanawasa used a government vehicle provided by the then Health Minister Mumba, but held that he did not know it was government property, so he could not be held accountable. The Supreme Court further found that the issuance of title deeds at a rally in Kitwe where Chiluba introduced President Mwanawasa as an MMD Presidential candidate was meant to induce people to vote for the MMD candidates, but this was not done by President Mwanawasa.

It is argued with greatest respect to the Supreme Court, that the candidate having been there, Chiluba speaking on his behalf, had become his agent and he had consented to his agent’s conduct, and such conduct would have been brought within the ambit of Section 53 of the Electoral Act. Chiluba on behalf of Mwanawasa as Presidential Candidate directly paid the expenses associated with obtaining title deeds for the voters. Section 53 is couched in these terms:

*“Any person who either by himself or by any other person either before, during or after election, directly or indirectly gives or*

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<sup>113</sup> *Mazoka & Others V Mwanawasa and Others*, (2005) ZR 138.

*provides or pays wholly or in part the expenses of giving or providing any food, drink, entertainment, lodging or provisions to or for any person for the purpose of corruptly influencing that person or any other person to give or refrain from giving his vote at an election shall be guilty of the offence of treating”.*<sup>114</sup>

In any event, the Supreme Court widened the meaning of agency in election Petitions in the case of *Mateo B. Mwaba V Anthony Kaunda Kasolo*,<sup>115</sup> when the Court said:

*“A candidate’s liability to have his election avoided under the doctrine of election agency is distinct from and wider than his liability under criminal or civil law or agency. Once the agency is established, a candidate is liable to have his election avoided for corrupt or illegal practices committed by his agents, even though the act was not authorized by the candidate or was not expressly forbidden”.*

The Supreme Court departed from this decision without justifiable reasons. The only hypothesis this decision can account for, is that the Supreme Court shied away from sanctioning President Mwanawasa’s conduct, when he was a candidate and consequently avoided to void his election.

The FDD President, Christon Tembo, said the Court had put itself on trial,<sup>116</sup> while his Vice President Edith Nawakwi was more critical when she said:

*“The courts had through their ruling sanctioned theft and there is no need to fight corruption, the courts are sanctioning theft”.*<sup>117</sup>

UNPD General Secretary Logan Shamena sharply criticized the Judgment and said:

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<sup>114</sup> Chapter 13.

<sup>115</sup> *Mateo Mwaba V Anthony Kaunda Kasolo*, SCJ No. 17 of 2003.

<sup>116</sup> The Post, 17<sup>th</sup> January 2005.

<sup>117</sup> Ibid.

*“In the next elections, people would be more comfortable meting instant justice on individuals suspected of perpetrating malpractices because they could not rely on the courts”<sup>118</sup>*

His national youth chairman Frank Tayali said:

*“Every Zambian did not expect much from the legal process, however the judgment had cast a dark shadow over the country. It is sad that even on issues that are clear for all to see, technicalities were introduced and given as reasons not to accept most of the critical evidence. Evidence from people who were architects of massive irregularities, such as former Intelligence Chief Xavier Chungu, Vernon Mwaanga and Michael Sata, were thrown out describing it as not credible. The root to all this is a weak Constitution where ‘Separation of Powers’ cannot be seen”<sup>119</sup>*

The Judiciary was indicted as being partial when dealing with Presidential Petitions.

#### **5.6.0. Conclusion:**

Although the Electoral Technical Committee did a good job, the Committee did not address the co-relationship between corruption in the award of government contracts or the politicization of government procurement. The Chiluba government appointed a Ministerial Tender Board Committee, which politicized the award of contracts. The beneficiaries were those who contributed to the MMD treasury and such contributions are a cost to the taxpayer as these companies inflate the prices of their products in order to recoup the cost of financing the ruling party campaign, as was the case with the Nikuv contract alluded to earlier in the Chapter.

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<sup>118</sup>The Post, 17<sup>th</sup> January 2005.

<sup>119</sup>Ibid.

Those in opposition are cut-off from supplying goods and services to government, which weaken them economically and disable them from participating with equal force in the democratic process.<sup>120</sup>

The political environment is a market of ideas, where those participating in politics have to sell their ideas. Currently in Zambia, the Public Broadcaster, Zambia National Broadcasting Corporation has allocated air time to the programme known as 'Government Forum,' where Ministers explain and propagate not only Government policies, but also those of the ruling party. The monopoly of this powerful instrument of communication unlevels the playing field, as Members of the opposition are not availed such air time to propagate their ideas.

The Electoral Commission lacks investigative and enforcement mechanism. It has been said that the ruling party removes the GRZ numbers from Government vehicles and puts private numbers, which they use for electoral campaigns. The contentiousness of the Zambian electoral process has eroded legitimacy on the part of the Governors, which contributes to political instability.<sup>121</sup>

A former Minister of Legal Affairs, Rodger Chongwe said, "there was no use for the politicians to blame the judges because the Supreme Court merely did what they were expected to do. Look at the evidence brought before them. Politicians in Zambia must look at the causes

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<sup>120</sup> An interview with David Mwitumwa, a quantity surveyor who was blacklisted to do jobs for government after he became Zambia Democratic Congress Chairman. He had to emigrate to Botswana and is still there, 15<sup>th</sup> January 2004.

<sup>121</sup> Kapur, points out, the stability of a popular or democratic political system depends not only upon economic development as it is generally understood, but also upon its legitimacy and effectiveness. While the effectiveness is judged according to how well a political system performs its basic functions as measured by the reactions of most of the people and their powerful groups. Legitimacy includes the capacity to produce and maintain a belief that the existing political institutions or forms, are the most appropriate for society. Kapur A.C, Principles of Political Science (New Delhi: S. Chand & Company Limited, 2000) p.511.

of the conflict and try to sort them out. Unless there is something done to the current constitution, there will continue to be numerous election Petitions”.<sup>1221</sup>

Despite Zambia being a democracy, political leaders are not committed to democratic values, in practice, elections can be rigged. Multi-party elections on their own are not a guarantee of democracy. The President is so powerful that he can circumvent the ‘will’ of the people, which Neo Simutanyi calls the process of disenfranchisement,<sup>123</sup> because of neopatrimonial politics and the Presidential hegemony over the Electoral Commission. An election observer in Africa, Cameron Duodu, commenting on Africa’s electoral commissions states:

*“It is time for election officials who cause bloodshed in an African country by deliberately seeking to reverse the verdict of the people, as expressed in their voting, to be equally rounded up and tried before the International Criminal Court. There cannot be one law for bandits who wield guns and another for bandits who create bloodshed by falsifying election results. Bloodshed is bloodshed, whatever method used to bring it about”*<sup>124</sup>

He cites how in January 2008, the Electoral Commissioner of Kenya surreptitiously declared the incumbent President, Mr. Mwai Kibaki, re-elected without going through the correct procedures. Because of the riots that followed, 1,000 people were killed in the ensuing protests and 300,000 made homeless, by this brazen defiance against the will of the people. He blames the lawyers, as most commissions are headed by lawyers. He says, the African populace cannot for ever be left at the mercy of smooth-talking, wig-wearing scoundrels, who are every bit as murderous as the bandits wielding AK-47s, who everybody recognizes as murderers.

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<sup>122</sup> The Post, 17<sup>th</sup> February 2005

<sup>123</sup> The Post, 7<sup>th</sup> May 2008.

<sup>124</sup> New African, May 2008, pp.44-45.

The point Duodu misses is captured by Professor Anyongo, when he says, ‘the Electoral Commissions in Africa are not independent, because the electoral legislation is enacted by an interested Head of State and Chief Executive who also chooses an election date and determines the logistics for elections’.<sup>125</sup> The Chairperson of the Commission reports to the President in the Zambian case. A free and fair, transparent electoral process results in the opposition’s acceptability of the results and thereby legitimizing the incoming government.

A situation where a sitting President appoints the Chairman and Members of the Electoral Commission (ECZ), determines their remuneration, subsequently contests an election, in which his appointee (the chairperson) is the ultimate umpire, has resulted in the impartiality of the chairperson being justifiably questioned. The Author suggests that an independent and neutral body like the Judicial Service Commission nominate three candidates and the National Assembly choose one. That will make the chairperson truly independent in name and in deed.

The winning Party remains beholden to their sponsors once elected, by giving them government contracts which reduces public official’s accountability to the population they govern and this fuels corruption. The unfairness of Zambia’s electoral systems is borne out by the African Peer Review Mechanism (APRM) lead specialist for Zambia, Gracia Machel, when she says, “we realize that we seem to have a problem with the electoral system, we may consider the need to adjust our electoral system to be not only much more transparent, but much fairer”.<sup>126</sup>

It is the Author’s view that while generally the elections are free, their fairness is questionable, moreso in Presidential elections. The incumbent President has an advantage in raising campaign finances. Firstly, the interest groups make donations, not to promote ‘Public

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<sup>125</sup> Voice of America Straight-talk Africa, 17<sup>th</sup> April 2008.

<sup>126</sup> The Author’s interview with Mrs. Machel, when she came to address Judges on the Africa Peer Review Mechanism – 24<sup>th</sup> February 2009.

Interest', but their narrow set of interests. They are not searching for the most thoughtful, well-qualified, or broadminded candidate to support. Secondly, the incumbent Presidential candidate monopolises the public media, so are ruling party candidates, which gives them a tactical advantage, to widely market their ideas. Thirdly, the incumbent President and his Vice have access to government resources like helicopters and planes.

Electoral corruption has left a lasting stain on our electoral process and consequently free and fair elections in the Zambian context are illusory. The current electoral legal framework cannot sustain free and fair elections. There can be no flawless electoral process. The issue at stake is that elections must meet the test of 'Good Governance'. The Zambian Electoral process is demonstrably flawed, and that cripples democracy. Apart from the Third Republic's founding elections of 1991, subsequent elections have not consolidated Zambia's democratic foundation to create a long and lasting tradition of 'Good Governance' and effective leadership. There will always be contention as to the fairness of the elections and the allegation that they produce rigged results, especially in Presidential elections, if our legislation does not correspond with the SADC guidelines discussed earlier in the chapter.

The next Chapter discusses local government as an instrument of grassroot participation.

## CHAPTER SIX

### LOCAL GOVERNMENT AS AN INSTRUMENT OF GRASSROOT PARTICIPATION

#### 6.1.0. Introduction:

There should be typically three levels of government; national, sub-national (regional/provincial) and local. Decentralization stresses the delegation of central government functions to lower levels of government (regional or local) to which may be granted a sphere of autonomy protected from the supremacy of national government. In response to the demands for greater self-determination, influence in decision-making and efficiency in the delivery of services and goods, many countries are devolving political, fiscal, and administrative powers to sub-national tiers of government.<sup>1</sup> This trend can be seen in countries with a long tradition of centralized government as well as in federalist systems, and in developing as well as industrialized countries. Yet, the issue of devolution of power is one that many African States have yet to address or provide for adequately. The African Independence Constitutions, including Zambia, did not provide for elected government accessible to the people at the local level. The local government systems that were established were centrally controlled through the Ministry of Local Government. Power, as illustrated below, remained consolidated in the central government. The situation in Zambia has remained unchanged since independence.

Decentralization is premised on the assumption that the people are sovereign: Sabato and others say:

*“Since the age of enlightenment positioned the individual to be as sovereign as any king, who is there to rule other than the people?”*

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<sup>1</sup> Ndulo Muna, *Democratic Reform in Africa, Its Impact on Governance and Poverty Alleviation*, (Oxford: James Currey, 2006) p.79.

*If the people are not competent to govern themselves, then we must suffer whatever kind of government the people's competence chooses''<sup>2</sup>*

The meaning of constitutionalism and good governance keeps on being stretched, to include decentralization. Decentralization is a critical component of good governance. It involves the creation of sub national governments, for example states, regions among others. South Africa is a good example. It has regional governments as well as local government legislation. Decentralized governance means political decentralization, administrative decentralization which includes, decentralization, delegation and devolution. Additionally, there should be fiscal decentralization if the decentralized functions have to be executed.<sup>3</sup>

There is a dramatic revival in emphasis on local democracy around the world. This renewed interest has arisen for many different reasons. In established democracies, new deal pressures emanating from the influences of globalization, urbanization, and increasing human migration, have led to a review of how cities can better cope with these challenges. In countries that have recently become democratic, there is an opportunity to design systems anew. And many have taken such initiatives, through decentralization and improved local governance.<sup>4</sup> The demand for decentralization has been motivated by a desire to protect local government against the great political manipulations, to which it has been subjected. The aim has been to stop the Central Government from "cavalierly and whimsically tinkering with local government organs."<sup>5</sup>

Decentralization does not seek to subvert the authority of the central government, but rather to behold the Central Government to the concept of sovereignty of the people. The local

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<sup>2</sup> Sabato J. Larry, Ernest R. Howard, Larsan A. Bruce, *Dangerous Democracy? The Battle over Ballot initiatives in America* (Oxford: Rowman and Littlefield Publishers Inc), p.63.

<sup>3</sup> Decentralization <http://en.wikipedia.org/wiki>, p.1.

<sup>4</sup> Sisk Timothy, *Democracy at the local level*, *The International Idea Handbook on Participation, Representation, Conflict Management and Governance*. [www.idea.int/publications/oju/uploa](http://www.idea.int/publications/oju/uploa), p.7.

<sup>5</sup> Ibid.

political community should not be subject to power outside of or above itself in social and economic developmental issues. Decentralization in a democracy intends to strengthen both central and local governance in ways that support the objects of national interaction, democratization and greater efficiency and equity in the use of public resources and service delivery. Decentralization is essential in creating a collaborative mechanism between the state and the people.

The heavy responsibilities thrust upon the local governments are not backed by human, material, financial and power to execute those functions. The councils depend on the central government for planning, finance and leadership generally. The only local commercial activity which generated money for councils was the collection of rent money from their housing stock. This was diminished, when President Chiluba directed councils to sell houses for far much below the market value.<sup>6</sup> The decision was imposed by the centre without local input. This points to the fact that there is no decentralization of power.

Ms. Nawakwi, a former Minister of Finance, now Forum for Democracy and Development President admits that her former government headed by President Chiluba made mistakes by concentrating power in the central government – a situation she says, did not benefit grassroot communities.<sup>7</sup> The cynics of centralism associate it with politics of survival. They say, “it is easy to see that the rich have a great distaste for their country’s democratic institutions. The people are the power whom they fear and scorn.”<sup>8</sup> Nwabueze succinctly puts it:

*“The colonial approach to state power and the position of the European colonial administrator as masters of the people with*

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<sup>6</sup> The author’s interview with Mr. Ali Simwinda, Town Clerk, Kitwe City Council on 26<sup>th</sup> June 2001 at Kitwe.

<sup>7</sup> Most developing countries, including Zambia have highly centralized governments that concentrate development at the centre. It is only in the recent years that politicians and development planners, have fully recognized the contribution that local government can make in achieving national development. Hageaves Sikwibele, Paper on Community Participation in Decentralized Planning in Western Province, A case for Lukulu District Mongu 2<sup>nd</sup>–3<sup>rd</sup> June 1997.

<sup>8</sup> Nwabueze Ben, Constitutional Democracy in Africa volume 2 (Lagos: Spectrum Books Limited, 2004), p.360.

*superior rights and privileges was part of Africa's political heritage and experience. The indigenous functionaries took over the colonial approach and patterned themselves on it. That, I believe, is the origin of the absence of a sense of service and trusteeship that pervades public service in Africa. The concept of service as equally that of trusteeship is foreign to the African public servant. He is notoriously discourteous, disrespectful, arrogant, undevoted, self-serving, unresponsive to the needs of the people, arbitrary, nepotistic and lacking in fidelity, probity and accountability"*<sup>9</sup>

Nwabueze's observation remarkably illustrates the reasons for lack of 'political will' in Zambia and Africa generally to decentralize power and functions to local governments. This is militated by the inherited colonial attitude which embraced elitist rule.

However, the Ugandan decentralization reform initiated in 1992 is said to be exceptional among developing countries in terms of the scale and the scope of the transfer of power and responsibilities to the local level. It has been praised as "one of the most far-reaching local government reform programs in the developing world" and as "one of the most radical devolution initiatives of any country at this time."<sup>10</sup>

### **6.1.1. Definition of Decentralization**

Grassroot participation in local governance can only be discussed, if Local Government is clearly understood and defined. Local Government is the tier of public authority that citizens first look to, to solve their immediate social and economic problems. It is also the level of democracy in which the citizen has the most effective opportunity to actively and directly participate in decisions made for all of society. There are various definitions as to what local

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<sup>9</sup> Nwabueze Ben, Constitutional Democracy in Africa volume 2 op cit, p.361.

<sup>10</sup> Gary Younge, Mail and Guardian, 8<sup>th</sup> - 14<sup>th</sup> February 2008.

governance is and all schools of thought agree that for development to be democratic, the grassroots must participate in the process.<sup>11</sup>

There are four facets to local governance or decentralization namely, deconcentration, devolution, delegation and privatization.<sup>12</sup> For the purposes of this study, privatization is not very pertinent. The Government of Zambia Decentralization Paper defines these concepts as:<sup>13</sup>

- (i) *“deconcentration – as the transfer of functions and resources to lower level units of the same administrative system while authority over decision making and use of resources remains with the center (i.e. from the headquarters of an institution of administrative system to the lower levels). In the case of government administration, this would entail the transfer of some functions performed at the headquarters of the ministry to provincial, district and/or sub district offices while power and authority are retained at the center;*
- (ii) *devolution is the transfer of some powers and authority, functions and resources by legal and constitutional provisions to the lower levels. The transfer is within formal political structures and is institutionalized by constitutional means. For example, when the central government transfers some of its powers and authority to democratically elected local authorities or regional governments empowering them by law, to determine local taxes, raise own revenue and decide on how to use it. Under this form of decentralization leadership is accountable to the local population through a system of elections;*
- (iii) *delegation is the transfer of functions and resources to a subordinate authority with the capacity to act on behalf of the superior authority without a formal transfer of authority in the same structure. An example is when an office of lower level is assigned to perform some duties or tasks by the higher office.*

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<sup>11</sup>The Australian Government Good Governance and Aid Programme defines local governance as a form of government whose legitimacy depends on the consent of the governed. This is also linked to the principle of participatory development, in project planning and implementation, and decentralization of authority to local and regional centres where possible, Policy Document on Human Rights, Democracy, Good Governance and the Aid Programme (AUS AID 1997), p.224.

<sup>12</sup>The Australian Government Good Governance and Aid Programme, op cit.

<sup>13</sup>Republic of Zambia, The National Decentralization Policy Towards Empowering the People, (Lusaka: Cabinet Office 2000), p.4.

*However, the lower office will still be required to consult the higher office on matters that require decision –making”*

Local governance has been defined by the Australian Centre for the Study of Social Policy in Sydney as:

*“A decision-making process whereby the community takes responsibility for developing and implementing strategies to achieve better results for children, families and communities. The ultimate goal is to have better decisions – that contribute to improving results for children, families and communities. Local governance is a partnership that brings together state government, private sector, local government elected officials, and community members”<sup>14</sup>*

This definition accords with participatory development. It is not another layer of bureaucracy, but a focus on the communities’ quality of life and needs. It is an ongoing process, which should be consistent and nurtured. It brings together all those who have a stake in the well being of children, families and communities to channel resources and information to that end. Local governance creates an integrated system in which schools, social services, health systems and a community’s resources can be linked together to coordinate and improve service system outcomes.<sup>15</sup> Decision-making becomes a more inclusive process based on integrated real-life in a given community.

It is in light of the above definitions of local governance that the process will be analysed. The government admits in the policy paper, the absence of decentralization, when President Mwanawasa states:<sup>16</sup>

*“Through this policy, the long term vision of government is to achieve a fully decentralized and democratically elected system of*

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<sup>14</sup> Center for the study of social policy: Building capacity for local decision-making [www.center-school.org/fssr/docum](http://www.center-school.org/fssr/docum), p.4.

<sup>15</sup> Ibid.

<sup>16</sup> National Decentralization Policy, op cit, p.3.

*governance characterized by open, predictable and transparent policy making and implementation processes at all levels of the public service, effective local community participation in decision-making and development administration, while maintaining sufficient linkages between Central and Local Government. Government will also outline the functions to be performed at each level, national, provincial, district and sub-district and specify the resources to be availed for the performance of these functions. Comprehensive legislation to back the implementation of the policy through empowering councils to determine, manage and control the district's human, material and financial resources will be enacted. However, government realizes that currently the capacity to attain such decentralized system of government does not exist and has therefore, deconcentrated some of its functions, powers and resources to provincial and district administration levels while the necessary capacities are being developed in the councils. The time frame for the implementation of the policy is ten years from the time of adoption”.*

The President's statement is indicative that there is no political will to implement decentralization, though the central government has professed commitment to decentralization, there has been a wide gap between political rhetoric and reality. There are 'Developing Countries' like Bolivia, Philippines and South Africa which have successful local government systems to emulate. Why then should it take 10 years to implement decentralization?.

### **6.1.2. Institutional Structure:**

In 1965, a year after independence, the various provisions relating to local authorities (municipal corporations, townships, native authorities) were consolidated into a single Local Government Act, which created three types of Councils (rural, municipal and townships) and allowed for local elections. A dual structure of elected councilors on the one hand and district

administration headed by a District Governor, who was a party official, on the other hand was established.<sup>17</sup>

This was revised by the 1980 Local Administration Act,<sup>18</sup> which fused the office of the District Governor and the Council Secretary in an attempt to eliminate duplication, and integrated them with the party structure. This was pursuant to the concept of 'Party Supremacy' which meant that all organs of state and institutions were below the party. The 1980 Act<sup>19</sup> also suppressed local elections, replacing them with party elections. The non-UNIP Members were not participating. Legislation vested authority for all public service delivery at local level, in the District Executive Secretary designated by the Central Government. This approach undermined local democracy, in that there was no participation by the local community in project planning and implementation.<sup>20</sup>

The District Executive Secretary was a delegate of the central government. However, this concept had two distinct advantages. This district became the focus of all local development activities, and the District Executive Secretary was in a position to ensure cross-sectoral co-ordination at local level. This reform was not implemented continuously, suffering from lack of resources.<sup>21</sup>

The 1991 Constitution was the first to mention local government. The 1991 Local Government Act reversed the situation to the pre-1980 position. But without the co-ordinating office of the District Governor/Secretary to head district level line ministry departments, there was no clarity as to whether local government was the focal point for development at district level. There were often conflicting instructions from the District Governor/District Secretary as

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<sup>17</sup> Chaponda Dafy, Fay Marianne, Mbao Helen, Mulongo Winnies, a review of local institutions in Zambia, July 1980, p.19.

<sup>18</sup> Local Government Act, Chapter 281 of the Laws of Zambia.

<sup>19</sup> Ibid.

<sup>20</sup> Sikwibele Hageave, Community Participation in Decentralised Planning, op cit, p.20.

<sup>21</sup> Ibid.

Political Head/Chief Executive of the district, respectively and instructions from the provincial or national headquarters of line ministries.<sup>22</sup> However, a number of government initiatives suggest a preference for placing local development under the control of appointed or selected individuals rather than locally elected representatives (councils).<sup>23</sup>

### **6.1.3. Local Governance at Provincial Level:**

Zambia has no local government at provincial level. The political head of the Province is a Deputy Minister appointed from Members of the National Assembly by the President.<sup>24</sup> The Administrative Head of the Province is the Provincial Permanent Secretary (PPS), a civil servant appointed by the President single handedly.<sup>25</sup> The Provincial Permanent Secretary represents Central Government's authority within the province.

The Provincial Permanent Secretary has no authority over local government, since there is no Local Government at Provincial level. However, he/she is the head of the Local Government Appeals Board, where employees of Councils who feel they have been unfairly treated by Councils in the province can appeal.<sup>26</sup> The Provincial Permanent Secretary's role is one that is subject to varying interpretations.

Some Permanent Secretaries perceive themselves as playing a controlling role and wielding authority over all government institutions, including Councils within the Province. In reality, their role is essentially to report to the Central Government. They are not involved in the Council's technical work, planning or decision making, and are generally bypassed by donors

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<sup>22</sup> Sikwibele Hageave, Community Participation in Decentralized Planning, op cit, p.20.

<sup>23</sup> Ibid.

<sup>24</sup> Section 120 (3), Local Government Act.

<sup>25</sup> Sikwibele Hageave, Paper on Community Participation in Decentralization, op cit, p.2.

<sup>26</sup> Ibid

engaging in the Council's area of jurisdiction.<sup>27</sup> The lack of resources both financial, material and human, incapacitates them to wield influence over Councils and to respond to emergencies.

#### **6.1.3.(i) Provincial Local Government Officer:**

The Central Government, though not spirited to create local governance partnership, created the position of Provincial Local Government Officer. The Provincial Local Government Officer (PLGO) is an employee of the Ministry of Local Government and Housing, whose mandate is to assist local governance at provincial level. He reports to the Provincial Permanent Secretary on issues affecting Councils.<sup>28</sup> The Provincial Local Government Officer is the intermediary between the Ministry of Local Government and Housing and Councils.

#### **6.1.4. What Structure of Sub-National Level Does Zambia Need?**

Before colonialism, traditional institutions of governance constituted a village headman, sub-chief, chief, senior chief and paramount chief at the apex of a tribal grouping. These structures existed in the post colonial era, but were subordinated to the colonial structures. Their subordination has continued to this day. Zambia should emulate Uganda.

The National Resistance Movement in Uganda, which came to power in 1986, had by 1992 initiated decentralization reforms which were exceptional among developing countries in terms of the scale and scope of the transfer of power and responsibilities to the local level. The government, under the leadership of President Yoweri Kaguta Museveni, has been strongly committed to decentralization, supporting such an ambitious and exemplary form of devolution, despite emerging from civil strife.<sup>29</sup>

The local government system is formed by a five-tier pyramidal structure which consists of the village (LC1), parish (LC2), sub-county (LC3), county (LC4) and district (LC5) in rural

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<sup>27</sup> Sikwibele Hageave, *Community Participation in Decentralized Planning*, op cit, p.20.

<sup>28</sup> Ibid.

<sup>29</sup> Saito Fumikuko, *Decentralization in Uganda: Challenges for the 21<sup>st</sup> Century*, Ryukoku University, Japan, 2000, p.6.

areas and the village (LC1), ward or parish (LC2), municipal division, town or city division (LC3), municipality (LC4) and city (LC5) in urban areas. These were initially Resistance Councils, but the 1995 Constitution renamed them local councils.<sup>30</sup>

The decentralization structure suggested in Zambia's national decentralization policy suggested the creation of area development committees, which were to be sub-division at district, municipal and city level, then the central government. The provinces are regional governments in countries like South Africa.<sup>31</sup>

It is quite clear, as earlier pointed out in this Chapter, that even the new decentralization policy, which has not been implemented like the earlier policies, has opted for making local development under the control of appointed or selected individuals rather than locally elected representatives (councils). The traditional chiefs have been marginalized in the process, as they can only nominate individuals to the area development committees.<sup>32</sup>

#### **6.1.5. The Best Approach to the Areas of Competence**

The United Nations Development Programme model for allocation of functions is that basic functions should be performed by the lowest organ of the local government structure.<sup>33</sup> This is because of the technical nature of the function.

The village councils should exclusively be responsible for infrastructure and public service in the following areas: sewage and drainage, cemeteries and waste management. In social, cultural and recreational sphere, the village councils should promote cultural and historical values, organize recreational activities, provide social service like orphanage and day care. The Wards should be responsible for water supply, local roads, sidewalks, squares and

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<sup>30</sup> Saito Fumikuko, *Decentralization in Uganda: Challenges for the 21<sup>st</sup> Century*, Ryukoku University, Japan, 2000, p.6, op cit.

<sup>31</sup> South African Constitution Act No. 108 of 1996.

<sup>32</sup> An interview with Mr. B.B. Chirwa Acting Permanent Secretary Ministry of Local Government 10<sup>th</sup> June 2006.

<sup>33</sup> Pandey Kalyan, UNDP Albania, *Local Government Structure, functions and UNDP Support paper presented in Community of Practice Workshop in Zagreb, Croatia, June 15-19, 2003.*

public parks. In the area of economic development, the wards should be responsible for development of small business and manage fairs and advertisement and provide veterinary services. The Wards could share the planning function with village councils. The Ward could delegate to the village committees some of its functions.

The District Council could be responsible for public lighting, public transportation, urban planning. The construction of health centres, public markets and their operation could appropriately be undertaken by the district council due to the complexity and technical nature of the function. The provision of pre school and pre university education, social assistance, public order and civil environment protection, could be shared functions with the provincial or regional governments. The provincial or regional governments should have the exclusive authority of developing regional policies and strategies. The harmonization of regional policies with national policies should be within exclusive competence of the provincial or regional governments.

The top fifth tier of local government, the central government, can be responsible for the preparation and implementation of decentralization strategy with time plan, implementation and review of organic layout of local government and formulation of legislation. There should be a ministerial committee headed by the Vice President to monitor decentralization.

It is critical that in the allocation of functions to a sub-national entity, regard must be had as to the available resources, both technical, human and financial. It would be counter-productive to allocate construction of hospitals, schools, rural health centres to a village council or a ward, which entities lack both material, human and financial resources to undertake the tasks.

### **6.1.6. The Power of Sub-National Entities**

When considering power to be allocated to sub-national entities, regard must be had to the concept of sovereignty of the people. If the people are sovereign, then they must have a say in who governs them and how they are governed. If democracy is a government of the people for the people and by the people, then the will of the people must override that of their governors.

### **6.1.7. Councils' Legal Framework**

Power to determine and approve developmental projects are the essential ingredients of autonomy, which in this context implies that Councils should be able to make legally binding decisions on their own, within a specified regulatory and legislative framework.<sup>34</sup> This has to be done in an environment where there is local governance partnership.<sup>35</sup> Local government autonomy worldwide manifests itself in laws which are aimed at facilitating service delivery, without much reference for approval to the Minister of Local Government or indeed any government authority. A review of legal provisions is undertaken to assess how the wide and sweeping powers of the Minister of Local Government in Zambia, have negatively impacted on the realization of local governance autonomy.<sup>36</sup>

If the concept of popular participation is to be realized, communities through their elected representatives or bodies, should be able to make independent decisions and freely implement them. The ideals of democracy must be enshrined in the citizen's right to participate in the

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<sup>34</sup> Ministry of Local Government and Housing, Action Plan for Financing Local Government in Zambia, March 3, 2000 pp.12-13.

<sup>35</sup> There should be a decision making partnership between the State, Private-Sector, Local Government and Community leaders and residents to carry out the process of local governance through. Chaponda Dafy, A review of local institutions in Zambia, op cit, p.20.

<sup>36</sup> President Levy. P. Mwanawasa, S.C. did not hide his observations when he stated that, "I have noticed that some pieces of legislation governing our Local Government system are not in tandem with the current dynamics obtaining in our country. It is my administration's desire to have them amended with particular regard to the Local Government Act --- My administration is very committed to ensuring that such legal provisions are reviewed". Ministry of Local Government and Housing, Action Plan, op cit, pp.12-13.

governance process. This seems not to be the case in the local government system of Zambia. Legislation guiding the administration of local authorities has generally been considered as not being supportive to the existence of a well functioning and participatory Local Government system. The present Local Government system is “dysfunctional.”

The overwhelming powers of the Minister of Local Government and Housing have, particularly been cited as too intrusive to an efficient, effective and democratic Local Government system.<sup>37</sup> The net effect of such overwhelming ministerial powers is the creation of Councils that are always dependent on the Central Government for the formulation of policy, projects, planning and implementation and provision of resources generally.<sup>38</sup>

It is a general concern that the powers of the Minister, as provided for in the Local Government Act, need to be reviewed and subsequently reduced in order to enhance local autonomy and check political interference. Some of the statutory powers of the Minister which will be reviewed in relation to the autonomy of Councils include the approval of Councils annual budgets, approval of by-laws and power to suspend and dissolve Councils.

#### **6.1.8. Building Capacity in Councils**

Capacity building in councils should be multifaceted. Currently, all councils be it City, Municipal and Local Councils suffer a deficit in terms of development planning, human resource development, management and financial mobilization.

Capacity building can facilitate decentralization by developing a participatory planning and budgeting process that involves communities and other stakeholders in setting priorities and oversight. One reason why there is a lot of ministerial intervention in local governance is due to

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<sup>37</sup> Chaponda Dafy, A Review of Local Institutions in Zambia, op cit, p.21.

<sup>38</sup> Ministry of Local Government and Housing, Action Plan, op cit, p.11.

lack of capacity to carry out the sixty three functions which Councils are supposed to execute.<sup>39</sup> The Minister has powers to order preparation of development plans,<sup>40</sup> ‘to approve them’<sup>41</sup> and ‘to revoke them’.<sup>42</sup> He/she can delegate approval to a planning authority.

### 6.1.9. Financial Constraints and Local Governance

One of the major obstacles to service delivery is the lack of financial capacity in Councils. Councils the world over are in the forefront of providing social services, especially to the poor. It has strongly been suggested that Councilors can only perform efficiently if Councilors and chief officers were not politically interfered within the running of the Councils.<sup>43</sup>

The Councils ought to budget and raise revenue to capacitate them to finance the critical needs of their communities if local governance has to have any meaning. However, though the Councils have corporate status,<sup>44</sup> that status falls short of that granted to a limited liability company. A company has the same rights and obligations as an individual.<sup>45</sup> While a limited liability company has profit as the primary motive, the Council has a duty to provide social services to the entire community, even to those that cannot afford to pay for the services.

The revenue earning capacity of Councils has been diminished by a presidential fiat directing Councils to sell their housing stock at a price determined by the President.<sup>46</sup> Housing units were a major revenue earner for the Councils, through rentals from tenants. This was in violation of section 67(1)<sup>47</sup> of the Local Government Act which is couched in these terms:

*“Subject to the provisions of this section, a council may sell, let or otherwise dispose of any property of the Council. Provided that*

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<sup>39</sup> Ministry of Local Government and Housing.

<sup>40</sup> Section 15 (1), Town and Country Planning Act, Chapter 283.

<sup>41</sup> Ibid, section 17 (1).

<sup>42</sup> Ibid, section 18 (1).

<sup>43</sup> An interview with Mr. Wynter Kabimba, a former Lusaka Town Clerk on 9<sup>th</sup> June 2006, Lusaka.

<sup>44</sup> Section 6, Local Government Act.

<sup>45</sup> Chapter 388 of the Laws of Zambia.

<sup>46</sup> See Republic of Zambia Handbook on Civil Services Home Ownership, 1996.

<sup>47</sup> Local Government Act.

*where the council intends to sell a council asset the council shall, before conducting the sale, cause a valuation of the asset to be carried out by the department of the Government responsible for property valuations or by a valuer, approved by the minister.”*

It is clear that President Chiluba violated the law. Had this provision been followed, it would have undermined the primary objective of President Chiluba, of gaining political mileage by selling council houses at a giveaway price. He was desirous of getting accepted to stand as President for the ‘Third Term’. The decision was populist. During a campaign rally in Chipata, Eastern Province, Chiluba’s successor Mwanawasa abolished a bicycle levy of K5,000.00 which was generating five billion kwacha annual revenue for the Council. The Council had based their budget on this anticipated revenue.<sup>48</sup> The result was that council projects for that fiscal year had to be abandoned.

Much of the revenue could be derived from annual property rates chargeable by Councils. But the Government, which is the major owner of properties in all Council areas, has neglected to pay rates. The Government budgetary allocation is extremely inadequate. The few government releases are routed via the line ministry and not everything reaches the Councils. The current system has created a dependency syndrome.

There is need for revenue raising power of Councils to be put in the Constitution to avoid such power being overridden by a Minister. In the Namibian case, the provision is couched in the following terms: The Regional Councils have the following powers:

- (i) elect members of the National Council;*
- (ii) perform the duties assigned to them by an Act of parliament;*

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<sup>48</sup> The President was desirous of turning this opposition stronghold into an MMD stronghold. The council, which was hitherto affording to pay monthly salaries became a victim of fiscal paralysis. An interview with Mr. Siwakwi, Town Clerk Chipata Municipal Council on 15<sup>th</sup> June 2005.

*(iii) raise revenue or share in the revenue raised by the central government.*<sup>49</sup>

With this kind of constitutional provision, there is an obligation on the Central Government not to interfere in revenue raising efforts of Councils. The Central Government is obligated to share with Councils the revenue raised.

The Central Government should ensure that a participatory planning and budgeting process is developed that involves communities and other stakeholders in setting priorities and providing oversight. Direct funding should be provided by the Central Government to Councils, along with adequate autonomy and flexibility in the use of those resources. There should be enhanced accountability at decentralized levels through the use of management agreements. These agreements would have terms on funds allocation, payment modalities and obligations of recipients.

#### **6.2.0. Objectives of the Fiscal Decentralization Strategy**

The objective is to strengthen the process of decentralization in Zambia through increasing local governments' autonomy, widening local participation in decision making and streamlining of fiscal transfer modalities to local governments in order to increase the efficiency and effectiveness of local governments to achieve the Poverty Eradication Action Plan (PEAP) goals within a transparent and accountable framework.<sup>50</sup>

This will be achieved by increasing the discretionary powers given to local governments in allocating resources towards both current and development activities, promoting increased participation at all levels of local government in the decision making process, providing direct financial incentives for local governments to increase local revenue and ensuring that local

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<sup>49</sup> Kender Christean, *Traditional Leaders and Local Governments in Africa: Lessons for South Africa* (Windhoek: University of Namibia, 1988) p.57.

<sup>50</sup> Fiscal Decentralization in Uganda, Draft Strategy Paper, March 2002, p.6.

revenue contributes meaningfully to local development, harmonizing the central and local government planning and budgeting cycles to ensure that local needs and priorities do feed back into the national budget, improving the effectiveness of Local Government Programmes through strengthening the effectiveness, transparency and accountability of local government expenditures.<sup>51</sup>

This may be achieved by streamlining the systems of transferring funds from the centre to local governments, developing a strong framework for financial accountability and increasing the focus of bookkeeping; a simple system of reporting on financial and output information, rewarding those local governments which implement programmes well in adherence to the legal and policy framework and sanctioning those which do not, a more co-ordinated and better targeted system of monitoring and mentoring local governments by the central government.<sup>52</sup>

The concept of 'equalization grant' as part of the fiscal decentralization strategy is politically sensitive in two senses, firstly, rich districts resist it as income earned in those districts is redistributed. Secondly, if not done, there will be no balanced development. The equalization grant should be provided in the constitution as a grant for "giving subsidies or making special provisions for least developed districts." The equalization grant will be used as an increasingly important tool to boost the development of those local governments with low levels of services and those poor districts/municipalities with low revenue potential.<sup>53</sup>

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<sup>51</sup> Fiscal Decentralization in Uganda, Draft Strategy Paper, op cit, p.7

<sup>52</sup> Ibid.

<sup>53</sup> Ibid.

### **6.2.1. Local Government Electoral System:**

The current Local Government electoral system provides for direct voting, except for the mayors. Councilors then elect Mayors. It has been suggested that, as Mayors are elected by fellow Councilors, the election is fraught with corruption and is elitist.<sup>54</sup>

The Government Policy Document intends to modify this position and has suggested as follows:

*“A mayor/council chairperson elected by universal suffrage in the council area will head the Council. In order to redress the challenge associated with local government electoral system, the system of local government shall be based on democratically elected Councils on the basis of universal adult suffrage as provided in the Contitution.”<sup>55</sup>*

The Mayor, as a player of pivotal role in the local development process, should be subjected to a wider mandate of all the registered voters in that Local Government area.

### **6.2.2. Suggested Legal Framework:**

The Minister of Local Government should not have power to dissolve democratically elected Councils or to unilaterally annul by-laws, especially of a revenue earning nature. There is need for a comprehensive legal framework, which will entail devolution of power, not only to the Councils, but to other stakeholders as well. The legal framework must create space for cooperating partners' participation in local development projects and the participation in service delivery by all stakeholders.

For the 'Decentralization Process' to be successful and sustainable, there is need to have a flexible legal framework, which can enable Councils to pool resources from all stakeholders and permits participation in governance by local communities.

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<sup>54</sup> Ministry of Local Government and Housing, Action Plan, op cit, p.38.

<sup>55</sup> Ibid.

### 6.2.3. The Mwanakatwe Recommendation

The Mwanakatwe Constitution Review Commission felt that, inherent in a working democracy, was the presumption that government policies and programmes would only be meaningful if they were felt and appreciated by the people for whom they were meant. The present system alienated the ordinary people from their government, thereby creating as it were, a perception of powerlessness, marginalisation, neglect and inequitable treatment by the centre.

The Commission enumerated the objectives of a local government system as to:

- (i) *ensure that functions, powers and responsibilities are devolved and transferred from the central government to the province, District and sub-District in a co-ordinated manner;*
- (ii) *promote the policies of decentralization from the highest to the lowest structure;*
- (iii) *realize democratic ideals and embrace fully the concepts of accountability, transparency and an efficient administration;*
- (iv) *devise mechanisms that would ensure that each local government level is able to plan, initiate and execute policies affecting the people within its jurisdiction;*
- (v) *promote the co-operation of traditional leaders with local government authorities in order to enhance development; and*
- (vi) *establish a sound financial base with reliable sources of revenue.*

The Constitution should provide for equalization account as part of fiscal decentralization, which will enhance financial resource capacity of local governments. Where there is a conflict, such conflict should be resolved in favour of local governments as the people are sovereign.

The suggested objectives by the Commission were not adequate to address local governance. The recommendations did not deal in detail with issues like revenue-sharing,

unfettered power of Councils to invest, to make by laws, prepare a budget in accordance with the resource envelope, to restrain the Central Government from making impermissible intrusion into local affairs. For instance, the Minister of Local Government has to approve by-laws and approve the budget. He/she does so without consultation with the local community, nor is the Minister obliged to take into account the local conditions.<sup>56</sup>

#### **6.2.4. The Mung'omba Commission**

The Mwanakatwe Commission proposal to set out the objectives of local governance in the Constitution was adopted by the Mung'omba Commission and improved upon. These objectives were to:-

- (i) ensure that powers, functions, responsibilities and resources from the Central Government are transferred to the district and sub-district authorities in a co-ordinated manner;*
- (ii) promote the peoples participation in democratic government at the local level;*
- (iii) promote cooperative governance with the Central Government in order to support and enhance the developmental role of local government;*
- (iv) enhance the capacity of district Councils to plan, control, co-operate, manage and execute policies in respect of matters that affect the people within their respective localities;*
- (v) promote social economic development at the district level;*
- (vi) establish for each district council a sound financial base with reliable sources of revenue;*
- (vii) oversee the performance of persons employed by the Central Government to provide services in the district and to monitor the provisions of government services or the implementation of projects in the districts;*
- (viii) ensure accountability of the district Councils and sub-district structures; and*

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<sup>56</sup> Report of the Mwanakatwe Constitutional Review Commission 16<sup>th</sup> June 1995, pp.163-164.

- (ix) *recognize the right of the districts to manage their local affairs and to form partnerships, networks and associations to assist in the management and to further their development.*<sup>57</sup>

The proposed Article 235,<sup>58</sup> dealt with non interference by the centre into local affairs. The local authorities had been elevated to being co-equals with Central Government. Articles 234 and 235,<sup>59</sup> if adopted by the National Constitutional Conference and enacted by Parliament, will supersede the Local Government Act.<sup>60</sup> The Minister's powers in that Act, will be inconsistent with the Constitution and therefore rendered null and void. Councils in relation to the Central Government could effectively be autonomous.

### **6.3.0. Philippines**

The Philippines: Local Government Code, section 5 (a) states:

*“Any provision on a power of a local government unit shall be liberally interpreted in its favour, and in case of doubt, any question thereon shall be resolved in favour of devolution of powers to the lower local government unit. A fair and reasonable interpretation as to the existence of the power shall be interpreted in favour of the local government unit concerned”*<sup>61</sup>

This provision obligates the courts and any other institution to interpret the law in favour of devolution of powers. The Act, goes on to establish participatory governance in section 2 which states:

*“It is likewise the policy of the state to require all national agencies and offices to conduct periodic consultations with appropriate Local Government units, non-governmental and people's organizations and other concerned sectors of the community before any project or program is implemented in their respective jurisdictions.”*<sup>62</sup>

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<sup>57</sup> Draft Constitution of the Republic of Zambia 29<sup>th</sup> June 2005.

<sup>58</sup> Mung'omba Constitution Review Commission Draft Bill 2006.

<sup>59</sup> Ibid.

<sup>60</sup> Local Government Act.

<sup>61</sup> UN-HABITAT, The Global Campaign on Urban Governance, op cit, p.7.

<sup>62</sup> Ibid, p.9.

This legislation recognizes the sovereignty of the people which is the foundation of constitutional democracy.

### 6.3.1. South Africa

The South African Local Government policy as reflected in the White Paper is centred on the notion of 'Developmental Local Government.' The latter is defined as:

*"Government which works with local communities to find sustainable ways to meet their economic and material needs and improve the quality of their lives"*<sup>63</sup>

The South African White Paper on local government recognizes participatory governance and inclusiveness as one of the central objectives of municipal institutions. There is special mention of the participation of the socially disadvantaged groups. Municipalities need to be aware of the divisions within local communities and seek to promote participation of marginalized and excluded groups in the community.<sup>64</sup>

A second White Paper, Batho Pele (people first) was issued by the Minister for Public Service Administration. It provides a useful approach to building a culture and practice of local government service. The paper is based on eight principles to foster a customer service in local Government. These principles are:

- i. Consultation: Citizens should be consulted about the level and quality of public service they receive, and where possible, should be given a choice about the services which are provided;*
- ii. Service Standards: Citizens should know what standards of service to expect;*
- iii. Access: All citizens should have equal access to the service which they are entitled;*

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<sup>63</sup> UN-HABITAT, The Global Campaign on Urban Governance, op cit, p.7.

<sup>64</sup> South Africa Municipal Systems Act, 2000.

- iv. *Courtesy: Citizens should be treated with courtesy and consideration;*
- v. *Information: Citizens should be given full information about the services they are entitled to receive,;*
- vi. *Openness and transparency: Citizens should know how departments are run, how resources are spent, and who is in charge of particular services;*
- vii. *Redress: If the promised standard of service is not delivered, citizens should be offered an apology, full explanation and a speedy and effective remedy, and when complaints are made citizens should receive a sympathetic, positive response; and*
- viii. *Value-for-money: Public Services should be provided economically and efficiently in order to give citizens the best possible value-for-money.*<sup>65</sup>

The Municipal Systems Act, reflected these ideas and section 2 defined the municipality as consisting of:

- i. *the governing structure and administration of the municipality; and*
- ii. *the residents and communities in the municipality.*<sup>66</sup>

The emerging initiatives in Bolivia, Philippines and South Africa have undoubtedly had a significant impact of improving governance in these countries which Zambia should emulate.

#### **6.4.0. Conclusion**

There is thus a critical need for devolution to be undertaken in a manner that will not only improve governance and enhance the accountability of leaders, but also make the state a positive force in people's lives. In the institutional sense, this means addressing the issue of the over-centralization of power, namely the concentration of power in the hands of a few executive offices, and therefore a few people.<sup>67</sup> This is usually reinforced by the tendency of governments

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<sup>65</sup> The Municipal Systems Act, 2000.

<sup>66</sup> Ibid.

<sup>67</sup> Muna Ndulo, *Democratic Reform in Africa, Its Impact on Governance and Poverty Alleviation*, Oxford: James Currey 2006, p.86.

to concentrate the most critical human and financial resources at headquarters, leaving rural administration with a lean structure lacking adequate resources or discretionary authority.<sup>68</sup>

To the masses, an ideology has little relevance, their conception of government being in terms of material benefits it can bring to them. These include peace and order, employment, education, medical services, among others. These are the very critical social services the elitist rulers neglect, by not deconcentrating or devolving power to local communities.<sup>69</sup>

The government of Zambia should adopt, with minimum delay, its Decentralization policy. Councils should be given autonomy on all resource-related issues, among them human, financial and technological resources. In terms of sequencing, decentralization should first and foremost focus on devolution of financial, legal and administrative affairs. The review of laws and practices that are detrimental to the autonomy of local governments should be undertaken by the government in collaboration with the Local Government Association of Zambia (LGAZ).<sup>70</sup> Laws and regulations governing land allocation and management are cumbersome and still not adequately decentralized, which has been a constraint to development.

It is clear that the Philippines, Bolivia and South African local government legislation is community service and democratically oriented. The Zambian society would benefit if useful legislation was enacted here, lessons could be borrowed and adapted to local conditions.

One common feature of polities within the region and beyond is that they had decentralized local governance during the colonial period. This decentralization was premised on divide and rule by the British and other colonial rulers. At independence the traditional leaders

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<sup>68</sup> Muna Ndulo, *Democratic Reform in Africa*, op cit, p.9.

<sup>69</sup> Nwabueze Ben, *Constitutional Democracy in Africa*, op cit, p.118.

<sup>70</sup> There is a proposal to amend sections 67 and 48 which restrict the sale of council assets and foreign borrowing, which inhibit councils to co-operate with the private sector and donor community. Government of the Republic of Zambia, Ministry of Local Government and Housing Report on Decentralization, December, 2002, p.91.

were reluctant to surrender their powers and influence to the new political structure, and the relationship between the two remained and remain one of conflict.

The post-colonial attitude towards traditional authorities in Africa was succinctly stated by a Namibian Minister of Home Affairs Helmut Angola who described traditional leaders as:

*“Good boys” who benefited from their colonial masters and were merely an extension of them. Their inclusion in the political process would abuse their traditional control over their subjects to get elected. We should run for political office on equal basis. They should die a natural death.”*<sup>71</sup>

This passage is a pointer to how skeptical post-colonial rulers are about decentralization. It is all about the fear of losing power and influence over the local population, especially in rural areas.

There is no grassroots participation in the Zambia Local Government system. This flows from the nation’s political culture of not incorporating the grassroots communities or those on the margins of society into the political structure. Its exclusiveness is rooted in its structure. Participation ends at district level, unlike the Botswanan, Namibian and Zimbabwean Local Government structures, which have two primary units below the district level i.e, ward and village assemblies and development Committees.<sup>72</sup> The community expectations are without realization. The Central Government’s feeling that they are the judges of how the populace should be governed, has turned local government into a national crisis. While lack of human and financial resources may be an impediment to efficient local governance, yet all glaring local government misfortunes cannot entirely be attributed to these impediments.

Going by what has been discussed in this Chapter, one is prompted to say that the current constitution-making process is a wonderful opportunity for Zambia to enshrine in the supreme

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<sup>71</sup> Kender Christean, *Traditional Leaders and Local Government in Africa*, op cit, p.58.

<sup>72</sup> Ibid.

law of the land a well-articulated decentralization system, a system which will spur development in all the corners of the country, thereby improving the people's standards of living.

As Emmerson Muchangwe, a Times of Zambia columnist observes, it is only Ethiopia, Ghana, Mali, Namibia, Nigeria, Senegal, South Africa and Uganda which have constitutions that are explicitly pro-decentralization and formally recognize the existence of Local Government.<sup>73</sup>

Winter Kabimba, a legal practitioner and former Lusaka City Council Town Clerk says:

*“one of the fundamental principles of decentralization in a unitary state like Zambia envisages that local authorities as representatives of local communities will be vested in areas of town planning, health care, education, security, environmental and national resources without day to day control by the centre”*

However, it is clear that some of these areas belong to other sector ministries and as such decentralized local government system cannot be functional in a situation where there are parallel Central Government structures at provincial and district levels.<sup>74</sup> In such a situation, structures at the centre will be a source of conflict with the decentralized structures, resulting in local power being eroded or usurped altogether and that is the case in Zambia.

However, effective devolution of power should result in the delivery of most government services by the local level, be it a regional or sub-regional government, thus alleviating the burden from already over-extended central governments. It entails the existence of local communities endowed with democratically constituted decision-making bodies and possessing a wide degree of autonomy with regard to their responsibilities, the ways and means by which those responsibilities are exercised and the financial resources required for their fulfillment. Citizens participate in the conduct of public affairs more directly at local level. The existence of devolved authorities that are given real responsibilities can provide an administration that is both

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<sup>73</sup> Times of Zambia, 8<sup>th</sup> December 2008.

<sup>74</sup> Ibid.

effective and close to the citizen. Unlike more centralized systems, this provides for more flexible responses attuned to local needs.<sup>75</sup>

The next Chapter will analyze the performance of institutions supporting constitutional democracy.

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<sup>75</sup> Muna Ndulo, *Democratic Reform in African*, op cit, p.86.

## CHAPTER SEVEN

### ACCOUNTABILITY AND TRANSPARENCY

#### 7.1.0. Introduction

The Chapter discusses how institutions of accountability and transparency support constitutionalism. There can be no constitutional rule without democracy, nor can there be democracy without accountability and transparency. Accountability is therefore an essential component of 'Good Governance'. In a polity where the leaders are not accountable and transparent, the 'Rule of Law' is under threat. Institutions of accountability and transparency to be discussed in this Chapter are the Investigator General, also known as the Commission for Investigations, the Auditor General, the Anti-Corruption Commission, the Human Rights Commission, and the Press. The functions of these institutions will be extensively discussed.

The primary objective of the institutions of accountability is to act as a check on public officials, notably Members of the Executive. The Executive Arm of Government is responsible for policy making, formulation and implementation. The Executive is a repository of coercive power as well as the most powerful Arm of Government. Although the other two Arms of Government, the Legislature and the Judiciary, do possess administrative and coercive power, these two organs depend on the Executive to enforce their orders. This therefore makes the Executive susceptible to abuse of power.

The philosophical foundation of setting up institutions of accountability like the Investigator General, the Auditor General, the Anti-Corruption Commission, Tribunal on the Parliamentary and Ministerial Code of Conduct, the Human Rights Commission, and the Media is a response to the potential abuse of power. Gordon an author of the book, *Controlling the State* aptly states that "in all governments there is a perpetual struggle open or secret, between

authority and liberty”<sup>1</sup>. James Madison, one of the founders of the United States of America has had this to say, “if men were angels, no government would be necessary”. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men, the great difficulty is that, you must enable the government to control the governed and in the next place oblige it to control itself.<sup>2</sup> There must be constraints within which government institutions and individuals operate.

Constitutionalism is premised on the principle that the people, not the monied elite, must control government. Through institutions of accountability and transparency, the government must restrain the selfish and grasping tendencies of those who profit at the expense of the common person. These institutions must thwart abuse of power and corruption as these undermine the common people’s will.

‘Accountability’ and ‘Transparency’ are concepts indispensable to constitutional democracy and have gained currency since 1990, both in ordinary political discourse, and in the transitional Constitutions of emerging democracies like Zambia. Accountability and transparency are explicitly affirmed as principles of government, and a specific duty of accountability and transparency is laid on public servants.<sup>3</sup> Zambia’s transitional Constitution of 1991 in the preamble re-affirms the resolve of the people to uphold the values of democracy, transparency, accountability and good governance.

It states: “We the people of Zambia by our representatives, as assembled in our Parliament resolve to uphold the values of democracy, transparency, accountability and good governance<sup>4</sup>”. These provisions are quite laudable. Yet, it must not be supposed that for all their

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<sup>1</sup> Gordon Scott, *Controlling the State Constitutionalism From Ancient Athens To Today* (Massachusetts: University Press, 1999) p.6.

<sup>2</sup> *Ibid.*

<sup>3</sup> Ben Nwabueze, *Constitutional Democracy in Africa Volume 3* (Lagos: Spectrum Books Limited, 2004) p.328.

<sup>4</sup> Constitution of Zambia, Chapter 1 of the Laws of Zambia.

affirmative and lofty terms, they by themselves alone, automatically create an ethic of public probity and accountability. They only prescribe the standard of behavior, which if regularly, uninterrupted observed in practice, is expected over time to give rise to such an ethic tradition.<sup>5</sup>

Accountability is not only an aspect of political responsibility, it implies an obligation on the part of government – an obligation flowing from its political responsibility – to account and answer for its use of the state power and resources entrusted to it by the people. It presupposes, but is not co-extensive with, the authority and control of the people, over the use of state power and resources by government. It is the authority and control of the people over the government that provides the main sanction for accountability.<sup>6</sup> Accountability is premised on the sovereignty of the people. The ruling class must be beholden to the Constitution and its fundamental values.

On the other hand, Government must be strong enough to effectively execute government policy. Government must be empowered to formulate and execute policies in the political, social and economic spheres without undue hindrance. This was the argument of post-colonial rulers when they sought to deconstruct the classic theory of the doctrine of ‘Separation of Powers,’ discussed earlier on in Chapter Four.

#### **7.2.0. Commission for Investigations: Legal Framework**

The enactment of the Commission of Investigations Act was done at a time when Zambia had become a One-Party-State. Despite the outlawing of the opposition, Kaunda sought to be perceived to be running an accountable government. The Commission was a creature of

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<sup>5</sup> Nwabueze Ben, *Constitutional Democracy in Africa*, op cit, p.329.

<sup>6</sup> Ibid.

the 1973 One-Party Constitution. The Commission was vested with the jurisdiction to inquire into the conduct of any person in the exercise of public authority.<sup>7</sup>

As Article 117(4)<sup>8</sup> of the 1973 Constitution in question was then interpreted, it applied to Party as well as government functionaries, as the Party was linked to government. The Commission's jurisdiction extended to persons in the service of any institution or organization in which the Government had a majority of shares or exercised financial or administrative control, members or persons in the service of any Commission established by the Constitution or by an Act of Parliament.<sup>9</sup> But the Article did not apply to the President.

Private persons were not amenable for their acts and omissions to the jurisdiction of the Commission. The Commission's provisions applied to the exercise of power by public officers. That meant that complaints would only be made against the state, its servants or agents or against quasi-governmental institutions.<sup>10</sup> The return of plural politics and the delinking of the ruling party from the state removed the application of the Act to persons holding office in the ruling party.<sup>11</sup>

The Commission consists of the Investigator General, who is appointed by the President in consultation with the Judicial Service Commission, and ratified by the National Assembly as Chairman and three Commissioners appointed by the President without<sup>12</sup> consulting the Judicial Service Commission. There is no requirement of ratification for the appointment of the three commissioners.<sup>13</sup>

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<sup>7</sup> Article 8, 1973 Constitution of Zambia.

<sup>8</sup> Act No.27 of 1973.

<sup>9</sup> Article 117 (7)...

<sup>10</sup> Sakala Bikoloni Julius, *The Role of the Judiciary in the Enforcement of Human Rights in Zambia*, op cit, p.497.

<sup>11</sup> Ibid.

<sup>12</sup> Article 90(1) One-Party-State Constitution.

<sup>13</sup> Article 90 (1), Constitution of Zambia.

The Investigator General has security of tenure as he/she retires like Judges at sixty-five years of age.<sup>14</sup> He/she can be removed from office for incompetence or inability to perform functions of his/her office. Such removal should be pursuant to the National Assembly resolution, backed by the recommendation of a tribunal appointed by the Chief Justice, of persons who hold or have held high judicial office. However, Commissioners are appointed to a three year term of office, which is renewable once for another term of three years.<sup>15</sup> The 1974 Act contained no such limitations. The President, Vice-President, Minister, Deputy Minister, Members of Parliament or public officers do not qualify for appointment to the Commission.<sup>16</sup> This is so because they are the subject of scrutiny by the Commission.

The President can however extend the period after the incumbent Investigator General has attained sixty five years.<sup>17</sup> A person can only be appointed to the Office of Investigator General if he/she is qualified to be appointed as a Judge of the High Court.<sup>18</sup>

At the time the Commission of Investigations Act was enacted in a One-Party-State, human rights violations were not on the agenda. The President of the Republic was the repository of enormous administrative powers, which had to be checked, if executive accountability had to be a reality. Sadly, he/she is excepted from being investigated by the Commission.

### **7.2.1. Functions**

The Commission reports to the Head of State and Government, whose appointees are the subject of investigations. Herein lies the difference between the Zambian Commission for Investigations and the other offices of Ombudsman, notably the Swedish and Canadian

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<sup>14</sup> Commission of Investigations Act, Chapter 39 of the Laws of Zambia.

<sup>15</sup> Section 5 (2).

<sup>16</sup> Section 5 (1).

<sup>17</sup> Ibid.

<sup>18</sup> Article 297, Republic of Zambia Mung'omba Constitutional Review Commission Draft Constitution 2005. The Commission for Investigations is what elsewhere is known as the Ombudsman. The Mung'omba Constitution Review Commission recommended that the Commission be renamed Ombudsman.

Ombudsman who reports directly to Parliament.<sup>19</sup> A complaint to the Commission for alleged maladministration or abuse of authority can be made by any person or body of persons whether corporate or incorporate.<sup>20</sup> The Commission may be directed by the President to investigate any alleged misconduct of any person covered under the Commission's jurisdiction.<sup>21</sup> This provision means that the Commission may be executive and politically-directed.

A complaint to the Commission for Investigations can be made orally or in writing. If made orally, it must be reduced in writing by the Commission's Secretary. Upon receipt of the complaint, the Commission has discretion to conduct or not conduct an investigation. The Commission for Investigations is not bound to give reasons for its decision not to proceed with any investigation.<sup>22</sup> The practice offends transparency as the complainant will never know reasons why his/her complaint has been rejected.

The actual procedure for conducting investigations is left to the Chairman, who is the Investigator General, to determine in the circumstances of each case. Every investigation must be conducted in camera.<sup>23</sup> The 'Open Justice Principle' does not apply to the proceedings of the Commission. And no person is entitled as of right to appear in person or to be legally represented.<sup>24</sup> There is a two year limitation period, beyond which a complaint cannot be brought, but the Commission can decide to receive a complaint outside that period.<sup>25</sup> In order to forestall complaints being laid before the Commission, the Commission does not investigate the complaint, if redress can be obtained from another forum or court.

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<sup>19</sup> Article 12.6, the Constitution of Sweden 2000.

<sup>20</sup> Section 9, Commission of Investigations Act.

<sup>21</sup> Section 8 (a) of the Act.

<sup>22</sup> Sakala Bikiloni Julius, *The Role of the Judiciary in the Enforcement of Human Rights in Zambia*, op cit, p.412.

<sup>23</sup> Section 16, Commission of Investigations Act.

<sup>24</sup> Section 17 (2), Commission of Investigations Act.

<sup>25</sup> *Ibid.*

After performing the Commission's primary task, that of investigating, the Investigator General submits an annual report to the National Assembly through the President. The annual report provides a unique opportunity, not only to analyze the problems that have arisen in the cases dealt with, but also to identify the most prominent ones.<sup>26</sup> The Investigator General is expected to publicize the existence of the Commission as a facility that may be of importance to Members of the Public who encounter problems in dealing with the government.

### **7.2.2. Effectiveness of the Commission**

There are various weaknesses in the operation of the Commission. For instance, lack of transparency, in that proceedings are held in camera.<sup>27</sup> The reports sent to Parliament do not contain the identities of people and institutions complained against.<sup>28</sup> This offends the 'open justice principle', which should be observed by institutions adjudicating upon public matters. Further the President has excessive discretion in deciding what sanctions he can impose and whether he can impose any sanctions at all. There is no obligation on the President to impose sanctions against a guilty official or institution.<sup>29</sup> This undermines the Commission's independence and autonomy.

Section 20(a)<sup>30</sup> states "that the President may take such decisions in respect of the matter investigated or being investigated into by the Commission as he thinks fit". In effect, by recommending to the President, the Commission becomes part of the Executive Arm of government, investigating the same Arm of government. The Commission cannot enforce its findings and conclusions but merely recommends.

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<sup>26</sup> Section 9(4), Commission of Investigations Act.

<sup>27</sup> Section 21 (1) of the Act.

<sup>28</sup> Section 20 (a) of the Act.

<sup>29</sup> Ibid.

<sup>30</sup> Ibid.

The Commission is accessible due to simple complaint handling procedures. It could serve as the people's protector against errors or abuse by public officials at minimum cost and delay. An effective and respectable institution will have persuasive authority to move the executive to take action on what has been recommended. However, this is only possible if the President believes in the 'Rule of Law'.

By contrast, judicial review has proved a more effective way of redressing administrative wrongs. The advantage with judicial review is that prerogative orders will be issued against any government official including Ministers, the Speaker among others, and they have binding effect. As more people have become educated and are able to afford hiring advocates and can draft originating process themselves, complaints being handled by the Investigator General are diminishing.<sup>31</sup> The One-Party State Commission for Investigations legislation, has been stagnant and has not been amended to take into account transparency and accountability which are important facets of the new democratic order in Zambia.

The Commission has also been adversely affected by the limited resources in terms of staff, transport and office stationery and equipment. Donors fund only specific projects. As a result, its last published annual report is for the year 1998. In view of the foregoing, the Investigator General should report to parliament, not the President. The findings should be enforceable if the Commission has to be relevant in a liberal political and economic environment. Finally, to some extent, the institution is beneficial to both the complainants and public officials. The complainant has his complaint redressed and public officials are vindicated from unfair accusations. This happens when the matter is thoroughly investigated, it is established that the complaint was not credible or that the allegations made were baseless.

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<sup>31</sup> An interview with Hon. Mr. Justice Chileshe, former Investigator General and then current chairman Anti-Corruption Commission on 11<sup>th</sup> November 2009.

### **7.3.0. The Auditor General**

The Auditor General's Office oversees the way public funds are spent by organs of state and institutions in which the government has a controlling interest. He/she is appointed by the President and ratified by the National Assembly. The Office of the Auditor General is a creature of the Constitution.<sup>32</sup> As a constitutional officer, the Auditor General retires at 65<sup>33</sup> and can only be removed from office for inability to perform the functions of the office arising from infirmity of body or mind or for incompetence or misbehavior. This Office is indispensable to 'Good Governance', as it ensures that the government accounts for the resources it holds in trust on behalf of the people of Zambia. The Auditor General promotes and assures financial accountability.

#### **7.3.1. Functions of the Auditor-General**

The Auditor General has power to audit government ministries, institutions and departments. Where a statutory corporation has been established and there is no provision made in the law establishing such a corporation for the appointment of auditors, the Auditor General shall be appointed as Auditor. He/she can audit such corporation at such times as he/she deems fit. He/she has unrestricted access to the books of accounts, documents, books and records of such a corporation as he/she deems necessary in the exercise of such function.<sup>34</sup>

The Auditor General should satisfy himself/herself that government spends money on purposes for which money was appropriated by the Appropriation Act or according to the

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<sup>32</sup> Article 121, Constitution of Zambia.

<sup>33</sup> Article 122.

<sup>34</sup> Section 16, Finance (control and management) Act Chapter 347 of the Laws of Zambia.

approved supplementary estimates or in accordance with the Excess Expenditure Appropriation Act.<sup>35</sup>

There is a constitutional mandate for the Auditor General, not later than twelve months after the end of each financial year, to submit reports on the accounts of revenues and expenditure of the Republic. The accounts are submitted to the President, who should lay them before the National Assembly within seven days after its first sitting. If the President defaults, the Auditor General can submit directly to the Speaker of the National Assembly. When the Office of Speaker is vacant, the Auditor General can submit the accounts to the Deputy Speaker.<sup>36</sup>

The Permanent Secretary, Ministry of Finance, sends copies to the Auditor-General of all supplementary provision warrants and treasury authorities immediately after authorization by the National Assembly. These become additional funds to be expended in addition to those already approved by the National Assembly in that fiscal year.<sup>37</sup>

In the exercise of these functions, the Auditor General is not subjected to the direction or control of any other person.<sup>38</sup> Once the Auditor General submits the report to the National Assembly, his/her role ends there. He/she then plays an advisory role to the National Assembly's Public Accounts Committee. The advice may be acted upon or not.

### **7.3.2. Effectiveness**

One major weakness of the Auditor-General's legal framework is that there is no provision for sanctions. There is no co-ordination with the investigative wings like the Police,

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<sup>35</sup> Article 121 (2). Constitution of Zambia.

<sup>36</sup> Article 121 (2).

<sup>37</sup> Section 18, Finance (Control and Management), Chapter 347.

<sup>38</sup> Article 121 (4) Constitution of Zambia.

Anti Corruption Commission, and the Drug Enforcement Commission. The Auditor General's Office, by its mandate, examines records pertaining to government revenue and expenditure, regardless of whether there is a financial malpractice or not. The investigative wings only get involved when financial and other resources have been abused or stolen. It would therefore be helpful if there was coordination between the Auditor General's Office and the investigative wings.

The other weakness is the lack of sufficient details of anomalies and irregularities. There is no distinction drawn between theft simpliciter, abuse of public funds and unconstitutional expenditure, which may be regarded as misapplication of funds. If a public officer misappropriates public resources for his own use, that is theft, which the Police have to deal with. Whereas, if public funds are expended on purchasing inferior goods or ordinary goods at inflated prices, this may well be abuse of power by a controlling officer or corruption. But where a controlling officer misapplies the funds or spends funds on heads of expenditure not approved by the National Assembly, that is unconstitutional expenditure. The Public Officer undermines the mandate of the Legislature as an allocator of resources to government organs and institutions. This may not be a criminal offence, although the officer may be disciplined.

Failure by the Auditor General's reports to expose anomalies and irregularities in whatever form, has rendered the reports not dependable for criminal investigations. The Auditor General's Office suffers from serious human resource inadequacy to efficiently audit governmental organs and institutions. Professionally qualified accountants shun public service due to low salaries.<sup>39</sup> The role of the Auditor General should not only be advisory to the National

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<sup>39</sup> The author as Chief Administrator/Permanent Secretary and controlling officer from 1977-2001 experienced the exodus of professional accounting staff from the Judiciary and the Auditor General's Office.

Assembly, but should also recommend sanctions which should not only be taken lightly by the National Assembly and the Executive.

In practice, the powers of the Auditor General are less impressive and his/her security of tenure in office is more theoretical than actual. First, he/she can be removed from office by a resolution of the National Assembly. In a country in which members of the National Assembly are mostly drawn from the ruling party, his/her position is more precarious than it ought to be. Also his/her term of office could and still can be altered by a simple amendment of the Constitution. In fact, the current Auditor General argues that controlling officers and the Ministry of Finance in particular, have very little understanding of her role and the importance of her office. Many officials refuse with impunity to adhere to the statutory requirement that they co-operate with her office. As far back as August 2007, the Auditor General had informed President, Levy Mwanawasa, that funds were being siphoned from the Ministry of Health, but the President shielded the Permanent Secretary. Later, donors had to withdraw aid to the Ministry because of abuse of resources.<sup>40</sup>

Some administrative measures to improve co-operation were introduced due to pressure from donors. However, other measures such as the process of liberalizing the economy have been used to undermine her office. Government departments are now free to hire private audit companies, which they may find more efficient. This is a drain on resources that could be used to strengthen her office.<sup>41</sup>

#### **7.4.0. Anti-Corruption Commission:**

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<sup>40</sup> An interview with Mrs. Anna Chafungulwa Auditor General on 20<sup>th</sup> September 2008 at the Auditor General's Headquarters in Lusaka

<sup>41</sup> Ibid.

Corruption does exist in developed and underdeveloped societies. In underdeveloped societies, corruption has devastating effects in that it hurts the poor more than in advanced societies. The social and economic infrastructure of mature democracies tend to have an insulating effect on the social and economic evils of corruption. They have strong social security institutions.

#### **7.4.1. Functions**

The current powers and duties of the Commission were exercised by the Zambia Police Force before 1980. The de-linkage of the Anti-Corruption Commission from the Police was necessitated by the advent of sophisticated corruption due to the contraction of the economy, especially after the Arab-Israeli War of 1973. The price of oil went up. There was therefore need to conserve the available foreign exchange for the importation of oil. It therefore became imperative to sharply focus on the corrupt activities in order to mitigate the effects of a deteriorating economy.<sup>42</sup>

This is a period when violation of foreign exchange regulations was regarded as a danger to national security.<sup>43</sup> Parallel to that was the desire by UNIP to create a classless or egalitarian society. The Provisions in the Penal Code dealing with corruption were repealed by section 64(1) of the Corrupt Practices Act.<sup>44</sup> The Penal Code was found inadequate to deal with sophisticated corruption. This is the time when businessmen and professionals were perceived as enemies of the people, serving foreign interests, bent on sabotaging the economy of the country to their own advantage and foreign capital. These types of offences needed a specialized agency to investigate them.

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<sup>42</sup> An interview with Mr. Edwin Sakala Director of Operations Anti-Corruption Commission on 2<sup>nd</sup> August 2007, Lusaka.

<sup>43</sup> *Effiliades V Attorney-General (1975) ZR at 69.*

<sup>44</sup> No. 14 of 1980.

The Anti-Corruption Commission Act of 1996,<sup>45</sup> sought to grant autonomy to the Commission with unlimited duration. The Commission was empowered to do all such things as a body corporate may by law do or perform.<sup>46</sup>

This provision of granting autonomy, extinguished the power of the President to give directions to the Commissioner under the 1980 Act, which powers were now transferred to the Commission under the new Act.<sup>47</sup> However, the Commission can only prosecute if the Director of Public Prosecutions (DPP) sanctions. The power of appointing investigators and staff under the old legislation were now transferred from the Commissioner to the Commission under the new legislation.

The functions of the Commission are divided into two, those performed by the Commissioners, like policy formulation which were hitherto performed by the President. The functions of the Commission under section 10 (1)<sup>48</sup> which are performed by the Director General, are similar to those under section 9 (1)<sup>49</sup> which functions were performed by the Commissioner who later became the Director-General. The functions are executive in nature and include general supervision and authorization of investigations.

The Commission can decline to conduct an investigation into any complaint alleging an offence or may discontinue investigations if the Commission is of the opinion that the complaint is trivial, frivolous, and vexatious or not made in good faith.<sup>50</sup>

#### **7.4.2. Effectiveness of the Commission**

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<sup>45</sup> No. 42 of 1996.

<sup>46</sup> No. 14 of 1980

<sup>47</sup> Section 9, Anti-Corruption Act 1980.

<sup>48</sup> Ibid.

<sup>49</sup> Section 16.

<sup>50</sup> Section 10 (2).

#### 7.4.2. Effectiveness of the Commission

The 1980<sup>51</sup> legislation, which empowered the President to intervene in the running of the Commission was repealed by the 1996 Act,<sup>52</sup> which created an autonomous Commission. This appears to have taken the Commission out of political control.

Ideally this was going to make the Commission more effective than hitherto. However, the consent of the Director of Public Prosecutions before a prosecution is undertaken, poses a hindrance to the effective operations of the Commission.<sup>53</sup> Justice Kapembwa, former Director General lamented, “there are times when we think that there is sufficient evidence, especially against influential politicians and the Director of Public Prosecution declines to prosecute”. However, a person can be arrested and detained notwithstanding that authority to prosecute has not been received from the Director of Public Prosecutions.<sup>54</sup> A further hindrance is the Director of Public Prosecutions unfettered power to discontinue criminal proceedings at any stage.<sup>55</sup>

Another inhibiting factor to the Commission’s effectiveness is financial resources. During the Chiluba regime, the operations of the Commission were frustrated by under-funding, which seriously affected the investigations. More so where the corrupt transaction is of a transnational nature. There were months when the entire Commission was given two million kwacha (USD400).<sup>56</sup> The only functions of the Commission that appear to be making impact are those funded by donors, particularly<sup>57</sup> the Public sensitization campaign and managerial accountability seminars.

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<sup>51</sup> Anti-corruption Act, No. 14 of 1980.

<sup>52</sup> Anti-corruption Act, No. 42 of 1996.

<sup>53</sup> Anti-corruption Act, No. 14 of 1980.

<sup>54</sup> An interview with Hon. Justice Kapembwa the then Director General of the Commission 20<sup>th</sup> November 2001, Lusaka.

<sup>55</sup> *DPP V Augustino (1977) ZR 266.*

<sup>56</sup> An interview with Mr. J. Jalasi, the Secretary of the Commission on the 20<sup>th</sup> November 2001 at the Commission Headquarters in Lusaka.

<sup>57</sup> A.W. Chanda, “National Integrity Systems Country Study Report Zambia 2002” (published by Transparency International Zambia Copyright 2002) at p.42.

Under the Mwanawasa regime (2001-2008), a parallel wing the 'Task Force' was created, whose mandate was to investigate corruption during Chiluba's ten year rule (1991-2001). The operations of this entity were not provided for in any statute. This resulted in undermining the existing Anti-Corruption Commission. The Task Force was directly reporting to the President and through it the President was interfering with the functions of the Director of Public Prosecutions.<sup>58</sup>

The President used Article 61 of the Constitution, which provides for creation of additional offices, to create the Task Force and mandated it to investigate the most serious crimes arising under the Act.<sup>59</sup> And yet this entity is not autonomous and is under the President's constant control as to, who they investigate and how much they investigate. This has the effect of diminishing the effectiveness of the existing Anti-Corruption Commission established under an Act of Parliament.

A further erosion of the independence of the institution is revealed in the case of a former Permanent Secretary for Health, Mr. Bulaya who bought unapproved AIDS drugs from Bulgaria. He disregarded tender procedures by buying three billion kwacha worth of drugs and later became a business partner with the supplier of the drugs. Initially, proceedings were discontinued at the behest of the Attorney General. The initial directive was resisted by the then acting Director of Public Prosecutions, Mrs. Sokoni. But after her appointment as Investigator General, the Attorney General renewed his directive to her successor, who discontinued the proceedings. The church, civil society, opposition political leaders and the press, notably the

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<sup>58</sup> The author sat on the tribunal to try the DPP. The DPP was being tried for disobeying Presidential directions concerning criminal matters against the former President. The tribunal cleared the DPP as he was exercising his powers within Article 56 of the Constitution.

<sup>59</sup> Section 43 of the Corrupt Practices Act 1980 and Anti-Corruption Act 1996.

Post Newspaper, put pressure on government until the government brought Mr. Bulaya back to court.<sup>60</sup>

The case of Mr. Hutwiler, a motor vehicle importer and a Zambian resident, who supplied MMD 150 vehicles, paid for from the intelligence account, was a glaring interference by the President in the functions of the Commission. The Director General of Intelligence Xavier Chungu testified that the vehicles were bought from public funds in *Mazoka et al V Mwanawasa et al*,<sup>61</sup> Presidential Petition, one of the biggest scandals ever to come to light since independence. Mr. Hutwiler was protected by State House when the Task Force on Corruption wanted to interview him. The Bulaya and Hutwiler cases brought to the fore Presidential interference in the operations of these watchdog institutions.

The Anti-Corruption Commission on the other hand has successfully prosecuted and arrested high profile individuals in the country. The point being made is, if left uninterfered with, the Anti-Corruption Commission has shown that it can perform and discharge its functions satisfactorily. Examples are the convictions of Mr. Musonda, former Managing Director of the then State-owned Zambia National Commercial Bank (ZANACO),<sup>62</sup> Mr. Bulaya, former Permanent Secretary, Ministry of Health,<sup>63</sup> General Funjinka, former Commandant of the Zambia National Service,<sup>64</sup> a former Army Commander General Musengule,<sup>65</sup> two former Air

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<sup>60</sup> The author presided over the application for a bail in the High Court and directed the trial magistrate to hear the bail application and apply the appropriate legal provision. The magistrate granted him bail in the sum of fifty million kwacha cash. Mr. Bulaya, was tried and convicted and sentenced to five years imprisonment. He unsuccessfully appealed to the High Court and is currently serving the sentence. He has not appealed to the Supreme Court. This case illustrates how sometimes the presidency undermines the Rule of Law.

<sup>61</sup> (2005) ZR 138.

<sup>62</sup> SP/101/2004.

<sup>63</sup> SP/191/2005.

<sup>64</sup> SP/151/2006.

<sup>65</sup> SP/126/2004.

Force Commanders Generals Kayumba<sup>66</sup> and Singogo<sup>67</sup> and former Minister of Lands, Gladys Nyirongo.<sup>68</sup> They have appealed to the High Court against their convictions.

However, comparatively in the region, Zambia is the only country that has arrested the military top brass for corruption. Corruption in the military in Africa is endemic.<sup>69</sup> The corruption fight, though to some extent, has not been perfect, due to logistical inadequacy and political interference. However, there has been some reduction of high level corruption. It can therefore be asserted that the corruption fight is not illusory. The Zambian Anti-Corruption Commission (ACC) has significantly contributed to transparency and accountability, thereby supporting constitutionalism and good governance, though the performance has not been very satisfactory for a variety of reasons earlier stated in the Chapter. A nation could only be said to be a well-functioning state if corruption and abuse of power are controlled.

#### **7.4.3. The Tribunal on Parliamentary and Ministerial Code of Conduct**

Zambia realized that although there is equality before the law, there was need to enact legislation to deal with corruption amongst elected leaders as they become repositories of enormous powers. The Parliamentary Ministerial Code of Conduct Act<sup>70</sup> was enacted, which obliges Members of Parliament and Ministers to conduct public affairs with decorum and in a non-corrupt manner. The Code<sup>71</sup> obliges Members of Parliament, and Ministers to disclose their assets and liabilities upon assuming office.<sup>72</sup> The main features of the Code are:

*“Section 4 provides that:*

- (4) *a member shall be considered to have breached the code of conduct if he knowingly acquires any significant pecuniary advantage by another person, by:-*

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<sup>66</sup> SP/126/2004.

<sup>67</sup> SP/03/2007.

<sup>68</sup> SP/535/2007.

<sup>69</sup> The Post, 25<sup>th</sup> June 2005.

<sup>70</sup> Chapter 16 of the Laws of Zambia.

<sup>71</sup> Chapter 91 of the Laws of Zambia.

<sup>72</sup> Ibid.

- (a) *improperly using or benefitting from information which is obtained in the course of his official duties and which is not generally available to the public;*
- (b) *disclosing any official information to unauthorized persons;*
- (c) *exerting any improper influence in the appointment, promotion, or disciplining or removal of a public officer;*
- (d) *directly or indirectly converting government property for personal or any other unauthorized use; or*
- (e) *soliciting or accepting transfers of economic benefit, other than*
  - (i) *benefits of nominal value, including customary hospitality and token gifts;*
  - (ii) *gifts from close family members; or*
  - (iii) *transfers pursuant to an enforceable property right of the member or pursuant to a contract for which full value is given”*

*“Section 5 provides:*

- (5) *a member shall not speak in the National Assembly, or in a committee thereof, on a matter in which he has a direct pecuniary interest unless he has disclosed the nature of that interest to the National Assembly or Committee”*<sup>73</sup>

Members should not acquire dishonestly any benefit or improper pecuniary advantage while performing their duties. They should disclose any pecuniary interest in any matters being discussed in the National Assembly or its committees. Any interest in government contracts should be disclosed by specifying its nature and extent.<sup>74</sup> Any member who breaches the Code as found by the Parliamentary and Ministerial Code of Conduct tribunal vacates office.<sup>75</sup> The process has been put in place for political leaders to account for their wealth and are accountable in their conduct of public affairs.

<sup>73</sup> Chapter 91 of the Laws of Zambia.

<sup>74</sup> Ibid.

<sup>75</sup> Section 14, Chapter 16 of the Laws of Zambia.

In *Mung'omba et al V Mandandi et al*,<sup>76</sup> it was alleged that three Cabinet Ministers namely, Godden Mandandi, Dr. Peter Machungwa and Dr. Katele Kalumba diverted public funds amounting to K2 billion from the National Assembly. They used the money to finance the MMD convention in Kabwe. This was contrary to section 4 (d) of the Parliamentary and Ministerial Code of Conduct.<sup>77</sup> The Tribunal found that the first and second respondents had diverted the K2 billion to some unauthorized use. The money having been taken out on the 25<sup>th</sup> and 26<sup>th</sup> April 2001, and the equivalent having been refunded to the National Assembly on the 7<sup>th</sup> May 2001. This conduct the tribunal found contravened section 4 (d) which is couched in these terms:

*"A member shall be considered to have breached the Code of Conduct if he knowingly acquires any significant pecuniary advantage or assist in the acquisition of pecuniary advantage by another person, by  
(d) directly or indirectly converting government property for personal or any other unauthorized use".*

The third respondent was acquitted for lack of evidence.

In *William Harrington V Dora Siliya and Attorney General*,<sup>78</sup> the respondent signed a Memorandum of Understanding (MOU) with RP Capital Partners in her capacity as Minister of Transport and Communications. The Tribunal found that she did not on the evidence adduced obtain any pecuniary advantage, but recommended that the President decide on the sanction for violating the Constitution by disregarding the Attorney General's advice. The Author as the High Court judge, when reviewing the case, held that the Tribunal acted in excess of jurisdiction as determination of constitutional matters is for the High Court and not the Tribunal, nor can the rejection of the legal advice tendered by the Attorney General be unconstitutional, as it is not

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<sup>76</sup> Complaint No. 1 of 2001.

<sup>77</sup> Ibid.

<sup>78</sup> *Dora Siliya V Attorney General and William Harrington 2009/HP/0601*.

mandatory for the advised to act on the advice. The applicant appealed to the Supreme Court and at the time of writing, the Supreme Court has not determined the appeal.

#### 7.5.0. Human Rights Commission:

Zambia's human rights record in a One-Party State or the 'Second Republic (1973-1991)' was a bad one. This was a period when there was a continued state of emergency which only came to an end when multi-party politics were reintroduced after repealing Article 4 of the One-party State Constitution.<sup>79</sup> The Preservation of Public Security Regulations were used to detain critics of government, though the Regulations were intended to preserve national security.<sup>80</sup> A minister of Legal Affairs in the 'Third republic' said:

*"Had the One-Party political system not been established, the excesses of that era would have been avoided"*<sup>81</sup>

A perusal of Ndulo and Turner's civil liberties cases in Zambia,<sup>82</sup> reveals that the majority of the detainees were politicians opposed to Kaunda's rule.<sup>83</sup> When the MMD won the first multi-party elections, the subject of human rights violations attracted the attention of the new government, some of the leaders of MMD, including Chiluba had been detained under these Regulations. Sakala notes that, "the newly elected government of the Movement for Multi-party Democracy (MMD) had shown a genuine desire to revisit the country's human rights record, which hitherto appeared unsatisfactory."<sup>84</sup> The Government appointed the Human Rights

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<sup>79</sup> Act No.27 of 1973.

<sup>80</sup> Chapter 106 of the Laws of Zambia.

<sup>81</sup> The Judiciary in Politics, paper presented by Vincent Malambo, Minister of Legal Affairs to a Judges' seminar on 22<sup>nd</sup> February 2001, p.3.

<sup>82</sup> Muna Ndulo, Turner Kaye, Civil Liberties Cases In Zambia (Oxford: The Africa Law Reports, 1984).

<sup>83</sup> Former President Chiluba, former Vice President Kapwepwe, former Minister Mundia were all detained for vying the top leadership of Zambia.

<sup>84</sup> Sakala Bikoloni Julius, The Role of the Judiciary in the Enforcement of Human Rights in Zambia, op cit, p.413.

Commission of Inquiry, chaired by Lusaka prominent Lawyer, Bruce Munyama. The Commission recommended the setting up of a Permanent Human Rights Watchdog".<sup>85</sup>

### **7.5.1. Functions of the Human Rights Commission:**

The Commission has a chairperson, vice chairperson and five commissioners. The duties of commissioners include review of decisions made by the directorate. The commissioners visit prisons and formulate policy for the Commission. The Director heads the operations of the Commission, he/she is also secretary to the Commission. He/she has a deputy.

The functions of the Commission are to investigate human rights violations and maladministration of justice. Under Section 7, the Commission's officers are allowed to visit prisons and assess the facilities in order to propose and make recommendations to redress existing problems and prevent human rights abuses. The Commission plays an advisory role by proposing effective measures to prevent human rights violations.<sup>86</sup> The primary function is to ensure that those in custody or prisons are not subjected to inhuman and degrading treatment contrary to Article 15 of the Constitution.

One most important action undertaken by the Commission was the Report of 30<sup>th</sup> March 1998. In that Report, the Commission alleged that the 1997 coup plot suspects were tortured.<sup>87</sup> Pursuant to that Report, the President appointed a commission of inquiry under the Inquiries Act,<sup>88</sup> headed by the late Mr. Justice Japhet Banda, which was known as the 'Japhet Banda Commission'.

The Commission found that almost all the suspects were tortured. There was a recommendation that damages be paid for torture and inhuman treatment. Four suspects were to

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<sup>85</sup> Republic of Zambia, Human Rights Commission of Inquiry, 6<sup>th</sup> September, 1995.

<sup>86</sup> Human Rights Commission Act, No. 42 of 1996.

<sup>87</sup> Republic of Zambia, Human Rights Commission Report of the 28<sup>th</sup> October, 1997 coup attempt suspects, Government Printer, Lusaka.

<sup>88</sup> Chapter 41 of the Laws of Zambia as read with S.I. No. 94 of 1998 and S.I. No. 102 of 1999.

receive twenty five million kwacha each, twenty suspects, twenty million kwacha each, twelve suspects, twelve million five hundred thousand kwacha each. Seventeen suspects were to receive five million kwacha each, while twenty one, were to receive five hundred thousand Kwacha each.

These acts of torture, the Commission concluded violated Articles 13<sup>89</sup> and 14 of the Constitution.<sup>90</sup> The investigating officers violated the right not to be tortured,<sup>91</sup> the right not to be treated in a cruel, inhumane or degrading way.<sup>92</sup>

The Commission did not recommend the prosecutions of the perpetrators as that was outside their terms of reference. However, it is doubted whether such a recommendation would have been accepted. Lukonde, Deputy Commissioner Criminal Investigation Department and Teddy Nondo, Assistant Commissioner, who were found to have tortured suspects, instead of being retired as recommended, were promoted to second in command of the Police and Drug Enforcement Commission respectively.<sup>93</sup> This was contemptuous of the Commission's Report by government. This demonstrated lack of political will by government to protect and respect human rights.

### 7.5.2. Effectiveness of the Commission

The mandate of the Commission is fairly adequate to deal with human rights, though the representation is not broad. On the inadequacies of the Commission the Director lamented:

*“The problem is that the Commission can only recommend. The Commission cannot enforce its findings, it merely recommends to the appropriate authorities. Sometimes the recommendations are ignored though not in all cases as the commission's report of 30<sup>th</sup>*

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<sup>89</sup> Republic of Zambia, Human Rights Commission Report, op cit, p.11.

<sup>90</sup> Ibid.

<sup>91</sup> Ibid, p.13.

<sup>92</sup> Ibid.

<sup>93</sup> An interview with Mr. Francis Nsokolo, a former Human Rights Commissioner on 21<sup>st</sup> February 2002.

*March, 1998 on which the government acted by appointing the Japhet Banda Commission may indicate. We would like to have teeth to bite, though we do not want to usurp the powers of the courts. My view is that lack of enforcement powers is a major inadequacy, especially if a commission is operating in a less democratic environment. In Ghana and Uganda the commissions have power to order those in illegal detentions to be released and order compensation in serious human right violations. The effectiveness of the commission can be enhanced if the functions and powers were spelled out in the Constitution”<sup>94</sup>*

Comparatively, other Commissions like the Ghanaian, Ugandan and South African ones have more powers than the Zambian Commission. The Zambian Human Rights Commission should have power to order the release of individuals illegally detained by servants of government.

One of the most effective weapons the Commission uses is publication of their findings, such publicity prompts the authorities to act. If government did not act on the Human Rights Commission Report,<sup>95</sup> and the subsequent tribunal recommendations,<sup>96</sup> they would have been condemned by the international community and civil society. The Commission of Inquiry found that, our domestic ‘Bill of Rights’<sup>97</sup> was grossly violated. The Commission does exert moral pressure on authorities with their comments.<sup>98</sup>

It is very clear that though the Commission does not have determinative or enforcement powers, it is not impotent. In certain cases, the recommendations have been acted upon, while in

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<sup>94</sup> An interview with Mr. Enock Mulambe, Director, Human Rights Commission on 2<sup>nd</sup> December 2006.

<sup>95</sup> An interview with Mr. Enock Mulambe, Director Human Rights Commission on 2<sup>nd</sup> December 2006, op cit.

<sup>96</sup> Ibid.

<sup>97</sup> Constitution of Zambia, op cit, Chapter III.

<sup>98</sup> During strikes on the Copperbelt four miners were held without being charged in Chililabobwe. The Director of the Commission commented, that while the Commission does not condone acts of violence and destruction of property, it was ordinarily important for the law enforcement agencies to respect the ‘Rule of Law’ and basic human rights. The detainees were released 24 hours later. Zambia Daily Mail, 11<sup>th</sup> August, 2005.

other cases their recommendations have not been acted upon. However, under-resourcing is a major handicap. Without resources, many human rights violations remain uninvestigated. The lack of both human, financial and material resources, in terms of vehicles which can facilitate mobility has constricted the Commission's operations. The Commission needs a full time Chairperson and direct access to Parliament. There should be clear channels for reporting to the DPP and ensuring that he takes action against erring police officers, especially in politically motivated detentions and arrests.

However, the *Zambian Human Rights Commission* structure and functions fall short of the *United Nations Principles Relating to the status of National Institutions (The Paris Principles)*.<sup>99</sup> The Commission does not have a broad mandate, with seven commissioners, these are not representative of the civilian society, the commission is under-funded and do not have the wide investigative powers. The only Paris principle complied with is that the Commission is a creature of the Constitution.

#### **7.6.0. The Media:**

A free media is a vehicle for exercising freedom of expression. Freedom of expression constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress and for the development of every person. It is not only applicable to information or ideas that are favourably received, but also to those that offend, shock or disturb the state or any sector of the population. Such are the demands of pluralism, tolerance and broadmindedness, without which there is no democratic society. However, the exercise of this freedom is not absolute.<sup>100</sup>

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<sup>99</sup> Adopted by the United Nations as Annex to General Assembly resolution 48/134 of 20<sup>th</sup> December 1993. Annex 1 sets out the principles in full.

<sup>100</sup> *Handyside V United Kingdom (1976) EHRR 737.*

Freedom of expression is most enjoyed in societies in which there is minimal regulation of the media. An example is a 'public interest' defence in Britain. The public interest defence has received statutory expression in England by Section 5 of the 1981 Contempt of Court Act which states:

*"Publication made as or as part of a discussion in good faith of public affairs or other matters of general interest is not to be treated as contempt of court under the strict-liability rule if the risk of impediment or prejudice is merely incident to the discussions"*<sup>101</sup>

It would be difficult, where a matter in which the public has interest is published, to hold the author and publisher liable for contempt, unless they act maliciously. It is compelling on the part of the Media to comment on heinous crimes i.e. serial killers, even when the matter is in court. Under the United States Constitution, freedom of the media and that of expression are equally acknowledged.

Freedom of expression has limits set out against its exercise. The exercise of freedom of expression carries with it duties and responsibilities and is subject to such formalities, conditions, restrictions or penalties as are prescribed by law. These are necessary in a democratic society, to preserve territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals and to avoid libel, sedition or treason.<sup>102</sup>

Freedom of expression is said to be the life-blood of democracy. It serves three broad purposes. First, it helps an individual to attain self-fulfillment. Second, it assists in discovery of the truth. Third, it enhances the capacity of an individual to participate in a democratic society.<sup>103</sup>

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<sup>101</sup> Section 5, Contempt of Court Act of England 1981..

<sup>102</sup> *Handyside V United Kingdom*, (1976) EHRR 737.

<sup>103</sup> *Ibid.*

Freedom of expression is an intrinsic feature of any genuine constitutional democracy, in which the power of the majority is constrained by the interest and aspirations of the minority. The legitimacy of State coercion depends in every case on its compatibility with a public scheme of just governance, pre-supposing the fundamental equality of citizens.<sup>104</sup> Freedom of expression is central to civil liberties. It may be defined as “to receive information and disseminate it without legislative constraints and Executive control”. However, the non-existence of wide-reaching private newspapers and private radio stations has left the government controlled Media dominant. These were established essentially to disseminate and reflect government views, which has militated against the plurality of voices. The failure to enact a Freedom of Information Act, has constricted the media’s ability to gather information, especially concerning scandals in public offices, which has affected transparency in the running of government. The United States Constitution recognizes the media as the fourth estate or fourth arm of government.

#### **7.6.1 National Protection:**

At the national level, the two freedoms of the press and expression are guaranteed by the Bill of Rights in the Constitution of Zambia. Article 20(1) of the Constitution provides that:

*“Except with his consent, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to impart and communicate ideas and information without interference, whether the communication be to the public generally or to any person or class of persons, and freedom from interference with his correspondence”<sup>105</sup>*

Article 20(2) protects freedom of the press by providing that:

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<sup>104</sup> *Indian Newspaper (Bombay) V Union of India AR (1986) SC. 515.*

<sup>105</sup> Article 20 (1), Constitution of Zambia.

*“Subject to the provisions of this Constitution a law shall not make any provision that derogates from the freedom of the press.”<sup>106</sup>*

As this wording is similar to the provision in the American Constitution, one would assume that freedom of expression is entrenched like freedom of the press is, under the United States Constitution.<sup>107</sup> Article 20(3)<sup>108</sup> is a clawback clause, which provides for the enacting of statutory provisions which may negate that freedom. Those statutory provisions should be enacted in the interests of defence, public safety, public order, public health, public morality, protecting the reputation of others, among other things.

It is quite evident that this is a very wide derogation clause, which, if broadly construed, completely emasculates the protection of freedom of expression and the press contained in Clauses 1 and 2 of Article 20.<sup>109</sup>

A timid judge will uphold all restrictions imposed by the state, by giving a broad interpretation to this clause. This has happened in a number of cases in Zambia.<sup>110</sup>

In a constitutional challenge in *M'membe and Another V The People*,<sup>111</sup> relating to Section 69 of the Penal Code, which creates the offence of defaming the President, the Supreme Court held that:

*“Section 69 was reasonably required in effect to forestall a possible unpeaceful reaction from the citizens and supporters and to protect the reputation of the first citizen. No one would dispute that side by side with freedom of speech, is equally very important public interest, in the maintenance of the public character of public officials for the proper conduct of public affairs, which*

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<sup>106</sup> Article 20 (2), Constitution of Zambia

<sup>107</sup> First Amendment to the American Constitution.

<sup>108</sup> Constitution of Zambia.

<sup>109</sup> The Constitution of Zambia.

<sup>110</sup> Chanda and Liswaniso, *Media Laws in Zambia*, op cit., 14.

<sup>111</sup> (1995/97) ZR II8.

*requires that public officials be protected from destructive attacks upon their honour and character.”*

What is surprising is that the Zambian courts have recognized the “Public Official Doctrine”, meaning that a public officer should have a thick skin to absorb criticism as expressed by the United States Supreme Court in *Sullivan V The New York Times*.<sup>112</sup> In *Sata V The Post Newspaper Limited and Another*<sup>113</sup> the Chief Justice sat in his capacity as High Court Judge and adopted the ‘Public Official Doctrine’. The same Chief Justice resiled from the reasoning in Sata’s case when deciding the M’membe case. One would have thought that, the Supreme Court, would have found that the President’s skin as a father of the nation should even be thicker than any of his ministers. Those who choose to serve the people must not be too sensitive to criticism. The point being made is that criticism of public officials inhere in any democratic society because they are servants of the people and not their masters.

The arrest of Post Managing Editor, M’membe over the charge of defamation of the President has been called absurd by the Media Council of Zambia Chairman, Judge Kabazo Chanda. He states, “the President uses similar language against his opponents like stupid, foolish, which M’membe used to describe him, when he said that M’membe had presidential ambitions.” Judge Chanda stated that the President is not going to equity and the criminal justice with clean hands.<sup>114</sup> There is a tendency to prosecute journalists from the independent media who are perceived not to conform to the government agenda.

Human Rights Law has laid down standards for evaluating what constitutes a democratic society. It has been stated that tolerance, pluralism and open-mindedness are intrinsic to a

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<sup>112</sup> 376 US 25 (1964).

<sup>113</sup> 1992/HP/1395 unreported.

<sup>114</sup> The Post 16<sup>th</sup> November 2005 – The DPP discontinued proceedings after this criticism.

democratic society. The European Court of Human Rights envisages a democratic society as an evolutionary society founded upon freedom of expression.

Some countries in Southern Africa, such as Malawi and South Africa, have better provisions in their Constitutions, which meet international standards. In these Constitutions, freedom of expression is provided for in a more liberal way.<sup>115</sup>

The Zambian legal system imposes many restrictions on freedom of expression. Almost all the laws which seriously impede on freedom of expression were enacted during the colonial era. The main purpose of this colonial legislation was to suppress the African struggle for independence. However, the repressive laws were not repealed by the Post Independence Government. Instead, the UNIP government enacted new ones like section 69 of the Penal Code which is defamation of the President.<sup>116</sup> The dawn of political pluralism in 1991 has not led to the repeal of this repressive legislation. This has been made possible by the wide derogation clause, contained in the Constitution and the lack of political commitment to individual rights on the part of political leaders.<sup>117</sup> The post-independence leaders retained the same repressive legislation they fought against in the colonial period.

#### **7.6.2. International and Regional Protection:**

Freedom of expression received international protection under Article 19 of the Universal Declaration of Human Rights of 1948,<sup>118</sup> while Article 19 of the International Covenant on Civil and Political Rights, 1966 has defined freedom of expression in broader terms.<sup>119</sup>

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<sup>115</sup> Sections 36, 37 and 38 Republic of Malawi Constitution, Chapter 1 of the Laws of Malawi, freedom of the press and expression is supplemented with access to information in the exercise of those rights.

<sup>116</sup> The author's interview with Mr. Arnold Kapelembi, Managing Editor, The Times of Zambia on 16<sup>th</sup> December 2004.

<sup>117</sup> Ibid.

<sup>118</sup> Which provides that everyone has the right to freedom of opinion and expression, this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through media and regardless of frontiers.

<sup>119</sup> Everyone shall have the right to hold opinions without interference; everyone shall have the right to freedom of expression, this right shall include the right to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice, Article 19 (2).

At the regional level, Article 9 of the African Charter on Human and People's Rights provides that:

*"Every individual shall have the right to receive information and, every individual shall have the right to express and disseminate his opinions within the law"*<sup>120</sup>

Also relevant is the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950.<sup>121</sup> It is indisputable that freedom of expression, just as other rights, is not absolute. Society is entitled to place some legitimate restrictions on the exercise of this freedom in order to prevent its abuse. Even international human rights instruments recognize the need for restrictions. Such restrictions must, however, meet three tests in order to be valid.

*"Any restriction must be prescribed by law, the law must be accessible, unambiguous, drawn narrowly and with precision so as to enable individuals to foresee whether a particular action is lawful. Moreover, the law should provide for adequate safeguards against abuse, including prompt, full and effective judicial scrutiny of the validity of the restriction by an independent court or tribunal."*<sup>122</sup>

It must be "adequately accessible" and foreseeable, that is, "formulated with sufficient precision to enable the citizen to regulate his conduct. To have a legitimate aim, a restriction must be in furtherance of, and genuinely aimed at, protecting one of the permissible grounds listed in Article 10(2). The Court mostly checks that there has been no abuse of power by the state. To be "necessary", a restriction does not have to be "indispensable", but it must be more than merely "reasonable" or "desirable".

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<sup>120</sup> African Charter on Human and People's Rights (1981/1986).

<sup>121</sup> Article 10 provides that everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent states requiring the licensing of broadcasting, television or cinema enterprises.

<sup>122</sup> Article 10, European Convention on Human Rights.

The derogations to press freedom under the Constitution form the basis of laws like section 69 of the Penal Code<sup>123</sup> and section 4 of the State Security Act.<sup>124</sup> The former criminalizes defamation of the President while the latter criminalizes government officials passing state secrets to unauthorized persons and if convicted they can be sentenced up to 20 years in jail.

The European Court of Human Rights in the case of *Sunday Times V United Kingdom*,<sup>125</sup> held that in order for a restriction to be prescribed by law:

*“A ‘pressing social need’, must be demonstrated, the restriction must be proportionate to the legitimate aim pursued and the reasons given to justify the restriction must be relevant and sufficient. In order to assess whether interference is justified by “sufficient reasons, the court must consider any public interest aspect of the case.”*

Where the information subject to restriction involves a matter of ‘undisputed public concern’; the information may be restricted only if it appears ‘absolutely certain’ that its dissemination would have the adverse consequences legitimately feared by the state.<sup>126</sup> There must be a pressing need. The test of whether there is a pressing social need, varies according to the aim at issue. For instance, protection of morals is accorded a wider margin, because national authorities are considered to be in a better position than the Judiciary to assess the need for interference. In the *Zambian context in Membe V The People*<sup>127</sup> which has already been discussed, the Supreme Court was of the view that a law criminalizing the defamation of the President was reasonably required in effect to forestall a possible unpeaceful reaction from citizens and supporters of the President.

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<sup>123</sup> Chapter 87 of the Laws of Zambia.

<sup>124</sup> Chapter 111 of the Laws of Zambia.

<sup>125</sup> (1979)2 EHRR 245.

<sup>126</sup> Chanda and Liswaniso, *Media Laws in Zambia*, op cit, p.4.

<sup>127</sup> *Membe V The People (1995/1997)*.

Furthermore, sections 191-198 of the Penal Code, create the offence of criminal libel, which arises from the publication of any defamatory matter. There is no separation between public and private figures. This offence too requires the prior consent of the DPP to prosecute. It is a defence to publish a matter, that is true or not true, if the matter is published by the President, by the Cabinet or the National Assembly in any official or proceeding. Further, if the matter is published in the course of any judicial proceedings or a matter is published concerning a person subject to military or naval discipline. The defence of absolute privilege is available in those circumstances.

These provisions make it extremely dangerous for anyone to obtain anything that the government may determine to be a state secret let alone publish in the media. The Act is too vague and broad in its determination of what is a state secret, leaving the door open to arbitrary determinations, which may be made in order to suppress information or other political objectives like prosecuting political opponents. It severely limits press freedom in a country like Zambia, where the press is the major source of information for purposes of monitoring government activities.

#### **7.7.0. Conclusion**

One major weakness of the Commission for Investigations is that though its proceedings are of quasi-judicial character, it holds its proceedings in camera, which offends the 'Open Justice Principle.' The principle is the cornerstone of adjudication. Unlike the Swedish and Canadian Ombudsmen, who report to the people's representatives (National Assembly), the Zambian Investigator-General reports to the President, who is the appointing authority and whose appointees are usually the subject of investigation.

The Auditor General should be part of the National Assembly as the allocator of resources, the National Assembly should have the duty to audit how such funds are spent. The audit reports should be taken seriously by investigative agencies, if fiscal indiscipline and misappropriation of funds have to be dislodged in public institutions. The lack of fiscal discipline undermines the ability of government to provide social services, especially to those on the margins of our society. The constitutional mandate of the National Assembly to allocate resources to governmental organs is undermined. Generally, the dominant creed of financial accountability in Zambia has been negated. As far back as August 2007, the Auditor General had informed the President, Levy Mwanawasa, that funds were being siphoned from the Ministry of Health, but the President shielded the Permanent Secretary.<sup>128</sup> Failure to act may be as a result of these institutions being used to serve political factions rather than the state.

The current Anti-Corruption legislation is adequate, though it needs improvement, but the political will of government is more imperative at the moment. A few questions have been asked, concerning the political will to fight corruption. Mr. Hutwiler, a motor vehicle importer supplied MMD with 150 vehicles and paid for them from the intelligence account, one of the biggest scandals ever to come to light since independence. He was protected by President Mwanawasa's State House, when the Task Force on corruption wanted to interview him. How serious then is the corruption fight?. This explains why President Mwanawasa did not really formalize the creation of the Task Force, because the Legislature was going to insist on its autonomy and independence. This was going to free the Task Force from presidential control. This has been discussed earlier in the Chapter.

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<sup>128</sup> An interview with Auditor General Anna Chifungulwa on 10<sup>th</sup> August 2007. The Auditor General worked as Senior Internal Auditor under the Author when he was Chief Administrator in 1998.

The Tribunal on the Parliamentary and Ministerial Code of Conduct has significantly contributed to transparency and accountability among ministers and members of the National Assembly. The citizens have a right to complain about perceived misconduct and if proved a minister or member of the National Assembly can be removed or prosecuted.

The Human Rights Commission in Zambia lacks enforcement powers, while those in Ghana and Uganda have power to order those illegally detained to be released. In any event, preventive detention has been used to silence political opponents. Inhuman and degrading treatment is inflicted while in detention. The power to free illegally-held detainees is fundamental to the effectiveness of the Commission.

The media is an instrument of marketing ideas in any polity. The existence of government-owned wide circulating dailies and a public broadcaster, not accessed by those with opposing views, has significantly undermined the leveling of the political terrain in Zambia. The prosecution and suing of journalists, who publish criticism of government views and the opposition has created a climate of fear among journalists, which has a chilling effect on freedom of the media and consequently, freedom of expression.

The Draft Constitution has enhanced freedom of expression and the Media, save and except that the freedom does not extend to propaganda for war, incitement to violence and advocacy of hatred. The electronic media has to be subjected to fair licensing procedures. The draft constitution obligates the media to fair coverage of political parties. Journalists shall not be compelled to disclose the source of information.<sup>129</sup> Discrimination is outlawed. These provisions meet regional and international standards, that is if such recommendations will become part of our basic law. The media's unrelenting criticism should exist in any democratic system. Media in a democracy informs and educates the public. Freedom of the media and of expression

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<sup>129</sup> Article 52, 53 and 54, Mung'omba Draft Constitution of the Republic of Zambia 2005.

enables people to make intelligent decisions about public matters as people need accurate and timely information.

Institutions supporting constitutional democracy need legal and moral protection to insulate them from being captured or neutralized for political and financial gain. To ensure independence of these institutions, they should except the media report to the National Assembly. There has been an emerging culture in the 'Third Republic' of attacking institutions of accountability and transparency such as the Anti-Corruption Commission, which has been discussed earlier in the Chapter. The Press should not be incapacitated to bring into public glare, criminal activities of members of the public and those in power, by threat of civil or criminal sanctions.

When the ruling elite consort with criminal elements in our society, democracy is in danger, as the people's will may be subverted through electoral corruption. Criminals must not be allowed to rule, as the increasing worldwide power and influence of organized crime is a threat to democracy, because money undermines the will of the electorate. These institutions need legislative, material and human resource boost, if they are to genuinely support constitutional democracy. When these institutions are malfunctioning, a nation may experience a serious abuse of financial resources. The abuse of national resources under the Chiluba and Mwanawasa presidencies has been discussed in Chapter Four.

The non-accountability of public funds has generated the wrath of donors who have withheld US\$33 million aid to the health sector. This will seriously hurt the poor as the Minister of Health points out, that medical services will almost be non-existent in the rural areas.<sup>130</sup> This is an indictment of the institutions of accountability, which failed to detect corruption and thefts which have forced donors to withdraw aid. The withdrawal of aid has the potential to generate

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<sup>130</sup> The Post, 2<sup>nd</sup> June 2009.

political instability, as electoral promises to deliver services to the poor will be mere rhetoric. These institutions must move to the position of neutrality, integrity and creditability, if they have to be above suspicion.

The next Chapter discusses external institutions as drivers of constitutionalism.