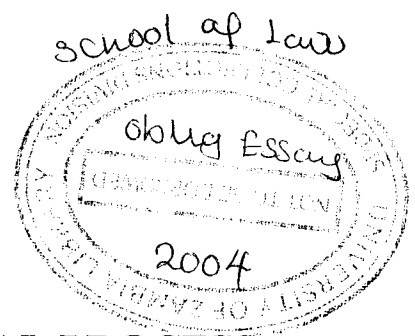


TITLE



CORRUPTION IN THE ELECTORAL PROCESS

AND IT'S EFFECT ON DEMOCRACY:

THE CHALLENGES OF ENFORCEMENT OF

ELECTORAL LAWS.

BY

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**AN OBLIGATORY ESSAY SUBMITTED TO THE
FACULTY OF LAW OF THE UNIVERSITY OF ZAMBIA
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I recommend that the Directed Research prepared under my Supervision by Joshua

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Entitled:

**CORRUPTION IN THE ELECTORAL PROCESS AND ITS EFFECT ON THE
DEMOCRACY: THE CHALLENGES OF ENFORCEMENT OF ELECTORAL
LAWS.**

Be accepted for examinations. I have checked and I am satisfied that it fulfills the requirements relating to the format as laid down in the regulations governing Directed Research.

.....*A Chanda*.....

Professor Alfred .W. Chanda

.....*21-12-04*.....

Date

DECLARATION

I **JOSHUA BANDA** Computer Number **99006626** hereby declare that the contents of this Directed Research Paper are entirely based on my own findings and that I have not in any manner used any persons work without acknowledging the same to be so.

I bear absolute responsibility for errors defects or any omissions therein.

Joshua BANDA

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21/12/2004

DATE:.....

DEDICATION

To you my mother, Constance Mbewe and father Sandford Banda, for the sacrifice and immeasurable love you have shown over all these years.

To you Tim, Dan, Ngoza, Robson and Milika for continuously stressing to me that I can do all things through God who gives us ability. Indeed He will grant each one of you the desires of your heart.

ACKNOWLEDGMENTS

The preparation of this work was far from easy. There are many times I thought this Obligatory Essay would never materialise.

Without hesitation and reservation, I would like to state that my only anchor and source of hope has been Jesus Christ my Saviour.

I would like to thank the individuals who have made writing this Essay possible.

However, practicality demands that I restrict my special thanks to the following:

My Supervisor, Professor Alfred .W. Chanda, under graduate Dean and Constitutional and Human Rights Lecturer, who not only supervised my work, read the manuscript and patiently corrected my English, but also made valuable suggestions which improved the quality of my work. I shall forever be indebted to him.

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To you all, may you find favour before God each day that unfolds.

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CHAPTER ONE:

THE ROLE OF ELECTIONS IN A DEMOCRATIC SOCIETY

1.1 INTRODUCTION

In a contemporary liberal democratic nation, elections form the heart, which propels the blood fueling the democratic management of public affairs in all representative institutions. No country must claim to be democratic in the absence of elections. In conducting elections, therefore it must be ensured that free and fair elections are promoted. Elections must be free and fair both on the part of the candidates as well as the electorate. Elections are supposed to be held periodically and can only serve the very purpose of their holding if they are free and fair.

In order to appreciate the role elections play in a democratic dispensation, this chapter will discuss firstly, the importance of elections and then proceed to look at the concept of free and fair elections.

1.2. IMPORTANCE OF ELECTIONS

It is a global phenomenon and indeed universally accepted that the will of the people shall be the basis of democratic governance. That will and consent of the people is made manifest through the conduct of elections. Matlosa aptly puts this idea this way; 'modern democracies rest on the principle that elections form the basis for proper administration of public affairs.'¹ Although elections are not *per se* the only ingredient of democracy, holding of elections to elect managers of public affairs for a particular period of time, is one of the cardinal ingredients of modern political systems.

¹ K. Matlose, *Electoral Systems, Stability and Democratic Governance in Southern Africa: The Case Study of Lesotho*, *Southern African Human Rights Review* 4, [1999] p.20

Elections are the means by which people exercise their right to vote, which right is recognised by international human rights law as an inalienable human right. Furthermore, elections provide the only sure means of ensuring that decision makers derive their mandate to rule from the people. Matlosa emphatically states that, 'Elections are indispensable in a democracy as the governors must derive their mandate to rule from the voters'.² On the same subject of elections, Melnik observed that,

*'Elections are the bedrock of democracy and at the same time one of the core variables of democratic rule, which plays a crucial role in deepening Democratic ideals.'*³

But in order to be acceptable and play this vital role, elections must not only be democratic, but also free and fair. Additionally, there should be in place an electoral system with a mechanism capable of fighting corruption. This entails that the conduct of elections should be meticulous, transparent and honest; ensuring that the general will of citizens expressed at the polls is accordingly respected.⁴ Another important factor about elections is that they are chiefly a rejection of dictatorships and authoritarian forms of government. Other than that, they are important in this context because they oblige officials to justify their actions and decisions to the citizens. Added to the above, elections make political parties to be responsible and accountable to the people.

The general purpose of elections is that they provide a platform for people to select their representatives on the basis of not only their promises, but also their ability in fulfilling those promises.

² Ibid.

³ S.Melnik, (ed.) Electoral Monitoring and Electoral Systems: A Brief Guide. (Brussels: Friedrich-Neumann Stiftung.) (1994) p. 3

⁴ Ibid.

From the foregoing it is quite clear that elections, when properly conducted, serve as the means by which the governed either give their consent or withdraw it.

1.3. THE PRINCIPLE OF FREE AND FAIR ELECTIONS

One of the most important linkages between elections and democratic governance is the principle of genuine, free and fair elections. The principle of genuine free and fair elections demands that states adopt procedures or systems of internal organisation which are conducive to, and which do not obstruct the attainment of internationally recognised norms of genuine democracy.⁵

Anyangwe, regarding this matter states, 'Genuine free and fair elections are a critical framework to elucidate, define and regulate democracy'⁶ Professor .C. Anyangwe aptly observes further that,

elections are said to be free and fair if they are held in and under conditions which ensure that the electoral process and climate makes the whole electoral package and environment free, fair and safe for elections.⁷

In other words, to have 'free' elections means that voters have the freedom to participate in the election the way they want, that is, not fearing adverse effects on their own or their families. Similarly 'fair' concerns securing equal opportunities for the exercise of political freedom. What the assertions above demonstrate is that there should be no question of any group or party having privileged chances of winning the political competition. In order to offer real possibilities of choice to the voters, the competition among the participating candidates and parties must be fair and undue advantage must be avoided. It has been

⁵ Melnik, 'Op cit, 25

⁶ C.Anyangwe, 'Elections and Electoral Codes of Conduct' Legality Journal of The University of Zambia Law Association (1998) 6

⁷ Ibid. p.9

acknowledged that regular and genuine free and fair elections are now the cornerstone of democracy. It should also be noted that genuine free and fair elections are a vital link that regulates the relationship between government and its citizens. The concept of free and fair elections entails the absence of unfair interference or manipulation of the elections by way of bribes, the distribution of goods and services during campaign rallies such as foodstuffs, fertilizers, cash donations and so forth. Furthermore, elections are free and fair if they are conducted in an atmosphere characterised by the absence of corrupt practices and intimidation.

Now, the question of democracy in political terms implies the right of people to freely choose their representatives and this freedom is expressed by the conduct of free and fair elections. Hence it is indisputable that free and fair elections are regarded as the essential beginning point of a democratic rule.

Therefore, good conditions for holding elections promote voter participation and enthusiasm and indeed democracy, the poll commanding confidence among both the voters and candidates. This usually makes the outcome to be a true and a faithful reflection of the popular will of the people. Under such circumstances, the people generally accept elections.

Former chairman for the Commonwealth Parliamentary Association, Hon Clive Griffith at a conference for election observers told delegates that:

*'elections are the lifeblood of democracy... (but)
what is a free and fair election? The acid test
must surely be whether the election produces
a government truly representative of the*

*People's will...*⁸

In the absence of issues alluded to above, the result as Spinard et al notes is that; 'the electoral process is subverted, the people's will is hijacked, leading to political chaos and national polarization'.⁹ It necessarily follows that Elections are free and fair if they are conducted in an atmosphere characterised by the absence of corrupt practices and intimidation.

Description of a free and fair election; Zambian case.

There is a generally agreed upon set of principles that must be met for an election to be deemed free and fair. These principles include; equal voting power for all citizens, freedom to organize for political purposes and to campaign for office, right of access to political information, and holding elections regularly that are decided by the freely cast vote of the majority.¹⁰ Additionally, transparency in the administration of the electoral process is vital. Other than that, one can add that levelling the playing field for all political contestants and the need to reduce barriers for participation in the process is of great importance.

The report by the Carter Centre raised a number of issues that clearly doubted whether the 2001 tripartite elections in Zambia were free and fair.¹¹ Among the relevant issues raised were misuse of state resources, a lack of enforcement mechanisms for the electoral code of conduct, unbalanced media reporting and access, and the need for greater voter education.

⁸ Was cited by C. Anyangwe, in 'Elections and Electoral Codes of Conduct – Legality Journal of the University of Zambia Law Association (1998) 6.

⁹ Leonard and Thelma Spinard: Speakers Lufembe Library New Jersey: Prentice Hall, 1979) p.21.

¹⁰ Ibid.

¹¹ Carter Centre 'Post Election Statement on Zambia Election.

The report also revealed a lack of transparency and openness on the part of the Electoral Commission of Zambia (ECZ) and inadequate logistical arrangements during voter registration process and in preparation for the polls.¹² In addition, it was found that although polling station staff was generally competent, they had difficulty processing voters quickly. Consequently, many voters were forced to endure long lines and extremely long wait in order to cast their ballots. The nightmare continued right inside the polling station; voters faced a cumbersome voting process, and the situation was compounded by the tripartite elections; the report states.

The report does observe that most of these Election Day problems described above, were avoidable with better planning and transparency. The Carter report further revealed that, certain polling stations did not have adequate polling materials or staffing to accommodate the number of voters. The report gives an example of the University of Zambia, which had over 4,000 registered voters at a single polling station while stations with less than 500 voters were given identical materials and staff. Such disparities served to deepen scepticism and frustration among the voters.

Added to the above, the Coalition report provides a fairly detailed account of the problems faced during the 2001 elections. For instance it states that; these predictable Election Day problems were further compounded by the ad hoc decision to extend voting hours.¹³ Further the report showed that, more than one third of polling stations closed late and that there was no adequate communication of this decision by the ECZ to the local electoral officers. Consequently, few presiding officers could not with certainty say when their polling station

¹² Carter Centre 'Post election Statement on Zambia Elections' (accessed from www.cartercentre.org. January 31 2001)

¹³ Coalition 2001 Elections Report (Lusaka: 2001) p.7

would close, creating confusion among voters. Not only did this lead to arbitrary decision-making by presiding officers (and hence unequal treatment across different polling stations), it was also far more difficult to monitor and police the voting process at night. Coalition 2001 report indicated that, many polling stations had insufficient or no light, which hindered the security of the vote and in some cases, eliminated the ability to vote.

It was also noted in the Coalition 2001 report that presence of officials from the Office of the President inside the polling centres, seemed to have an intimidating effect on some voters.

Other issues that point to unfair and not free elections as highlighted in the carter centre report included; that results were delayed, or released sporadically, and there was an apparent bias in terms of which results were announced and how they were conveyed to the public. The report showed that, in the first 24 hours following the close of the polls, the ECZ and state-owned TV (ZNBC) announced mainly the results of constituencies won by MMD despite the fact that, results from non-MMD constituencies were also available.

These instances discussed above, do show to considerable extent that the electoral process, particularly of the 2001 tripartite elections was characterised by acts that created unfair and not free electoral process.

It can be argued therefore that what would be called a successful 'free and fair' election is one that leads to the successful establishment of a properly functioning democratic parliament and government. Ordinarily, a fair electoral system and free and fair elections are not ends in themselves or a remedy for preventing undemocratic practices. However they are

crucial in building trust and respect in the political system. Indeed, faith, in the electoral system is paramount; the system must be fair and seen to be fair. Therefore the elimination of corruption from the electoral process should be a fundamental objective of any electoral system. Thelma expresses the consequence of this; in this way, 'public confidence in the electoral process is the foundation of public confidence in government'.¹⁴ Therefore, this implies that, public confidence can be achieved if an electoral process is one where the conduct of elections is free and fair.

In the absence of issues alluded to above, the electoral process is subverted, the people's will is hijacked, leading to political chaos and national polarization.¹⁵

1.4. CONCLUSION

From the discussion above it is obviously clear, that elections are a vital ingredient to any electoral process. And that the elections themselves, should be conducted in a free and fair manner if credibility and respect of a democratic process is to be attained. As alluded to above the consequences of a fair and free election inter alia is, establishment of a legitimate government whose preoccupation will not be contesting a disputed election but pursuing the social and economic programmes it has been promising in the election campaigns.

It is imperative therefore that the issue of free and fair elections be seriously addressed if the electoral process is to be relevant in contributing to an ideal democratic society that Zambia is striving to become.

¹⁴ Leonard and Thelma Spinard: Speakers Lifetime Library (New Jersey: Prentice Hall, 1979) p21

¹⁵Ibid.

CHAPTER TWO:

CORRUPTION IN THE ELECTORAL PROCESS

2.0. INTRODUCTION:

That Zambia has been ranked high on the corruption list is no secret. Transparency International, has rated Zambia the 11th most corrupt country in the world for three years running. It is fair to note that the fight against corruption is helping in Zambia's governance rating. Internationally, it has been acknowledged that Zambia is making difficult but worthwhile efforts to push the fight forward. The Annual Profile on Africa Research by the economic division of Standard Bank South Africa has recognised Zambia's efforts towards combating corruption. This is a widely circulated document, which rates corruption prevalence in many countries.

In its recent report published this year, and cited by Sikazwe, it acknowledges President Mwanawasa's commitment to the *fight*; 'corruption has been an ongoing problem in Zambia and it serves as a strong deterrent to investment and growth. In Zambia the President has taken a strong stance against corruption which is at high level.'¹⁶

One thing the South African Bank report quoted has noted is that, corruption is still a problem in Zambia. That is correct.

Launching the National Movement Against Corruption in Lusaka two years ago, Mr. Mwanawasa stated this concerning the fight against corruption:

¹⁶ H.Sikazwe, 'Corruption Crusade needs Support', a Media Release accessed from www.timesofzambia.zm

This administration is committed to the rule of law, it shall therefore do everything in its power to achieve transparency, accountability and inclusiveness.¹⁷

He added,

In our quest for a corrupt free Zambia, there shall be no sacred cows. Lawbreakers and those who have abused and continue to abuse the trust of the people cannot expect kindness from the victims of their schemes and deeds. We stand by this.

Since his speech, a lot has happened. Including the setting up of the Task Force on Corruption. Dr Moyo, the Director of NAMAC said President Mwanawasa's crusade has instilled in many people's minds an awareness of the existence of corruption and what efforts were being made to fight it. Notwithstanding the above scenario, corruption in the electoral process remains the biggest challenge in our young democracy.

This chapter seeks to describe the aspects to corruption in the Electoral process. After which specific electoral corrupt practices will be discussed. Additionally, the essay looks at some of the effects of corruption in the electoral process. And a conclusion shall be given.

2.1. CORRUPTION IN THE ELECTORAL PROCESS

The electoral process begins with the preparation of electoral rolls. If the rolls are incomplete or defective, the whole electoral process is vitiated.¹⁸ Elections are generally won or lost before the actual poll takes place. However, the mechanics of the poll itself are wide open to corrupt practices and results can be distorted. Political parties have been players in this dirty game, as come election time there are charges of rampant vote buying of all sorts to woo voters. Election monitoring groups and other campaigners have attested to this.

¹⁷ Ibid.

¹⁸ G.S. Goodwill, 'Free and Fair Elections' (Geneva: IPU 1994) p 5

Corruption in the electoral process has been growing and the fight against the scourge reached its peak shortly before the 2001 elections when even political leaders in different parties made it a campaign subject.

The Foundation for Democratic Process (FODEP), has been concerned that corruption and bribery seem to have been adopted as the first choice campaign strategy by most political parties and candidates. Sikazwe writing on this, observed that, 'the only variation seems to be mitigated by the levels of resources, and not public morality or integrity.'¹⁹ He further writes that, 'the more resources political parties or candidates have, the higher their levels of corruption.'

In spite of being a criminal offence, there is no law enforcement agency that monitors corrupt practices during the electoral process. For instance research by FODEP has shown that the Anti Corruption Commission (ACC) has no human and financial capacity to effectively prevent corruption during election campaign.²⁰ Added to this the Anti Corruption Commission has not seriously made efforts to ensure that its presence is felt in the electoral process.

Hence Sikazwe in noted; 'the main problem seems to be lack of human and financial capacity to enable the Commission play an active and pro-active role of minimising corruption and bribery in Electoral Process.'²¹ Christine Munalula observed that,

¹⁹ H.Sikazwe, '*Corruption Crusade Needs Support*' a Media Release accessed on www.timesofzambia.zm

²⁰ A.W. Chanda, '*Fighting Corruption in the Electoral Process*' a paper presented at TIZ organised public discussion at Chrismar Hotel on 26th July 2001.

²¹ Ibid.

“a review of the capacity of the Electoral Commission of Zambia (ECZ) to fight corruption in the electoral process indicates that indeed the ECZ lacks adequate power and institutional machinery to fight corruption in the electoral process”²²

She further pointed out that, ‘the legislation does not confer on the ECZ power to deal with disputes arising before or during the elections.’²³ Regrettably the ECZ cannot prosecute anyone for engaging in electoral malpractices.

Suffice to state that The Coalition 2001 Elections Report, showed that the majority of the respondents were of the view that the levels of corruption were extremely high. Further the results of the survey showed that levels of tolerance of corruption were high as most respondents agreed that although corruption had negative effects on the country they would still accept bribes if they were offered, as this was the only way they knew they would benefit from the system.

This problem is compounded by the fact that the Electoral Law does not prohibit the distribution of relief food, agricultural inputs or implements during the campaign period, as well as donations from the President. The impact of such actions on the fairness of the electoral process cannot be underestimated.

The general decay in public welfare due to dehumanising, deep and high levels of poverty have compounded the problem of electoral malpractices. Ironically, instead of treating corrupt officials with utmost contempt they deserve, as the cause of endemic poverty, some

²² C.L.Munalula, ‘Corruption in the Electoral Process’ A Paper presented at the FODEP conference on Electoral Reform-25th to 26th July 2002.

²³ Ibid.

voters are seeking immediate and short-lived relief of the pangs of hunger by soliciting and accepting bribes.

Of course not all those who receive bribes are corrupted in the real sense, as they still do not vote for such people. But due to different levels of poverty in terms of lack or inadequate information and education, others still fall prey to corruption. The Foundation for Democratic Process (FODEP) has been actively involved in civic education, sharing information with the public and stressing that corruption worsens poverty. The implication of electoral corruption is that those who offer bribes engage in illicit activities through which they obtain excessive resources to distribute in exchange for favours, particularly votes. Added to this, those who bribe the electorate are likely to spend the entire tenure of office looting public resources at the expense of bringing development to the electorate.²⁴

The exercise by FODEP has been received with mixed reaction by the public, an indication of how deep rooted corruption is. For instance, some members of the public were complaining that FODEP was jeopardising their chances of benefiting from politicians during the campaigning period by campaigning against corruption during the electoral process. As a result, posters against corruption were not popular among some political parties, electorates and political spin doctor NGOs masquerading as independent civic organizations. They were tearing such posters as a way of preventing the dissemination of information against corruption.

²⁴ N.Mwananjiti, Paper Presentation at the FODEP Electoral Reform Workshop on 26th July 2002 at Mulungushi International Conference centre.

People who perpetuate corrupt practices target registered voters who are well known to be supporting their rivals. Hence Mwananjiti comments that, 'the strategy of buying the voters' cards or collecting their National Registration Cards (NRCs) under any pretext is to ensure that they are unable to vote.'²⁵ They may also obtain voters' cards and facilitate the acquisition of NRCs for their supporters based on the collected voters' cards so that they may vote. Double or multiple voting is possible as long as someone's particulars appear in the voters' registers in different polling districts. Other issues of malpractices apparent in the electoral process include; voters being prevented from voting, or intimidated as they go to the polling stations, elections officers can mark ballot papers for voters with disabilities, ballot boxes can be exchanged before the count with boxes which have been stuffed in favour of a particular party or candidate and, the compilation of results can be fraudulent.²⁶ Obviously the habit of vote buying and bribery erode public confidence and undermines the electoral process and democratic governance.

Election Monitoring and Civic Education NGOs, attending a workshop, organised by Transparency International Zambia (TIZ) on electoral corruption, held at Fair view Hotel on 19th July 2001 observed and resolved as follows;

'Realising the fact that corruption cases and are on the increase; Realising that corruption can be detrimental to society and our young democracy Agreed that there is an urgent need to resolve t issues relating to corruption and its effects in the

²⁵ Ibid.

²⁶ FODEP, *Electoral Malpractices by Parties worry FODEP* 'accessed from www.fodep.com.zm

electoral process. Committed themselves to continue with the following activities: Embarking on door - to - door campaign promoting market place meetings and drama, Promoting concerted advertising in the media, sponsoring drama/theatre concert groups on electoral issues, Sponsoring Anti-corruption awareness programmes in Educational institutions'.²⁷

They further urged political parties and members of society to report cases of corruption and malpractice to law enforcement agencies, such evils as vote buying, vote rigging, bribery and any activities that are aimed at manipulating the voter. The organizations that participated in the mentioned workshop include; Operation Young Vote (OYV), University of Zambia Anti-Corruption Movement (UNZAMO), Zambia Civic Education Association (ZCEA), Coalition 2001, Catholic Commission for Justice and Peace (CCJP), AFRONET, Foundation for Democratic Process (FODEP), Anti Voter Aparty Project (AVAP), and Southern Africa Centre for Constructive of Resolution of Disputes (SACCORD).

If corruption is to be controlled, therefore, corrupt officials must be exposed and punished frequently and severely. Controlling corruption means making it clear to public officials that if they engage in corrupt conduct they will lose their offices, forfeit illegally acquired wealth, and go to prison.²⁸

Implementing such sanctions requires an institutional framework. Effective and durable corruption control requires multiple, reinforcing, and overlapping institutions of accountability. The essay anyhow shall delve into these issues in the next chapter.

²⁷ Ibid.

²⁸ Ibid.

2.2. COMMON ELECTORAL CORRUPT PRACTICES

Corrupt practices in Zambia take various forms and some of the most common ones that are reportedly used during election time are:

Bribery-which is one of the most commonly, used methods of vote buying, through the giving of cash especially to those who are underprivileged in order to gain support. Another form of electoral malpractice is the distribution of goods such as fertilizers, maize or relief food, essential drugs to clinics or any form of donation during election time or just before elections. Added to this is promising to or embarking on developmental projects such as sinking of boreholes, grading or rehabilitating roads, renovating schools and expending public funds but claiming to the public that it was a party programme. Coalition 2001 Reports notes that one of the biggest sources of corruption in the 2001 Presidential and General elections was the presidential slush fund.²⁹ The president made well targeted and well publicized donations in Southern, Luapula, and Copperbelt provinces weeks before the elections. A case illustrative of this is the presidential directive for title deeds to be issued expeditiously to over 1400 sitting tenants in Kabwata Township in Lusaka just before the Kabwata Parliamentary Bye-election. This clearly constituted an act of vote buying which act is typically a corrupt practice in the electoral process and a gross abuse of power by the highest office in the land. Further, the report alludes to the fact that the then president, Chiluba advised miners in Mufulira during a campaign rally held a month before the general elections to vote for the Movement for Multiparty Democracy if they were to be accorded an opportunity to purchase the houses they were occupying.³⁰ Other than the above, manipulation and victimization of underprivileged groups is one form of corrupt electoral

²⁹ Coalition 2001 Elections Report p7 accessed from www.euu-zambia.org

³⁰ Ibid.

practice. In effect people, because of being poor and unable to sustain themselves, have their basic rights infringed and therefore succumb to all forms of threats and intimidation, and so in order to avoid these circumstances, they end up voting wrong leaders into office.³¹ Furthermore there is also abuse of state machinery such as the civil servants (police and public media) to support partisan or selfish motives. For instance vote buying has been a prominent activity in most elections in Zambia. A lot of vote buying prevails during the election period. Money from government coffers is sometimes dished out as part of the campaign and it is often alleged that the purpose is to win favouritism.

Other corrupt practices include; forgery, falsification and fraudulent destruction of election documents.³² Offences relating to personification for purposes of applying for a ballot paper or voting more than once and also offences relating to publishing false statements in respect of candidates.³³ There are also reports of political parties purchasing voter's cards from registered voters.

Corruption in the electoral process has been exacerbated by rising levels of poverty in the nation in the rural areas, where some electorates are already used to receiving handouts. To this end the locals find nothing wrong, and freely open their hands when candidates offer some inducement in order to vote for them.³⁴

Malpractices in the electoral system are evident in the process of registration of voters. An initial problem is drawing up an accurate register of eligible voters - a register that manages

³¹ Sikazwe Op Cit

³² Supra 15

³³ Ibid.

³⁴ FODEP, 2001 Elections report.

to include those entitled to vote, while excluding voters who have died, or who are otherwise unqualified.³⁵ Sometimes there is manipulation of the voters register to the disadvantage of the rest of the players in a given election. Related to this, there must be checks against impersonation - those presenting themselves at polling stations must be the voters they claim to be. In many parts of Africa including Zambia a finger of each voter is marked with indelible ink to ensure against voting twice. Voters must be permitted to cast their ballots without feeling under threat of violence or under an obligation to support a particular candidate or party.

Other corrupt electoral practices include bribery of voters, raising campaign funds by making promises of illegal benefits (such as favourable government contracts) as payoffs to donors, bribing opposing candidates to withdraw, and (where there are legal limits on permitted campaign spending) fiddling election expenses in order to exceed the limit.³⁶ The secret ballot is the main device to restrict vote buying. If voters cast their ballots in secret, there is no way for candidates and party organizers to be certain that they will vote in the way that they have promised to those offering the bribes. However, in some communities, the secret ballot has proved insufficient to stamp out vote buying altogether.

Whereas electoral malpractices may be difficult to regulate, there are other forms of unfairness that should be easier to control. Henroit suggests that, it is important to ensure that opposition candidates and parties are given a proper opportunity to present their case on national television. In the frequent cases where national broadcasting is a public monopoly, the government should not use its control over the airwaves to stifle free and fair debate

³⁵ Ibid.

³⁶ P.Henroit, *Electoral Process Issues: Zambia 2001 Tripartite Elections*, 2001

during an election campaign. Corruption of electoral practices is, of course, not limited to bribery or intimidation of the individual voter. The possibilities are endless, ranging from the dissemination of scurrilous rumours about candidates, and deliberately false campaign propaganda, to tampering with the election machinery by stuffing the ballot box with fraudulent returns, dishonest counting or reporting of the vote, and total disregard of electoral outcomes by incumbent officeholders. The existence of these practices depends more on a population's adherence to political civility and the democratic ethos than on the prohibitions and sanctions written into the law.³⁷

The integrity of the electoral process is maintained by a variety of devices and practices. Permanent and up-to-date registers of voters are maintained to guarantee easy identification of those eligible to participate in elections, and procedures are designed to make the registration process as simple as possible. In most jurisdictions, elections are now held on a single day rather than staggered. Polling hours in all localities are the same, and opening and closing hours are fixed and announced, so that voters have an equal opportunity to participate. Polling stations are manned by presumably disinterested government officials or polling clerks under governmental supervision; and political party agents or party workers are given an opportunity to observe the polling process, enabling them to challenge irregularities and prevent abuses. Efforts are made to maintain order in polling stations, directly through police protection or indirectly through such practices as closing bars and liquor stores. The act of voting itself takes place in voting booths that protect privacy. Votes are counted and often recounted by tellers, watched by party workers to assure an honest

³⁷ Ibid.

count. The transmission of voting results from local polling stations to central election headquarters is safeguarded and checked.

Whereas 'dirty tricks' may be difficult to regulate, there are other forms of unfairness that should be easier to control. For instance, it is important to ensure that opposition candidates and parties are given a proper opportunity to present their case on national television. In the frequent cases where national broadcasting is a public monopoly, the government should not use its control over the airwaves to stifle free and fair debate during an election campaign. The question of what Other related activities of Corrupt electoral practices include bribery of voters, raising campaign funds by making promises of illegal benefits (such as favourable government contracts) as payoffs to donors, bribing opposing candidates to withdraw, and (where there are legal limits on permitted campaign spending) fiddling election expenses in order to exceed the limit. Vote buying is reputed to remain common in some countries. The secret ballot is the main device to restrict vote buying. If voters cast their ballots in secret, there is no way for candidates and party organizers to be certain that they will vote in the way that they have promised to those offering the bribes. However, in some communities, the secret ballot has proved insufficient to stamp out vote buying altogether.

2.3. EFFECTS OF CORRUPTION IN THE ELCTORAL PROCESS.

Electoral fraud is one of the most devastating forms of corruption to the establishment of a democracy.³⁸ This ordinarily has very bad effects such as; leaders who are illegitimately appointed cling to power, opposing any efforts to introduce open governments and this can lead to the abuse of basic human rights. Apart from that, some leaders use whatever political

³⁸ Ibid.

or economic power they can to perpetuate their rule by engaging themselves in activities that are dishonest, corrupt and unaccountable. Mukelebai³⁹ notes that leaders who are a product of an electoral process are likely to encourage dishonest business practices and will put in effect measures that will foster greed and maladministration. The height of it all is the existence of high poverty levels.

Corruption is destructive. It breeds inefficiency and can cause systems to collapse. When the systems crumble, there is no development or any growth hence there would be no country. Controlling fraud, corruption, and unfair practices is a fundamental objective of any system of regulating political parties and candidates. When an election has been held, it is essential to ensure that citizens at large, whether they have supported winning or losing parties and candidates, should have faith in the integrity of the process. Serious electoral fraud, corruption, and unfair practices bring the reliability of the electoral process into question. They thus undermine democracy itself.

Where there is significant inefficiency or deliberate cheating by the authorities responsible for administering an election, the whole purpose of holding an election is negated. It is because electoral fraud is such a risk in countries emerging from non-democratic rule that the practice of mounting international election observer missions has burgeoned.

One of the most critical problems in the matter of electoral reforms is the hard reality that for contesting an election one needs large amounts of money. The limits of expenditure

³⁹M. Mukelebai *Strengths and Weaknesses of Enforcement of the Electoral Law* 'A paper presented at a conference to examine the adequacy of legal and institutional capacity to fight corruption in the electoral process.

prescribed are meaningless and almost never adhered to. As a result, it becomes difficult for the good and the honest to enter legislatures. It also creates a high degree of compulsion for corruption in the political arena. This has progressively polluted the entire system. Corruption, because it erodes performance, becomes one of the leading reasons for non-performance and compromised governance in the country. The sources of some of the election funds are believed to be unaccounted criminal money in return for protection, unaccounted funds from business groups who expect a high return on this investment, kickbacks or commissions on contracts etc. No matter how we look at it, citizens are directly affected because apart from compromised governance, the huge money spent on elections pushes up the cost of everything in the country. It also leads to unbridled corruption and the consequences of wide spread corruption are even more serious than many imagine. Electoral compulsions for funds become the foundation of the whole super structure of corruption

2.4. CONCLUSION

Controlling fraud, corruption, and unfair practices is a fundamental objective of any system of regulating political parties and candidates. When an election has been held, it is essential to ensure that citizens at large, whether they have supported winning or losing parties and candidates, should have faith in the integrity of the process. Serious electoral fraud, corruption, and unfair practices bring the reliability of the electoral process into question. They thus undermine democracy itself.

Double efforts will therefore be needed to uproot it. Efforts should be made to strengthen institutions such as the media, the Zambia Police Service, the Anti-Corruption Commission (ACC) the Auditor General's office, the Drug Enforcement Commission (DEC). Other

measures should include strengthening the electoral process. The need for an independent Electoral Commission has never been more imperative. A stronger commitment to strengthening democracy will also help.

There is immediate need for capacity building in these institutions and a vibrant civil society is a key partner in the fight against corruption, more so corruption in the electoral process.

There will be need for political will from politicians at all levels whether they are in Government or the opposition, and not just from the President. Indeed, the fight against corruption is visible. All it needs is relentless support not only from those in Government, but ordinary men and women, not forgetting those in politics and NGOs. The one thing clear is that the fight is not easy but it can be won given the will and determination. Though it may be impossible to regulate unfair electoral practices by law, there may be some moral value in codes of conduct. Such codes may be developed for electoral officials, political parties, and election observers.

CHAPTER THREE:

THE LEGAL AND INSTITUTIONAL FRAMEWORK

3.0 INTRODUCTION

The Legal Framework elections in Zambia are founded on the following pieces of legislation; The Constitution of Zambia,⁴⁰ the Electoral Act⁴¹ and the regulations made there under. Other pieces of legislation that govern and regulate elections include; the Electoral Commission Act of 1996 and other related legislation such as the Public Order Act.⁴² The Electoral Commission, political parties, the legislature, the police, mass media, civil society and the judiciary are some of the most important institutions forming the foundation of the institutional framework for elections.⁴³

This chapter focuses on the law that relates to the conduct of elections. Additionally the chapter shall look at the institutions that play an active role in the electoral process. This chapter further explores the challenges that are encountered in the enforcement of the Electoral Laws particularly the electoral code of conduct when it comes to the fight against corruption in the electoral process.

3.1.THE LEGAL REGIME FOR ELECTIONS: AN OVERVIEW.

3.1.1 The Constitution of Zambia (Amendment) Act No. 18, 1996

Some of the provisions in the Constitution relating to elections include: Article 63 of the Constitution which provides that the National Assembly shall consist of one hundred and

⁴⁰ Chapter 1 (as amended by Act NO 18 of 1996) of the Laws of Zambia.

⁴¹ Chapter 13 of the Laws of Zambia.

⁴² Chapter 113 of the laws of Zambia.

⁴³ FODEP, *'Towards Zambia free and fair 2001 Presidential and General Elections'* (Lusaka: FODEP National Secretariat 1999) p.20.

fifty elected members and not more than eight nominated members and the Speaker of National Assembly. Articles 11 – 32 of the constitution sets out the 'Bill of Rights' containing the fundamental rights and freedoms of the individual, encompassing freedom of expression, association and assembly. Article 75 extends to every citizen of Zambia who has attained the age of eighteen the right to be registered as a voter.

Suffice to state that, certain provisions in the Constitution do infringe on the aspect of free and fair elections and in a way creates a platform for electoral malpractices. The following illustrates this is:

The requirement in Article 34 (3) (b) that presidential candidates must be second or third generation Zambians and related to that is clause (f) of the same Article which requires that a presidential candidate must be domiciled in Zambia for a period of at least twenty years. It is not clear whether the twenty-year residence requirement is continuous or not, but whatever the intentions of the framers of the Constitution might have been, the period is unrealistically long and portrays what appears to be a discriminatory tendency against some category of citizens.

Under clause 9(d) of the same Article, Presidential candidates are required to belong and be sponsored by a political party. This in effect eliminates independent candidates. This is an unjustifiable discrimination of certain categories of citizens from standing for this important office. Lungu⁴⁴ in relation to this, argued that, the intentions of the Chiluba government in inserting some of these clauses especially Article 34 (3) and Article 129 (which bans chiefs

⁴⁴ G.F.Lungu, 'Some Bizarre Clauses in a Noble Document: Critical Observations on the Constitution of Zambia (Amendment) Act No. 18 of 1996'. P.26

from participating in partisan politics) was to ban certain candidates from standing in the 1996 elections. Requirements (a) and (b) appeared to be tailored to ban from running for president, certain candidates, including former President Kaunda, who was banned by both the citizenship clause and the condition that a Presidential candidate can only be elected to office twice since he was considered to be the major challenger to the then President Chiluba.

Chiefs who wanted to contest Parliamentary elections were required by the Constitution to abdicate the throne. Article 129 of the amended Constitution barred UNIP Vice President Senior Chief Inyambo Yeta. It is quite clear that the requirements for Presidential candidates and Chiefs wishing to engage in partisan politics were and still are plainly unreasonable.⁴⁵ This also violate Articles 2 and 25 (b) of the International Covenant on Civil and Political Rights 1996 which prohibits discrimination on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

From the foregoing, it can be safely submitted that the electoral law particularly the discussed relevant provisions above of the constitution are not credible and are a recipe of an unfair and not free electoral system.

3.12. The Electoral Act

The Electoral Act, Chapter 13 of the Laws of Zambia and the regulations made there under are the main legislation governing the conduct of elections in Zambia. The Act provides for the regulation of Presidential and Parliamentary elections; it empowers the Electoral Commission to make regulations, provide for the registration of voters and for the manner of conducting elections. Most significantly (especially with respect to corruption) the Act also

⁴⁵ Ibid.

makes provision for offences and penalties in connection with elections. Further it provides for election petitions with respect to Parliamentary and Presidential elections.

The Electoral Act has a number of weaknesses, which factor makes this law virtually impotent to fight corruption in the electoral process. It has been noted that, the penalties provided for those who contravene the law are very mild and cannot effectively deter electoral malpractices.⁴⁶ For example fines of K10, 000.00 while they may have made sense in 1991, when the Act was enacted are unrealistic today given the depreciation of the Kwacha over the years.⁴⁷ Second, the electoral law does not adequately address the corrupt issue of the distribution of relief food, agriculture inputs or implements, as well as presidential donations, which characterized the political activities, the rule of then former President, Chiluba. The impact of such actions on the fairness of the electoral process cannot be under estimated. And because of this concern, the Supreme Court has pointed out in the Presidential petition case that;⁴⁸

the regulations are silent on such matters and on any possibly improper donations when not directed at individual benefits. As at the moment, Public Philanthropic activity is not prohibited by the regulations, we can do no more than to urge the authorities concerned to address the lacunae so that there can be a closed season at election time for any activity suggestive of vote – buying, including any public and official charitable activity involving public funds and not related to emergencies or any life threatening situations.

Third, at the moment there is no law regulating electoral campaign financing – neither does the law require candidates and political parties to disclose sources of their funding. This lacuna in the law poses a great threat to democracy as powerful forces, including drug barons can easily take over government through the financing of the electoral campaign and

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ SCZ Judgment No.14 of 1998 at Page 51

corrupting the impoverished helpless electorates.⁴⁹ This essentially means that those with money can easily manipulate the electoral process through corrupt acts.

Moreover, a ruling party can easily finance its operations from public funds, as was the case a few years ago where it was alleged that K2 billion scam, from the National Assembly funds were illegally diverted to the MMD convention of 2000.

3.1.3. The Electoral Commission Act, 1996

The Electoral Commission Act, 1996 established an autonomous Electoral Commission. This autonomy arguably, is on paper only. The Commissioner's appointments, the commission's funding, activities and reaction to complaints have proved that the electoral Commission is far from being independent.⁵⁰ As such the Commission is vulnerable to the Executive's control and manipulation. In the long run this compromises the Electoral Commission, which is supposed to be an impartial body in the management of elections.

3.1.4. The Electoral (Conduct) Regulations, 1996

This law by virtue of the passage of Statutory Instrument No.179 of 1996 provides for the existence of the Electoral Code of Conduct. This came about because the public and stakeholders such as political parties, churches, Non-Governmental Organisations (NGOs), and civil society in general felt the need to have regulations to assist and oversee the Electoral Process in order to level the playing field.⁵¹

The Regulations were made to regulate the conduct of players in the electoral process, before, during and after elections. The Code was meant to achieve this by putting in place

⁴⁹ C.L.Munalula, '*Corruption in the Electoral Process*' A Paper presented at the FODEP conference on Electoral Reform-25th to 26th July 2002

⁵⁰ Ibid.

⁵¹ ERTC REPORT, accessed from www.ertc.gov.zm

certain rules that prohibit illegal behaviour in the process of elections.⁵²The regulations do specify the rights and obligations of every stakeholder in the electoral process. In section 4, for instance, the Regulations state that every person shall have a right to express his or her political opinion and debate and contest the policies and programmes of other political parties. Other regulations cover the right to canvas freely for support from voters, to hold public meetings, to distribute electoral literature, campaign materials, publish and distribute notices and advertisement and other rules.⁵³

The Electoral Code of Conduct obviously plays a critical role in setting the stage for free, fair and genuine elections. Consequently this is not only bound to lead to more peaceful elections but also a free corrupt election. A code of conduct is essential in order to develop confidence in the democratic and electoral process.

3.2.0 THE INSTITUTIONAL FRAMEWORK

The Electoral Commission, political parties, the legislature, the Police, Mass Media, Civic society and the Judiciary are some of the most important institutions forming the foundation of the institutional framework for elections. Additionally, these institutions are supposed to play a vital a role in the fight against corrupt practices that are perpetuated in the electoral process. Some of these are discussed below.

3.2.1The Electoral Commission and its role in the fight against electoral malpractices.

With the coming of political pluralism in 1990/1991 it became imperative that an independent body be formed to supervise elections in Zambia. When the MMD ascended to power, it was pressured by the opposition parties to fulfill its promise of reforming electoral

⁵² Ibid.

⁵³ Ibid.

laws, particularly in relation to the composition and independence of the Electoral Commission.

The Constitution of Zambia (Amendment) Act of 1996 provided for the creation of an autonomous Electoral Commission. Following persistent pressure from opposition parties, civic organizations and the international community, the MMD government pushed for the enactment of the Electoral Commission Act, 1996. The Commission was composed of five (5) Commissioners who were appointed by the President and ratified by Parliament.

The Electoral Commission as an institution is vested with the authority to govern the conduct of elections in Zambia. It is expected to act independently and with integrity in order to uphold the accepted international standards and national requirements for democratic elections.⁵⁴ However it is contended that, The Electoral Commission as the body charged with this responsibility has regrettably failed or neglected to effectively carry out this vital responsibility. The events of 2001, especially towards and during the election period demonstrate a failure by the Electoral Commission to discharge its duties to the expected standards. Indeed throughout the year, the Commission failed to act independently and diligently, and allowed itself to be used as a tool for political expediency.⁵⁵ Offences such as vote buying, abuse of state resources, intimidation, character assassination and violence were committed in the presence of the election officials with impunity.⁵⁶

⁵⁴ FODEPP, Zambia's 2001 Tripartite Elections (Lusaka: FODEP National Secretary 2002) p.52.

⁵⁵ Ibid.

⁵⁶ Ibid.

3.2.2. The Police and their role in the fight against electoral malpractices.

The Police have often operated under strong political influence and, in most cases, with no signs of professionalism.⁵⁷ There were many complaints from opposition parties on how the Police discriminated against them in the granting of permission for public gatherings in favour of the ruling party during both the 1996 and 2001 elections. It has been argued that the Police also failed to bring to book persons who were involved in open bribery.⁵⁸ This attitude of the Police signified that either the Police were not familiar with the electoral offences, or they deliberately ignored the commission of the offences.

A major concern was the selective and discriminatory manner the criminal law was applied by law enforcement agencies. The Police are allegedly to have stood by when MMD supporters were beating up opposition leaders, no matter how remote they were connected to the purported criminal behavior. For instance, on July 4 UPND President Anderson Mazoka was arrested and charged with notorious behavior and malicious damage of Defence Deputy Minister Ephraim Mateyo's vehicle.⁵⁹ On the other hand the Police are said not to have anything about the violence perpetrated by MMD cadres against the opposition. On June 25, MMD cadres smashed UPND National Youth Secretary Andrew Banda's vehicle.⁶⁰ The incident was reported to an arresting officer, a Constable Chilufya from Lundazi. Despite the culprits being identified, they were not arrested.⁶¹

In all these illustrations it can fairly be contended that the police have participated in enhancing corruption in the electoral process. They have abdicated their legal and moral responsibility, which is that of prosecuting criminal acts.

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ Coalition 2001 Elections Report p.7.

⁶⁰ Ibid.

⁶¹ Ibid.

3.2.3 The Legislature (Parliament) and its role against electoral malpractices

The law making body (the legislature) put in place laws that were to determine the course of the 1996 electoral process and beyond. However the changes made to the existing laws has contributed greatly to the unfairness of the elections. For instance the voter registration process, the enactment of the much criticized Constitution of Zambia⁶² and the subsequent ratification of the autonomous Electoral Commission whose members were perceived to be MMD. All these had direct and indirect bearings on the electoral process and the elections outcome.

In an effort to set the stage for 2001 elections and beyond the Parliament of Zambia made amendments to the electoral laws namely the Local Government Elections (Amendment) Act No. 17 of 1997 and the Electoral (Amendment) Act No. 17 of 2001.

The former was primarily enacted to give authority to the Electoral Commission to “supervise the conduct of local government elections” while the latter’s object was to allow continuous voter registration. However, with respect to the 2001 elections, the amendment to the Electoral Act came rather too late to contribute positively to the voter registration, as this did not commence in 2000 due to inadequate time in which to prepare the voter’s register.⁶³ It is yet to be seen the extent to which the laws made by parliament can deal with corruption in the electoral process. Hence it can be fairly concluded that parliament in as far as the laws mad

⁶² Amendment Act No. 18 of 1996.

⁶³ Ibid.

3.2.3. The Media and its role in the fight against electoral malpractices.

During the run-up to the elections, government media institutions gave uneven coverage to different parties.⁶⁴ According to a committee for a clean campaign media analysis, coverage was biased in favor of the ruling party, which had over 48% of the airtime and space while the other parties shared the remaining time and space. Some parties like UNIP and LPF were denied airtime and space to put across their boycott campaign. There was intimidation of staff members who featured articles or broadcast programmes that the government did not like.⁶⁵ The Committee for Clean Campaign reported that on 28th October 1996, the state aired and controlled Zambia National Broadcasting Corporation; (ZNBC) suspended its Controller of Television, Ben Kangwa for allowing UNIP Political advertisement in which President Kaunda announced his party's decision to boycott the November 19, 1996 elections to be broadcast with the caption, 'A ZNBC Production'.⁶⁶

In the run – up to the 2001 elections it was observed by several monitoring groups that the media were being used and in fact served as a campaign tool for the ruling MMD, whilst the opposition was only given limited access to state media.⁶⁷ The coverage of political parties by the Zambia National Broadcasting Corporation (ZNBC), the Times of Zambia, and the Zambia Daily Mail was in most cases in favor of the ruling MMD. This kind of bias was prevalent on ZNBC and the Times of Zambia. It is certainly clear that the principle of equality was flagrantly violated. There was a systematic attempt to outreach the MMD government at all costs by state – owned media, while views of the opposition and all those perceived as holding dissenting views were obliterated. A notable case of public media bias

⁶⁴Committee for a Clean Campaign, report on the 1996 Elections, p59

⁶⁵ Ibid.

⁶⁶ Ibid. p.69

⁶⁷ FODEP Report,

was when the Zambia National Broadcasting Television cancelled a Presidential debate programme sponsored by the Panos Institute. All these issues are a real recipe for an unfair and not free electoral process. Arguably such a process is vulnerable to acts of corruption because the political parties who are more affluent are likely to use bribes to have their party programmes sold.

3.2.4. Civil Society and its role in the fight against electoral malpractices.

The role of domestic civil organizations in conducting voter education campaigns and building confidence in the electoral process was significant both during the 1996 and 2001 elections.⁶⁸In November 1995 a group of NGOs came together to form the Committee for a Clean Campaign, to oversee the conduct of the 1996 elections.⁶⁹

In 2001 a coalition of NGOs (Coalition 2001) and individual NGOs continued with their various activities to enhance voter participation and advocate for a fair electoral process.⁷⁰ Likewise the fight against corruption took centre stage in the activities of coalition 2001. Thus generally, the civil society has performed fairly well in the fight for a free corrupt electoral process. There has been progressive growth in civil education, advocacy and campaign for a fair electoral system.

3.3 THE CHALLENGES OF ENFORCEMENT OF ELECTORAL LAWS

The challenges of enforcement of electoral laws with respect to corrupt practices shall be analysed by looking at the role of the Electoral Commission, and the court system in tackling the electoral malpractices.

⁶⁸ Ibid.

⁶⁹ A. W. Chanda, 'Fighting Corruption in the Electoral Process' a paper presented at TIZ organised public discussion at Chrismar Hotel on 26th July 2001.

⁷⁰ Ibid.

3.3.1 *The Electoral Commission*

The Electoral Commission of Zambia as alluded to above, has a legal duty to deal with disputes and any other issues arising before or during elections. The law requires that electoral violations and malpractices generally should be reported to a 'proper authority'. However, the law does not stipulate what is meant by 'proper authority'⁷¹ and other than that there is no indication given as to what action will be taken against the infringing party, and who shall take such action. This is definitely a challenge.

The 1996 elections were full of controversies, and not surprisingly numerous complaints were raised following the announcement of election results. The electoral process itself was marred with suspicions starting from the constitutional amendments, controversy surrounding the award of a contract to NIKUV Computers (Israel) Limited,⁷² complaints of unequal access to the media, unfair application of the Public Order Act, irregularities such as the improper registration of voters and negligence by the Polling Officers to execute their duties diligently and incidences of vote buying and corruption.⁷³ However, the Electoral Commission was unable to address these matters particularly the corrupt acts that were evidently clear.

Furthermore, the Electoral Commission failed to make instant decisions to correct anomalies created by its officials.⁷⁴ For example, in Matero Constituency, the Returning Officer

⁷¹ Actual provision in the provision

⁷² A company that was contracted to work on the registration voters' register.

⁷³ M. Mukelebai *Strengths and Weaknesses of Enforcement of the Electoral Law* 'A paper presented at a conference to examine the adequacy of legal and institutional capacity to fight corruption in the electoral process.

⁷⁴ C.L.Munalula, '*Corruption in the Electoral Process*' A Paper presented at the FODEP conference on Electoral Reform-25th to 26th July 2002.

erroneously disqualified a candidate from filling his nomination papers. When this complaint was brought to the attention of the Commission, the Commission's reply was that the candidate should petition to the High court after the elections.⁷⁵

The 2001 polls saw the Electoral Commission once again fail to live up to its expectation.⁷⁶ The EU Long Term Observers deployed into every Province observed that government vehicles were being used by MMD, the ruling party and District Administrators (now called District Commissioners) were openly campaigning for the MMD.⁷⁷ And yet the Electoral Commission charged with constitutional power to regulate, govern and conduct elections hopelessly watched by.

However, rather than exposing these breaches of the Code of Conduct and taking action, the Electoral Commission announced publicly that it was unable to enforce the code. Unsurprisingly, the breaches continued with impunity.⁷⁸

Several factors account for the Electoral Commission's dismal performance, inability to handle corrupt acts and enforce the Electoral laws. The Electoral Commission suffers from a number of weaknesses.

First, the Electoral Commission lacks the adequate power and institutional capacity to fight electoral malpractices and abuses.⁷⁹ The enabling legislation (The Electoral Commission

⁷⁵ Ibid.

⁷⁶ M.Meadowcroft, '*The Election that might have been... ..*' Southern African Human Rights Review special edition 9 (2002) pp 1-3

⁷⁷ Ibid.

⁷⁸ Ibid.

Act, 1996) does not confer on the Commission power to deal with electoral malpractices. Moreover, it cannot disqualify a candidate engaged in corruption. In fact in response to criticism that it has lamentably failed to enforce the Electoral Code of Conduct of 1996, the Commission has repeatedly stated that it had no power to enforce the code, arguing that it is the responsibility of the Police and other law enforcement officers (such as the Anti-Corruption Commission) to do so.⁸⁰ The Police have similarly refused to enforce the Code, shifting the responsibility back to the Electoral Commission.⁸¹

Secondly the Commission does not have sufficient financial autonomy to secure funds from any source. In any case, the government itself is likely to be the major source of the Commission's funds.⁸² Reports of Registration Officers and election officials not being paid their allowances are frequent. The Commission depends on temporary staff to conduct registration of voters, as well as elections. If the officials are not paid their allowances their morale will be low and they cannot be expected to put in their best. The Electoral Commission is not able to train the temporary staff adequately, resulting in shoddy performance.

The status and powers of the Electoral Commission can be contrasted with that of the Ugandan Electoral Commission. The President with the approval of Parliament appoints the seven Commissioners.

Article 66 (1) of the Uganda Commission Act obliges Parliament to ensure that adequate resources and facilities are provided to the Commission to enable it to perform its functions effectively. And according to Article 66 (2) of the Ugandan Constitution, the Commission

⁷⁹C.L.Munalula, '*Corruption in the Electoral Process*' A Paper presented at the FODEP conference on Electoral Reform-25th to 26th July 2002.

⁸⁰ Ibid.

⁸¹ AFRONET, Zambia Human Rights Report (Lusaka: AFRONET Secretariat, 2001) p. 61-63

⁸² Ibid.

shall be a self-accounting institution and shall deal with the Ministry responsible for finances.

These provisions are commendable and would go a long way not only in ensuring the independence of the Electoral Commission of Zambia, but also in facilitating its work. And consequently guarantying a fair and corrupt free electoral system.

The Courts of Law

In the aftermath of the 2001 elections, complaints about electoral irregularities lodged with Electoral Commission had to be referred to either the High court or the Supreme Court.

3.3.2 (a) The High Court

Section 18 of the Electoral Act makes provision for election petitions in respect of Parliament elections. A candidate or registered voter or Attorney General may present a petition complaining of an unlawful election of a Member of Parliament by reason of any corrupt or illegal practice or irregularity to the High Court. A successful petitioner would be entitled to a declaration that the election was void or a declaration that a particular candidate was duly elected. For instance following the 2001 elections there have been couple of petitions in the high court. According to the report on the 2001 elections by FODEP, a total number of thirty-three Parliamentary seats were petitioned by the losing candidates in the High Lusaka Court.⁸³ As alluded to above Election petitions for parliamentary elections are provided for under Regulation 18 and 19 of the Electoral Act. The grounds of petitioning range form illegal and corrupt practices to lack of compliance with the electoral laws and rules in the conduct of an election. During the 2001 elections, the losing candidates presented all the thirty-three petitions. Some of these have led to nullification of the results

⁸³ FODEP, *Zambia's 2001 Tripartite Elections* (Lusaka: FODEP National Secretariat 2002) p.59-61

on account of corrupt practices.⁸⁴ Notable example is that of former Mulobezi Member of Parliament Micheal Mabenga whose election was declared null and void and the court instructed prosecution of the former Member of Parliament.

3.3.3 (b) The 2001 Court Injunction

As a result of widespread anomalies in the 2001 election results as announced by the Electoral Commission of Zambia, six Presidential candidates applied for judicial review in the High Court on December 30 2001.⁸⁵ The applicants were seeking verification and recount in the Copperbelt, Northern, Lusaka and Luapula Provinces, and an order that the Returning Officer refrains from announcing the Presidential election results and declaring a winner until after verification and recount. The case came for inter party hearing before High Court Judge, Justice Peter Chitengi, on January 1 2002 (but he postponed it to January 2 which was the date set for inauguration).⁸⁶

Justice Chitengi agreed with the Attorney General that the High Court lacked jurisdiction in the matter because the issues raised related to an election of the President He said that the applicants could challenge the Presidential election within the fourteen days period stipulated under section 9 (3).⁸⁷

The problem with this law (proposition) is that an opportunity is denied to verify the results to make them acceptable to all the people before they are declared.

⁸⁴ Ibid.

⁸⁵ Southern African Human Rights Review Special Edition 9 (2002) PP 26-27

⁸⁷ Of the Electoral Act (Amendment Act) No. 23 of 1996. The Amendment requires that no one can challenge the eligibility of a Presidential Candidate until fourteen days after election

3.3.2 (c) *The Supreme Court*

Under Article 41 of the Constitution,⁸⁸ any question which may arise as to whether any provision of the constitution or any law relating to election of a President in accordance with Article 34 shall be referred to and determined by full bench of the Supreme Court.

Related to that, section 9 (3) of the Electoral Act provides that:

“Any question, by any person, which may arise as to whether any provision of the constitution or any law relating to nomination or election of President has been complied with shall be referred by the Returning Officer or by such person to the full bench of the Supreme Court within 14 days of the person elected as President being sworn in”⁸⁹

The Court’s role in the Presidential elections of 1996 and 2001 (which has just closed though judgment is yet to be delivered) on the whole reflects badly on the court’s expected role as an electoral dispute resolution mechanism. To show this, in 1996 Presidential petition, the Supreme Court concluded 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”

In the final analysis the petition was dismissed. The case lasted almost one and half years and it took the full bench of the Supreme Court over six months to deliver its judgment.

In August 2002, the three opposition political parties (UPND, FDD and HP), which entirely petitioned the results separately decided to have a consolidated petition in the Supreme Court to challenge the December 27 Presidential election, results. In their consolidated action, the three petitioners are seeking a declaration that President Mwanawasa was not

⁸⁸ The Constitution of Zambia (as amended by Act No.18 of 1996)

⁸⁹ In the matter between.

duly elected as Republican President and that the Electoral Commission willfully neglected its obligation to supervise the elections thereby allowing a fraudulent exercise in favor of Mr. Mwanawasa.

The petitioner's consolidated grounds among others are that, the elections were marred with general and notorious bribery, corrupt and illegal misconduct.⁹⁰ They also claimed that the elections were characterized by fraught violation or non-compliance with the provisions of the law and regulations governing the elections.

It will be interesting to see how substantially different the ruling in the 2001 petition will be and how long it will take before judgment is delivered.

3.4 **CONCLUSION:**

The foregoing discussion does indicate to a greater extent, the inadequacies in Zambia's system of resolving electoral disputes, arising from among other things corruption itself. Like the Electoral Commission, the courts of law have not been instrumental and keen to curb electoral flaws and irregularities. The status and powers of the Electoral Commission of Zambia do not enable it to deal with election complaints effectively. The court's apparent lack of independence can be attributed to its' seemingly timid and impartial rulings in favour of the ruling party.

It is quite evident from the above discussion that there are tremendous challenges when it comes to enforcement of electoral laws. As such we have seen a continued trend of electoral corruption particularly in the last two elections. This situation is worrisome and calls for an

⁹⁰ The Post. 21st August, 2002

urgent electoral reform programme to remedy the desperate situation. Otherwise the democratic culture of our young democracy is under serious threat.

The government however appears to have gathered political will as seen in the commencing of electoral reforms. To this effect the formation of an Electoral technical committee whose task is to recommend a suitable and sustainable electoral process on account of the submissions made to the committee through various stakeholders and interests groups is a commendable gesture. It is yet to be seen however whether the good recommendations made by ERTC will be implemented so that the next election can be held in a truly democratic environment.

CHAPTER FOUR:

GENERAL CONCLUSION

4.1.INTRODUCTION

This chapter concludes the foregoing discussion. It summarises the previous chapters, highlighting their main aspects. It will furthermore, provide recommendations on the electoral reforms so as to strengthen the electoral laws especially in the fight against corruption in the electoral process.

4.2. SUMMARY:

The dissertation has shown that the electoral process in Zambia is highly characterised with serious flaws, particularly rampant corruption. The negative effect of this, on Zambia's democratic process is without doubt. Hence Mulwanda wrote:

the democratic ideals such as free participation of citizens in selecting decision makers, freedoms to criticize government are consistently elusive.⁹¹

Chapter one of this study looked at the role elections play, in a democratic dispensation. The chapter discussed firstly, the importance of elections. It was noted that, the will and consent of the people is made manifest through the conduct of elections and that modern democracies rest on the principle that elections form the basis for proper administration of public affairs.⁹² Other than that, chapter one underscored the fact that, although elections are not *per se* the only ingredient of democracy, holding of elections to elect managers of public affairs for a particular period of time, is one of the cardinal ingredients of modern political

⁹¹ S.R. Mulwanda, '*Corruption and Abuse of Office in Zambia's 2001 Elections*, The Corruption Eye, Vol 2, (2002.) p.7

⁹² Matlose, K. *Electoral Systems, Stability and Democratic Governance in Southern Africa: The Case Study of Lesotho*, Southern African Human Rights Review 4, (1999) p.20

systems. We further noted that elections are the means by which people exercise their right to vote, and that the right is recognised by international human rights law as an inalienable human right. Added to the above, it was underscored that elections provide the only sure means of ensuring that decision makers derive their mandate to rule from the people. Matlosa on this matter states that,

*Elections are indispensable in a democracy as the
Governors must derive their mandate to rule from the voters.*⁹³

Then the chapter proceeded to look at the need for a fair and free election. Were it was noted that elections should be free and fair in order to make them acceptable and play a vital role in the democratic process.

In chapter two, a general description of corruption in the Electoral process was given. It was noted in this chapter that the electoral process in Zambia is vulnerable to corrupt practices. The study observed that, Political parties have been players in this dirty game, as come election time there are charges of rampant vote buying of all sorts to woo voters. Elections monitoring groups and other campaigners have attested to this.⁹⁴

The chapter did show that in spite of being a criminal offence, there is no law enforcement agent that seriously monitors corrupt practices during the electoral process. Hence as Sikazwe wrote; 'the main problems seems to be lack of human and financial capacity to enable the Commission play an active and pro-active role of minimising corruption and

⁹³ Ibid.

⁹⁴ H.Sikazwe, 'Corruption Crusade needs Support', a Media Release accessed from www.timesofzambia.zm

bribery in Electoral Process.⁹⁵ Christine Munalula observed that, “a review of the capacity of the Electoral Commission of Zambia (ECZ) to fight corruption in the electoral process indicates that ECZ lacks adequate power and institutional machinery to fight corruption in the electoral process.⁹⁶ She further pointed out that, ‘the legislation does not confer on the ECZ power to deal with disputes arising before or during the elections.’⁹⁷ Regrettably the ECZ cannot prosecute anyone for engaging in electoral malpractices.

The chapter further discussed some of the electoral corrupt practices that have been prevalent in the last two elections in Zambia. Some of the cited included, bribery, which is one of the most commonly, practiced corrupt acts involving buying, through the giving of cash especially to those who are underprivileged in order to gain support. The chapter also noted that the common electoral malpractices in Zambia’s electoral process, is the distribution of goods such as fertilizers, maize or relief food, essential drugs to clinics or any form of donation during election time or just before elections. Added to this is promising to or embarking on developmental projects such as sinking of boreholes, grading or rehabilitating roads, renovating schools and expending public funds but claiming to the public that it was a party programme.

Additionally, the chapter discussed some of the effects of corruption in the electoral process. For instance, leaders who are illegitimately appointed cling to power, opposing any efforts to introduce open governments and this can lead to the abuse of basic human rights. Apart from that, some leaders use whatever political or economic power they can to perpetuate

⁹⁵ Ibid.

⁹⁶ Munalula, C.L. on ‘*Corruption in the Electoral Process*’ A paper presented at FODEP conference on Electoral Reform-25th to 26th July 2002.

⁹⁷ Ibid.

their rule by engaging themselves in activities that are dishonest, corrupt and unaccountable. Mukelebai⁹⁸ notes that leaders who are a product of a corrupt electoral process are likely to encourage dishonest business practices and will put in effect measures that will foster greed and maladministration. The height of it all is the existence of high poverty levels. It was pointed out that Corruption is destructive. It breeds inefficiency and can cause systems to collapse. When the systems crumble, there is no development or any growth hence there would be no country.

Chapter three, focused on the law that relates to the conduct of elections. This chapter considered certain provisions in the Constitution that infringe on the aspect of free and fair elections. It was noted generally that the law that regulates elections in Zambia has flaws that affect the electoral process. Additionally we looked at the institutions that play an active role in the electoral process. This chapter further explored the challenges that are encountered in the enforcement of the Electoral Laws particularly the electoral code of conduct when it comes to the fight against corruption in the electoral process.

For instance, the Electoral Commission as the body charged with this responsibility has regrettably failed or neglected to effectively carry out this vital responsibility. The events of 2001, especially towards and during the election period demonstrate a failure by the Electoral Commission to discharge its duties to the expected standards, particularly in the area of mitigating the high cases of electoral malpractice. Indeed throughout the year, the Commission failed to act independently and diligently, and allowed itself to be used as a tool for political expediency. Offences such as vote buying, abuse of state resources,

⁹⁸ M.Mukelebai 'Strengths and Weaknesses of Enforcement of the Electoral Law' A paper presented at a conference to examine the adequacy of Legal and Institutional capacity to fight corruption in the Electoral Process.

intimidation, character assassination and violence were committed in the presence of the election officials with impunity

The chapter further explored the challenges that are encountered in the enforcement of the Electoral Laws particularly the electoral code of conduct.

4.3.RECOMMENDATIONS FOR ELECTORAL REFORMS.

It is a fact not in dispute, that, the issues raised in this dissertation call for urgent and serious review and reflection on the appropriate legal, constitutional, and institutional framework that would ensure not only free and fair elections but also an electoral process void of malpractices.

First, the legal and administrative bottlenecks in the electoral process have to be addressed in any future elections. It is therefore, submitted that some of the issues that have to be addressed include the following; the voter registration exercise; the Electoral Commission; access to the media; the manner of resolving corrupt practices.

It is therefore gratifying to note that there has been an electoral reform exercise being facilitated by the ERTC. One can only hope that the government before the next Presidential and Parliamentary elections in 2006 shall implement the recommendations made by this Committee.

LEGAL AND INSTITUTIONAL REFORMS.

4.3.1 (a) The Electoral Act:

There is no doubt that the current Electoral Act is in need of urgent review and reform, given its various flaws and weaknesses shown and discussed by the study. To start with, there is no provision in the Act regulating electoral campaign financing and given that the

law does not require candidates and political parties to disclose their source of funding, this study echoes what others have suggested that this lacuna be addressed.⁹⁹ Needless to state that, the issue of funds contributes significantly to the many cases of corrupt practices such as vote buying, bribery, as it is a notorious fact, that those with the money are able to manipulate the electoral system and indeed bribe the voters.

4.3.1 (b) *The Electoral Code of Conduct:*

It is furthermore suggested and recommended that the entire Electoral code of conduct be rigorously enforced. At the moment, the Electoral Code of conduct does not have an enforcement mechanism. As commented by Mwanajiti¹⁰⁰, ‘the law only provides for a ‘proper authority’ to enforce the code, but does not stipulate what is meant by ‘proper authority.’ This has led to uncertainties as regards responsibility for enforcement between the Electoral Commission of Zambia and other law enforcement agencies. It is thus suggested that, there should be a clear provision in the code concerning the institutions and/or agents that have been conferred with power to enforce the code.

The Electoral Code of Conduct should create new penalties that could include suspension or expulsion from participating in the electoral process depending on the seriousness of the matter.¹⁰¹ Furthermore, like the ERTC have recommended, the Electoral Code of Conduct should forbid undertaking of new government projects, especially that this is often done in the election period. Such gestures should not be entertained within the electoral period except on justifiable grounds such as matters that can reasonably be considered as

⁹⁹ M.Meadowcroft, ‘*The Election that might have been... ..*’ Southern African Human Rights Review Special Edition 9 (2002) p.1-3

¹⁰⁰ N.Mwananjiti, Paper Presentation at the FODEP Electoral Reform Workshop on 26th July 2002 at Mulungushi International Conference centre

¹⁰¹ ERTC REPORT, Accessed from www.ertc.gov.zm

emergency or disasters.¹⁰² Added to this, the Electoral commission should be charged with the responsibility to sanction the same. It is, furthermore recommended that, electoral malpractices should be dealt with as and when they occur and the culprits must be punished as quickly as is practicable. This hopefully would deter political parties, candidates, voters, cadres and all stakeholders from flouting electoral regulations.¹⁰³ The penalties should include disqualifying of candidates on grounds of corrupt practices, where they have been found guilty. The ECZ should be empowered to disqualify those candidates whose agents or supporters are found guilty of contravening the electoral regulations.

Added to the above, the study supports FODEP that the, Electoral Code of Conduct regulations be embodied within the Electoral Act and be enforced by the police and ACC with the Electoral commission playing a facilitative role.¹⁰⁴ Hence, the Electoral (conduct) regulations and Anti-Corruption Commission Act be amended in order to empower the ACC to be responsible for the enforcement of the law on corrupt practices in respect of elections. Related to this, the provisions of the Anti- Corruption Act, No 42 of 1996 should be used to detect and punish persons who illegally acquire funds for election campaigns.¹⁰⁵

It is recommended further that, there be enforcement of the prohibition of the use of government resources by ministers and others for campaign purposes. Therefore parties, candidates, agents and supporters are prohibited from handing out gifts during campaigns to the electorate and other charitable or philanthropic organization or institutions. No

¹⁰² Ibid.

¹⁰³ Ibid.

¹⁰⁴ FODEP submission to the ERTC, accessed from www.fodep.com.zm

¹⁰⁵ www.ertc.gov.zm

disciplinary or punitive action shall be meted out on a police officer or any other security officer, for professionally enforcing the Electoral Code of Conduct (ECC).

In countries where the criminal justice system is inadequate, a body, such as an electoral court, can be empowered to enforce election law violations. It is therefore recommended that as part of the electoral reforms an electoral court be established and we could have the benefit of expeditious disposal of electoral disputes.

4.4. INSTITUTIONAL REFORMS:

The Electoral Commission of Zambia (ECZ).

The status, powers and mandate of the Electoral Commission are provided for under Article 76 of the Constitution of Zambia Act, 1991. However, in order to enhance its work several reforms are necessary to its composition and the way it manages and conducts elections. In the light of this it is suggested and submitted that the Electoral Commission must be given adequate powers particularly to deal with disputes arising before or during elections. At the moment these have to be referred to the High Court after the elections. Under the Electoral law, all electoral complaints and petitions must be referred to the High Court. This is quite unsatisfactory, as it often takes too long for the cases to be resolved by the courts, not to mention the expenses. The courts, in addition are mandated with enormous cases as against a severe shortage of judges. The Electoral Commission can take the pressure off the courts if it is empowered to hear and determine election complaints, including those of electoral malpractices arising before and during polling.¹⁰⁶

¹⁰⁶ Ibid.

There should be specific provisions in the law to empower the Electoral Commission of Zambia to enforce the code; although the problem here could be that there may be a complaint against the independence and impartiality of the Electoral Commission of Zambia. Other jurisdictions have this arrangement into place; for example, in Mexico, the Federal Electoral Institute and the Federal Electoral Tribunal have the mandate to oversee the enforcement of election legislation, as well as the application of sanctions in cases of administrative faults.¹⁰⁷ In the case of South Africa, the Chief Electoral Officer may institute civil proceedings before a court, including the electoral court, to enforce provision of the South African electoral law.¹⁰⁸ Given the challenges our electoral system faces in the enforcement of electoral laws, it is recommended that Zambia considers adopting a similar system such as exists in the examples above.

Alternatively, the Electoral Commission should merely be charged with a facilitative role while leaving the issue of enforcement of the code to the already established enforcement agencies that is the Anti- Corruption Commission, the Zambia Police and the Drug Enforcement Commission. The ECZ should be mandated to ensure the effective administration and enforcement of the Electoral (conduct) regulations by those traditional agencies referred to above.

4.5 CONCLUSION

Finally it must be retaliated, that the electoral process in the 1996 and 2001 elections had major flaws and failed to facilitate a conducive environment for the holding of free and fair

¹⁰⁷ www.eurobid.com

¹⁰⁸ Ibid.

elections. The current legal and institutional framework has not been effective in ensuring free and fair elections, and a corruption free electoral process.

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