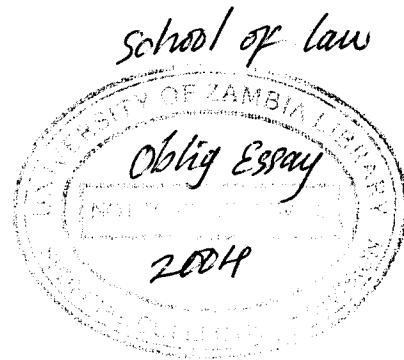


“A CRITICAL ANALYSIS OF THE MANAGEMENT AND CONDUCT OF BY-ELECTIONS IN THE THIRD REPUBLIC (ZAMBIA)”



BY

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An Obligatory Essay submitted to the University of Zambia, Law Faculty, in partial fulfilment of the requirements of the Degree of Bachelor of Laws (LLB).

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**A CRITICAL ANALYSIS OF THE MANAGEMENT AND
CONDUCT OF BY-ELECTIONS IN THE THIRD REPUBLIC
(ZAMBIA)**

BY

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**BEING A PAPER SUBMITTED IN PARTIAL FULFILMENT OF THE
DEGREE OF BACHELOR OF LAWS OF THE UNIVERSITY OF ZAMBIA**

UNZA- SCHOOL OF LAW.

DECEMBER 2004.

DECLARATION

I, Siloka Sililo, Computer No 99543664 do declare that I am the author of this Essay entitled: "A Critical Analysis of the Management and Conduct of By-elections in the Third Republic (Zambia)." I further solemnly declare that this work represents my own ideas and is not a production of any other work produced or submitted by any other person to the University of Zambia or to any other institution. Due acknowledgement has been given where other scholarly work has been cited.

Student's Name:

Signature:.....

Date:

DEDICATION

May the fruits of my mind be to the glory of the almighty God, my Creator.

To my father and mother who brought me on earth, I love you so much. Your counsel, love and material support has come to fruition. I cannot repay you for what you have done.

To my brothers and sisters, both living and dead, I thank you for helping me in my dreams and ambitions.

To Fridah, Masiliso, Sepo and Liseli, I did this for you. Your patience, unfettered love and affection is all I needed to come this far. Please continue to be good.

PREFACE

This Obligatory Essay is composed of five chapters. Chapter One discusses the Importance and Constitutional basis of By-elections.

Chapter Two discusses the Management of By-elections. In discussing this, the chapter will look at the legal framework regulating the conduct of By elections and the extent to which the legal framework has been respected during By-elections.

Chapter Three will discuss the free and fairness of By-elections. In doing so, the chapter will bring out the major electoral malpractices.

Chapter Four will analyse the Impact of By-elections on Democracy. The Chapter will look at the Impact By elections have had on parliament and how these By elections have affected political parties.

Chapter Five covers for recommendations on how to improve the Management of By-elections in Zambia.

The justification for the study is that it will greatly assist political parties, the Electoral Commission of Zambia, non-governmental organisations concerned with elections. The Essay identifies most of the contentious issues and gives recommendations on how such issues may be settled. The work is not exhaustive there is still plenty of space for more research.

SILOKA SILILO
SCHOOL OF LAW
DECEMBER 2004

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All the shortcomings, errors and mistakes are mine alone to bear.

TABLE OF CONTENTS

	Page No.
Dedication	V
Preface.....	Vi
Acknowledgement.....	Vii
Introduction	1
 CHAPTER ONE	
Introduction	4
Definition	4
Importance	5
Constitutional basis of By-elections	8
Conclusion	8
 CHAPTER TWO	
Introduction	10
The legal framework	10
Extent to which the Electoral Code of Conduct is followed during By-elections	10
Lacunae	15
Areas of Conflicts in the Electoral System.....	18
Conflict Management in the electoral process.....	22
Conclusion	24
 CHAPTER THREE	
Introduction	25
Free and Fairness of By-elections.....	25
Electoral Mal practices	32
Conclusion	37

CHAPTER FOUR

Introduction 38
Parliament under One Party State..... 38
Parliament under the Reign of Chiluba..... 41
Parliament under Mwanawasa 44
Effect of By-elections on political parties 48
Conclusion 49

CHAPTER FIVE

Conclusion and Recommendation 50
Summary 51

INTRODUCTION

Elections in general give life to the democratic process in any given country. Elections are a source from where political leaders get the necessary legitimacy to be in a position to make decisions on behalf of the people they represent. Zambia being a democratic nation embraces elections as a way through which the electorate are able to determine how their country will be managed.

From Independence, Zambia was a multi-party democracy until 1972, when the country changed to one party democracy. From 1972 to 1991, Zambia was a one party state. During the one party state, the electoral process was tailored to suit the ideals of one party state. The conduct of elections and the Electoral process left much to be desired in the sense that candidates were not allowed to campaign freely. Candidates had to make campaign speeches only at meetings organised by party officials. No individual campaigns were allowed. Candidates were not even allowed to campaign through the press.¹

However, the situation unfolded in a different direction in 1991 when Zambia yet again, reverted to Multi-party democracy. The onset of Multi-partism in the Third Republic brought intense competition between political parties. This competition is more evidenced in By-elections. Indeed, By-elections have been a source of intense competition between the various political parties. The party in power has

¹ A. W. Chanda, Zambia: A Case study in Human Rights in Commonwealth Africa (A Thesis submitted to the Yale Faculty in conformity with the requirements for JSD degree (New Haven, 1992) p, 452.

used By-elections as a means of consolidating its position in power, while opposition political parties, have viewed them as a chance for them to expand their sphere of influence in parliament. This intense competition has resulted in political parties trying to outwit one another in the game of politics. The opposition political parties have bitterly complained that By-elections have not been free and fair. A fortiori, opposition political parties have also contended that By-elections have been a systematic means of getting rid of them from the political arena. The party in power, on the other hand, has vehemently supported them as one way of enhancing democracy.

This essay contends that most of the By-elections that have been held in the Third Republic have not been necessary and have to a large extent negatively affected the growth of democracy in Zambia. This contention arises from various reasons, which, inter alia, include, firstly, that the By-elections have not been free and fair. Secondly, By-elections have made parliament lose its vibrancy. Thirdly, By-elections have drained a lot of resources, which could have been channelled to other needy areas.

The purpose of this essay is therefore to critically examine the Management or Conduct of By-elections in the Third Republic and by so doing, hopes to demonstrate that most of the By-elections have not been necessary because they were induced by the party in power so that its' numbers in parliament could

increase. Furthermore, the essay will endeavour to demonstrate that By-elections have weakened democracy.

The essay is divided into five chapters. Chapter one discusses the importance and constitutional basis of By-elections. The second chapter analyses the rules regulating By-elections. To do this, the chapter will examine the extent to which the electoral code of conduct is followed during By-elections. The chapter will also identify the lacunae that exist in the electoral system. Chapter three will look at the Management of By-elections, paying particular attention to various forms of mal-practice that occur during By- elections. The fourth chapter will examine the impact of By-elections on parliament and on political parties. The fifth and last chapter will consist of a conclusion and recommendations.

CHAPTER ONE

IMPORTANCE AND CONSTITUTIONAL BASIS OF BY-ELECTIONS

INTRODUCTION

By-elections, like elections in general, serve a very important purpose in any democracy. It is elections that help to give new life to the whole political scenario. Without elections, political leaders would not be accountable to the people who elected them into power. This chapter, therefore, looks at the importance of By-elections in a democratic country like Zambia. In discussing this, the chapter will also look at the constitutional basis of the By-election.

DEFINITION

Before defining the term By-election, it will also be important to first of all define what an election in general is. An election is defined as a process where people choose their leaders by voting.² The voting can either be at local or National level. If it is done at National level, all the eligible voters will be allowed to vote without any discrimination.

Thus, coming to a By-election, the term can be defined as a process where -by people belonging to a particular constituency choose their local leaders to

² Stefan Mlenik (ed)., Electoral Monitoring and Electoral systems – a brief guide. (Brussels: Fedrich-Nauman-Stiftung Foundation 1994) p.3.

manage the affairs of the state on their behalf.³ A By-election involves the election of local representatives by people in a constituency. Thus it is different from a general election in the sense that it is designed to fulfil the needs of local people while the general election is intended to fulfil the needs of the whole nation.

IMPORTANCE OF BY-ELECTIONS

The rule of law springs,

... "from the rights of the individual developed through history in the old age struggle of mankind for freedom, which rights include freedom of speech, press, worship, assembly and association and the right to free elections to the end that laws enacted by the duly elected representatives of the people afford equal protection to all." ⁴

From the aforecited quotation, it is submitted that By-elections are important because they allow the electorate to elect people who are going to represent them in parliament when their original Member of Parliament dies or resigns. Indeed, By-elections help to achieve the ideals of a representative democracy to be fulfilled by allowing the electorate in a given constituency to elect their representative. By so doing, By-elections, therefore, ensure continuity in the representation of a given constituency. This is important because it keeps the political life of that constituency in motion.

³ Khabele Matlosa, Electoral System, stability and Democratic governance in Southern Africa: The Case Study of Lesotho, Southern Africa Human Rights Review 4 (1999) p, 20.

⁴ From the Act of Athens, which crystallised the deliberations of the International Congress sponsored by the first International Commission of Jurist in 1955.

By-elections are also important because they act as a litmus test on how a given political party is fairing in the game of politics of a particular country. Normally after general elections political parties go to sleep. Political promises made to the electorate prior to the elections are left to gather dust because the politicians have got what they wanted – political power. When By-elections occur, political parties are awakened from their slumber, and are reminded that power is with the electorate. It is the electorate who are masters, with the power to hire and fire any politician who is not performing to their expectations. The importance of By-elections was recently exhibited in the Kantanshi By-election where the Patriotic Front (PF) humbled the ruling Movement for Multi-Party democracy.⁵ The voters in the Kantanshi Constituency demonstrated that they are still followers of the Patriotic Front, in spite of the material support that was offered to them by the ruling party. From this By-election, political parties are therefore in a position to be able to gauge themselves in terms of popularity in a given constituency.

The electorate through By-elections are afforded a chance to make their local leaders accountable over the promises made during the presidential and parliamentary elections.⁶ During presidential and parliamentary elections, political parties and their candidates offer very attractive promises to the electorate. However, soon after the elections, the parties and their newly elected

⁵ FODEP: Election Monitoring Report for Lukulu East, Kaoma Central and solwezi Central constituencies held on September 18th 2003.

⁶ Carlson Anyangwe, "Parliamentary Democracy and Constitutional Democracy," *Zambia Law Journal*, vol. 31 (1999) p, 95.

members of parliament, become overwhelmed in their newly earned success so much so that they became oblivious of their promises made to their constituencies. Thus, when By-elections occur, political parties are awakened from their mid-night sleep to face reality. The electorate through the power in their vote are afforded a chance to vote out a political party that has abandoned them. A good example of an instance where the electorate used their power to vote out a candidate was demonstrated in the Kabwata By-elections, where the constituents voted out the Movement for Multi-party Democracy and voted in a candidate for the Forum for Democracy and Development.

Democracy is underpinned on the concept of the popular basis of government. The idea that government rests upon the consent of the governed, given by means of elections in which the Franchise is universal for both men and women is very important in any democratic state.⁷ This proposition is amplified by Article 21 (ii) of the Universal Declaration of Human Rights of 1948, which states:

“the will of the people shall be the basis of authority of government. This shall be expressed in periodic and genuine elections which shall be held by secret vote or by equivalent free voting procedure.”

From the fore-going, it is submitted that By-elections are important because they allow the electorate choose the representative of their choice, while at the same time stamping the authority of the newly elected with legitimacy. By-elections

⁷ A. W. Chanda, Supra 1 note 1.

therefore give legitimacy to leaders to make decisions on behalf of their constituencies.

CONSTITUTIONAL BASIS OF BY-ELECTIONS

The constitutional basis of By-elections is Article 67(1) of the Constitution of Zambia, which states:

“When a vacancy occurs in the seat of a member of the National Assembly as a result of death or resignation of the Member of Parliament or by virtue of Article 71, a By-election shall be held within ninety days after the occurrence of the vacancy.”

Furthermore, a By-election will be held when a Member of Parliament who was elected as an Independent later on joins a politically party. The question whether a Member of Parliament who was elected on a ticket of a particular political party should retain his seat in parliament when he resigns to become an Independent was discussed in the case of **Fabian Kasonde and Others V Attorney General**,⁸ where the Supreme Court stated that a Member of Parliament who was an elected Member of Parliament on a political party's ticket will lose his seat if he resigns from his party to become an Independent. The case of **Fabian Kasonde** upholds Article 71 (1) (c) of the constitution which states that a member of the National Assembly shall vacate his seat in the National Assembly in the case of an elected member, if he becomes a member of a political party of which he was authorised candidate when he was elected to the National Assembly or, if having been an independent candidate, he joins a political party or having been a member of a political party he becomes an independent. The

⁸ SCZ Judgment no. 36, 1994.

holding in Fabian Kasonde's case was distinguished from the case of **Joshua Lumina and Bennie Mwiinga V the Attorney General**⁹. In that case, two Members of Parliament resigned their seats and became Independent. The Supreme Court allowed them to continue to sit in the National Assembly as Independents for the remaining period. The reasoning of the Supreme Court was based on the fact that since UNIP was the only political Party then, the members of parliament should remain in parliament because they did not join any political party.

CONCLUSION

This chapter discussed the Importance of By-elections and the Constitutional basis By-elections. By-elections are important because they act as a litmus test on how a given political party is fairing in the game of politics. The next chapter looks at the legal framework regulating By-elections and the extent to which the Electoral Code of Conduct is followed during By-elections.

⁹ (1990-1992) ZR, p. 47.

CHAPTER TWO

ANALYSIS OF THE LEGAL FRAMEWORK REGULATING BY-ELECTIONS

INTRODUCTION

This chapter looks at the legal framework within which By-elections are conducted. Additionally, the chapter will examine the extent to which the legal framework and the electoral code of conduct has been followed during By-elections. Furthermore, the chapter will identify lacunae and problem areas that exist in the whole electoral system. Finally, the chapter will look at conflict management in the electoral process.

THE LEGAL FRAME WORK

The competitive nature of Elections demand that there must be rules regulating Elections. The Electoral Act¹⁰ and the Regulations made there under are the major 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, provides for the registration of voters and for the manner of conducting elections. The Act also makes provision for offences and penalties in connection with elections, and for election petitions with respect to parliamentary and presidential elections and the hearing and

¹⁰ Chapter 13 of the Laws of Zambia.

determination of applications relating to parliamentary and presidential elections.¹¹

Another piece of legislation that regulates By-elections is the Electoral Code of Conduct, which was passed through Statutory Instrument No. 179 of 1996. The principal aim of the Code was to see that campaigns were free and fair during elections. Elections must be free and fair because this is the source from where rulers derive the legitimacy to make decisions on behalf of the electorate.¹²

This Code was promulgated against a background where past elections were not conducted equitably.¹³ With the Electoral Code of Conduct in place, it was hoped to level the playing field by putting limitations on government participation in the electoral process which, if not checked, would impede the exercise of the fundamental human rights of choice, participation and representation.¹⁴ The Code was intended to diffuse the consequence that mainly arises as a result of conflicting political and economic interests of stakeholders. The Code is, therefore, meant to embody the legal framework for the conduct of elections in Zambia, of which we can only expect or invite aspects of violence, intimidation and various electoral offences or abuses if it is not in existence.¹⁵

¹¹ Preamble of the Electoral Act- Chapter 13 of the Laws of Zambia.

¹² Article 21 (1) of UDHR, 1948.

¹³ D. Kalele, Role of the Electoral Code of Conduct, 13th October 2001.

¹⁴ N Mwananjiti, The Role of the Electoral Code of Conduct in the Electoral process 26th July 2002.

¹⁵ B. Tembo, The Role of Monitoring in the Electoral process, 26th July 2002.

EXTENT TO WHICH THE ELECTORAL CODE OF CONDUCT IS FOLLOWED DURING BY-ELECTIONS

Zambia has an elaborate Code of Conduct which if followed would result in free and fair elections. In spite of such an elaborate Code, there have been divergent views concerning the extent to which it is being respected and followed during elections. The ruling party has claimed that the Code has been followed, while opposition parties and non-governmental organisations have argued that there are some flaws in the electoral process. For example, the Electoral Code prohibits a person from using violence, intimidation or coercion during election campaigns, public debates or election.¹⁶ Further, Subsection 7(1) (a) of the same Electoral Code states that a person shall not cause violence or use any language or do any kind of action that may lead to violence or intimidation during election campaigns or elections. Although the Code prohibits the above, violence is indeed a permanent feature in most By-elections conducted in the Third Republic as was evidenced in the Lukulu East, Kantanshi, Kaoma and Solwezi Central By-elections. Foundation for Democratic Process (FODEP) observed that political parties, both ruling (MMD) and the opposition, were involved in the practice of importing cadres to campaign in the respective constituencies and that this was the prime cause of violence. It was against this background that Catholic Bishops expressed worry at the alarming growth and

¹⁶ Section 6 of the Electoral Code of Conduct, Statutory Instrument No179 of 1999.

persistence of political violence as was reported in Mkushi and Chawama By-elections.¹⁷

The Electoral Code of Conduct also states that,

*“a person shall not make false, defamatory or inflammatory allegations concerning any person or party in connection with an election, but shall confine criticism and comments to policies and programmes of the parties”*¹⁸

Although this regulation is very clear, incidents of abusive language, for example, were very much prevalent in all the four parliamentary By-elections (i.e. Lukulu East, Kantanshi, Kaoma Central and Solwezi Central Constituencies) where both the ruling party and the opposition used abusive and defamatory language during the campaigns at the expense of dealing with issues of development which is indirect violation of section 7 (1) (c) of the Electoral (Conduct) Regulations of 1996.¹⁹

Bribery has been very rife in all the By-elections so far conducted. Although in varying degrees, almost all the contesting political parties were involved in some aspects of bribery or enticement of the electorate through giving out money and material goods to people and institutions within the precincts of the constituencies where By-elections were taking place. This was in anticipation of support for their candidates on polling day. In Kantanshi constituency, the

¹⁷ FODEP: Election Monitoring Report for Lukulu East, Kaoma Central and solwezi Central constituencies held on September 18th 2003.

¹⁸ Section 7(1) (C) of the Electoral conduct Regulations, Statutory instrument no 179 of 1996.

¹⁹ Ibid.

parties which were highly involved in inappropriate enticement of electorates by giving out cash and material goods included the ruling Movement for Multi-Party Democracy(MMD), the Zambia Republican Party (ZRP) and to some considerable extent, Patriotic Front (PF) and, the United Party for National Development, (UPND).²⁰ Due to its incumbency advantage and unmatched access to resources, the MMD surpassed the opposition in dishing out resources. It is, however, not possible to exactly say how much cash each party dished out, but it is easier to infer from how much the ruling party was offering to people in exchange for a voter's card. In Kantanshi, the ruling MMD bought voter's cards at K50, 000 each while in Solwezi Central the voter's cards were bought for between K30, 000 and K40, 000 each²¹. In the recent Kantanshi By-election, FODEP noted that it was almost inconceivable that one could contest an election without money or giving out material goods to the voters. In the same By-elections, incidents of vote buying and appeasement of voters with beer was observed²². All these activities are in direct violation of the Electoral Code, Subsection 7 (e) which states that

“A person shall not offer any inducement or reward to any person in consideration of that person voting or not voting for a certain candidate, joining a party, accepting, refusing or not joining a party, accepting, refusing or withdrawing such person's nomination as a candidate”.

²⁰ FODEP, Election report for Lukulu East, Kantanshi, Kaoma & Solwezi Central constituencies, held on 18th September 2003.

²¹ Ibid.

²² Ibid.

Under the Electoral Code of Conduct, only the President and the Vice President are allowed to use government transport for political campaign purposes.²³ However, during parliamentary By-elections, as has always been the case, all Ministers and senior party and government officials involved in the election campaigns were seen using government vehicles. In some cases, even vehicles for parastatal companies such as ZESCO and ZAMTEL were seen being used for campaigning for the ruling MMD. For instance, in Solwezi, government vehicles were seen ferrying MMD cadres to campaign rallies and from one place to another. These included a white truck registration number GRZ 576-BR belonging to the Ministry of Education.²⁴ In the Kabwata By-elections, the ruling MMD used huge sums of money and other resources of government and other public companies to improve the infrastructure in Kabwata and surrounding areas, with the hope of winning the seat after it fell vacant upon resignation of the area Member of Parliament Brigadier General Godfrey Miyanda. However, after the electorate chose to vote for an opposition candidate Richard Kachingwe of the Forum for Democracy and Development (FDD), the government withdrew equipment and resources from projects it was working on thereby abandoning the unfinished roads and other projects.²⁵

²³ Section 7 (1) (1).

²⁴ FOPEP: By- election Report for Lukulu East, Kantanshi, Kaoma and Solwezi Central, held on 18th September 2003.

²⁵ Zulu., M. A critical Examination of the Electoral (conduct) Regulations, otherwise called the Electoral Code of conduct in Zambia, (obligatory Essay), Unza, 2003.

From the above incidences, it is very clear that Section 7 (1) of the Electoral Code is being violated with impunity, which only goes to show that the law is in no way being respected. Section 7 (1) has been grossly abused and in most cases this has contributed to the unlevelling of the playing field for the candidates contesting an election.

LACUNAE

It has been argued that the electoral law has serious lacunae, which hamper the performance of the law to the satisfaction of all the concerned parties. The first lacuna identified is that bordering on financial regulations. The Electoral Act is silent on such matters and on any possibility of improper donations when not directed at individual benefits. In the presidential petition case, the Supreme Court stated that

“At the moment public philanthropic activity are 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.”²⁶

This was demonstrated more during the rein of Dr Chiluba as regards the controversial presidential slush fund. The slush fund grossly undermined any possibility of having a level political playing field during the election campaigns. The former president donated huge sums of money to selected organisations and institutions, which were believed to be loyal to him and to the MMD. The

²⁶ SCZ Judgment NO. 14 of 1998, p51.

former president also used the sale of government houses as political bait. Dr Chiluba went as far as getting involved in assessing the cost of government and mine houses as well as issuing title deeds during elections.²⁷

The story is not different in President Mwanawasa's government as was exemplified in the By-elections conducted in Lukulu East, Kantanshi, Kaoma Central and Solwezi Central. The MMD, in Kantanshi for example donated K5 Million to United Church of Zambia through the provincial Deputy Minister, while the Vice President pledged donations of incubators and erection of wall fence at Clinic 1 (one)²⁸ In Solwezi, government promised to electrify five schools and poles were even brought prior to the elections. Roads were also graded ahead of the By-elections in the respective constituencies. The MMD government even hijacked a project by the Catholic Church for electrifying St Francis Mission at a cost of K287 Million.²⁹ This was aimed at stealing the credit and even undertook to refund the Catholic so that government could claim the project.²⁸ As demonstrated above, the lacuna has weakened the electoral system in the sense that it is difficult to know whether the donation is made genuinely or it is just an attempt to influence the voters.³⁰

²⁷ FODEP, Zambia's 2001 tripartite elections, p9.

²⁸ FODEP, By-election, Report for Lukulu, Kantanshi, Kaoma and Solwezi, held on 18th September 2003 p5.

²⁹ Ibid P18.

³⁰ Ibid p18.

The second lacuna centres on Regulation 12 of the Code which states that any person who contravenes any of the regulations mentioned in the Code shall be guilty of an offence and shall be liable upon conviction to a fine not exceeding three hundred thousand Kwacha or to imprisonment for a term not exceeding three months or to both. This regulation when analysed closely reveals that there is a lacuna in terms of enforcement. The enforcement mechanism of the Code has been widely criticised for lack of efficiency and clarity.³¹ For instance, it has been argued by stakeholders that the Code does not specify which government agency should enforce it, whether it is the Zambia Police or the Anti-corruption Commission. However, it can reasonably be inferred that the enforcement of the Code rests on the Zambia Police Service as they have the duty to prosecute any person accused of committing a crime in the country. This lacuna was clearly exemplified in the Kabwata By-election. In that By-election, Major Kachingwe caught some MMD cadres red handed buying off cards from the opposition members. However, despite such overwhelming evidence and the effort of taking them to the Electoral Commission with the hope that the law was going to be enforced, nothing happened, apart from the complainant receiving a heavy rebuke from the chairman of the Commission, Judge Bobby Bwalya, who denied responsibility of prosecuting electoral offenders.³² The cadres were let free and the practice has continued to date. Clearly, this shows that there is no will by all law enforcement agents involved in dealing with such cases of the Code. This problem has been brought about by the non explicitness of the Code

³¹ D. Kalale, paper presentation at the Konard Adenauer Foundation of Germany Workshop on the Electoral Reform conference, 26th July 2002.

³² Zulu, M Supra note25.

which does not specify who is responsible for its enforcement. This lack of enforcement mechanism of the code has been taken advantage of by all the political players to flout the Electoral laws with impunity.

Another lacuna surrounds Regulation 67. In the presidential petition, the Supreme Court ruled that not everyone is an agent of the candidate since under Regulation 67, an Agent has to be specifically appointed. Therefore, according to the Supreme Court ruling, party leaders are only accountable for acts of the Agents legally appointed, and not for members of the party acting in their individual capacities. This is a lacunae in the sense that candidates may not directly appoint Agents, but cadres are by conduct Agents of the party, as such they will do anything to corrupt voters, yet escape punishment because they are construed not to be Agents of the candidate. Agency should have been extended not only to candidates but to political parties as well.

AREAS OF CONFLICT IN THE ELECTORAL SYSTEM

Analysing the whole electoral process, it becomes very crystal clear that there are many areas where the political players seem not to be in agreement. These areas include the following.

One of the most contentious issues is the registration of voters. The Electoral Act, (Amendment) No 17 of 2001 was enacted to give authority to the Electoral Commission to continuously register voters. However, in actual fact, there is no

continuous voter registration on the ground.³³ This is because the department of *National Registration and the Electoral Commission* are under-funded to take up this responsibility. Thus when a By-election occurs the two organizations are strained in terms of time and resources. As a result of this, the issuance of Voter's Cards and National Registration Cards is done on party lines, with the ruling party having undue advantage over the opposition political parties. Indeed, Opposition parties have submitted that the issuance of voter's cards is done on party lines as was demonstrated in Msanzala and Kembe by-elections.³⁴ In retaliation, the UPND confiscated a set of equipment and materials used to produce NRC and voter's cards. In Solwezi Constituency, FODEP with dismay, received complaints that bus loads of ruling party cadres imported from the Copperbelt and other districts were ferried to camp in Solwezi East Constituency. It was such party cadres who were being issued with new NRC cards and voter's cards, which the ruling party was buying from the electorate to enable them vote.³⁵ Connected to this, there was also a practice of collecting particulars of Registered Voters in constituencies. Lists were then compiled of all voters who were not present in the constituency- whether they had shifted, were away and unlikely to vote or had died. It is believed that on the basis of this information, "ghost voters" would then be able to obtain NRCs and participate in the election.³⁵ This is absurd in a democratic state because it distorts the electoral

³³ FODEP, *Zambia's Tripartite Elections*, p9.

³⁴ FODEP, *Report on Kembe By- election*.

³⁵ FODEP; *Election Monitoring Report for Lukulu East, Kantanshi, Kaoma Central and Solwezi Constituencies held on September 18th, 2003* p. 5.

³⁵ *Ibid* .

ideals in the sense that the ruling party has undue advantage over the opposition parties.

The second area of conflict surrounds the candidates fielded in the By-election. The fielding of candidates who originally belonged to the opposition has generated a lot of conflict between political parties. This usually arises when a particular candidate has been expelled from a political party that originally sent him to parliament. Conflicts arise because opposition parties feel robbed of their candidate who is fielded by another political party as was demonstrated in the Mwandi By-election. At the moment, By-elections have generated a lot of tension because opposition parties feel that By-elections being held are not genuine, but are only induced by the ruling party as a systematic means of eradicating opposition parties from the political scenario.

The third area of conflict stems from the use of government resources. The Electoral Code of Conduct prohibits the use of government resources for political purposes. The Code states that

*"no one shall use government transport or facility for campaign purposes or to carry voters to polling stations: provided that this paragraph shall not apply to the president and the Vice President; or any way discriminate against any person on grounds of race, sex, ethnicity, class, gender or religion in connection with the election of political activity where any form of government transport or property is available for hire, it shall be made accessible to all political parties at a fee on a first come first serve basis."*³⁶

³⁶ Section 7 (1) of statutory instrument No 179 of 1996.

This provision was aimed at levelling the political field in a multi-party democracy by separating the activities and resources of a ruling party from state resources. However, the party in power has continued to use government resources during elections in breach of the Electoral Code of Conduct. The government seems to be more fused with the ruling party after the creation of the office of the district administrators, who in spite of their terms of reference as civil servants, operated as political functionaries of the ruling party. The National Treasury was funding the office of the District Administrator. This is against the Zambian laws that do not allow funding of political parties by the government. It was clear, therefore, that the office of the District Administrator was being used as a conduit for siphoning public resources into political party activities of the ruling MMD.³⁷ This provided an unfair campaign environment as the ruling MMD had undue advantage of accessing and using state resources for political purposes.

CONFLICT MANAGEMENT IN THE ELECTORAL PROCESS

The Management of conflicts in the electoral system is very important in any democracy. In Zambia, the Electoral Commission is the body that is bestowed with the responsibility and power to conduct elections. This body however, lacks power to deal with dispute arising before or during elections. The law requires that electoral violations should be reported to a proper authority, but does not specify who this authority is³⁸.

³⁷ FODEP, Zambia's Tripartite Elections, p 26.

³⁸ Mwananjiti. N., The role of the electoral Code of conduct in the electoral process, 2002.

That aside, Section 18 of the Electoral Act makes provision for election petitions in respect of parliamentary elections. A petition complaining of an unlawful election of a candidate by reason of any corrupt or illegal practice or irregularity may be presented to the High Court by a candidate or registered voter or the Attorney General. A successful petitioner would be entitled to a declaration that the election was void or a declaration that a particular candidate was duly elected. Election petitions for parliamentary elections are provided for under Regulations 18 and 19 of the Electoral Act. The grounds of petitioning range from illegal and corrupt practices to lack of compliance with the electoral laws and rules in the conduct of elections.

In spite of the above mechanism being put in place, it is sadly being submitted that the mechanism of Conflict Management in connection with the conduct of By-elections and elections in general is poor.

The electoral system does not provide for means and ways of solving disputes before elections. There is no provision for dialogue between the parties concerned in terms of how these elections will be managed. Furthermore, the available method of solving conflicts is painfully slow. Under the current electoral law, all complaints and petitions must be referred to the High court. It is acknowledged that courts play a vital role in settling disputes between contending parties, but it must also be admitted that courts sometimes are not suitable for solving certain minor issues, and in any case, parties cannot always

ran to court for minor issues which can easily be sorted out between the parties themselves. The Supreme Court in the Presidential petition case acknowledged and stated that

“delays in rendering judgement is regretted but was occasioned in part by the length and complexity of the case and by the heavy schedule of other cases which the members of the court had to contend with.”³⁹

The ruling of the Supreme Court affirms that the current mode of settling disputes is slow, and therefore, justice delayed is justice denied. This lack of conflict management has undermined public confidence in the whole electoral process, and as such conflicts in the electoral process will always exist in the elections to be conducted.

CONCLUSION

In the preceding discussion, the essay has shown that Zambia has a legal framework that regulates Elections. Furthermore, the essay has also shown that the legal framework has a number of loopholes and lacks conflict management. The next chapter looks at the management of By-elections in the Third Republic.

³⁹ Presidential Petition case, SCZ No. 14 of 1998 at p 51.

CHAPTER THREE

MANAGEMENT OF BY-ELECTIONS

INTRODUCTION

This chapter identifies international standards that are supposed to be met for any election to be declared free and fair. After this has been done, the chapter will then analyse By-elections that have taken place so far in the light of these established international standards so as to find out whether they have been free and fair.

FREE AND FAIRNESS OF BY-ELECTIONS

Free and fair elections means that voters have the freedom to participate in the election the way they want, that is, without fearing adverse effects on their own or their families safety, welfare or general dignity and without coercion and restrictions.⁴⁰ "Fair" concerns securing equal opportunities for the exercising of political freedom.⁴¹ Thus, 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.⁴²

⁴⁰ International Institute for Democracy & Electoral Assistance. Report of the Democracy Forum, Stockholm idea, 1996, p2.

⁴¹ Anyangwe. , "Elections and Electoral code of conduct, Legality Journal", 1998, p7.

⁴² Chanda Alfred, "The Role of the Media in Promoting Democracy and Human Rights", Southern Africa Human Rights Review 4(1997), p.3-5.

Recognising the importance of any election, Article 21 of the Universal Declaration of Human Rights, 1948 states and guarantees,

“the right of all persons to take part in government directly or through freely chosen representatives as well as in periodic and genuine elections which shall be held by secret ballot or by equivalent voting procedure”

The International Covenant on Civil and Political Rights to which Zambia is a party, also extends to every citizen the right to:

- (a) *“take part in the conduct of public affairs, directly or with freely chosen representatives.*
- (b) *“to vote and to be elected at genuine periodic elections, which shall be by Universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electorate.”⁴³ Similarly, the African Charter on Human and Peoples Rights states that every citizen shall have the right to freely participate in the government of his/her country, either directly or through freely chosen representatives in accordance with the provisions of the law.⁴⁴*

Realising the importance elections occupy in a democracy, the international community agreed on minimum standards that have to be fulfilled in order for any election to be declared free and fair. Theversman provides seven internationally

⁴³ Article 25.

⁴⁴ Article 13.

recognised principles, which must be complied with as regards what constitutes free and fair elections.⁴⁵ These are:

- (a) *No unreasonable restriction imposed on parties or voters;*
- (b) *Participants respect for the right of free expression, free association and Assembly for a period adequate enough to allow political organisations and campaigning and to inform citizens about candidates and issues;*
- (c) *The adequate guarantees of a secret vote and freedom from intimidation;*
- (d) *The integrity of the balloting and counting process is secured;*
- (e) *Non-discrimination in the treatment of political contestants, voter eligibility and other political rights;*
- (f) *Due process including legislative regulatory hearing, appeals that protect against arbitrary or biased ruling and effective remedies for abridgement of protected rights;*
- (g) *Good faith efforts to ensure the integrity and credibility of the electoral process.*

It is argued in this essay that not all of the above points have been fulfilled, and as such, it is being vehemently argued that most of the By-elections have not been free and fair because of the failure of the electoral process to uphold all the

⁴⁵ Theversman, Election monitoring and election assistance in peace building. A paper presented at a seminar on elections monitoring and assistance, Vienna 16-18 September, 1992 p6-8.

seven principles. For example, the electoral system has failed to uphold the principle that requires,

"that no unreasonable restrictions shall be imposed on parties or voters."⁴⁶

In a democracy, unhindered election campaigns are indispensable. There are certain fundamental rights and freedoms that must be protected and promised during elections campaigns, if the outcome of elections is to be accepted as an expression of the free will of the electorate. Prominent among these, are freedoms of Association, Assembly, expression and, press freedom and other civil and political rights of political contestants.⁴⁷ The Zambian Constitution guarantees the freedom of association and assembly under Article 21 while the freedom of expression and press are protected under Article 20.

For the purpose of elections, there must be a conducive atmosphere for free and fair elections and a climate of democratic tolerance in which political activity may take place without fear of coercion, intimidation or reprisals.⁴⁸ The Electoral Code further stipulates rights of all political contestants and their conduct in relation to each other's rights and freedom during elections Campaigns. The Electoral (conduct) Regulations, 1996 in particular states " A person shall not impede, the democratic right of any party, through its candidates and representatives, to have reasonable access to voters for the purpose of

⁴⁶ Ibid, p 6-8.

⁴⁷ FODEP, Zambia's 2001 Tripartite elections Report p 19.

⁴⁸ Section 3 of the Electoral (conduct) Regulation 1996.

conducting voter education, fund raising, canvassing membership and soliciting support.⁴⁹

As already stated, the electoral process has failed to uphold the principle of removing unreasonable restrictions on political players. This failure is demonstrated by the disruption of political meetings of opposition parties by cadres from the ruling party. This mainly arises as a result of cadres who are hired from other districts to come and intimidate the electorate in a constituency where a By-election is being held. The Kantanshi, Lukulu West and Solwezi By-elections experienced a lot such violence as a result of the importation of cadres⁵⁰.

Dr Chanda, in his paper, "A critique of the electoral process in Zambia," stated

"It is crucial that political parties and candidates have freedom to hold meetings and rallies during election period. The current Public Order Act, which requires organisers of public meetings to give the police at least seven (7) days notice before the event is a serious hindrance to political activity. This law is unrealistic and is often abused by authorities."⁵¹

⁴⁹ Subsection 7 (c).

⁵⁰ FODEP; Election Monitoring Report for Lukulu East, Kantanshi, Kaoma Central and Solwezi Constituencies held on September 18th, 2003 p. 5.

⁵¹ Paper presented to a National Workshop on the Role of Civil Society in the promotion of democracy in Zambia at Mulungushi Conference Centre from 25th to 28th March 1999, p 82.

The Supreme Court in the case of **Christine Mulundika**⁵² also acknowledged that the Public Order Act hindered political activities when it stated that,

“Section 5(4) went too far in giving unlimited power to regulating officers, reducing the fundamental freedoms to be a mere licence to be granted or denied on the subjective determination of a regulating officer.”

Thus, the use of the Public Order Act by the party in power to block dissenting views is in direct conflict with the principle of a democratic society, which thrives on different ideas competing in the same market place without any restrictions.

It is further being argued that free and fair elections can only be obtainable if the civil servants with the mandate to implement elections are free from external interference. This point seems to have eluded the Zambian electoral process, because the ruling MMD has a tendency of intimidating civil servants. The government has used some civil servants such as District Administrators and some school officials to drum up support for MMD candidates. On the other hand, they have threatened sympathisers of the opposition with reprisals, for example in Lukulu West By-election; civil servants were threatened with transfers for supporting the opposition.⁵³ The fact that the civil servants who are implementers are biased, is an indication that By-elections have not been free and fair.

⁵² Christine Mulundika and Seven Others V The People. SCZ Judgement No 25 of 1995.

⁵³ FODEP, Election monitoring report, for Lukulu East, held on 18th September, 2003.

By-elections in the Third Republic have not been free and fair because the ruling MMD has monopolised the public media. Freedom of expression is fundamental to the dissemination and exchange of information, ideas and views. This freedom becomes indispensable in an election campaign in which the electorate ought to know about the contesting political parties and candidates, their policies and positions on various national issues.⁵⁴ The media plays a critical role in informing and educating the public especially during election campaigns when the electorate must be availed timely and accurate information about policies and programmes of contesting parties and candidates. The public media in particular has a social responsibility to provide fair coverage and equal access to a cross section of society without any discrimination. The Electoral Code of Conduct provides that all media “shall provide fair and balanced reporting of election campaigns, policies, meetings, rallies and press conferences for all registered political parties during the period of campaigning and news of the electoral process up to the close of the poll.”⁵⁵

It has been observed with dismay, that the public media has been used as a campaign tool for the ruling MMD. The coverage of political parties by the Zambia National Broadcasting Co-operation (ZNBC), Times of Zambia and Daily Mail was in most cases in favour of the ruling MMD.⁵⁶

⁵⁴ FODEP, Zambia’s 2001 Tripartite Elections, p 27.

⁵⁵ Ibid.

⁵⁶ Ibid.

Indeed, unbalanced media coverage has remained a contentious issue in the electoral process. In the Kantanshi By-election, the bias of state media towards the ruling party was clearly exposed. In that By-election, the Patriotic Front candidate was not given adequate media coverage as compared to the MMD candidate. The outcome of the By-election was also not publicised for the simple reason that it was won by the opposition Member of Parliament.⁵⁷

ELECTION MAL-PRACTICES

(a) INTIMIDATION AND POLITICAL VIOLENCE

A string of intimidation and violence has run through all the By-elections conducted in the Third Republic, contrary to Section 6 and 7 of the Electoral Code of Conduct. The most common method used to instigate political violence is the use of hired cadres from one political party to attack the enemy camp. This trend was condemned by the Catholic Bishops who expressed worry at the alarming growth and persistence of political violence as was reported in Mkushi, Chama and Chawama By-elections.⁵⁸ Violent clashes were also prevalent in Kantanshi, Solwezi and kaoma.⁵⁹ The main cause of clashes was that ferried cadres from elsewhere outside their respective constituencies were allowed to obtain

⁵⁷ Ibid.

⁵⁸ www.africanline, com. Reported by Bivan Saluseki, on 24/7/2001, Downloaded on 6/10/2000.

⁵⁹ FODEP; Election Monitoring Report for Lukulu East, Kantanshi, Kaoma Central and Solwezi Constituencies held on September 15th, 2003, p. 7.

appropriate NRCs on names that were in the voter's register and be able to vote, using either a voter's card bought from some voters or voter certificate obtained on the pretext of having lost the voter's cards. The clashes were mainly between cadres of the ruling MMD and opposition Patriotic Front.⁶⁰

It is also important to mention that it was not only cadres who were involved in acts of violence and intimidation, but candidates themselves intimidated the electorate, especially in areas where they were not very popular. This was mainly done by the MMD, who clearly stated that they would not develop areas where they lost elections. A good example in this instance was the Kabwata Constituency By-election where the ruling MMD used huge sums and resources of government and other public companies like ZESCO to improve the infrastructure in Kabwata Estates and surrounding areas with the hope of winning the seat after it fell vacant upon the resignation of the area MP, Brigadier General Godfrey Miyanda. However, after the electorate chose to vote for an opposition candidate, Mr Richard Kachingwe of the Forum for Democracy and Development (FDD), the government withdrew equipment and resources from projects it was working on, thereby abandoning the unfinished roads and other projects.⁶¹

⁶⁰ Ibid.

⁶¹ Tembo.B., The role of Monitoring in the Electoral process, 25-26th July 2002 at Mulungushii conference center.

Similarly, Section 7 (i) of the Electoral Code was violated in the Mumbwa By-election where the MMD lost the seat to UPND and as a result withdrew all borehole equipment they had taken to surrounding areas before and during the campaign period.⁶² This was clearly a show of intimidation to the electorate and a caution to the other would be victims that they risked losing development for choosing the opposition. The withdrawal of equipment was meant to demonstrate how powerful the government could be against its own citizens if it was not supported.

(b) CORRUPTION

Election campaigns in Zambia are generally characterised by massive corruption, which is the act or process of being dishonest and other malpractices of various forms, most notably is vote buying, where candidates distribute money, material and agriculture inputs to the electorate in order to win their votes.⁶³ Indeed, it has been noted before that money has sadly become a determining factor in winning any By-election in Zambia today. It is almost inconceivable that one could contest an election without distributing money or giving material goods to the voters. In the Kantanshi by-elections, incidents of vote buying and appeasement of voters with beer were observed. FODEP observer team found a group of people sharing some tokens of money they had been

⁶² Section 7(1) (1).

⁶³ FODEP, Zambia 2001 Tripartite Elections.

given by the Patriotic Front officials soon after the rally, which the party had organised at Murundu a day before the polls on 25th may 2004.⁶⁴ On the polling day, FODEP monitors received complaints of the Deputy Minister of Mines, Mr Richard Kazala, giving out money to the voters. Reports of relief distribution only to MMD supporters was witnessed. The grading of the main road from Landless Corner to Chiyuni by government was viewed as part of the campaign strategy by the ruling MMD to entice voters.

The presidential directive for title deeds to be issued expeditiously to over 1,400 sitting tenants in Kabwata township in Lusaka constituted an act of vote buying and gross abuse of power by the highest office in the land. The same was reported in the recent Kantanshi by-election, where there were reports that the Ministry of Lands was directed to expedite the processing of Title deeds, which were intended for distribution to the former Miners in Kantanshi Constituency.⁶⁵

CHARACTER ASSASSINATION

“A person shall not make false, defamatory or inflammatory allegations concerning any person or party in connection with an election, but shall confine

⁶⁴ Ibid.

⁶⁵ FODEP: Election Monitoring Report for Lukulu East, Kantanshi, Kaoma Central and Solwezi Central Constituencies held on September 18th 2003, p. 76.

criticism and comments to policies and progress of the parties. ⁶⁶ Although the Electoral Code is very clear, there have been countless incidences of character assassination. In one incident, the UPND accused the MMD candidate of being one of the economic plunderers while he was serving as the Commander of Zambia Air Force. Similar incidents of abusive language were also prevalent among the Patriotic Front and MMD cadres. In most parliamentary elections all political parties were using abusive and defamatory language during the campaigns at the expense of dealing with issues of development, which was in direct violation of section 7(i) (2) of the electoral (conduct) Regulations of 1996. In **Alex Luhila Vs Batuke Imenda**,⁶⁷ the petitioner petitioned the election result after losing the election for Lukulu West constituency held on the 29th December 2001. The petitioner claimed that there was electoral malpractice, in which he alleged that the respondent held a meeting with the presiding officers and polling assistant a few days before elections and promised them k100, 000 each if they ensured that he won the election. The court warned politicians when it stated, *“Those who think they can find their way to parliament on the platform of lies and calumnies intended to defame the character of opponents: Those who think they can find their way to parliament in the platform of illegal practices of various shades; Those who think they can find their way to parliament on the platform of bribing and corruption, the message is this: The courts will not hesitate to show them the door and EJECT them from parliament.”* In spite of the above warning,

⁶⁶ Section 7(i) (2) of the Electoral conduct Regulations.

⁶⁷ High Court Judgement, (unreported) 2002.

character assassination has sadly become part and parcel of the Zambia political culture.

CONCLUSION

The preceding discussion examined how free and fair By-elections have been in the Third Republic. This examination was done using the International Set Standards. The discussion has shown that going by the International standards, By-elections in the Third Republic have not been free and fair. The discussion also examined malpractices that occur during By-elections. The next chapter discusses the Impact of By-elections on Democracy.

CHAPTER FOUR

IMPACT OF BY-ELECTIONS ON PARLIAMENT

INTRODUCTION

To appreciate how by-elections have affected the current parliament, it will be very necessary to briefly examine how effective parliament was in the past. This will, therefore, entail examining how effective parliament was during the one party and multi-party state. It is only after this analysis is completed that a proper analysis of the effect of by-elections on the current parliament will be undertaken.

PARLIAMENT UNDER THE ONE-PARTY STATE

Parliament, in whom the legislative power was vested, comprised the president and National Assembly. The National Assembly consisted of the Speaker and 135 members, 125 of whom were elected and 10 of whom were nominated by the president.⁶⁸

Parliament during the one party state was a very weak institution, which failed to make the executive accountable for its acts. This was mainly because the president, who appointed the cabinet and possessed the real power within the party and government, was not accountable to parliament.⁶⁹ The President

⁶⁸ Article 63 of the Constitution of Zambia.

⁶⁹ A. W. Chanda, *Zambia: A Case Study in Human Rights in Commonwealth Africa*. A Thesis submitted to the Yale Faculty in Conformity with the requirements for JSP degree (New Haven, 1992) p 439.

therefore could not be unseated by a Parliamentary vote of no confidence. Neither could his Cabinet.⁷⁰

In the same vein, the principle of collective responsibility precluded Ministers and other government officials from criticising the government in the National Assembly. The principle of collective responsibility entails that once a decision has been made by the cabinet, all the members, including those who opposed it behind closed doors, must support it publicly.

Parliament, because of the concept of party supremacy was merely regarded as an instrument of the party. Its' role was merely to pass whatever legislation the party wanted. President Kaunda emphasised this in a speech to the UNIP National Council on December 12, 1977 when he stated;

“Parliament is not an opposition device to the party or other party institutions. Under our system I regard parliament as a committee of the National Council charged with the responsibility of enacting laws of this country.”⁷¹

The party demanded that Members of Parliament who had the opportunity to express their views during discussions in the National Council were expected to conduct only the barest minimum of discussion over the proposals in the National

⁷⁰ Ibid.

⁷¹ Ibid.

Assembly.⁷² Members of Parliament who criticised proposed legislation and government policies were often attacked by the President and threatened with reprisals. On several occasions, Kaunda, accused parliament of acting as an opposition party, working to subvert the government. In his famous watershed speech to the National Council on June 30, 1975, President Kaunda said,

*"The party and government would not tolerate any indiscipline among Members of Parliament masquerading under parliamentary privilege... We are going to deal with any cases of parliamentary indiscretion with utmost severity. In doing so the party is going to use the very institution which misguided Members of Parliament are using."*⁷³

From the above instances, it can be seen that parliament during the Second Republic was only a decorative organ, serving only the interest of the executive. Parliament was hindered in making the executive answerable for their deeds because it was only there to rubber stamp decisions of the executive. It was only selected Members of Parliament who stood their ground. For example, a backbencher, Kantanshi Member of Parliament, David Nkhata, successfully moved a motion urging government to rescind its decision, to alienate 20,500 hectares of land in Chief Chiyawa's area to a foreign company. However, the National Assembly failed to propel this motion to the very end so that the decision could be rescinded. To further demonstrate how impotent parliament

⁷² Ibid.

⁷³ Ibid.

was, the Prime Minister even declared that the government was not bound by the resolution.⁷⁴

PARLIAMENT IN THE MULTI-PARTY ERA (THIRD REPUBLIC)

(A) PARLIAMENT UNDER THE REIGN OF CHILUBA

Zambia entered the Third Republic from a background where parliament was merely a decorative organ of the party and its' government. The wind of change brought in a demand for a better political system that would provide competition and checks and balances, which were non-existent in the Second Republic. A political party, the Movement for Multi-Party Democracy (MMD) was formed to Challenge the United National Independence Party (UNIP).

In the general election that followed the MMD scooped 125 seats (84.3%) while UNIP scooped 25 seats (16.6%).⁷⁵ The crushing defeat of UNIP also brought to an end 19 years of one party rule.

From the analysis of the above election, it can be gleaned that Zambia had moved from a *de jure* to a *de facto* one-party state.⁷⁶ This was so because the landslide victory that the MMD scored made it the dominant party. The lack of credible opposition in parliament meant that the party could literally pass any law

⁷⁴ Ibid.

⁷⁵ Owen Sichone., and Bornwell Chikulo., (Editors), Democracy in Zambia: Challenges for the Third Republic (Harare: Sapes Books, 1996), p39.

⁷⁶ Ibid, p39.

it wanted and that law would pass without any problems. Thus, even though many Zambians wanted change, change to the dismay of many was only in name.

The new Zambian parliament failed to live up to the expectations of many Zambians. To the disappointment of many, the new parliament turned out also to be a rubber stamp of the executive. Parliament under Chiluba's government was toothless as illustrated by many incidents which inter alia include, firstly, the failure by the speaker to convene parliament so that impeachment proceedings could be commenced against former President Chiluba for gross violation of the constitution even after all the constitutional requirements were met, just showed how toothless parliament was. Indeed Article 37(i)⁷⁷ is very clear and states,

“if notice in writing is given to the speaker of the National Assembly signed by not less than one- third of all the Members of the National Assembly of a motion alleging that the president has committed any violation of the constitution or any gross misconduct and specifying the particulars of the allegations and proposing that a tribunal be established under this Article to investigate those allegations the speaker shall;

- (a) *“If parliament is then sitting or has been summoned to meet within five days, cause the motion to be considered by the National Assembly within seven days of the notice.”*

⁷⁷ Chapter 1 of the Laws of Zambia.

(b) *“ If parliament is not then sitting (and notwithstanding that it may be prorogued) summon the National Assembly to meet within twenty one days of the notice and cause the motion to be considered at that meeting.”*

Even though section 37(i) was satisfied the Speaker failed to convene Parliament as provided for by section 37(i) (a) and (b). It is clear that the inaction was as a result of a directive from the President, since the impeachment proceedings that were supposed to be commenced were to affect him. Parliament being a rubber stamp could not flex its muscle against the powerful president.⁷⁸

Secondly, Parliament during Chiluba's era failed to block the infamous presidential slush funds. This was even after it became clear that such funds were being used to further the President's own agenda. At one point, the Ministry of Finance disclosed that President Chiluba had ordered the release of K120 billion for his allocation under the presidential discretionary fund, yet the amount budgeted for was K12 billion.⁷⁹ Parliament never raised any eyebrows to question how this could happen, because there is no way the President can order the Ministry of Finance to release money that was not budgeted for without Parliament's approval.⁸⁰

⁷⁸ FODEP, Zambia's 2001 Tripartite Election Report, p 26.

⁷⁹ Ibid, p 29.

⁸⁰ Article 115(2) of the constitution states that a warrant shall not be issued by the President authorizing expenditure from the general revenue of the Republic unless the expenditure is authorized by an appropriation Act.

As shown above, parliament under Chiluba's era was not in any way better than parliament during Kaunda's era. In both regimes Parliament was merely there to act as a rubber stamp. Parliament was in both instances weak.

PARLIAMENT UNDER MWANAWASA'S GOVERNMENT AND HOW BY ELECTIONS HAVE AFFECTED IT.

After the 2001 Presidential and Parliamentary elections, there was a ray of hope in the institution of parliament. To many Zambians, parliament was for the first time going to offer the necessary checks and balances that were going to keep the party in power on its toes.

This hope emanated from the fact that although the MMD had won the elections, it was still a minority political party having only scooped 77 parliamentary seats as compared to the opposition who had 81 combined members of parliament.

With the opposition in the majority, it was thought that Parliament under the new deal government was going to be independent from the executive, for it is in this that the real essence of liberty lies. "Liberty is not secured by constitutional guarantee of rights alone. No Constitution however strongly entrenched can be guaranteed against the temptations of power on the part of the executive, unless

there is an independent legislature to act as a counterpoise against such temptations.”⁸¹

To many Zambians this hope has been dashed as a result of the “political engineering” of the ruling party. The MMD under President Mwanawasa having realised that they were a minority government, embarked on a scheme called the “olive branch”.⁸² Through the “olive branch,” the President was to appoint opposition Members of Parliament to the front bench as Deputy Ministers and Ministers.

The extension of the “olive branch” raised a lot of controversies as to whether the President has such constitutional powers. It appears that the President took advantage of the silence of the Constitution as to whether the President could or could not appoint opposition Members of Parliament.

A look at Article 46 of the constitution illustrates this point. This article provides:

“46 (i) there shall be such Ministers as may be appointed by the President;
(2) Appointment to the office of the Minister shall be made from amongst Members of the National Assembly.”

Furthermore, Article 47(i) provides that the President may appoint such Deputy Ministers as he may consider necessary to assist Ministers in the performance of

⁸¹ Nwabueze B. O., *Presidentialism in Commonwealth Africa* (London: Martin Press, 1974), p. 258.

⁸² Post Newspaper, Wednesday, February 5th 2003 “FDD cadres protest against Nawa over Levy’s offers.

their functions and to exercise or perform on behalf of Ministers, such functions as the President may authorise in that behalf.

Indeed, an analysis of the above two provisions indicates that the Constitution does not either prevent or allow the President to appoint Members of Parliament as Ministers or Deputy Ministers. The only requirement that is supposed to be fulfilled is that a candidate must be a Member of Parliament.

It is the considered opinion of this dissertation that political parties whose Members of Parliament were offered Ministerial positions should have petitioned the Speaker to declare such seats vacant. This is so because by accepting such positions they had resigned by conduct.

Moreover, once on the government bench, such Members of Parliament (who are now Ministers) will be bound by the doctrine of collective responsibility. This doctrine will make it impossible for such MPs to support their political party's ideas in the House if they conflict with those of the government. This will therefore be as good as not having any Member of Parliament in the house.

On the above premise, it is being submitted that opposition Members of Parliament appointed to Ministerial positions in reality cross the floor and cease to be opposition Members of Parliament.⁸³

⁸³ The Post News Paper, Thursday, February 6th 20032 MPs appointed to ministerial position will have to cross the floor."

The presidential olive branch scheme received a lot of resistance from opposition political parties. In spite of this resistance, the President went ahead and appointed opposition Members of Parliament as Cabinet and Deputy Ministers. Such appointments were done without consulting various Political Parties. The President only consulted individual Members of Parliament. It was this very move that resulted in numerous expulsions of Members of Parliament from their parties. This was more pronounced in the camp of the opposition United Party for National Development (UPND). Immediately after the expulsion of such Members of Parliament, the MMD went ahead and picked them as their candidates in the very constituencies they well expelled from. Surely this could not have been a mere coincidence; there should have been some political engineering behind, aimed at luring such Members of Parliament to the party in power.

It is argued that these numerous by-elections that have rocked Parliament ever since the introduction of the olive branch scheme, affected Parliament to a very great extent.

Parliament today is drifting slowly into a decorative organ of the executive. The motive behind these by-elections is to weaken the opposition so that the MMD can have the majority.⁸⁴ When this majority is attained, then the executive can

⁸⁴ Post Newspaper, Sunday, February 9th 2003 "Opposition Ministers."

control parliament in whichever way they want. Parliament will become a rubber stamp in the sense that it is usually the outspoken Members of Parliament who are lured to become Ministers. Zambia is a pluralistic society and should remain so by encouraging different views to be articulated in parliament from different political parties.⁸⁵ This provides checks and balances. If these by-elections are not checked, a **defacto** one party state will be created and we will go back to the excesses of the Chiluba's regime.⁸⁶

EFFECT OF BY ELECTIONS ON POLITICAL PARTIES

President Mwanawasa told the nation on arrival from Addis Ababa that he "would go ahead and appoint those opposition Members of Parliament in the national interest who are ready to work with him regardless of what the parties they belong think. If those MPs end up being expelled from their parties for joining the regime, then the MMD will adopt them to re-contest their seats on the MMD ticket."⁸⁷

From the above statement it can be inferred that the extension of the olive branch was calculated to weaken the opposition, because the failure of the MMD will also entail the failure of the government. Therefore, since the opposition are part of the government, it will also entail that the opposition political parties whose Members of Parliament were part of the cabinet would also have failed

⁸⁵ The Post Newspaper, Wednesday, February 5th 2003 "*Defacto* one party state."

⁸⁶ Ibid.

⁸⁷ The Post Newspaper, Thursday, February 6th 2003, "Listening to Advice."

because they formed part of the Executive.⁸⁸ Looking at it from a critical angle, the offer is also intended to compromise the opposition leaders who are appointed into government as they will fail to effectively criticise the government to which they are party.

Indeed, by-elections have been a systematic way of killing the opposition so that the MMD remains the only political party in parliament as a result of which the country will revert to a *defacto* one party state where there are no checks and balances.

SUMMARY

The preceding chapter has examined how By-elections have impacted negatively on parliament. Parliament under President Mwanawasa's government promised to be a break with the past in the sense that for the first time in Zambian history, Members of Parliament from the opposition combined were more than those of the ruling party. With such numbers in place, parliament would have been a vibrant institution offering checks and balances. However, as things stand today, this looks to be a far-fetched dream.

⁸⁸ The Post Newspaper, Monday February 3rd, 2003 "Opposition Alliance accuses Levy of being arrogant".

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

SUMMARY

The essay has shown that by-elections are very important in a democratic nation, for they act as a yardstick which political parties can use to measure their popularity.

By-elections in Zambia like elections in general are regulated by the Electoral Act and the Electoral Code (Conduct) Regulations Act. The legal framework is quite comprehensive, in spite of certain lacunae that are found been identified.

Although the legal framework is quite comprehensive, there is a bigger problem in connection to its observance. The Electoral laws are not adhered to by most of the political parties as has been exemplified in the essay. This lack of adherence has led to the emergence of numerous conflicts between political parties. These conflicts have in turn caused a lot of tension among political parties, and this has led to the lack of confidence in the whole electoral process as can be evidenced by the number of petitions that appear before courts of law.

The essay has also demonstrated that the numerous by-elections that have occurred in President Mwanawasa's Government have negatively affected parliament. Parliament in Mwanawasa's government had promised to be a vibrant institution offering checks and balances; however, this is now a different story. Parliament has been silenced by the appointment of Opposition Members of Parliament to Ministerial positions. With this in motion, Zambia will slowly but sure drift into a *defacto* one party state.

RECOMMENDATIONS

LEGAL FRAME WORK REFORMS

(A) ELECTORAL ACT

It is being recommended that the current porous Electoral Act be reviewed and reformed so as to seal the various loopholes. To begin with, there is no provision in the Act regulating electoral financing. Furthermore, the law does not require candidates and political parties to disclose the sources of funding. It is being suggested that his lacunae be sealed. Political parties must disclose their source of their income and a limitation on how much

should be spent must be fixed. This will help stop the vote buying practice, which is very rampant during by-elections.⁸⁹

It is also being recommended that the Electoral Code (conduct) regulations should be incorporated into the Electoral Act and be enforced by the police and Anti-Corruption Commission, with the Electoral Commission playing a facilitative role. For this to be achieved, the Electoral (conduct) regulations and Anti-Corruption Commission Act must be amended in order to empower the Anti-Corruption Commission to be responsible for the enforcement of the law on corrupt practices in respect of elections. When this is done, the provisions of the Anti-Corruption Act, No. 42 of 1996 can be used to deter and punish persons who flout elections procedures.⁹⁰

(B) THE ELECTORAL CODE OF CONDUCT

If the Electoral Code of Conduct is not incorporated into the Electoral Act, the Code should then be vigorously enforced. At the moment, the Electoral Conduct Regulations, 1996 lack an enforcement mechanism. The law merely provides for a 'proper authority' but does not stipulate what is meant by 'proper authority' to enforce the Code. To make this clear it is being suggested that the Electoral Code of conduct should have

⁸⁹ Minutes of the consultative forum with Non governmental organisations (Southern Africa for Centre for Conflict Resolution (SACCORD), Anti Voter Apathy Project (AVAP), Zambia National Lobby Group, NGOCC Movement for Multi-Party Democracy (MMD), United Nations Independence Party (UNIP), ZIMT) Movement for Multi-Party Democracy (MMD), United Nations Independence Party (UNIP).

⁹⁰ www.tizambia.co.zm.

enforcement mechanisms. The Electoral Reform technical Committee (ERTC) recommended in this regard, that prosecution of Electoral offences must squarely fall on the Director of Public Prosecution with delegated authority to the Director General of the Anti corruption, and the Zambia police.⁹¹ For example, in Mexico, the Federal Electoral Institute and the Federal Electoral Tribunal have the mandate to oversee the enforcement of election legislation. In the case of South Africa, the Chief Electoral Officer may institute civil proceedings before the electoral court, to enforce provisions of the South Africa electoral law.⁹² If this recommendation is implemented, Electoral offences will reduce because people will then fear to break the electoral laws for fear of prosecution. This in turn will promote free and fair elections.

Furthermore, 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.⁹³

ELECTORAL MALPRACTICES

(a) Corruption

Corrupt activities are very rampant during By-elections. Both the ruling and opposition parties are culprits when it comes to corruption. All political players engage in corrupt activities so that they can woe more

⁹¹ www.ertc.gov.zm.

⁹² www.tizambia.co.zm.

⁹³ Ibid.

supporters to their side. One such corrupt activity is vote buying. Vote buying should be discouraged through the introduction of stiff penalties such as disqualification from the election if found guilty of vote buying. This disqualification should only take place after a detailed investigation has been conducted. A law enforcement agency, or a specialised election investigation body can assume this role of investigation. In Canada, for example, special investigators who report to the commissioner of Canada Elections, undertake this role.⁹⁴ In the alternative, Electoral mal practice should be dealt with as and when they occur with sanctions being slapped immediately. Such a measure would deter political parties, candidates and cadres from flouting the Electoral regulations. To make this effective, the ERTC recommended that the Electoral Commission of Zambia should be empowered to disqualify candidates whose agents or supporters are found guilty of contravening the electoral regulations.⁹⁵ The implementation of such a recommendation will help reduce electoral malpractices because candidates will fear to be disqualified, this being the case they will monitor their supporters so that they do not involve themselves in vote buying activities.

Furthermore, this essay affirms the recommendation of the ERTC, which recommended that the Electoral Code of Conduct should forbid the undertaking of new government projects, which coincide with by-elections.

⁹⁴ www.ertc.gov.zm.

⁹⁵ Ibid.

Such projects should not be allowed to be undertaken by the Government unless in times of emergencies or disasters.⁹⁶ The prohibition of such projects during by-elections will create a level playing field among political parties. The same rule should also extend to political parties, agents and supporters. These should also be prohibited from handing out gifts during by-elections to the electorates and other philanthropic organisations.

It is also being recommended that voter Registration should be a continuous exercise. For this to happen the Department of National Registration should be adequately funded. Furthermore, the issuance of National Registration cards and voter's card should be conducted in a fair way, and not on political lines.

(b) Importation of Cadres

Importation of political cadres from outside the districts to camp and campaign in constituencies where by elections are taking place, should be discouraged. It is this practice that brings about political violence. To discourage this practice, severe punishment on candidates whose party import cadres should be imposed.⁹⁷

(c) Use of Government resources

⁹⁶ Ibid.

⁹⁷ FODEP- Election Report for Lukulu East, Kantanshi, Kaoma Central and Solwezi Central Constituencies held on September 18th 2003, p9.

The ruling party has over the years taken advantage of its access to government resources to win by-elections. It is being recommended that the separation of the party and government be strictly adhered to. The ruling party should not use government resources for party functions.⁹⁸ Where this is proved, the ruling party's candidate should be disqualified.

It is also being recommended that the president and the Vice President should be barred by the constitution from campaigning for individual political parties during By-elections. By campaigning for a particular candidate, such a candidate is afforded an advantage over the others.

CONFLICT MANAGEMENT

The stakeholders have recommended that there is need for the Electoral commission of Zambia to look into the possibility of establishing a complaint procedure platform to precede the formal petition process.⁹⁹ This platform can attempt to settle minor infringements that occur before each by-election.

In a country like Zambia where a deep level of mistrust in the electoral administration exists a specialised electoral court may be established as

⁹⁸ Section 7(1) (C) forbids the use of government transport or facilities for campaign purpose or to carry voters to polling stations; Provided that this Paragraph shall not apply to the president and the vice president. This has not been followed as the party in power has continued using government facilities in By elections as was reported by FODEP in the Lukulu East, Kantanshi, Kaoma central and Solwezi central constituencies held on September 18th 2003.

⁹⁹ Minutes of the Consultative Forum with Non Governmental Organization (Women for Change, Anti Voter Apathy, National Lobby Group, Movement for Multi Party Democracy, United National Independence Party).

was done in Mexico and Kenya. Such courts would lighten the burden on the already over burdened courts.¹⁰⁰ The establishment of the electoral court would quicken the dispensation of justice. The ERTC in this regard recommended the establishment of a parliamentary tribunal to be presided over by a High Court Judge whose main task of is to hear parliamentary election petitions¹⁰¹. Such petitions should be disposed of within thirty days and the decision shall be final. Having such a tribunal will help enhance efficiency in the electoral system because cases will be settled in time. However, assessing this recommendation, it can be argued that the denial of the right to appeal is a violation of the Rule of Law. The Rule of Law gives an aggrieved person an inherent right to appeal.¹⁰²

If the establishment of an electoral court proves difficult to establish, it is being recommended that alternative dispute resolution be used to settle electoral disputes between political parties.¹⁰³ Alternative Dispute Resolution should be used to iron out disputes that mainly occur during Campaigns. Regarding Alternative dispute Resolution, the ERTC recommended that conflict Management Committees be established by the Electoral Commission of Zambia at National, Provincial and District levels.¹⁰⁴ These committees must be institutionalised and must continue operating under the auspices of the Electoral commission of Zambia. In the alternative, it should be left to political parties to

¹⁰⁰ www.tizambia.co.zm.

¹⁰¹ www.ertc.gov.zm.

¹⁰² Guest A.G (Editor), Oxford Essays in Jurisprudence.(London:Oxford University Press,1961),221-60.

¹⁰³ www.tizambia.com.zm

¹⁰⁴ www.ertc.gov.zm.

choose which method is appropriate in a given situation. For example, in by-election A, political parties may appoint FODEP to act as a mediator. This is important in the sense that Alternative Dispute Resolution requires that the Mediator be chosen with the consent of the parties and must be impartial¹⁰⁵. In this regard, the Electoral Commission of Zambia should not be in charge of mediation and Arbitration because the Commission, being a government organ is bound to dance to the tune of the government of the day. The use of Alternative Dispute Resolution will create confidence in the whole electoral system in the sense that the political parties will be engaged in dialogue which is currently lacking in the political process. With dialogue in place, numerous disputes will be solved amicably.

MEMBERS OF PARLIAMENT WHO CROSS THE FLOOR

It is being recommended that Members of Parliament who move from one party to another should lose their seats and should not be allowed to contest any parliamentary seat for five years. This may seem to be a very stiff punishment but it is one that is necessary considering the increasing number of Members of Parliament crossing the floor. These by-elections are a strain on the national economy and the only way out is to introduce stringent measures that will curtail this unpleasant tendency. In relation to this, the ERTC recommended that a member of parliament who is expelled or suspended by the Party on whose ticket he or she became a constituency based member of Parliament should not lose his or her seat, unless his or her expulsion is endorsed by a tribunal appointed by

¹⁰⁵ Article 2(3) of the International Chamber of Commerce.

the chief Justice¹⁰⁶. For the expulsion to be sustained it must not infringe upon the Member of Parliament's right and privileges provided and protected by the National Assembly (power and privileges) Act.¹⁰⁷

APPOINTMENT OF OPPOSITION MEMBERS OF PARLIAMENT

Zambia is a pluralistic society, which thrives on divergent political opinion and competition. The ruling party needs to be checked by the opposition if democracy is to have any meaning. It is against this background that it is being recommended that the president should be barred by the Constitution from appointing opposition Members of Parliament to Ministerial positions. If this trend is not checked, Zambia will always remain a *de facto* one party's state.

CONCLUSION

The Third Republic has witnessed numerous By elections taking place in the country. It is sad to say that most of these By-elections have not been free and fair because they have failed to meet the internationally recognised standards.

Most of these By-elections have usually been held amidst conflicts between the various political players. These conflicts have usually emanated from the lack of conflict management coupled with the appointment of opposition members of parliament to government positions.

¹⁰⁶ www.ertc.gov.zm.

¹⁰⁷ Chapter 12 of the Laws of Zambia.

From the foregoing, it is submitted that the ploy of By-elections if not carefully watched will erode the democratic society that this generation is trying to build. Our society allows the existence of political parties to compete for power and this is what we should try by all means to protect whatever the cost.

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