CONSTITUTIONALISM OF VETTING PROSPECTIVE MEMBERS OF PARLIAMENT IN THE CONTEXT OF HUMAN RIGHTS

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I recommend that the obligatory Essay prepared under my supervision by MWELWA CHIBESAKUNDA, entitled CONSTITUTIONALITY OF VETTING PROSPECTIVE MEMBERS OF PARLIAMENT IN THE CONTEXT OF HUMAN RIGHTS, be accepted for examination. I have checked it carefully and I am satisfied that it fulfills the requirements relating to the format as laid down in the regulations governing obligatory essays.

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Constitutionalism of Vetting Prospective Members of Parliament in the Context of Human Rights (1988 - 1989)

By

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This paper is dedicated to my supportive family for the encouragement and love that I have always received from them, especially to :

My Mother, the one person who sustains my belief that good still reigns on this earth:

My Father for his constant 'quiet' criticism and advice - life would be intorelable without your advice, Dad!

And to all those people who take me for what I am and leave me that way, I'll never walk alone.

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Introduction

Human rights have evolved progressively from assertion of rights and liberties in the Magna Carta of 1215 to the universal declaration of human rights by the United Nations in 1945. Their purpose is to ensure that fundamental human rights are protected from arbitrary use of public power. Power in every country eventually lies in the ruling body - whatever form it may be. As Lord Acton once observed; "Power tends to corrupt and absolute power corrupts absolutely", it is necessary that these basic rights are protected. Thus, although the governing body has absolute power in exercise of most of its actions, the security to do this is founded on the basis that its actions are supported by the people for the benefit of the people, when some of these actions adversely affect the basis rights of the people. They deserve to be questioned.

This essay, thus discusses the constitutionalism of vetting prospective members of parliament in relation to protection of human rights. Though it is considered that constitutionalism is inconsistent with the concept of a one-party state, some of the rights not fully protected can be, if not fully, at least better protected. It is the intention of the author to show how these basic rights are not protected and how the situation could be alleviated so as to accord every citizen the rights he deserves.

Chapter One introduces the concept of vetting in relation to human rights. It is divided into three parts, the first part defines human rights and everyday understanding of vetting. The second part discusses the historical background which led to the introduction of vetting procedure. The factors that induced such a constitutional change are discussed and the form that it took and the form it has

since evolved into; the third part studies countries with similar constitutional backgrounds and thus similar constitutions. The similarities are discussed in relation to how Zambia could have been influenced by their constitutions.

Chapter Two sets out the legal basis for vetting, this includes the constitutional provisions and other statutory provisions which provide for a vetting procedure. The chapter, at the same time highlights any inconsistencies in the provisions themselves. The chapter also assesses the protection accorded by international laws. In this part it is contended that international law 'per se' does not provide adequate protection of human rights.

Chapter Three examines vetting in practice. The author traces the vetting system from its inception and examines how it has worked, practically from its first usage in 1973 to 1988. The practicality of it also includes reported reactions of people at time, any changes that took place in the procedure and the reasons why as they were understood.

Chapter Four shows that though the system of vetting has flaws, mostly attributed to the fact that it is still developing, it also has positive attributes which considerably protect human rights in Zambia. The chapter discusses advantages and disadvantages of the vetting procedure.

Chapter Five is the concluding chapter of the essay and offers recommendations for change which would help improve the protection of human rights in relation to the vetting procedure.

CHAPTER ONE

Definition of Human Rights and Vetting

Human rights could very simply be defined as rights which are both fundamental and natural to man. They have been described as "natural in that they belong to every man and woman as an expression of their humanity; they are fundamental in that unlike many rights established by law or custom, they could not be denied or taken away in any circumstances by any person or authority, even government or Parliament."[1]
They are thus formulated to ensure that these rights are realised by the people.

These rights have over two thousand years been shaped by social forces in communities by competition or tension or conflict between the individual and the state: between workers and employers; between men and women; between groups in the community or whole communities differing in race, religion, language or culture. They have also been shaped by the continual intellectual effort to build a law of nature.

Rights, however, are different from claims, in that with rights the implication is that there is, or ought to be means of their enforcement, whereas claims imply that the human needs ought to be met but are not yet met because the community is not ready to meet them or because there is a conflict between the needs and demands.

Further, "there are in any community two principles at work, the development of the individual and the security of the social order. Neither can be carried to the point of exclusion of the other. These rights can be restricted where necessary for the protection of national security or of public order. The continuing balance between freedom and restriction is the whole end of social management and the human rights principles".[2]

Central in human rights are the role of law; self-determination and non-discrimination. To this end the concept of vetting can be considered as an encroachment of some fundamental human rights, such as freedom of representation and freedom of choice. The Constitution does not define the concept of vetting in relation to parliamentary elections, but it is understood to mean the process of examining and checking the prospective parliamentarians.

The exercise of vetting is essentially found in some form or other in most countries, whether democratic or socialist. Before an election for parliament, the party decides who will stand where or alternatively, there is the process of elimination where the most popular candidate represents the party. In one-party states, however, where any person can join the ruling party and hence stand for elections, the party must decide which persons are genuine party members who will adequately represent the party and their constituency and which persons are not. Hence the need for a vetting procedure.

Background to the Establishment of Vetting Procedure

In 1964 Zambia inherited a system of government and administration which was ill-suited to the tastes of political development to which the new leaders were dedicated, in that it was considered that a multi-party system bred excessive internal strife at a time when national unity was necessary for the development of the country. Indeed what little national unity and mobilisation had been achieved in the independence

struggle declined with the removal of the common enemy. The government rested on a fragile base, without adequate instrument available for the implementation of its policies. So the search began for a "more suitable political system which could cope with new needs of independence and provide for the stability of the state and the survival of the government."[3]

It was, thus widely accepted that Zambia as a young developing country with seventy-two ethnic groups needed unity more than anything else, for its survival both economically and politically. The decision to introduce the one-party system by constitutional amendment was therefore, principally influenced by political upheavals with the ruling party. in that there were acute divisions along ethnic lines which led up to the rise of political parties such as the African National Congress (ANC) and the United People's Party (UPP). The consequence was that sectional political behaviour by one part of the population tended to force the other parts also to organise on sectional lines.

Thus in 1972, October 15, President Kaunda by authority of Statutory Instrument No. 46 of 1972 appointed the National Commission on the establishment of a one-party participatory democracy in Zambia. To consider and recommend changes in the Constitution of the Republic of Zambia, the Constitution of the United National Independence Party (UNIP) and matters related to the establishment of a one-party participatory democracy. The Commission chaired by the Vice-President of the Republic, Mr Mainza Chona, hence popularly known as the "Chona Commission" was empowered to consult with the people, not whether they wanted change, but in the form it should take within the context of participatory democracy and the Philosophy of Humanism".

The decision to appoint the Chona Commission was hastened by pressure from the public. The Central Committee noted that in this overwhelming

public demand the objective for calling for a new system of government was the fundamental need to preserve unity, strengthen peace and accelerate development in freedom and justice..... It was against this background, in the light of the loud and clear voice of the overwhelming majority of the people of this country, that the government undertook an exhaustive consideration and examination of all the representatives made both verbally and in writing demanding a change in the system of government....."[5]

Zambia thus became a one-party participatory democracy and the Zambian Parliament became a one-party Parliament on the 13th December 1972. The Chona Commission had recommended that all "qualified citizens should be free to stand for elections and that the choice of candidates should be placed in the hands of local people themselves. They came to the conclusion that in a one-party participatory democracy elections should be completely free and that the party should have no role in vetting or selecting candidates in order to avoid charges and practices of nepotism, tribalism and possible abuse of this function by the local party officials. Since the quality as a candidate, one must be a party member, they felt that the electorate should be left to choose the best candidate from among the contestants. Moreover, the membership of the party should be open to every citizen and every party member should be free to stand for elections. They came to the conclusion that there should be no independent candidates. They considered the idea of conducting primaries in order to arrive at the final list of candidates and came to the conclusion that such a practice would be expensive to the tax-payer apart from involving the electorate in numerous elections".[6]

While accepting the recommendations for free and competitive elections, the government decided that elections should, "in the name of fair play and justice, be conducted under party supervision and control.

To this end it was essential to hold primaries."[7] The manner in which the procedure was to follow was that, names of all candidates elected by the regional conference (that is at the primary stage where party officials would select the top three candidates), should be submitted to the Central Committee together with the number of votes cast for each candidate. The Central Committee will then select up to four names and have the final say. If the Central Committee decided that one or two of the top three candidates are 'not suitable' to stand for parliamentary elections then he/she will be vetted. The fourth person will then become the third, or if two people have been vetted, then likewise the fourth and fifth from the primary elections will become the second and third and will go on to test for the parliamentary seat in the general elections.

The decision to make the Central Committee have a final say gave the Central Committee wide powers within which to conduct its duties. The decisions of the Central Committee were and are still not open to question. Further, the Central Committee is not obliged to give reasons as to why it has vetted a candidate.

The reasons behind rejecting the Commission's recommendations was based on the fact that, firstly there had to be a system of checking who stood for elections, after all not anybody can stand for elections as a member of the ruling party regardless of political ideals, otherwise as many people as wished to stand for elections could. This was verified by the then Minister of Finance, Mr John Mwanakatwe, during the parliamentary debates proceding the coming into effect of the Republican Constitution, when on behalf of the government he stated that having a system of primaries before the general elections was "obviously a welcome innovation intended to allow as many people as possible the chance of testing their popularity before actual elections

are held."[8] He further stated that "let it be known that the party and government are genuinely interested in allowing party officials and voters complete freedom to elect the best candidate. More men and women should now feel free to become eligible as parliamentary candidates in contrast with the previous system whereby those who did not secure a party nomination were automatically discouraged from participation as independent candidates. In future only minimum requirement will be demanded from aspiring candidates and the conditions will be applied universally."[9]

The second reason for rejecting the Chona Commission's recommendations was that the intention of establishing such a system with primary elections and vetting by the Central Committee, was that it was considered to be a method of taking power to the people as this was what participatory democracy was deemed to constitute. The way the power was to be taken to the people was through the party officials who were elected locally. Thus they knew the people at the grass-roots and what they needed. By having primary elections, party officials (hence the people) could be involved in selecting the best candidate for the constituency.

The second reason did, however, raise a problem with Mrs Robertson, a nominated MP who was of the view that the proposal that only party officials shall vote for candidates in primary elections had its weaknesses "which could place the President and the Prime Minister in an uncomfortable position when deciding on the choice of Ministers",[10] in that there could be a tendency for party officials to be chosen to the exclusion of representatives of all other sectors of the community. Mrs Robertson, hence suggested that to avoid such a situation the electoral college should be broadened in order to make it representative of the whole community. Above all, if it is a participatory democracy, then the more reason why representatives of all sections of the

community should participate in electing people who are honest, dedicated and able, who will strive to do their best for the new Republic, whether they are party officials or not.

The system introduced in 1972 thus prevailed until 1983 when it was amended due to public pressure and criticism. The complaints with the system were mainly twofold. Firstly, that it was expensive in that the candidates had to campaign twice, in the primaries and then if they were among the successful candidates in the parliamentary elections. Secondly, that the candidates were subjected to double vetting, firstly by party officials and then by the Central Committee. It was critised for instance by Mr Stephen Sikombe, former Central Committee member for Southern Province, who said the system as it was caused friction between party officials and the Central Committee as some of the candidates elected by the party officials ended up being rejected by the Central Committee.[11]

Mr Sikombe simply echoed public sentiments and consequently the primary elections were abolished in 1983. The system adopted was where all prospective members of parliament filed an application for adoption to the Central Committee, who must within fourteen days notify the Electoral Commission in writing of the names of the candidates whose candidature it has adopted.

The power of the Central Committee in the election procedure was not affected and thus they still were not obliged to give reasons for not adopting somebody. The Constitution provides that non-adopted candidates are 'inimical to the interests of the State'; the provision is vague and too wide. It would be helpful to perhaps read this provision together with a statement given in the report on the recommendations accepted by the government where it was stated that the Central Committee's decision not to select somebody will be based

on whether or not a candidate is a full member of the party and fulfils all the conditions laid down by the party."[12] These apparently have not been the only criterion as was claimed by Mr Edgar Mumba, former Mufulira MP,who contended that he had renewed his membership every year.[13] Mr Peter Mutale Kasoma who was rejected for Kabushi Constituency also said he had "all the qualifications required to stand in the general elections."[14]

Therefore, though at the time when the new system was instituted, it was a result of complaints about the unfairness of vetting a candidate after succeeding in the primary elections. It must primarily be noted that though the abolition remedied the problem of unfairness and expense incurred in campaigning by candidates, the change in procedure added additional problems to the already existing problems and faults prevalent in the procedure, namely that the abolition of the primary stage totally contradicts the maxim, "giving power to the people"; as effectively power is being taken away from them in not involving the grassroots in the election of the prospective MP's. Further, while acknowledging that a system of checking party members was essential especially in a one-party state, the public felt that there was too great an element of uncertainty in the election procedure. Even if a candidate was a full member of the party and had fulfilled all the stipulated conditions, it did not necessarily mean he would be adopted. What is needed is a form of explanation to accompany notice of non-adoption.

International Comparison

The Constitutions of Malawi, Ghana and Tanzania, like several other African countries provide for a one-party state. It would help to note that only Tanzania has some form of selecting candidates before they go through to the parliamentary elections. Malawi and Ghana do not have any provisions for selecting candidates.

The ensuing part will therefore, briefly examine the Constitutions of Malawi and Ghana in relation to the parliamentary election process in direct contrast with Zambia's. Thereafter, a more detailed study of the Tanzanian system will follow, which will include an outline of Tanzania's pre-one-party state experience and examine what factors induced the country to adopt a one-party government, at the same time comparing the factors of change in Tanzania to those in Zambia.

Malawi

The Constitution of Malawi, although it does have an entrenched provision for adopting or selecting candidates for parliamentary elections, is similar to the Zambian Constitution. It has a national assembly consisting of fifty elected members and not more than five nominated candidates.[15]

A point of interest is that the Zambian National Assembly consists of more than twice the number of Malawian National Assembly. It consists of one hundred and twenty-five elected members and no more than ten nominated members. Zambia is not only a larger country but it has an estimated seventy-two tribes which in one form or other need representation in Parliament.

Furthermore, the Malawian Constitution, unlike the Zambian has provision for a member of the assembly to vacate his seat and thereupon cease to be a member, if he declares his support for the President whilst a parliamentary candidate at the previous elections and consequently in the next election he votes against the President on the taking in the national assembly a motion of confidence in the government.[16] The rationale perhaps is that though the members of parliament have representative responsibility towards their constituency, they owe their allegiance to the President as the head of the one ruling party under which they were able to obtain a seat in parliament. Hence if the

member does not wish to support the President, that action is tantamount to a show of no confidence in his party and he should vacate his seat as it could be detrimental to the functions of the house which is founded on the principle of 'collective responsibility'.

The Constitution of Malawi also provides an electoral commission whose function is strictly confined to the workings and procedures of the elections that is, to ensure that all is conducted in the prescribed manner. It consists of a chairman and not less than two or more than four other members. These members must not be ministers, parliamentary secretaries, members of the national assembly or public officers.

Ghana

The Constitution of Ghana is also fundamentally the same as the Zambian Constitution with only a few differences. The requirements and grounds for qualification and disqualification for aspiring parliamentary candidates are the same as Zambia's, for example, being a citizen of Ghana and having attained the age of twenty-one. The constitution does not, however, specifically lay down any procedure to be followed when the party intends to disallow any citizen who qualifies to stand for election on all the grounds specified. Unlike the Zambian Constitution, the Ghanaian Constitution appears to have an open-competition election system. In this system, any citizen can stand for elections as long as he is a member of the ruling party.

The underlying principle for elections in Ghana is that every person has the right to stand as a parliamentary candidate "without distinction of sex, race, religion or political belief", so long as they are "a citizen of Ghana, have attained the age of twenty-one years and are not disqualified by law on grounds of absence, infirmity of mind or criminality."[17]

Tanzania

The most relevant comparison, however, is that of Tanzania which adopted the one-party system before Zambia, in 1964. The Tanzanian Constitution is substantially the same as the Zambian Constitution and as will later be discussed, it is apparent that the reasons advocated for a one-party state and subsequently the rationale for a system of pre-selection in Tanzania (President Nyerere's Commission on the establishment of a democratic one-party state) were the same as those advanced in Zambia by the Chona Commission. It is thus likely that Zambia, in investigating the feasibility of such a system, tried to learn from the Tanzanian experience and hence borrowed heavily from that country's constitutional changes.

In 1963, President Nyerere at the Tanganyika African National Union (TANU) expressed dissatifaction with the existing state of affairs in the country at the time. The President believed it would be possible to devise an electoral system which was genuinely free and democratic. Though many party leaders supported the idea, they feared that competitive one-party elections would damage TANU.[18] These fears were confirmed in the election for the Zahaya District Council in April, 1963. Several TANU rebels stood as independents and defeated the official TANU candidates. The party officials hence took measures against similar setbacks.

The Presidential Commission, therefore, which was appointed by President Nyerere in January, 1964, found that to devise a new electoral system was the most difficult question with which the Commission was faced. The Commission considered and consequently rejected the possibility that there should be an entirely open contest whereby any TANU member could stand for election in a constituency.

It, however, favoured some form of pre-selection so that the number of candidates standing in a constituency could be limited. Although pre-selection had always gone on, its form was now enshrined in the TANU Constitution and the Constitution of the Republic of Tanzania. The Commission considered that the "positive role of the party cannot be sustained if it abdicates all right to influence the choice of the candidates for election to parliament", indeed they believed "that a system of pre-selection would help to sustain and strengthen the party as a positive force in the politics of Tanganyika."[19]

The selected candidates are the legal ones. Thus, although the Presidential Commission affirmed the idea of TANU as a non-elitist party, both the de-jure one-party and the system of pre-selection by the TANU District Conferences and the National Ezxecutive Committee (NEC) have worked to constitutionalise certain oligarchy tendencies in TANU.

The method of electing is that there are hundred and seventy constituency members, each drawn from a constituency whose boundaries were prescribed by an electoral commission in such a way that each constituency contained as nearly practicable the same number of people. In order to prevent a person being elected on a minority vote, two and not three TANU candidates could stand for elections in each constituency. Initially however, candidates for the election were required to be nominated at a primary nomination by not less than twenty-five persons registered in that constituency as voters."[20] Subsequently these nominated candidates had to be approved by the National Executive Committee.

Where only one or two candidates are nominated and no breach of the electoral regulations have occured, the NEC has to accept the candidates whether or not it approves of their candidature.[21] Where more than two candidates are nominated, however, a special District

Conference of the party shall hold a secret ballot when each member shall cast his preference for a particular candidate. The results of the balloting will then be forwarded by the returning officer (a civil service administrative officer) to the NEC. The latter determines which two candidates should contest the election.[22]

Further, in a situation where two or more candidates have been nominated the NEC shall not approve or select one candidate only for such constituency.[23]

In contrast, the Zambian Constitutional provisions relating to pre-selection as they exist today may be considered to be more rigid in that the Central Committee, the Zambian equivalent to the Tanzanian NEC, has an absolute say in the choice of candiates that contest the parliamentary elections. Though the Zambian Constitutional provisions are more rigid, the reasoning behind their rigidity is conduc ive to the Zambian situation and perhaps any country with a one-party system. The reasons briefly being that firstly, the party was trying to have unity among the people and one of the ways of doing this was to ensure that tribalist or disruptive elements were kept out of parlimanent. And secondly, by making the system rigid and allowing the Central Committee absolute discretion in its exercise of its functions, it was hoped that the non-interference would enhance the efficiency of the Central Committee.

The current form of the Constitution, however, as has already been noted is open to abuse in the form of dispensing with legitimate candidates in order to maintain the status quo of the political hierarchy. Under the Tanzanian Constitution, the role of the NEC is more limited as in cases where there are two or fewer candidates so that candidates should not be unopposed. The rationale behind this is that the Tanzanian Government is trying to ensure that the electorate is not deprived of the opportunity of voting and this is

significant in the light of the fact that the party and the popular choice do not always coincide.

The Zambian system, although borrowed from the Tanzanian experience is more refined in that the Zambian system took into consideration the facts that the power to select candidates should be left to the electorate and the Central Committee. Thus, the Central Committee always has a say in the type of candidates who go to parliament unlike in the Tanzanian system where in cases of two or less candidates contesting a constituency none of them will be vetted. The powers of the Central Committee, however, in relation to adopting candidates should be checked and limited in some way, as in the Tanzanian Constitution. The main reason being that having wide powers as the Central Committee has led to abuse of the powers, as there is no system of checking that the rules are adheredto.

As the situation is at the moment the Zambian executive controls to a certain extent, who goes to parliament and even with the exercise this control the government is still heavily criticised. So what may be envisaged or feared by the Central Committee is a situation where, if the type of parliamentarian was not controlled, there would be even more damaging and perhaps unjustified criticism aimed at the government. It is interesting to note that this has not happened in Tanzania where the power of NEC is curbed. Indeed President Nyerere went as far as to say that members ought to be fearless (but responsible) in criticising the government. He suggested that as members of one or another of the assembly's standing committees, they might increase their effectiveness by specialising in particular fields of interest rather than trying to know a little of everything and therefore mastering nothing.[24]

Additionally, the system in use in Tanzania provides for an appeal to the High Court on any issue arising from the election process, S-36(1), such as where the proper electoral procedure was not followed, as laid down in Section 28 and consequently the candidate is not approved by the NEC. In contrast the Zambian Constitution does not allow appeal to the High Court. Anything pertaining to the election process is reported to the Disciplinary Committee of the Central Committee which in essence means appealing to the same organ that vetted the individual in the first place.

In conclusion therefore, it should be said that the concept of vetting as introduced in the form prescribed by the Chona Commission was necessary in a one-party state. A system of regulating the type or prospective parliamentarian under the banner of UNIP was needed.

It was further contended that this system of vetting is not unique to Zambia, as Ghana, Malawi and Tanzania have methods of regulating who goes to parliament.

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CHAPTER TWO

Legal Basis of the Vetting Procedure

In this chapter, the author will discuss the legal provisions that establish the vetting procedure. He will attempt to point out any inconsistencies in the provisions. The extent of protection accorded will then be discussed in relation to international human rights.

1. Constitution of Zambia

The formal provisions establishing the one-party state and the concept of vetting are embodied in the Republican Constitution. The provision establishing the vetting procedure is Article 75 of the Republican Constitution which states that:

> "any person who is qualified to be elected as a member of the National Assembly under Article 67 and is not disqualified under Article 68, may deliver his application for adoption as a candidate ..... provided that such application shall not be valid unless it is supported by not less than nine persons registered in that constituency as voters for the purpose of election to the National Assembly."

This article essentially establishes that, persons who fulfil the normal qualifications set out in Article 67 such as being a

citizen of Zambia, having attained the age of twenty-one years and being a member of the party, shall be qualified to be elected or nominated as members of the National Assembly;

> "provided that a person shall not be qualified to be a candidate for election to the National Assembly unless his candidature has been adopted by the Central Committee in accordance with the provisions of Article 75."[1]

Article 68 specifies the issues that disqualify candidates for election or nomination to the National Assembly such as not owing allegiance to Zambia, being of unsound mind, having a death-sentence imposed on him, being a declared bankrupt or being a person whose freedom or movement is restricted or detained under appropriate authority.

Article 75 further goes on to lay down the procedure to be followed in that "as soon after receiving the applications as is practicable, the Election Commission shall submit to the Central Committee the names of each applicant for adoption, as a candidate who fulfills the requirements set out in Clause 1."[2] And that "unless the Central Committee is satisfied that the adoption of any particular candidate would be inimical to the interest of the state, it shall adopt the candidate."[3]

Therefore, in other words after the procedural part of it, which involves submitting an application for adoption to the Electoral Commission, the Commission then hands over the applications to the Central Committee who decide whether to adopt or reject an application on the ground of the candidate being inimical to the interests of the state. Though inimical is not defined, it is interesting to note that there is some inconsistency in the vetting procedure, as stated in Articles 67 and 75(1), in that Article 75 states that a person who is qualified under Article 67 can apply for

adoption by the Central Committee. Article 67 states that the qualification requirements for election to the National Assembly includes the approval of the application of the Central Committee. The inconsistency is in the order to be followed in the procedure, in that firstly, a candidate should discover if he is eligible to be elected or nominated as an MP under Article 67, and secondly, if he qualifies he will be subject to vetting by the Central Committee. Article 67 requires that the candidate be first approved by the Central Committee before proceding to the next stage, which under Article 75 is the approval of the Central Committee itself. Thus, there is repetition of functions.

Other inconsistencies relate to the basic rights a human being is entitled to in every society. In Zambia, these are embodied in Article 15 to 25 (inclusive) of Part III of the Constitution.

Article 13 states that it "is recognised and declared that every person in Zambia has been and shall continue to be entitled to the fundamental rights and freedoms of the individuals, that is to say, the right to ..... life, liberty, security of the person ... freedom of conscience, expression, assembly and association and protection for the privacy of his home."

This Article 13 is related to Article 22(1), "except with his own consent, no person shall be hindered in the enjoyment of freedom of expression, that is to say, freedom to hold opinion without interference; freedom to communicate ideas ...."

The question that arises at this stage is how are the provisions laying down these fundamental rights reconciled with the provision of vetting? The vetting of a candidate who wishes to express his opinions or ideas is restrictive of and an interference to his fundamental right of freedom of expression. The interference

with this right involves all the other rights as well. Once vetted, a candidate cannot have public meetings (freedom of assembly or association) or express his thoughts and beliefs freely and in public. It contradicts all the fundamental rights everybody is entitled to.

Further, Article 25(1) states that, "no law shall make any provision that is discriminatory either of itself or in its effect." 'Discriminatory' is defined as "affording different treatment to different persons attributed wholly or mainly to their respective description by ..... political opinions .... whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are accorded to persons of another such description."

Is vetting, therefore, a form of discrimination against those whose political opinions are not sympathetic to party ideals or do not conform to those ideals? As the criterion or reasons are not given, one can only speculate as to whether it is concerned with political opinions or not. But as the whole issue is of a political nature, it is probable that the reasons for vetting an individual are related to what he says politically or what the government fears he is very much capable of doing.

The state would undoubtedly argue that any inconsistency is dispelled by the overall proviso to the fundamental rights section of the Constitution;

> "nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this article to the extent that it is shown that the law in question makes provision,

(a), that it is reasonably required in the interest of defence, public safety .... or (b), that is reasonably required for the purpose of protecting the reputations, rights and freedoms so far as that provision, or as the case may be, the things done under the authority thereof is shown not to be reasonably justifiable in a democratic society."[4]

The issue of whether the breach of fundamental rights could be justified on the premise that it was for the public welfare, was considered in the Nkumbula case. The facts briefly being that on February 25, 1972, the President announced that the Cabinet had taken a decision to establish a one-party democracy and that a commission would be set up with the task of determining the form it was to take. Mr Nkumbula appealed against the High Court decision, dismissing his action on the grounds that the provisions of certain sections of Chapter III of the Constitution were likely to be contravened in relation to the appellant.

The appellant argued that the appointment of the commission of enquiry was ultra vires and null and void because the matters to be enquired into could not be 'for the public welfare'. And that although there are many areas in which the interests of the society at large and the requirements of orderly government are in conflict with interests of individuals and lead inevitably to restrictions on the freedom of action and behaviour of individuals, where such a conflict arises, in the area of individual rights and freedoms as protected by Chapter III of the Constitution, the interests of the individual must prevail.

The court rejected this argument and stated that what was in public interest was a question of balance; the interests of the society at

large must be balanced against the interests of the particular section of society or of the individuals whose rights are in issue. And the interests of the society as a whole are considered sufficiently important to over-ride the individual interest, then the action in question must be held to be in to be in the public interest.[5] Hence it can be interpreted that the view taken by the State as to the breach of fundamental human rights when an individual is vetted is that it is in the public interest or public welfare as understood by the definition provided for by Justice Baron in the Nkumbula case.

The Party Constitution specifically deals with the issue of discipline in the party, which is related to the adoption of candidates and the channel of appeal if rejected. Regulation 38 states that; "the Central Committee shall be responsible for discipline of the party members, it shall hear appeals from the Appointments and Disciplinary Committee of the Central Committee" and "shall have the power to review decisions of Appointments and Disciplinary Committee and shall have original jurisdiction."[6] Thereafter, the appeals in the case of decisions of the Central Committee such as vetting, shall be heard by the National Council as "the National Council shall hear appeals from the decisions of the Central Committee and may delegate its disciplinary functions to an ad hoc appeals committee of the National Council."[7]

As has been mentioned in the previous chapter, it is constitutionally provided for that the Central Committee shall have a final say in the vetting process in that no appeals or reviews are permissable. Though the provision discussed above - Regulation 39 - provides for opportunity of appeal, Regulation 91 states that; "the Central Committee's approval of the candidancy shall be evidenced

by a certificate of approval signed by the Secretary-General. The decision of the Central Committee in this regard is final." Inconsistencies, however, have been noted in this procedure in that, in 1978, two candidates, Mr Rupiah Banda and Mr Elias Chipimo, who had been vetted, were later adopted. The procedure thus cannot be absolutely final, though it is necessary that for a procedure as important as vetting,the aspect of finality is strictly adheredto.

The UNIP (Election) Regulations further entrench vetting into the Zambian legal framework by repeating what the Party and Republican Constitutions state.

The Electoral Act also mentions the qualifications that are needed to be an aspiring member of parliament. These are the same as those stated in the Constitution including being a citizen of Zambia, having attained the age of twenty-one and being a member of the party. The Act also states that a person shall not be qualified to be a candidate for election to the National Assembly unless his candidature has been adopted by the Central Committee in accordance with the provisions of Article 75 of the Constitution."[8] Thus reinforcing the whole concept and practice of vetting.

II International Human Rights

This part of the chapter will examine the various legal instruments intended to enforce protection of human rights. The relevance to the first part of the chapter being that when the new constitutions were drafted for former colonies when they achieved independence, detailed provisions for the protection of the basic rights and freedoms were inserted in them, taken directly from the European Convention of Human Rights of 1953, and the universal declaration of the United Nations.

European Convention

The European Convention of Human Rights was signed in Rome on 4 November, 1950 and came into force on 3 September, 1953. Article 1 of the Convention obligates states party to the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention." These rights include the right to life (Article 2(1), no subjection to inhuman or degrading treatment or torture (Article 3), the right to liberty and security of person except where there is lawful detention or lawful arrest (Article 5).

Everybody is entitled to a fair and public hearing, "in the determination of his civil rights and obligations or of any criminal charge against him." (Article 6(1)).

Everyone has the right to freedom of thought, conscience and religion (Article 9(1)). Article 10 embodies the right to freedom of expression. This includes "freedom to hold opinions and to receive and import information and ideas without interference by public authority." Further Article 11 states the "right to freedom of peaceful assembly and freedom of association with others." Thus anybody "whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in official capacity." (Article 13)).

The positive aspects of the Convention as observed by Luard[9] is the fact that the Convention accords by virtue of Article 25, remedies to non-Europeans within the jurisdiction of the contracting parties. Further, he says that for states such as newly independent ones who have inserted large portions of the Convention in their constitutions, it will go a long way to bringing

the human rights recognised by various states more into concert.

D W Greig[10] however, criticises the Convention because firstly, being the common denominator of the extent to which a number of like-minded states agree on certain basic rights, merely reproduces rights which these states believe are already accepted within their municipal law. And secondly, he says that the rule which states that local remedies he exhausted first, is likely to restrict the number of successful complaints that will be made to the commission, as they will only consider complaints where the commission's view of the Convention differs from the interpretation put upon it by the state. Greig however, concedes that the Convention has contributed to the adoption of a number of statements of human rights in the constitutions of newly independent states.

The United Nations

In 1945 at the Yalta Conference, the world powers decided that to "save succeeding generations from the scourge of war .... and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person[11] they needed to draft a multilateral treaty establishing or restricting the rights and duties of the signatory states.

The charter however, has limited legal effect, though it strives to promote "universal respect for and observance of human rights and freedoms"[12] it does not legally oblige them to do so. "A common standard of achievement for all peoples and all nations to the end that every organ of society keeping this declaration constantly in mind shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition

and observance, both among the peoples of member states themselves and among the peoples of territories under their jurisdiction."[13]

The United Nations, however, does expect that as concerns the United Nations Charter, "members of the international community will abide by it. Consequently, in so far as the expectation is gradually justified by state practice, a declaration may by custom become recognised as laying down rules binding upon states."[14]

The African Charter on Human Rights and People's Rights

The African Charter on Human Rights and People's Rights was drafted by the Organisation of African Unity in 1981 in Gambia at the African Foreign Ministerial Conference. The Charter borrowed heavily from the European Convention on Human Rights.

Therefore, it is found that the rights and freedoms stated in the Charter are the same as those in the Convention such as being entitled to protection of the law (Article 3(2), right to liberty and to the security of his person (Article 6), freedom of conscience, (Article 8), right to free association (Article 10), free assembly (Article 11) and so forth.

The Charter however, like the United Nations Charter, has no legal effect until a simple majority of the contracting parties have ratified it. It, however, calls upon states to enforce human rights stated in the Charter.

Conclusion

This chapter strove to show that human right is not what the sovereign deems it to be but as a God-given right. These rights are of universal application as their standards are established by international organisations such as the United Nations.

It is contended that the form which constitutions of former British colonies such as Zambia took, were reflective of the human rights that prevailed at the time in Europe as expressed in the European Convention on human rights.

The vetting procedure to a certain extent, therefore, breaches the fundamental right of representation. Though there is extensive legal protection of human rights in the form of constitutions, human rights conventions in international law states are not obliged to abide by them.

Article 2(7) of the United Nations states that "nothing contained in the present charter shall authorise the UN to intervene in the matters which are essentially within the domestic jurisdiction of any state ....."

It is therefore submitted that a bill of rights does not per se guarantee absolute protection of human rights from violation of these rights by the executive.

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CHAPTER THREE

In this chapter, the author will discuss the practicality of the vetting procedure, in that the system will be examined in relation to how it worked in practice, the faults people found in it, from the time it was introduced in 1973 to the present day.

Vetting in Practice

The concept of vetting exercised by the Central Committee was received with mixed feelings as to the adverse effects it had and has continued to have. It is seen as contradicting both the principle of participatory democracy and a means of maintaining the political hierarchical status quo. That is, it is regarded as contradicting the participatory democracy principle, in that it has created a definite conflict of interest between the Central Committee and the people at the grassroots level who often find that their preferred candidate has been vetted. It is also considered that it attempts to maintain the status quo, as candidates (as we shall later discuss) are vetted in order to safeguard the seat for a key party member.

Vetting was introduced in 1973 after the passing of the Republican Constitution which provided for a one-party system of government. The rationale for introducing vetting was that not everybody who wished to stand for elections should stand,[1] as there had to be a method of filtering the aspirants. Those who were sympathetic to party policy and would therefore support party policy in Parliament and not engage in

unconstructive criticism should be allowed to stand, but not those who would not represent party policies adequately in the National Assembly.

The country on November 3, 1973 and all prospective members of parliament, therefore, went to the polls in the primaries. The primaries being a newly introduced system in the election procedure was a system whereby the party officials chose the candidates. The party officials consisted of regional secretaries, chairmen, vice-chairmen, vice secretaries, etc. The party officials picked the highest three candidates who thereby went onto contest for election to the National Assembly.

The reason behind the party officials picking the candidates was that they, by virtue of associating with the people at the grassroots were in a better position to know who the popular candidates were. After being picked by the party officials in the primaries, the successful candidates were subjected to scrutiny by the Central Committee. Following this procedure, twenty-six candidates who had gone through the primary election stage were then disqualified by the Central Committee. No reason was given for their disqualification and one is left simply to conclude that they were "inimical to the interest of the state". What that actually means is open to question. But the opinion column of the Times of Zambia of November 4, 1973, quoted the dictionary's definition of inimical as meaning unfriendly, hostile and harmful.

The Times of Zambia of November 9, 1973 sympathised with the vetted candidates - "they were flying high until today when they were shot down like ducks to plunge ungracefully into the muddy waters of obscurity..... We believe that the entire procedure whereby the Central Committee disapproves of people who have come through with flying colours in the primaries is counter-productive, time-consuming and absolutely unfair on the victims."[3]

However, the Times went on, "we do not believe the Committee disqualifies candidates on anything so flimsy as what kind of clothes they wear or what kind of car they drive. We know that much thought must go into every individual case and that when the final decision is made it is fair as any human being can possibly be fair."[4]

The sarcasm was perhaps not intended, but it was taken and the Secretary-General of the Party, Mr Grey Zulu, said, he could not understand how the Times of Zambia could complain of the system of vetting by the Central Committee. This system, he said, was embodied in the Constitution itself and therefore part of Zambian laws.[5] The Times was quick to reconsider its position; "we have no sympathy for them (vetted candidates). They got what was coming to them. We know that under the Constitution the Central Committee is empowered to vet the names of all candidates. We know that the Central committee is not obliged to disclose the reasons for its action against a candidate, its decision, the Constitution says, is final."[6]

Thus whether the twenty-six disqualified aspirants were hostile or harmful and the extent of the hostility is what the Central Committee should state when they vet somebody. One thing is clear from this exercise, firstly, once a candidate has been vetted the decision is not to be questioned. This is based on the fact that the decision of the Central Committee as regards vetting is final. The finality, however, relates only to actions in the courts of law, but it should not interfer with the basic right of every citizen to freedom of expression and the right to voice an opinion on the matter. And secondly, it is apparent that criticisms and unfavourable comments are not expected in relation to the vetting exercise, not that it is particularly sensitive or of no concern to the people. On the contrary, it is the concern of the general public who are affected by whom they are represented by in Parliament. This concern and opinion

expressed through a newspaper should be given the respect it deserves and not discouraged.

It is the reaction of 'criticism' and 'unconstructive criticism' that appears to be a controlling factor in a candidate being vetted, in that if a candidate is very vocal and critical of party actions, he will not 'stand a chance'. Such a statement is supported by the fact that among the twenty-six vetted candidates of the 1978 elections were ex-Bahati MP, Mr Valentine Kayope and Mr Arthur Wina. Mr Kayope, who apart from being very vocal also chaired the Parliamentary Select Committee on Parastatals whose report highlighted the inefficiency of the companies and hence proved quite unpopular with the government.

It would appear that the party officials were trying to prove "that the Party is supreme and that if anybody tries to challenge this supremacy through the courts of law the Party will take action against them depending on the nature of the case."[7] One is therefore given the impression that MP's are not at all free to speak in Parliament under the banner of Parliamentary Privileges, as sooner or later they may be vetted.

In addition to the uncertainty caused by lack of definition of the proviso 'inimical to the interests of the state', criticism has also been leveled at the inconsistency in the manner the Central Committee exercises its vetting power. For instance, on November 4, 1978, the Daily Mail reported that thirty candidates who had gone through the primaries had been vetted. They, however, later adopted two of the vetted candidates, Mr Rupiah Banda and Mr Elias Chipimo. The question was that had they ceased to be inimical to the interests of the state, or did the Central Committee simply make a mistake? The latter being very improbable, it could be said that the rest of the vetted candidates

could have equally argued that their cases required similar review. The point being emphasised is that it is possible for the Central Committee to go back on its decision, hence provision should be made for aggrieved candidates to appeal. There should be some flexibility in the system to cater for appeals and even reversion of decisions so at least it would not be viewed as an inconsistency to the normal procedure.

The National Commission of 1972 on the establishment of a one-party state, having considered the matter of how much freedom of speech MP's should have in a one-party participatory democracy, decided that ministers should not be free to criticise government policy publicly as this was contrary to the principle of collective responsibility. The government accepted the recommendation and further added that MP's could criticise the government and its policies if they resigned their posts. It is perhaps on the basis of such recommendations that the government feels justified to vet candidates. It should, however, be stated whether constructive criticism was intended to be included in the National Commission recommendations.

The desired effect of the vetting exercise appears to produce "committed party loyalists in Parliament, the type of MP who cannot offer constructive criticism because he considers everything from Freedom House or government flawless, he may also not criticise because he does not want to be in bad books with the Party. He will therefore, not do anything which in the eyes of the Central Committee would be considered as an act of disloyalty to the Party".[8]

Thus all vocal MP's face repremand of one form or another. For instance, in the 1978 elections, Mr Valentine Kayope was very vocal in his

criticism of the executive arm of the government. He chaired the all-important Parliamentary Select Committee on parastatals whose reports revealed irregularities. This report was found very unpalatable by the party and its government. Thus, that he was vetted in the 1978 election in his attempt to retain his Bahati Constituency and later in a by-election in Kantanshi Constituency, is not surprising and is probably related to his performance in the previous Parliament.

The behaviour of MP's in highlighting and discussing government policy therefore, would appear to us to be what the MP's are essentially there for, though not what the government would like them to do. Indeed this behaviour is considered to be indiscipline, the source of which the President acknowledged when he said, "but because they (MP's) know the law of the land, as it stands makes them immune from disciplinary action outside the purview of Parliamentary process, they have chosen to abuse their privileges."[9]

Although the MP can criticise the party and its government in Parliament for their shortcomings, they should expect to incur the wrath of the Central Committee. Indeed the President personally threatened the MP's when he said, "but let me warn them (MP's) that they are being clever by half, they are biting the hand that feeds them .... because the party is supreme and because it is the medium of expression of the power and will of the people, it has the power and means to deal with any individual MP who may be tempted to abuse his position in Parliament."[10]

The vetted candidates of the 1978 elections all have common features in that, firstly, they were rather controversial and were critical of the continued closure of the southern trade route through the then Southern Rhodesia. Some of them were even critical of the continued assistance Zambia rendered to the liberation movements in this region.

Their being vetted was therefore, not at all surprising and would actually be justified if the criteria used for their being vetted was the disruption of unity among the people. One would of course, have to bear in mind, that at this time Zambia was assisting the freedom fighters in a bitter struggle for independence and was as a result in a war situation, being subjected to air raids and other forms of destabilisation. At this time, the people were largely behind the government and recognised the fact that "Zambia could not afford the luxury of political debate and self-seeking publicity" and "that those in public and political life must gear all efforts in holding the nation together."[11]

Whether the vetted candidates were actually undermining or threatening this required unity in highlighting particular issues that they thought were of public importance can only be decided by examining the particular issues raised. The opinion of the author is that many of the issues debated were only national issues such as the Select Committee which revealed blatant inefficiency in the parastatals. However, these MP's did heavily criticise government policy in relation to the involvement of Zambia in the independence struggle in Southern Rhodesia which could not only have had a disruptive effect on the general public, but could have led to rifts and conflicts at a time when unity was absolutely necessary.

It was thus considered that in view of this, the place to attack government policy was in the National Council and that "under a one-party democracy, Parliament should be the place for dealing with the technicalities of the bills before the house ..... and not a forum for efforts to change party policy and seek dubious publicity."[12] It would therefore seem that inimical to the interests of the state is concerned with state security and that critical speeches in Parliament by vocal MP's could undermine the concept of unity the party is trying to instil

in the people hence any action interfering with these policies is tantamount to security interests.

The 1978 elections also saw what many considered to be an attempt at maintaining the status quo in the political leadership through vetting upcoming or strong candidates in the constituencies of key political members. For example, when a Lusaka lawyer Mr Mundia Sikatana was challenging the political base of the Prime Minister Mr Lisulo in Mongu Constituency. To many observers, the move by the Central Committee to drop him was aimed at safe-guarding the seat for the Prime Minister in what would have been a close contest. Mr Lisulo was finally retained unopposed.

It would be useful therefore, for the sake of clarity and dispelling uncertainties when and before a candidate is vetted, to explain what is actually entailed in the inimical to the interests of the state proviso, as it appears to be open to abuse. The desire for a definite meaning by the Central committee prompted Mr Kayope to raise a point of order in Parliament, during the debate on the Electoral Bill in 1977 by the then Minister of Legal Affairs and Attorney-General, Mr Lisulo, when he said, ".... is it in order for the Honourable and Learned Minister of Legal Affairs and Attorney-General to fail to explain to the House that an act tantamount to treason, which may be regarded as inimical to the security of the state, is not investigatable and punishable by the courts of law? Can he reconcile how a person in the employment of government can remain District Governor (he is in the district representing His Excellency the President) can he be adjudged by the Central Committee to be treasonable, therefore inimical to the interests of the state? How can he be allowed to function without bringing him before a court of law?"[13]

Earlier another MP had expressed a similar view when he said. "..... *Article 25 is relevant to the extent that the Central Committee* may disapprove a candidate on the ground that his nominatioin would be 'inimical to the interests of the state.' I doubt whether this is the only ground at the moment in which all those who are vetted are in fact vetted, because I know of people like District Governors or a person who in fact is a Councillor who have been vetted as MP but not vetted as local District Governor."[14] Thus whether this is true or not, one thing is clear, the party would like and is determined to protect its fundamental principals against those it suspects would dilute them.

The general feeling amongst the public at this time, as gathered from newspapers, is that no matter how one justifies the system, one thing was apparent and that it is used to either maintain the status quo or to sieve out those who are not absolute loyalist to the party objectives and aims. Therefore, although the party may cry 'unity' and the need for unity is indisputable, it should not be interpreted as a licence in whittling down the right to vote of the electorate, for to do so would be to render their right to vote futile. It was pointed out by one writer that an election "is the process by which the voting portion of the public formally participates in the selection of public officials and in approval of public policy."[15] What is therefore decided by the public should be accorded the respect it deserves, after all a handful of people cannot determine what is good for the voters and what is not, as the voter by casting his vote knows what is to be in his favour and is therefore the best judge.

Thus, because of this kind of criticism and also the fact that having a system where the candidates had to campaign twice at the primaries then for the actual parliamentary elections was too expensive, the

election procedure was under review by the end of the 1978 elections.[16] By 1983, the procedure was changed so that candidates were now to file their applications for adoption by the Central Committee, who within fourteen days, were to notify the Electoral Commission in writing of all the names of the candidates whose candidature it had adopted.

The Central Committee in the 1983 general elections, using this system, rejected forty out of the hundred and twelve aspiring candidates who had applied for adoption. Among the notables were, Valentine Kayope, Mr William Chipango, Reverend John Mambo and Mr Kangwa Nsuluka. Again no reasons for vetting were given by the Central Committee. Furthermore, to actually find out who had been vetted was made more difficult as the Central Committee or Electoral Commission did not publish a list of names of those who had applied for adoption but only a list of those who had been adopted.

The 1983 elections indicated just how much tension had been building up between the electorate and the party in that, unlike before, people began to react to the process of vetting. In Ndola, Police apprehended about ten people who protested the vetting of Mr Chiko Bwalya for Chifubu Constituency. Mr Bwalya's supporters accused the party and its government for not honouring its statement that youths were the future leaders by vetting Mr Bwalya aged 23.[17] They later appeared in court and were fined for staging unlawful demonstration.

In 1988, elections were probably the best indicator of not only the growing friction between the MP's and the party, but also the general public and the party. Several MP's were vetted and unlike before, they publicly criticised the Central Committee's actions. The former MP for Wusakile, Mr Dennis Katilungu charged that the "recent vetting of outspoken MP's is designed to erode the freedom of speech of

Parliament", and "those going to parliament would not be able to speak their minds. They will be confined to petty issues."[18] The former MP for Kafue, Mr Chanda Sosala, said it was a pity that the essence of democracy was somehow being infringed upon.

Of the hundred and thirty vetted candidates in the 1988 elections, many were top MP's. Six hundred were adopted to stand for elections though it is not clear the exact number of vetted MP's, as a list of candidates applying for adoption is not published, but of those who came forward were about four vocal MP's; former Chililabombwe MP, Mr Palakasa Chiwaya, Wusakile MP, Mr Dennis Katilungu, Masaiti MP, Mr Dawson Lupunga, former Mufulira MP, Mr Edgar Mumba, former MP for Kafue, Mr Chanda Sosala and Freedom House Provincial Political Secretary, Mr Matiya Ngalande.

The vetted candidates know their plight is final and no appeal is advisable as Mr Sosala said, doing so would be like "pushing one's head against a brick wall."[19] And so, like in the 1988 elections once again people demonstrated in the Copperbelt. It was rumoured that at least three demonstrations took place, though only two were reported one of which involved fifty supporters of Mr Limited Kalenga who marched to the office of Kitwe Governor, Mr Peter Lishika. The demonstrators claimed that their candidate had been embarrassed. They, therefore, suggested that the system be reviewed to at least make it clear why they were vetted.[20]

In the other reported case, Mr Marcellino Bwembya's supporters travelled from Chingola to register their disapproval against the action by the Central Committee.[21] They claimed, like Mr Peter Kasoma of Kabushi Constituency, that vetted candidates were viewed as dissidents by the public because no reasons were given for their non-adoption by the Central Committee.[22]

The problems, therefore, in the system of vetting all seem to originate from the fact that the Constitution does not define what is actually entailed the 'inimical to the interests of the state' provision. The danger in such a constitutional provision is that the party assumes unlimited powers which are open to abuse. The party may therefore have initially made such a wide provision so as not to be confined to a certain category of persons who were 'inimical' only according to the definition given in the Constitution. Hence, anybody vetted who did not fall within that definition could easily bring an action for being vetted on the wrong grounds. The party probably envisaged such a situation and chose to make it very wide. The only problem with this is that it appears to be abused in that it is evident that the factors used in considering whether a person should be vetted are quite unrelated to that person being 'inimical to the interests of the state'.

In the Nkumbula case, the issue of what constituted in the 'public welfare' came up. The court decided that this was a question of whether the public interests overrode the interests of the state which exercised its powers to the general benefit of the public. The court in ths case decided that the interests of the public had been overridden. It is, however, interesting to consider that what is envisaged in the 'inimical to the interests of the state' proviso is a situation where the state can run an orderly society and hence impose whatever constitutional restrictions on individual liberties as it regards as necessary, to enable it to govern to the best advantage for the benefit of the society as a whole.[23]

Conclusion

It has been the contention of the author in this chapter to show that the public opinion towards the vetting procedure has been one of scepticism as concerns its fairness. The examination of its practicality has revealed that although it is cricitised by the public, it has several positive attributes.

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CHAPTER FOUR

The Advantanges and Disadvantage of the Vetting System

The predominant issue at this stage of the thesis is whether the system is protecting the basic fundamental human rights, especially the right to vote or undermining these rights. It would appear that the fundamental rights such as the right to vote, freedom of expression and so forth are contradicted later in the Constitution by the provisions barring certain people from exercising these rights. The object of the ensuing chapter therefore, is to analyse these contradictions and also highlight and perhaps justify the more positive attributes of the system.

The intention of the initial constitutional provision, which vetted candidates after the primaries, was to involve the local party officials in selecting the best candidates. This was so as to ensure that those three who attained the highest number of votes were not only the best candidates but were also sympathetic to the party cause. This way there could be broad participation of the grassroots in the election process and at the same time safeguard against party opportunists.

The Constitution was amended in 1983 as to the manner of selecting candidates after the primaries. The form this took was briefly that the primary elections were abolished and the vetting was done by the Central Committee after the candidates submitted their names for approval. Though no reasons were given publicly for this change, it can be assumed that it was mainly because of the anomalies in the old procedure and as

a result of the adverse criticism that it received. This criticism was mainly that candidates felt that they should not wait till they had spent money campaigning for the primary elections only to discover that they had been vetted. Further, where they were successful, among the three highest in the poll and subsequently vetted, a lot of discontent arose as it indicated that had that person not been vetted, he stood a good chance of winning the substantive election.

It is interesting to note that although the constitutional provision relating to the election procedure which received the most criticism was abolished, people still feel that the present system causes a certain amount of embarrassment to the vetted candidates. Whatever reasons they were vetted for, they are generally regarded as dissidents. This was pointed out by Mr Peter Mutale of Kabushi Constituency in Ndola in the 1988 general elections when he pleaded with the government to revise and devise a better system of adopting or rejecting people.[1]

The reason for the vetted persons feeling this way is possibly because most of the vetted candidates are either former vocal opposition members or actively discontented citizens. These people hence advocate that a partial remedy for the situation would be to influence the Central Committee. The point being that if the party is supreme and the people are the party, as is advocated, then just how necessary is vetting? If the power is taken to the people, then the people's choice must prevail. Thus as the party constitutes the people, the people's view will always be the same as that of their leaders.

To this end therefore, where the party vets prospective candidates thereby to an extent determining the candidates who go to parliament, one would pertinently ask, what is the significance of the election for the country as a whole? One of the more important effects of an

election is that it is supposed to "cleanse" the party of members who do not have public support. The fact that voters are permitted to exercise a real choice between rival UNIP candidates demonstrates the extent of inner party democracy. The voters can and do reject members of the government at the polls.

On the other hand, an electoral system which is completely "democratic" is not always best for a developing nation. We will therefore consider the positive aspects of vetting so as to show that a completely democratic system is essential in a one-party system.

Advantages

It has been argued that despite its many defects, one advantage of a non-competitive one-party election (such as Ghana's in 1965 - where all 198 candidates were nominated by the Convention People's Party) is that the President is unfettered in choosing the members of his government. In the Zambian system where the main criterion is the local standing and the personality of the candidate, the President's choice might be severely curtailed through the removal from the assembly of most of his former ministers. If this happens, he would have to select his cabinet from untried back-benchers. To assume that most ministers will be returned may be a risk worth taking, but it is a calculated risk which may not come off and could have serious consequences for the country. Indeed, this could have been the basis of vetting stiff competiton for the then Prime Miister, Mr Lisulo, in the 1978 general elections in Mongu Constituency, bearing in mind that the Prime Minister must be a member of the Assembly in accordance with Article 50(1) of the Constitution.

One solution to this difficulty which may face the party every election would be to amend the constitutional provision in Article 50 which

requires all ministers and junior ministers to be members of the National Assembly. This would however, be definitely considered to be undemocratic and undermining the very principle of participatory democracy upon which the Constitution is founded. It could be counter-argued that there is no optimum democracy and that we should not compare our democracy to that of the west as we are democratic in our own right.

The second advantage of the current system is that not anybody can stand for elections, that is to say, there must be a mechanism of determining who is going to stand and where, when that individual belongs to a party, be it a multi-party or single-party system. Indeed more people may actually be encouraged to stand for election in a single-party system although they must express certain sentiments. This is unlike the old system (under the 1964 Constitution), "whereby those who did not secure a party nomination were automatically discouraged from participation in general elections as independent candidates."[2]

The party recognises that it has to encourage public participation in the election process, so it enacted a provision involving the people in the choice of candidates with the exception of undesirable candidates. Thus, the people were free to choose any candidate, but if the top three of their choice included an undesirable or hostile element, then the people's choice took second place. Indeed it may be argued that such decisions are not only to cleanse the party for its own benefit, but seriously undermine all efforts to achieving a united nation.

The 1983 amendment to the electoral procedure only means that the people are not given the initial choice, but are also able to choose from the candidates who are not vetted. Although to this extent it erodes the principle of public participation, it is a fairer system than the old one of vetting after the primaries. It also enables some public

participation in the choice of candidates going to the Assembly through elections. This is in contrast to systems adopted by some one-party states, such as Ghana where there are non-competitive elections, thus keeping public participation down and imposing a rather undemocratic system or a procedure where even in the least democratic nations public opinion and participation is considered essential and acts as a useful barometer of public opinion for government.

The third advantage is that when the party does vet a candidate for whatever unpublished reason, it feels it should not be confined to vetting persons in specific categories covered by a definition in the Constitution. That would limit the powers of the party and would restrict them to the constitutional definition. Further it should be noted that to define or explain (constitutionally) what is "inimical to the interests of the state," would give rise to appeal cases, in that anybody vetted who felt that they did not 'reasonably' fall into that category, would bring an action. The provision, therefore, is deliberately wide so that it covers all circumstances.

Disadvantages

The one-party state and the current election procedure is not flawless and several flaws or disadvantages are apparent upon examination. Firstly, some of the candidates who end up in parliament are not always the people's first choice, as in most cases the candidates vetted are those with a controversial history in parliament. Thus these are the ones who in the public eye appear to be doing their job. It is from the strength of this popularity that they derive their security to make relentless efforts in the Assembly to participate and hence represent their constituents well.

The question therefore is, to what extent should the grassroots "participate democratically" in the choosing of future legislators of the country? The answer to this question is embodied in the issue of not precisely knowing what is meant by "inimical to the interests of the state" in the constitutional sense. This non-definition leads to too much abuse of the election procedure. For instance, in the last election, 1988, of the vetted candidates who made their vetting public, six were former members of parliament, all of whom had been very critical of government policy. One wonders what exactly is expected from the members of parliament as their supposed function is to inquire into government actions that affect the public and thereby ensure that their constituents' interests are protected.

The power that the MP's hold is a delegation of the electorates collective right to question actions that affect their well being. The result of vetting vocal MP's and attempting to restrict their freedom of speech in the Asembly could be that parliament might be a group of MP's paid out of public funds who were merely a burden on tax-payers because they cannot speak for the people they represent. Thus the people at the grassroots may tend to become disenchanted with the executive in regard to the extent the power to vet is used.

Vetting, therefore, of former MP's and potentially active candidates should be avoided as it is associated with the maintenance of the status quo. It should also be noted that of all the national institutions, it is the Presidency and the National Assembly whose occupants are directly elected and mandated by the people.

Secondly, the vetting procedure causes dissatisfaction and conflict between the government and the electorate as the people begin to see that there is a contradiction in the party policy of taking power to the

people and thereafter taking their privilege away by vetting their potential choice of representatives. If the power is truly with the people and they constitute the party, there should be no conflict of interests as the choice of the people would automatically be the choice of the party.

Indeed Article 13(1) of the African Charter on Human and Peoples Rights states that every "citizen shall have the right to participate freely in the government of his country either directly or through chosen representatives in accordance with the provisions of the law". Though parliament can be said to house the representatives of the people, can it truly be said that every citizen freely participates in the government's actions affecting them? It may seem that candidates are only free to participate in the government directly if their views conform to those of the party and do not result in their being vetted. This is contrary to the rights laid down in Article 20(1) of the African Charter which states that "all peoples shall have a right to existence. They shall have the unquestionable and unalienable right to self-determination. They shall freely determine their politcal status and shall pursue their economic and social development according to the policy they have freely chosen."[3]

The issue here then is that as the candidates who are adopted may not be popular with the electorate and as the population grows, the number of competing candidates may increase. The candidates going to parliament may end up going to parliament on a minority vote, as well as not being the people's first choice. This problem has already been recognised by the executive when President Kaunda stated that "sometimes when there are too many candidates contesting one seat, the winner goes to parliament on a minority vote."

It is interesting to note that situations could arise where the candidate goes to parliament without the support of a significant number of the electorate. This could occur in two situations, where the number of contestants for a constituency is large and the successful candidate is voted into parliament on a minority vote, or where the support in a constituency is divided between two contestants and one of them is vetted letting the other go unopposed. In both cases a large portion of the electorate will feel that their interests will not be adequately represented in parliament. An illustration of the second situation, being the 1978 parliamentary elections for Mongu constituency which was contested by Mr Sikatana and the then Prime Minister, Mr Lisulo, Mr Sikatana was vetted leaving Mr Lisulo to be unopposed in what according to the Times of Zambia of Saturday November 4, 1978, would have been a closely contested election.

The final short-coming of the vetting system is the issue of inconsistency which has already been looked at in Chapter Two and thus needs only brief mention. Inconsistency in this case relates to the manner in which the party conducts its vetting exercise. Article 91 of the Party Constitution provides that the decisions of the Central Committee as concerns the vetted candidates will be final and not subject to review or appeal. Yet we have seen how in 1978 the Central Committee went back on this provision and adopted two candidates after it had vetted them. Whether they appealed or the Central Committee reconsidered the case and decided it had not acted judiciously, one can only guess. The system should, however, provide a channel for appeals. There have been no reported cases of appeal of any kind in relation to Article 25, or even to the Central Committee as provided for in the Party Constitution. Perhaps such appeals are confidential. Additionally Article 91 of the Party Constitution does not make provision for an appeal.

The question therefore that remains is just how constitutional is the vetting exercise in relation to the protection of human rights? It has been quite evident that the whole vetting procedure may be in conflict with the various 'freedoms' stated in the Constitution, although perhaps justified in the name of maintaining national unity. This non-protection of their basic rights has led to a situation where some of the ablest citizens are avoiding active party politics. This contrasts with the old Constitution where the 'Central Committee or the National Council could ask for certain individuals in society who possess certain qualifications essential to good government to stand for parliamentary elections".[4] This aspect of inviting able individuals should be re-introduced for the benefit of developing the nation.

One would have thought that with the establishment of a one-party state some, of these discrepancies could have been anticipated. The elimination of opposition had a detrimental effect on the ruling party, as the opposition, now members of UNIP brought their conflicts and competition within UNIP's ranks. Instead of concentrating on the positive attributes and benefits a potential candidate could bring to a constituency, his past involvement with the other parties became the overriding factor.

Thus having considered the advantages and disadvantages of the vetting system in relation to protection of human rights, it is apparent that though these rights are protected to some extent they are also breached. It is this aspect of the breach of the rights accorded to every citizen that should be alleviated.

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CHAPTER FIVE

Conclusion

The concept of 'Constitutionalism' of vetting in relation to protection of human rights discussed in this essay as practiced in Zambia, is not fully observed in that some fundamental rights are breached, which could easily be observed by the state.

The essence of human rights is based on the premise that every human being is born with certain rights, rather than rights being conferred upon him by the Sovereign. This aspect was discussed in Chapter One. The factors that led up to the introduction of vetting in Zambia and the reasons that were given for its inception were also discussed. The factors that induced the change to a vetting were compared with those that led to a change in the Tanzanian system, Tanzania being the country from which Zambia borrowed the idea. Other countries such as Malawi and Ghana with similar constitutions, were also discussed as compared to Zambia's constitution.

The inalienable rights of man, such as the right to vote, are embodied in the constitution and other statutory provisions. Chapter two examined the various relevant provisions and strove to show that a Bill of rights does not per se ensure protection of fundamental human rights. Even intergovernmental bodies such as the United Nations or the Organisation of African Unity have no legal binding force or mechanism of enforcement of the rights on states, as discussed in Part II of Chapter Two.

In Chapter Three, it was seen how the vetting procedure works in practice and it was illustrated that in most cases the candidates vetted are the vocal parliamentarians who are popular with the public, but are also viewed by the public as serving their purpose in parliament by highlighting discrepancie in government policy.

It is contended in Chapter four that though the system of vetting has some disadvantages, it also has advantages. And sometimes the state, being aware of the flaws, will decide that the positive attributes have an overriding influence over the negative ones in the name of 'public welfare or benefit'. This principle was laid down in the Nkumbula case, though it is the contention of the author that some of the negative aspects of the vetting system such as candidates going to parliament on a minority vote, the decentralisation of the vetting procedure, and definition of 'inimical to the interests of the state', can actually be alleviated so as to guarantee more protection of human rights in the society.

Recommendations

The author puts forward the following recommendations:

1. That "inimical to the interests of the state" as stipulated in Article 75(3) of the Constitution of Zambia should be defined to some extent. The form of the definition should not be the form of an explanation as to what type of person is 'inimical to the interests of the state', but should detail the circumstances in which a person will be vetted.

2. That the Central Committee should give reasons to a vetted candidate as to why he was vetted. As, to "deny somebody the right to represent his supporters is very serious, and the onus is on the government to give reasons as to why the person has been denied his right".[1]

3. That the system of vetting be decentralised and the responsibility of choosing the candidates be shifted to the provincial level, with the Central Committee playing an advisory role only. The task of choosing the eligible candidates should (at provincial level) be given to persons in high judicial office, so as to lessen the chances of bribery which was allegedly the case with some party officials in the abolished primaries. The list of candidates seeking elections in a province or district would be submitted to the judicial officers, who would then be advised by the Central Committee (acting in an advisory capacity) as to who and who not to adopt and why. It would then be up to the discretion of the judicial officers to either accept the advice or not.

4. That to ensure that candidates do not go to parliament on a minority vote, a system of "proportional representation" be introduced, whereby the voters pick the candidates they would prefer for first, second and third positions, and thereafter the candidate with the highest number of first place votes goes to parliament.[2]

5. And that a channel of appeal or review by the High Court be set up for candidates who feel that they have been wrongly vetted. This would ensure that (if the recommendations of defining 'inimical to the interests of the state' and decentralising the vetting procedure were followed) human rights as regards the vetting procedure were better protected.

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