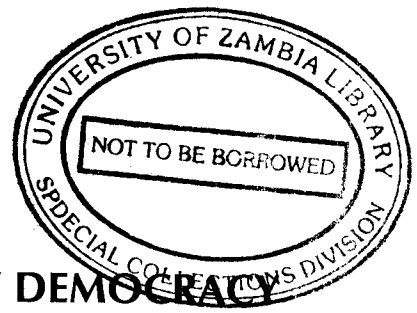




**THE LEGAL FRAMEWORK OF MULTI-PARTY DEMOCRACY
AND THE FREEDOM OF ASSEMBLY AND ASSOCIATION IN
ZAMBIA.**

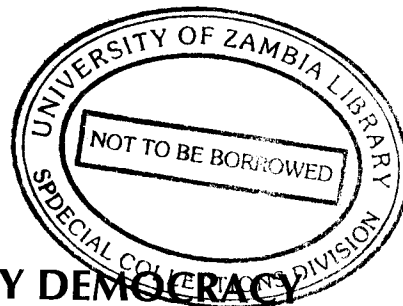
**(A critique of the extent to which the tenets of Multi-party
Democracy have been upheld in Zambia)**

BY

CORNELIUS MWEETWA

University of Zambia

December, 2006



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CORNELIUS MWEETWA

**Submitted to the School of Law in partial fulfillment of the
requirements of the degree of Bachelor of Laws.**

University of Zambia

December, 2006

**THE UNIVERSITY OF ZAMBIA
SCHOOL OF LAW**

I recommend that the Obligatory essay prepared under my supervision
by **CORNELIUS MWEETWA**

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**THE LEGAL FRAMEWORK OF MULTI-PARTY DEMOCRACY AND THE
FREEDOM OF ASSEMBLY AND ASSOCIATION IN ZAMBIA.**

**(A critique of the extent to which the tenets of Multi-party Democracy
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DEDICATION

To my parents, the late Mr. Mathias Mweetwa and the late Monica Muleya Mweetwa whose Excellency I hope is reflected in this work. This is in partial fulfillment of what you tirelessly desired that I achieve.

And to my son Chabota who has endured my absence during the period I was working on this paper.

ACKNOWLEDGEMENTS

Every successful work, I attribute it to you God the Almighty for making it possible for me, once more, to achieve this and for the good of useful people you always provide around me.

This work would not have been complete without the generosity of many people. Firstly, my supervisor, Dr P. Matibini for his insightful guidance and tolerance. I will never really pay you the debt I owe you for the priceless effort you put in this work.

Secondly, Mrs. Mercy Zulu for typing this work for many to see and read in the unknown future.

To my elder brother Chris and family, for the material support rendered. My gratitude also goes to the entire staff at Law School for making my academic dreams become reality.

To my ever helpful friends, Chikuta L.M, Clavel S, Andeleki C, Matariro J and many others whose names I have not listed. Without you colleagues success would not have been achieved.

To Benson Mpalo (CHR Chairman) and my fellow UNZASU members when I served as UNZASU Sports Secretary and UNZASU President, I'm grateful for your unflinching support.

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INTRODUCTION

The main feature of today's global politics revolves around the doctrine of democracy. The notion that the form of government in a given country is closely linked to its economic potential, now more than ever before, is receiving global universal assent. The above statement is true to explain why in the 1990's a 'wind of change' blew across the continent of Africa with citizens yearning for greater democratic governments and meaningful participation in the running and improvement of their political and social economic conditions.

The above statement can be said to be true to the political scenario of Zambia. The realisation of this much cherished Democracy however, is at risk of being hijacked by greedy politicians and individuals who may use their positions and status to serve their private advantage. Thus, when the citizenry of a country cannot fully participate in the political and socio-economic process of their country, there cannot be said to exist self-government in the spirit of Democracy.

This paper undertakes to examine the extent to which the tenets of Multi-party Democracy have been upheld in Zambia, under the re-introduced Multi-party Democracy in Zambia. It examines the extent to which the Third Republic has delinked itself to the First and Second Republic political order and Legal structures and which are largely , pieces of legislation inherited from the pre-independence colonial era. This is important in order to ascertain whether or not Zambia's multiparty democracy has been consistent with the universal tenets of democracy, namely; constitutionalism, separation of powers and the rule of law.

CHAPTER ONE

1.0 THE HISTORICAL DEVELOPMENTS OF ZAMBIA'S POLITICAL SYSTEM

It is generally true that every nation is a product of its past and Zambia is no exception.¹ It is for this reason that the historical developments of the freedom of assembly and association in Zambia will be explored. The purpose is indeed to see how the past may have a bearing on the present and the future. This chapter will cover the period from the imposition of colonial rule, up to the birth of the Third Republic. The rationale for starting with the issue of the freedom of assembly and association is because the functioning of such rights lays a basis for the enterprise of democracy. This will give us a foundation of the framework to Zambia's Multi-party Democracy.

1(i) POLITICAL GOVERNANCE AND THE FREEDOM OF ASSEMBLY AND ASSOCIATION BEFORE INDEPENDENCE

European rule was imposed on what is now Zambia, only at the extreme end of the nineteenth century.² While the causes were those underlying the general 'Scramble for Africa', the immediate occasion was the large gold discoveries of 1886, in South Africa, which unfortunately from the British point of view, were located in the Boer – controlled Republic of the Transvaal.

Cecil Rhodes, businessman and imperialist, decided to by-pass the Boer Republic and establish British colonies to its north where he hoped to find new minerals. To this end he formed his British South African Company (BSA), which established itself in what is today Zimbabwe and at once sent agents north of the Zambezi to sign

¹ Tordoff (ed), Politics in Zambia, (Manchester University Press, 1974) P. 1

² Ibid, P 2.

treaties with various chiefs.³ In 1888, Rhodes signed the Rudd concession with Lobengula which may well be considered as the real origin of the British power and influence in Central Africa, as it was the basis upon which the British Government granted the Royal Charter of incorporation of the BSA company on October 29th, 1889. under the Rudd concession, Lobengula handed over all the mineral rights in his kingdom to the BSA company. It however has to be stated that perhaps the most important Treaty the BSA company signed was with Lewanika, king (Litunga) of the Lozi people of Barotseland in 1890, called the Lochner Treaty, for it became the basis of the company's subsequent absolute claim to mineral rights, over land far beyond Lozi control.⁴ The BSA company ruled Zambia from the 1890s, until 1st April, 1924, when for mainly economic reasons, it handed over its administrative role to the British Colonial office.⁵ The first Governor of the territory was also appointed on that date.

1(i)(a) The BSA COMPANY RULE AND THE FREEDOM OF ASSEMBLY AND ASSOCIATION

it is important to state from the outset that when we talk about the freedom of assembly and association in the context of the pre-1948 Universal Declaration of human rights, we are referring to the inherent rights that human beings were entitled to even if they were not yet universally codified.

According to Virmani, the first ever get together of the Africans of Northern Rhodesia was the formation of Mwenzo Welfare Association in 1912, near the border with

³ Ibid, P. 2

⁴ Ibid, P. 2

⁵ Ibid, P 3

*Tanzania.*⁶ The subjects of discussion ranged from equality, right of self-determination and an opportunity to contact local officials.⁷ The activities of the Association did not expand much because of the outbreak of the war in 1914. During the early twenties, the idea of welfare association was revived with more vigour in 1923. The Mwenzo Welfare Association was revived, then under David Kaunda, Hezekiya Kawosa and Donald Siwale.⁸ The idea of welfare societies spread to the other parts of the country in the 1930s and some examples include Livingstone Welfare Association and Ndola Welfare Association both of 1930.

The establishment of voluntary associations played the most significant role in the development and the eventual emergence of nationalist movements of the 1940s. They also sought redress for grievances suffered or allegedly endured by Africans for more than twenty years.⁹

1(i)(b) FREEDOM OF ASSEMBLY AND ASSOCIATION DURING CROWN RULE (1924 – 1964)

Under the British colonial administration beginning on 1st April 1924, under the leadership of the Governor, as representative of the colonial office, the African welfare association became widespread. This was due to the urbanisation of the 1930s, following a rapid expansion in copper mining. These societies amalgamated into the Federation of African Societies in 1946. Within two years the Federation transformed itself into the Northern Rhodesia African National Congress which soon

⁶ Virman K. K. *Zambia: The Dawn of Freedom*, (Delhi: Kalinga Publications, 1989), P 55.

⁷ Ibid, P 55

⁸ Robert I. Rotbery, *The Rise of Nationalism in Central Africa: The making of Malawi and Zambia 1893 – 1964*, (Harvard University Press, 1967) P. 124.

⁹ Ibid, p 116

became known as the African National Congress (ANC). The ANC had a militant offshoot, the Zambia African National Congress (succeeded by the United National Independence Party (UNIP), after it was banned in 1959), which spearheaded the struggle for independence and was victorious in 1964.¹⁰

These welfare societies progressed amid severe government restrictions. They were recognised only in so far as they looked at the non-political interests of detribalised Africans in town.¹¹ In 1933 for example, the Government refused to recognise an attempt by the Africans to form a "United African Welfare Association of Northern Rhodesia" because these welfare societies had in fact become political societies and these should not be allowed to operate in the jurisdiction of the Native Authority. Even after the formation of the Federation of Welfare Societies in 1964, there was no change in the attitude of the Government towards the Africans.¹²

While the colonial authorities were resisting the political rights of Africans, the Government allowed the formation of the labour party of the white workers from the mines and railways in 1941, under the leadership of Roy Welensky.¹³ He mobilised his political support through the Labour Party for closer relations with Southern Rhodesia in order to strengthen the political force of the white settlers in Central Africa.¹⁴ The formation of African trade unions was actively discouraged through devices such as denying them recognition and harassment. It was only in 1947 that the government allowed the formation of an African Union, the Copperbelt Shop Assistants Trade Union. African miners formed the African Mineworkers Union

¹⁰ Tordoff (ed) Op. cit, P 3

¹¹ Chanda A. W, Zambia: A Case study in Human Rights in Commonwealth Africa, (J S D) Thesis, Unpublished, P 73

¹² Ibid, P 63

¹³ Ibid, P 61

¹⁴ Ibid, P 61

(AMU) under the leadership of Lawrence Katilungu in 1949.¹⁵ Two factors were responsible for changing the official policy on trade unions, after the Second World War. First, the newly elected labour Government in Britain put pressure on British dependencies to facilitate the development of trade unionism. And second, there was mounting pressure on the Government from African workers, for the improvement of industrial organisation and relations.¹⁶

Public meetings and assemblies of Africans were severely curtailed by the Government. Under the Public Order Ordinance¹⁷, any person who wished to convene an assembly or to form a procession in any public place had to apply for a written permit from the authorities. Written permits, however, were rarely granted resulting in many Africans who participated in illegal gatherings being arrested, prosecuted and jailed.¹⁸ In *Chitambala V. The Queen*¹⁹, for example, the appellant one of the leaders of the nationalist struggle against colonial oppression, was convicted by a Native Court on charges of convening a meeting without permission of the Native Authority and disobeying orders of that authority. All his appeals, to the Native Appeal Court, to the District Commissioner's court and to the High Court were dismissed. The wide use of emergency powers by the colonial Government was another hindrance to the freedom of assembly during the period of its rule. The effects of declaring a state of emergency are basically that Government obtains exceptional powers resulting in the suspension of certain human right,²⁰ but only "to the extent strictly required by the exigencies of the situation."²¹

¹⁵ Chanda A. W. Op cit, P 81

¹⁶ Ibid, pp, 81 – 82, citing Meebelo H. S, African Proletarians and Colonial Capitalism, (1986) at 75 and 105.

¹⁷ No. 38 of 1955, Cap 206

¹⁸ Chanda A. W, Op Cit, P 81

¹⁹ (1955 – 58) 6 LRNR 29

²⁰ John Hatchard, Emergency Powers in Zimbabwe: An Overview of Post Independence Development", In Zambia Law Journal (1986) Volume 18, P 35

²¹ Ibid, P 35

The emergency powers were governed by the Emergency Powers²² Ordinance of 1927; ²³ the Emergency Powers Orders in Council 1939 and 1956²⁴ and the Emergency Powers Regulations of 1956.²⁵

As was the case across the African continent under the cruel hand of colonialism, the powers contained in these laws were mostly used to suppress the African struggle for human rights and self-determination. The African mine workers for instance, spearheaded the fight for economic and political rights, through strikes, the most serious one of which occurred in 1956. In order to break the strikes, the acting Governor declared a state of emergency on the Copperbelt, pursuant to the powers vested in him by the Emergency Powers Order in Council 1939 and 1956.²⁶ During the emergency, which lasted four months, fifty-four leaders were detained without trial. An amendment of the Emergency Powers Ordinance of 1927 enabled the government to continue the restriction of the labour leaders for another two years.²⁷ The rejection of the Benson Constitution of 1958, by some Africans in Northern Rhodesia and the Government's response to the rejection, affords another instance of the suppression of the freedom of assembly and association against Africans during colonial rule.

A splinter party of the ANC called Zambia African National Congress (ZANC), rejected the Benson Constitution and planned to boycott the elections. Due to its campaigns many Africans declined to register as voters for the elections that were set for March 20th 1959. ZANC's boycott campaign threatened to undermine the

²² As cited by A. W. Chanda, *Op Cit* pp 88 - 89

²³ Repealed and replaced in 1960 by the Preservation of Public Security Ordinance, No. 3 of 1960 and at Independence renamed Preservation of Public Security Act, Cap. 106 of the Laws of Zambia.

²⁴ Replaced by the Emergency Powers Act, Cap 108 of the Laws of Zambia, at Independence

²⁵ G. N. No. 220 of 1956

²⁶ Chanda A. W, *OP Cit*, P 90 citing David C Mulford. *Zambia: Politics of Independence : 1957 - 1964*, pp 13 - 46

²⁷ *Ibid*, P 90

credibility of the elections, and Government decided to act decisively.²⁸ The Governor issued the Safeguard of Elections and Public Safety Regulations 1959 on March 11th. ZANC's sixty-four principal leaders, including Kaunda, Sikota Wina and Simon Kapwewe, were arrested on 12th March 1959, and restricted to various remote areas.²⁹ In addition, the Governor prescribed ZANC and all its registered branches in the territory under Section 21(2) of the Societies Ordinance.³⁰

Shortly afterwards, ZANC was succeeded by UNIP in August 1959, under Mainza Chona who led the Party until Kaunda took over in 1960 after his release UNIP had its branches declared unlawful and banned by the Governor in May 1960 pursuant to the Preservation of Public Security Ordinance. Five of its leaders were served with restriction orders forbidding them to enter the Copperbelt area.³¹

The ban on UNIP and restriction orders were revoked on November 14, 1960. Serious disturbances broke out at the beginning of August, 1961 in the Northern provinces due to UNIP's master – plan of civil disobedience (Cha Cha Cha). On August, 19th 1960, the Governor, Sir Evelyn Hone, declared a state of emergency in the Northern and Luapula provinces. The Governor banned all of UNIP's branches in the two provinces under the Societies Ordinance.³² On September 26th 1961, the Governor extended the state of emergency in Luapula and it continued in force until the ANC – UNIP black Coalition Government took office in January, 1963.³³

²⁸ Ibid, P 93

²⁹ Ibid, P 93

³⁰ Cap 262

³¹ Chanda A W. Op Cit, P 96

³² Section 12

³³ Chanda A W Op cit, P 97

1(ii) THE FREEDOM OF ASSEMBLY AND ASSOCIATION IN THE FIRST REPUBLIC (1964 – 1972)

The Northern Rhodesia Constitution of 1963 which came into force on January 3rd 1964, introduced self Government for the first time in Northern Rhodesia. It also introduced for the first time in the history of Northern Rhodesia a Bill of Rights.³⁴ The Bill of rights, incorporated in the Zambian Constitution at independence was modelled on the Nigerian Constitution of 1963, which in turn was based on the European Convention on the Protection of Human Rights and Fundamental Freedoms of 1950. From that time, the Bill of rights has been entrenched in the Zambian Constitution and now forms part three of the current Constitution of Zambia. According to Professor Alfred Chanda, the Bill of rights had to be entrenched in the Constitution basically because; the Constitution is the supreme law of the land in Zambia.

On 24th October, 1964, Northern Rhodesia ceased to be a protectorate and became an independent republic under the name of Zambia.³⁵ This was provided for under Section 1 of the Constitution of Zambia. At independence, the Governor's powers passed to the President, largely unaltered in character and extent³⁶ and the colonial Institutions of Government, including repressive legislation were adopted, with only minor modification.³⁷

It can be argued, of course that certain objective circumstances faced both the colonial and Zambian Governments and made such take over inevitable. But it remains indisputable that the colonial era did little to develop a political culture in Zambia, which placed a high valuation on limited Government and respect for individual rights³⁸, and this had enormous implications.

³⁴ Ibid, P 99

³⁵ Appendix 3 to the Laws of Zambia

³⁶ Mubako V. S. "Zambia's Single Party Constitution – a search for Unt" in International Commission of Jurists, Human Rights in a One Party State. (London: Search Press, 1976) 47

³⁷ A. W Chanda, Op Cit P 108

Articles 23(1) of the Independence Constitution provided that except with his own consent, no person could be hindered in the enjoyment of his freedom of assembly and association, that is to say his right to assemble freely and associate with other persons and, in particular, to form or belong to trade unions or other associations for the protection of his interests." This freedom was however subject to limitations under Article 23 (2) of the Constitution the Government could pass a law: (a) that is reasonably required in the interest of defence, public health; (b) that is reasonably required for the purpose of protection the rights or freedoms of other persons; (c) that imposes restrictions upon public officers, or (d) for the registration of trade unions. Such a law had not only to be reasonably required for the permitted purpose, but had also to be reasonably justified in a democratic society.

In the case of *Nkumbula V. Attorney General*,³⁹ Baron J. P made some interesting remarks on restrictions on individual liberties when he said"... it is unthinkable to suggest that the Government of a country elected to run an ordered society is not permitted to impose whatever constitutional restrictions on individual liberties it regards as necessary to enable it to govern to the best advantage for the benefit of the society as a whole."⁴⁰ In practice there were a host of statutes and regulations that imposed limitations on the freedom of assembly and association.⁴¹

The formation and operation of societies and associations was regulated by the Societies Act.⁴² The Act required every society, unless specially exempted from registration, to be registered.

The Registrar of Societies, under Section 8 of that Act, would refuse to register:

³⁸ Tordoff, Op Cit, P 8

³⁹ (1972) Z R 204

⁴⁰ Ibid as cited by L. Zimba, "One Party States in Commonwealth Africa, in M Ndulo (ed) Law in Zambia (Nairobi: East African Publishing House, 1984) P 129

⁴¹ Chanda A W Op Cit, P 175

⁴² Cap 105

"Any society where it appears to him that such society has among its objects, or is likely to pursue or to be used for any purpose Prejudicial to or incompatible with the peace, welfare or good order in Zambia or that the interests of the peace welfare or good order in Zambia would otherwise be likely to suffer prejudice by reason of the registration of such society."

This provision gives a wide discretion to the Registrar to deny registration to any society that the Government does not like. But in so doing he must act fairly.⁴³

Section 23(1) of the Act provides that the Minister may, in his absolute discretion where he considers it to be essential in the public interest, by order, declare to be unlawful any statutory society which in his opinion: (a) is being used for any purpose prejudicial to or incompatible with the maintenance of peace, order and good Government; or (b) is being used for any purpose at variance with its declared objects.

The wording of this provision made it difficult to challenge the minister's action in Court. In the case of **Zimba v The Attorney General**,⁴⁴ the applicant applied for the registration as a society of the Mutendere Branch of Jerusalem Church. The Registrar refused the application on the ground that the interest of the peace, welfare or good order in Zambia would be likely to suffer prejudice. The said refusal was upheld on appeal to the Minister. The applicant applied for an order of certiorari to remove into the High Court for the purpose of quashing the decision of the Registrar. He submitted that he was not afforded an opportunity to be heard when the application and appeal were considered and secondly that the reason for the refusal

⁴³ Chanda A W OP Cit P 176

⁴⁴ (1979) ZR 83

was without merit, as there was no evidence to show that any of the grounds set out in Section 8 applied. Justice Hadden held that provided the Registrar properly refused the application on grounds contained in Section 8, such a refusal would not be a violation of the applicant's constitutional rights. He held further that the Registrar was under a statutory duty to have regard to certain criteria, he had to determine whether the interests of peace, welfare or good order in Zambia would be likely to suffer prejudice. There was a duty on the Registrar to act fairly and this required him, in considering the statutory grounds upon which he could refuse registration to give the applicant a sufficient indication of any relevant objection raised against him to enable him make such objection without necessarily disclosing his source of information. As the applicant was not provided with this information or opportunity Justice Hadden quashed both the decision of the Registrar to refuse registration and the subsequent decision of the Minister to sustain the refusal.

The Kaunda regime availed itself of this provision to ban opposition political parties. For example, the United Party led by the late Nalumino Mundia, was banned in 1968.⁴⁵ the United Progressive Party (UPP) led by the late Simon Kapwepwe was banned in February 1972⁴⁶, the prohibitions of these parties was accompanied by mass arrests and detentions without trial of the leaders.⁴⁷

In 1966, following the formation of the United Party, the Government amended the Constitution to require any MP resigning from the party that had supported his election to resign also from Parliament and (if he so wished) to contest his seat again⁴⁸. That amendment, it has been observed, no doubt inhibited other UNIP MPs who might otherwise have resigned both in 1966 and again in 1971⁴⁹, at (the

⁴⁵ A. W Chanda, OP Cit, P 177, Citing Zambia Daily Mail, August, 20, 1968 at 1.

⁴⁶ Ibid, P 177, Citing Zambia Daily Mail, February 3, 1972 at 1.

⁴⁷ Ibid, P 177

⁴⁸ Act No. 47 of 1966, Gazette Supplement, 22 September, 1966

⁴⁹ Gertzel (ed), The Dynamics of the one Party State in Zambia, Manchester university Press, 1984, p12.

formation of UPP) showing another way of hindering the exercise of the freedom of association.

Some strategies employed by the ruling party for recruiting new members were another way of undermining the freedom of assembly and association. People without UNIP cards were often prevented from boarding public buses, buying and selling at public markets and utilising other public services.⁵⁰ In **Chilufya v. Kitwe City Council**⁵¹ for example, the Local Authority terminated the appellants' trading license on political considerations. (He supported the ANC party) and the Court held this decision to be ultra-vires because it contravened the principles of natural justice. Indeed the first Republic of Zambia, with the spirit of intolerance to opposition or criticism, fear of delegating authority, branding of all virile opposition as treasonable learnt from the colonial master⁵², did all it could to suppress the freedom of assembly and association.

1(iii) THE FREEDOM OF ASSEMBLY AND ASSOCIATION DURING THE SECOND REPUBLIC (1972 – 1990).

The One-Party State or the Second Republic was formally established on 13th December, 1972, when the Constitution Amendment Act,⁵³ implementing the decision, received the Presidential assent. By article 4 of the Constitution only one political party, UNIP could exist and it was unlawful for anyone to form or belong to or assembly with another party. One of the reasons advanced for this change was that a one party state was a necessary counter to the rising tide of political violence.⁵⁴

⁵⁰

⁵¹ (1967) Z.R 115

⁵² Chanda A. W op. cit p.107

⁵³ No. 5 ActNo. 29 of 1972.

⁵⁴

Hitherto, the UNIP party had argued, with reasonable constituency that the one-party state would only be achieved in due course through the ballot box when voters voted the ANC out of existence⁵⁵ however the 1968 election result worked against the Government's plan for the destruction of the opposition through the ballot box. The contest was between ANC and UNIP and the results were that UNIP emerged with eight one elected members and ANC had twenty-three elected members.⁵⁶ Further, the by-elections, which took place in December 1971, were also in many respects, a hollow victory which demonstrated UNIP's vulnerability. Kapwepwe's victory in Mufulira, without campaigning personally, was the first occasion that UNIP had been defeated on the Copperbelt in Parliamentary elections on a universal franchise.⁵⁷ Another reason that was given by the President for the introduction of a one-party state was that since independence there has been a constant demand for the establishment of a one-party state in Zambia. He said that the demands had increasingly become more and more widespread in all corners of Zambia⁵⁸. But, as Nwabueze has observed, these demands which the President was referring to, were made by UNIP partisans, and should not be taken as conclusive of the wishes of the Zambian people as a whole.⁵⁹ Thus, conflict within UNIP and the formation of UPP in particular, constituted the immediate and conscious spur to the creation of the new system.⁶⁰ Public meetings and processions were restricted by the Public Order Act⁶¹ and the Preservation of

⁵⁵ Ibid p.16

⁵⁶ L Zimba in Ndulo (ed) op. 116

⁵⁷ ibid p.116

⁵⁸ ibid p.116

⁵⁹ Ibid p. 116

⁶⁰ Gertzel (ed), *The Dynamics of the one Party State in Zambia*, Manchester university Press, 1984, p116

⁶¹ CAP 104

Public Security Regulations⁶² (RPS). By Section 5(4) of the Public Order Act, anyone who wishes to convene a public meeting an assembly or to form a procession in any public place, had to apply for a permit from the regulating officer of the area concerned. The regulating officer was empowered in issuing such a permit to impose conditions to the holding of such assembly or public meeting as the may deem necessary for the preservation of public peace and order. This position has however changed following the Court's decision in the case of **MULUNDIKA AND OTHERS V THE PEOPLE**⁶³.

Section 12(1) of the same Act stipulated that anyone who participated in a meeting or procession for which a permit had not been issued may be arrested without warrant and charged with unauthorised assembly.

Regulation 3(2) of the Preservation of Public Security Regulations empowered any proper officer by order to prohibit the holding of any meeting in any area or place within the prescribed area, either generally or on any particular day or during any particular time. Such an order may relate to all meetings, or any specified class of meeting, organised, convened held or attended by any specified person or group of persons. The only people exempted from the permit requirement in the Kaunda era, were the President, Secretary General of the Party, the Prime Minister, Ministers, junior ministers, Members of Parliament, the Speaker and Deputy Speaker of Parliament and District Governors⁶⁴.

Over the years the Government used these regulations and the Public Order Act to suppress dissent, much the same way as the colonial Government used them to suppress the nationalist struggle for independence. Permits were as a rule never granted for anti-Government demonstrations by students, workers and other interest

⁶²

⁶³ 1995-1997 ZR 20 (SC)

⁶⁴ Chanda A. W . case study oin Human Rights in Commonwealth Africa, (JSD) Thesis p. 180

groups⁶⁵. Public meetings and processions held without permits were often brutally broken up by security forces. A lot of people, including leaders, were either detained or charged with organising illegal assemblies. This occurred frequently during the first Republic through 1972 and during the campaign for abolition of the one party rule in the Second Republic.

With regards to trade unions, Government policy was that of one union in one industry until 1990 , just before the end of the second Republic. This policy was governed by the Industrial Relations Act of 1971⁶⁶. The Zambia Congress of Trade Unions (ZCTU) was established as the sole national federation of labour organisations in the country. It was empowered to approve decisions of affiliate unions relating to strike ballots, strikes, dissolution, amalgamation or affiliation to another body.⁶⁷

The Government perceived the role of labour as a partner in development, supportive of Government's endeavours to overcome under-development. In this connection, Government did not hesitate to intervene in labour matters whenever it was dissatisfied with labour's performance. Government's basic strategy was to control labour leaders by appointing them to Government or party office⁶⁸. Intimidation of unions by government was not uncommon.

In 1981, four top leaders were detained for opposing the introduction of the so-called decentralised system of local government. Kaunda on many occasions threatened to ban the ZCTU, for its refusal to toe the party and government line.⁶⁹

⁶⁵ Ibid p.181

⁶⁶ Banda D.a Industrial Relations in Zambia in Image News letter December 1991 p.13

⁶⁷ Chanda A. W . case study oin Human Rights in Commonwealth Africa, (JSD) Thesis p. 181

⁶⁸ Ibid p.185

⁶⁹ Ibid p. 185-186

When the unions in 1990 threw their weight behind the campaign for political pluralism the government sought to punish the ZCTU by cancelling the check off system of paying union dues, so as to deprive it of funds. The government also dropped its long standing policy of one union for each industry in an attempt to break up the ZCTU but his tactic failed miserably.⁷⁰

CONCLUSION

From the historical background of the freedom of assembly and association in Zambia, it is clear that these freedoms were highly abused in pre-independence time and during the first and second republics. Clearly, there has been less or no major law reforms in relation to the promotion of the freedom of assembly and association. What seems to come out clearly is that at every stage, those wielding state power have maintained the oppressive laws in order to suppress the people's right to freely assemble and associate. As we conclude this chapter, the question however, is, has this trend of abuse of people's right to freely assemble and associate continued in the third republic? Chapter three will discuss this issue.

⁷⁰ Ibid p.288.

CHAPTER TWO

2.0 DEMOCRACY

Introduction

The main feature of today's global politics revolves around the doctrine of democracy. The notion that the form of government in a given country is closely linked to its economic potential, now more than ever before seems to be receiving global universal assent. The above statement is true to explain why in the 1990's a 'wind of change' blew across the continent of Africa with citizens yearning for greater democratic governments and meaningful participation in the running and improvement of their political and social economic conditions.

According to a Danida, Human Rights and Development Report⁷¹, the agitation for a democratic Africa was triggered by the realisation, *"that there is a vital connection between open democratic and accountable political systems, individual rights and effective and equitable operation of economic system."*

This chapter will discuss the extent to which the Third Republic has delinked itself from the Second Republic legal structures and political order, in order to ascertain whether or not Zambia's multiparty democracy has been consistent with the universal tenets of democracy, namely; constitutionalism, separation of powers and the rule of law.

In this chapter, the term "1991 constitution," means the constitution of Zambia 1991 and the term "current constitution" means the 1991 Constitution as amended by Act No. 18 of 1996.

⁷¹ Danida, Human Rights in Danish Development Cooperation Copen Hagen, 1990, p.4

2.1 WHAT IS DEMOCRACY?

Although the term democracy, just like many legal terms defy a single definition, the one definition with the greatest universality of acceptance is that of Abraham Lincoln who stated that, democracy is a government of the people, by the people for the people.⁷² From this definition, clearly the concept of democracy rests on the popular base of government in which the idea of government rests upon the popular consent or mandate of the government given by means of an election in which the voting franchise is universal for all eligible and that the government exists to their benefit. According to Dorothy Pickels⁷³, democracy as a system of government and a set of institutions must exhibit at least two essential characteristics. The first one is that it must be able to elicit as accurately as possible the opinion of as many people as possible on who shall be their representative and how the country ought to be governed, through adult suffrage in a free and fair election. The second characteristic according to Pickels, is that a democracy must provide ways of ensuring that which they have been elected for. The elected officials in a democracy should also be made accountable to the people through effective checks and balances (separation of powers) and respect for the rule of law.

2.1(a) CONSTITUTIONALISM

It is a generally accepted that in any country, there must be a government so that society can be ordered and allow the citizens to fully realise themselves. However, the concept of government itself introduces a hazard as to how

⁷² From the Gettybury address, cited in B.O Nwabueze 1973 Constitution in the Emergent States, London, C. Hurst & Co. p1

⁷³ Pickels Democracy: London, B. t Batsford, 1970, p13

government power shall be strictly used for the benefit of its citizens and restrain those in power from the arbitrary use of power so inherent in government itself.

The concept of constitutionalism has been developed over time to express the idea that arbitrary political power should be curtailed. The essence of constitutionalism is placing limitations upon power. For the process of self-government to be effective, therefore, democracy demands that, the government should always promote dialogue and consensus between the leaders and the governed. This is intended to ensure that the leaders do not use the power vested in them to manipulate the machinery of government or indeed to repress the people's opinion on issues of public interest. This kind of public supervision, if attained, ensures that the leaders do not place themselves beyond the reach of the ordinary citizens. Therefore, for the ordinary citizen to continue to supervise the leaders, the leaders must operate within the delineated scope of the law. This is basic concept of self-government within the framework of the law is what is sometimes called limited government, which is the basic fundamental pillar of constitutionalism.

According to De Smith, constitutionalism revolves around,

*"the principle that the exercise of political power shall be bound by rules which determine the validity of legislative and executive action by prescribing the procedure according to which it must be performed or by delimiting its permissible content... Constitutionalism becomes a living reality to the extent that these rules curb the arbitrariness' of discretion and are in fact observed by the wielders of political power and to the extent that within the forbidden zones upon which authority may not trespass, there is significant room for the enjoyment of individual liberty."*⁷⁴

From the above statement, constitutionalism basically denotes key aspects that must be integrated to a government in a democracy. Nwabueze has aptly stated that the concept of constitutionalism seeks to express the limiting of arbitrariness of political

⁷⁴ De Smith S. A "Constitutionalism in the Commonwealth today" in *Malaya Law Review*, Vol 4, 2: pp 205 – 17 at 205.

power exercisable by a public officer. Thus, constitutionalism places emphasis on limiting political power to the extent only necessary for smooth and effective operation of government in a manner that leaves sufficient room for the free enjoyment of fundamental freedoms and liberties.

Professor Nwabueze has thus summed up constitutionalism as a limitation on government, it is the antithesis of arbitrary rule, and its opposite is despotic government, the government of will instead of law. Arbitrary rule is government conducted not according to predetermined rules, but according to the momentary whim, and caprices of the rulers.

Shivji has concluded that the concept of constitutionalism rests upon two main pillars, limited government and fundamental freedoms or rights of the citizenry. For a "majority held in restraint by constitutional checks and limitations and changing easily with deliberate changes of popular opinions and sentiments, is the only true sovereign of a free people"⁷⁵. According to professor Wheare (1966 P139), in the book *Modern constitutions*, when talking about democracy being the rule by majority will, there is need to apply extra care, because 'universal suffrage can create and support a tyranny of the majority or of the minority of one man.... Have not modern tyrannies been returned to power by majorities of over 90 per cent?' accordingly, he suggests, 'the crucial test is whether the government is limited by pre-determined rules of law. In this vein, the question that can be asked in relation to the constitution is, 'does the constitution impose limitations upon the government?' To this extent

⁷⁵ Lincoln A, The First Inaugural Address, 4 March 1961

professor De Smith in the book, *The New Commonwealth and its constitutions* (1964 p106) has stated that,

"a contemporary liberal democrat, if asked to lay down a set of minimum standards, may be very willing to concede that constitutionalism is practised in a country where the government is genuinely accountable to an entity distinct from itself, where political parties are free to organise in opposition, legal guarantees of fundamental rights and liberties enforced by an independent judiciary; and he may not easily be persuaded to identify constitutionalism in a country where these conditions are lacking".

It is apparent thus, that the limitation of government by constitutional guarantees of individual liberties enforceable by an independent judiciary is the very essence of a constitutional government. Therefore, in order that there is adherence to the laid down procedures to promote constitutionalism and make it a living reality to the growth of democracy, there must be adequate checks and balances and observance of rule of law among and between the arms of government. In the Third Republic, the concept of constitutionalism can be discerned from the provisions of article 1(3) of the current constitution that states that the constitution is the supreme law of the land, and any law that is inconsistent with the constitution is, to the extent of the inconsistency, null and void. Thus, any act not done in accordance with the constitution is equally null and void.

2.1(b) SEPARATION OF POWERS

The doctrine of separation of powers is derived from Montesquieu, whose elaboration of it was based on John Locke's writings and the British constitution of 18th century.

In his **Second Treatise of Civil Government**, Locke wrote:-

'it may be too great a temptation to humane frailty , apt to grasp at power , for the same person who have the powers to make the laws , to have also in their hands the power to execute them, where by they must exempt themselves from obedience to the laws they make , suit the law, both in its making and in its execution, to their own private advantage'.

From this statement, Locke was clearly advocating for separation of the arms of government in order to avoid monopoly of power concentrated in the same hands to an extent that, those wielding it may use it to their private advantage. The doctrine of separation of powers was then developed further by Montesquieu, the French philosopher who was more interested in the preservation of political liberty. In his fight for the preservation of political liberty, Montesquieu wrote, as quoted in *De L'Esprit des las*, Book X1 chapter 6;

'political liberty is to be found only where there is no abuse of power. But constant experience shows us that every man invested with power is liable to abuse it, and to carry his authority as far as it will go.... To prevent this abuse, it is necessary from the nature of things that one power should be a check on another....When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no libertyAgain, there is no liberty if the judiciary powers be not separated from the legislative and executive, where it joins with the legislature, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator. Where it is joined to executive however, the judge might behave with violence and oppression. There would be an end to everything, where the same man, or the same body, whether of the nobles or of the people, to exercise those powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.'

The point being stressed is that in any form of government operating on the basis of law, the functions of one arm of government should be exercised by that particular arm of government separate from another arm or body of government. It does not however necessarily imply that the arms of government must operate as exclusive entities from one another, but that neither should exercise the whole powers of another. To this extent, professor Nwabueze, (1993) in his book, constitutionalism in the emergent states at page 20, has aptly stated that,

"the idea of checks and balances seeks to make the separation of powers more effective by balancing the powers of one agency against those of another through a system of mutual checks exercised by the governmental organs upon one another. The legislature might be empowered to approve the appointment of certain top state functionaries. The idea of checks an balances presupposes that a specific function is assigned primarily to a given organ, subject to a power of limited interference by

another organ of the state to ensure that each organ keeps within the sphere delimited to it".

In Zambia, for instance, the executive arm of government is created under party IV of the constitution and provides under Article 33(2) that:

"the executive power of the Republic of Zambia shall vest in the President and subject to the other provisions of this constitution, Shall be exercised by him either directly or indirectly or through officers subordinate to him."

The duty of the executive is thus policy formulation and implementation. The executive also enforces the law as prescribed.

The legislature is created under Part V of the Republican Constitution. Article 62 of the Republican Constitution, Cap 1, of the Laws of Zambia, which provides:

"The legislative power of the Republic of Zambia shall vest in Parliament which shall consist of the President and the National Assembly."

The primary function of parliament is to formulate legislation. According to Article 78(1) of the Zambian constitution, "the legislative power of parliament shall be assented to by the president."

Considering that the three arms of government need to operate separately in order to enhance checks and balances, it is already clear that the president of the Republic of Zambia can and does wield his/her presidential powers in both parliament (legislative) and the executive. This perhaps explains the reason why certain decisions made by the executive, which the National Assembly is expected to question, go unchallenged. For instance, during the reign of former president Fredrick Chiluba, the President was allocated a presidential slash fund, money which he donated and distributed to various individuals and groups of individuals, clubs, churches, etc, without being required to account to anybody or any institution. This is

largely because Parliament was dominated by one political party which was headed by the same person who was Republican President. This tends to undermine separation of powers.

The judicature is created under part VI of the current Zambian constitution under Article 93, which creates the Supreme Court of Zambia, the High court for Zambia, the Industrial Relations Court, the Subordinate Courts and the Local courts. Under the current constitution, the President, exercising his prerogative of mercy, is empowered to reduce, suspend or quash a sentence slapped by the courts on a convict. This power, if regularly used has great potential and does undermine the powers of the courts.

2.1(c) THE RULE OF LAW

The rule of law has since 1945, in parallel with the human rights movement, been a matter of much international debate. The Universal Declaration of Human Rights, adopted by the UN in 1948, was followed by the European Convention on the Protection of Human Rights and Fundamental Freedoms of 1950. Both of these refer to the need for states to observe the rule of law. It is thus no wonder that, in today's global politics, one of the most common features of any democracy is the supremacy of the law. As the concept itself suggests, it is the rule of the principles of law and not of men. The concept of rule of law is a traditional cornerstone to constitutionalism and democracy. In most newly democratic African countries, rule of law is one of the terms regularly used and/or abused by those wielding political power in furthering to persuade the electorates to remain complacent about the operations of the executive. The rule of law is a deliberate and necessary expression for the preference of order and not anarchy. In essence, it prohibits arbitrary and, or unbridled authority on the part of those wielding state power. Rule of law involves

three related, but separate ideas; absence of arbitrary exercise of power, equality before the law and the recognition for enjoyment of human rights.

2.1(c) (i) ABSENCE OF ARBITRARINESS

The first requirement Dicey A. V considered as a useful criterion to judge the form of a government is the absence of arbitrariness' in governmental decisions. According to Dicey, the law must stipulate the boundaries beyond which the application of discretion is forbidden. This is crucial because discretionary power can be used to infringe on individual people's rights, if left uncurbed as shall be demonstrated below when I delve into the application of the doctrine of rule of law in a multi-party Zambia.

2.1(c)(ii) EQUALITY BEFORE THE LAW

By this requirement is meant, the application of the law should be of the same measure to all the citizens. The law should not select who should be prosecuted or not for committing the same offence as anybody else. In Zambia, we have observed that in many cases, those who belong to the ruling elite have some immunity from legal prosecution. For example, in 1995, President Chiluba's uncle Ephraim Chibwe, who was Minister of Works and Supply in the first Movement for Multi-party Democracy (MMD) Cabinet and the first minister to be fired under Chiluba rule, was not prosecuted for corruption after the Anti-Corruption Commission had established a prima facie case against him.⁷⁶ Similarly, the then MMD National Secretary Mr Michael Sata, who was then Local Government Minister was implicated in corruption by the Anti-Corruption Commission but he was not prosecuted because the Attorney

⁷⁶ The Post News Paper, July 1995 "Chibwe Faces Arrest."

General decided that it was against the public interest to prosecute him.⁷⁷ To the contrary, the law has been used to selectively stifle the views and voices of those opposing government. For instance, on 1st November 1996, six leading United National Independence Party (UNIP) members including their Vice President then, Chief Inyambo Yeta, were acquitted of treason after being held for five months in custody. Many political commentators were of the view that the charges were trumped up by government in order to weaken the main opposition party then and discredit it in the run up to the November 18th, 1996 polls, as the charges were without reasonable basis.⁷⁸ In early 1996, the Supreme Court in the landmark judgement in the case of **Christine Mulundika and 7 others** as cited above, declared unconstitutional Section 5(4) and Section 7 of the Public Order Act, which required people who wanted to hold public rallies or processions to apply for police permits. Government openly rejected this decision and the then Republican Vice President Brigadier General Miyanda, speaking in Parliament described the courts' decision as ridiculous and said it was wrong for anyone to decide to repeal the Act just because someone they loved was about to be tried for breaking the law.⁷⁹ Clearly, those in the ruling elite have been displaying an attitude that they are above the law.

2.1(C) (iii) RECOGNITION OF FUNDAMENTAL FREEDOMS

The third requirement that Dicey espoused was the recognition that personal rights lay not merely in the declaration that the rights exist as provided for by the constitution, rather, the extent to which the actual legal machinery ensures that they

⁷⁷ Times of Zambia, 14th July, 2004, Why Sata was not prosecuted. Attorney General

⁷⁸ The People V Chief Inyambo Yeta and 7 Others. (1996),

⁷⁹ Times of Zambia 1996 January 19th, Miyanda Fires at S. C Judge

are respected. In the Zambian case therefore, institutions such as the Human Rights Commission must be made effective, to ensure that human rights abuse perpetrators are brought to face the machinery of justice. It has to be emphasised that the question of the human rights discourse has assumed such an important place in the “democratic renaissance”. Most African countries are appreciating that “the first task facing reformers has been the push for new social contract, one that establishes a new political society which in turn, becomes the countervailing force that could contain state power... by focussing on civil and political rights, reformers hope to dismantle the despotic state and bind its successor by creating an opposing force, the civil society.”⁸⁰ Therefore, the system of government in a democracy must respect the rule of law, separation of power and limited government.

2.2 MULTI-PARTY DEMOCRACY IN ZAMBIA

Introduction

*“If a group, class or nationality does not have control over its destiny, does not have the possibility to fulfil its potential or its dominated by another, then it is oppressed. The key to the perpetuation of such oppression is the ability of the oppressor to persuade the oppressed to co-operate in their servitude.”*⁸¹

As the ‘second wind’ of Africa’s change blew across Zambia, whereby the ordinary citizens began to realise that they were no longer in control of their destiny and realised their levels of political and economic marginalisation,’ they vigorously embarked on a campaign for political leadership change. This call was legitimatised by the falling living standards of the people as a result of the state’s failure to adequately provide the social services which had been the basis for its legitimacy. As the economy deteriorated in the 1990s, which coincided with the rise in the levels of

⁸⁰ JOne B. L. Garners Administrative Law, 7th edition, London , 1989, p. 9

⁸¹ Stephane Urdoing as quoted by Mutangelwa I, in a Booklet – Submissions to the CRC, April 2004, p1

awareness among the people on issues of human rights, the then MMD secretary Mr. Akashambatwa Mbikusita Lewanika proclaimed that “the best means to achieve development was to give the people power to replace inept leaders through the ballot”⁸². The realisation that there is a vital connection between open , democratic and accountable political systems, individual rights and effective and equitable operation of the economic systems, thus became the impetus for the 1991 revolution. The structures of the one party state were then successfully challenged and defeated with millions of people supporting that change hoping for a new independence legally, politically and economically. This led to the rebirth of multi-party democracy in Zambia.

On 24th September 1990, in an address to the 25th National Council of UNIP, the former President, Dr Kenneth Kaunda, informed the nation that the country should revert to a multi-party political system and had cancelled the national referendum, which should have been held on the issue⁸³. Accordingly, the Constitution of Zambia Act⁸⁴ was passed as the Constitution for the Third Republic. The first multi-party elections under the Third Republic Constitution were held on 31st October 1991 and were won by the MMD. On 2nd November, 1991 Mr F.T.J Chiluba was inaugurated as Zambia’s second President⁸⁵.

2.2(I) SEPARATION OF POWERS

In discussing the extent to which the principle of separation of powers has been incorporated in government under the Third Republic, the question that may be posed is:

⁸² Times of Zambia, 12th January 1991 p1

⁸³ Summary of the Mvunga Commission Recommendations 1991.

⁸⁴ No 1 of 1991.

⁸⁵ National Democratic Institute for International Affairs, “The October 31st 1991 National Elections in Zambia” (1992) p.8.

'To what extent has the third republic legal order been able to curb or militate against the executive influence over both the judiciary and the legislature?'

In answering this question, it is my contention that any law in respect of the judiciary that seeks to perpetuate its dependency on the executive for funding or for job appointments, which law, inadvertently, seeks to take away the independence of the judiciary and this frustrates the full realisation of the concept of separation of powers.

In respect of the legislature, it is my considered position that any law that seeks to place the legislature in subordination to the executive equally has the effect of eroding the effect of separation of power on the operations of the three arms of government.

To examine how the concept of separation of powers has applied under the third republic in Zambia, I shall first endeavour to discuss the independence of the judiciary and the role played by the legislature in running government.

2.2(l)(a) INDEPENDENCE OF THE JUDICIARY

In assessing the independence of the judiciary, I shall discuss the appointment of office bearers in the judiciary, their remuneration (funding) and their security of tenure as these have a major bearing in the way the judiciary shall execute its functions.

2.2(l)(a)(i) APPOINTMENT OF OFFICE BEARERS

In the third republic, as in the second republic, the President has continued to enjoy and exercise the power to appoint the top office bearers of the judiciary. Unlike in the Second Republic, however, in the Third Republic, the President appoints the Chief Justice, Deputy Chief Justice and Judges of the Supreme Court subject to ratification by the National Assembly.⁸⁶ Ratification is a check and balance device that was

⁸⁶ Article 93 of 1991 as amended.

introduced in the 1991 Constitution to try and curb on excesses of arbitrary use of presidential powers. Article 93 of the current Constitution provides that; “the Chief Justice and the Deputy Chief justice shall, subject to ratification by the National Assembly, be appointed by the President’. Under the same Article the Judges of the supreme court are appointed in the similar manner. Similarly, under Article 95, of the current Constitution, the appointment of judges of the High court, chairman of the Industrial Relations Court is done by the President, subject to ratification by the National Assembly, on advice from the Judicial service Commission.

The appointment of the top officers of the judiciary by the President although under scrutiny from the National assembly has far reaching implications in the sustenance of the independence of the judiciary⁸⁷. Although the point to note is that, the National Assembly is usually dominated by one political party, the ruling party. Therefore ratification is compromised since the MPs from the ruling party will always win the vote.

2.2(I)(a) (ii) TENURE OF OFFICE OF JUDGES

Closely associated to any job appointment is the question of security of tenure of the office bearer and this acts as a cornerstone to the independence that the office bearer is able to dispense. With respect to the tenure of judges both at supreme and high Court level, the law requires that they vacate office upon attainment of the age of sixty five years⁸⁸. Apart from age, a judge can also be removed ‘for inability to perform the functions of his/her office, whether arising from infirmity of body or mind, or incompetence or from misbehaviour. In that respect, a judge can be removed by the President only if the procedure laid under Article 98 (3) is satisfied. The

⁸⁷ Agrawal, Political Theory (1979)

⁸⁸ Article 98 of both the 1991 and current constitution of Zambia.

procedure referred to requires the President to appoint a tribunal consisting of a chairman and not less than two other members who, hold or have held high judicial office. After the tribunal has investigated the question of removing a judge, it submits a report to the President containing both the facts thereof and its recommendations.

Under the 1991 constitution, the High Court Commissioners did not enjoy security of tenure to the same extent as substantive judges. The High Court commissioners served for the period of their appointment, or if no such period is specified, until their appointment was revoked by the President acting with the advice from the Judicial service commission. According to Chanda A.W, the lack of security of tenure for the high court Commissioners whose jurisdiction, powers, privileges and functions were as those of the High Court Judges, was a serious drawback on the quest for more judicial independence. Also, since commissioners served at the pleasure of the President, they were not likely to pass judgement which would annoy or displease the appointing authority, besides such High court Commissioners had a stronger incentive to favour the executive in the hope that they would be eventually elevated to the position of High Court Judge⁸⁹.

In terms of funding, the judiciary receives operation grants from the government and the salaries of the judges are a charge on government revenue. From the foregoing, it is my contention that the legal provisions relating to the appointment and ratification thereto and the procedures for removal from office, of the top judiciary officers are useful tools in promoting the independence of the judiciary, and are prima facie commendable. It has to be emphasised however that the absence of a law severing the judicature's financial dependency on the executive is creating a potential for the infringement of the judiciary independence. To this extent, the continued dependency of the judiciary on the executive for funding is seriously undermining and frustrating

⁸⁹ Chanda A W. Human Rights in commonwealth Africa, Thesis, Yale University (1992 p 363)

the efforts for the full realisation of separation of powers. This is because, for as long as the judiciary continues to depend on the good will of the executive to sanction improvements in funding levels, there will not be a clear cut line between the two. In this respect the executive may exert some indirect pressure on the judiciary thereby maintaining the indirect supremacy of the former on the latter.

2.3 RULE OF LAW IN THE THIRD REPUBLIC

As we have discussed above, the concept of rule of law forms another essential fabric of the theory of constitutionalism. It is perhaps in this area that it is most apparent that the full realisation of democracy in Zambia is being potentially and actually frustrated. As has been outlined above, this concept-of the Rule of law, establishes three neatly connected principles of; lack of arbitrariness in governmental decision making, equality before the law or respect for the law by all, and the recognition for the enjoyment of fundamental freedoms. The MMD government which has been in power since Zambia reverted to multi-party democracy can be said to have, in many instances, failed to have shown commitment to rule of law and civil liberties. Under the MMD rule, government agencies such as the Police have been used to harass members of civil society who have been perceived as harbouring views that are contrary to those wielding state power.⁹⁰ A number of cases that are politically motivated have been instituted against individuals who the state considers as dissident to their rule, for instance; the son of the former President Major Wezi Kaunda was arrested and charged with treason on flimsy grounds⁹¹. The independent press which has been reporting without government "input" has also been viewed as anti-MMD government has equally come under a serious wave of

⁹⁰ Times of Zambia 11th October 1995- "Police pick up 15 Civic Leaders".

⁹¹ Zambia daily Mail 4th April, 1995- "Wezi Denies Treason Charge"

intimidatory harassment, on grounds for instance of flouting the State Security Act⁹². The Press has been dragged to court for defamation of the President and cases such as contempt of Parliament. In the case of ***Fred M'membe and Bright Mwape v Attorney General***,⁹³ for instance, the Supreme Court upheld the constitutionality of section 69 of the Penal Code, which creates the offence of Defamation of the President. The Court stated that the law was enacted in order to safeguard the integrity of the head of state and to hold him in high esteem because of the office. The Court stated that whoever flouted section 69 was liable for prosecution. The court ordered that all the various criminal cases of defamation that M'membe, Masauso Phiri, Bright Mwape and Golliath Munkonge were facing, be tried expeditiously by the magistrate's court.

On November 1, 1996, six leading UNIP leaders including its vice President, Chief Inyambo Yeta were acquitted of charges of treason that were placed upon them without any reasonable basis. This was after they had been in prison for about five months. Observers believed that the charges were intended to discredit and disadvantage UNIP in the run-up to the November 18th 1996 elections. Some civic leaders, such Anti Voter Apathy President, even called for the resignation of then Director of Public Prosecutions Gregory Phiri⁹⁴. Even after the elections of 1996, government continued to harass civil society leaders by arresting ZIMT, AFRONET and Committee for Clean Campaign leaders who had declared that the 1996 elections were not free and fair⁹⁵. With this background, what is interesting to know is that, even as the law enforcers seem to be so eager to pursue those who violate the 'law', if the offender is part of the ruling elite, the law has been turning a blind eye and

⁹² Zambia daily mail 9th Feb 1996 'Post editors committed to the High Court and Zambia Daily Mail, 30th October 1996 'court told of plan to nab Post Editors'

⁹³ scz/8/57/95

⁹⁴ The Post 4 – 8th November 1996, see *The People v Chief Inyambo Yeta and 7 others* (1996) (unreported)

⁹⁵ The Post, "Elections Dissidents Persued: ZIMT, CCC, ZDC leaders, Jowie Mwinga Face Cops"

has been frowning upon those cases in which the accused are in the ruling party. For instance, the President's uncle, Ephraim Chibwe who was then Minister of Works and supply was not prosecuted for corruption even after the anti- corruption had established a prima facie case against him⁹⁶. Similarly, the then MMD National secretary Michael has never been prosecuted after being implicated in a corruption scandal by the Anti- corruption commission. This is because the Attorney General decided that such prosecution was against public interest.⁹⁷ Sata was at the time, the Minister of Local Government and Housing.

In terms of respecting the rule of law and recognition for fundamental freedoms, the MMD government laid bare their lack respect for the rule of law in their reaction to the landmark ruling in the case of **The People V Christine Mulundika and others** (ZR 1995-1997 ZR. p.20 and **The People V Dr Kaunda, 1995/sc/25**. In its ruling the Supreme Court declared unconstitutional section 5(4) and section 7 of the Public Order Act, which required people who wanted to hold rallies or processions to apply for police permits. Reacting to the ruling, the then republican Vice-President Brigadier General Miyanda speaking in Parliament, described the court's decision as "ridiculous" and said that it was wrong for anyone to decide to repeal the Act just because someone they loved was about to be tried for breaking the law. Earlier Energy Deputy Minister Ernest Mwansa, expressed disappointment at the Supreme Court verdict amid calls for "*Ngulube must go*" and the "Supreme Court must go". Mathew Ngulube was the chief Justice at the time.

Due to the inertia of wanting to extend their authority as far as it can go, in April of 1996, the MMD government had included, in the constitution of Zambia amendment

⁹⁶ The Post 19th July 1995, 'chibwe Faces Arrest'

⁹⁷ Times of Zambia, 14th January 1994, 'Why Sata Was Not Prosecuted'

Bill, a provision allowing the President to dismiss a Judge for 'Gross Misconduct'.⁹⁸ The proposal also included a provision to exclude the courts from having judicial review powers over Acts of Parliament. The particular proposal under Article 91 (4) of the Zambia (Amendment) Bill, No. 17 of 1996, provided, inter alia:

"Judicial power shall vest in the Judicature and shall be exercised in conformity with the law and with the values, norms and aspirations of the people based on the following principles...(i) "that presumptive Constitutionality shall be accorded to legislative Acts and no Judicial inquiry into legislative motives or into the regularity of legislative process shall be employed in effecting a rebuttal of such a presumption"

These proposals would have gone through had it not been for the spirited opposition that was mounted by the Judges and magistrates Association of Zambia, the Church, The NGOs and Independent Press that ensured that the proposals in question were dropped.

The current MMD government, calling itself the New Deal Government, when it assumed office in 2002, under the leadership of President Levy Mwanawasa, pledged to the Zambian people that, 'his' government would be a government of laws and not of men. Emphasis was made to the effect that, who ever was involved in the matrix of national resource plunder under the Chiluba regime would be visited by the law. Five years down the line, out of the many named in the plunder, some of whom are high ranking MMD officials today, the prosecution has only successfully managed to have one accused duly convicted and sentenced. The question therefore is to what extent has the concept of rule of law been effective in Zambia.

From the foregoing, it is my contention that a government that believes in the rule of law cannot at any time denounce the judiciary when it has made decisions that do

⁹⁸ constitution of zambia (Amendment) Bill, 1996.

not please the ruling class. To underline the defiance against the rule of law by the MMD government, there was another interesting incident in the year 1996, where a tribunal found the Legal Affairs Minister, Dr Remmy Mushota and the then Mandevu MP, Mr Patrick Katyoka guilty of corruption contrary to the Ministerial and Parliamentary Code of Conduct Act. The Chief Justice at the time, Mathew Ngulube who and three other judges comprised that tribunal came under massive criticism and verbal attacks from the two men. Dr Mushota even went as far as accusing the judges of trying to wage a political campaign against him locally and internationally in order to tarnish the image of the two leaders and the MMD government. Dr Mushota even insinuated that the judges had been involved in a tribal plot to victimise him allegedly because of the instrumental role he played in the enactment of the 1996 Constitution.⁹⁹ With the above attitude towards the law, by those we have entrusted with political power since the reintroduction of multi-partism in Zambia, clearly, there has been lack of commitment and respect for the principles of rule of law.

2.3(I) RECOGNITION AND ENFORCEABILITY OF PERSONAL RIGHTS

At the centre of the doctrine of rule of law is the need for the recognition and respect for human rights. Thus, the need to follow predetermined rule is to ensure that there is sufficient room for the enjoyment, by the citizenry of their rights so that they can fully realise themselves. The question therefore is, to what extent have the legal structures in the Third Republic ensured the recognition and enforceability of human rights?

⁹⁹ Times of Zambia, 23rd July, 1996 :Mushotam Katyoka Accuses Tribunal.”

2.3(l)(a) RECOGNITION OF RIGHTS

Both on paper and in practice, commendable steps have been taken to try and recognise the rights of the citizens. In respect of the recognition of these rights on paper, it is worth noting that the Constitution has in Part III, a justiciable Bill of Rights. Prominent among these rights are, protection of right of life, the protection of freedom of expression, protection from inhuman treatment, and protection from discrimination on the ground of sex, freedom of assembly and association, etc. article 22 of the current constitution specifically provides for the right to assemble and associate.

2.3(l) (b) ENFORCEABILITY OF RIGHTS

The infringement of any of the rights guaranteed under the Bill of Rights in Part III of the Constitution entitles the aggrieved person to seek redress in the High Court. In that respect, Article 28 has an enforcement provision which gives the High Court power to hear and determine any application by a person who alleges that any of the provisions of Articles 11 to 26 inclusive has been, is being or is likely to be contravened in relation to him. The High Court is therefore one institution which provides for recourse to an aggrieved party and thus offers a platform for the enforceability of personal rights.

CHAPTER THREE

3.0 FREEDOM OF ASSEMBLY AND ASSOCIATION IN THE THIRD REPUBLIC

As we have discussed (above) the rebirth of multi-partism in Zambia, on 24th September, 1990, in an address to the 25th National Council of UNIP, the former President, Dr K. D Kaunda informed the nation that the country would revert to a multi-party political system and had cancelled the national referendum which was to have been held on the issue.¹⁰⁰ Accordingly, the Constitution of Zambia Act¹⁰¹ was passed as the Constitution for the Third Republic. The first multi-party elections under the Third Republic Constitution were held on 31st October, 1991 and were won by the Movement for Multiparty Democracy Party (MMD). On 2nd November, 1991, Mr F.T.J Chiluba was inaugurated as Zambia's second President.¹⁰²

In this chapter, we shall examine the constitutional provisions relating to the freedom of assembly and association and how they have been applied in the Third Republic.

Constitutional provisions on the freedom of assembly and association, Article 21 of the Constitutional provides for the freedom of assembly and association and it reads in part as follows:

"21 (1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of assembly and association, that is to say, his right to assemble freely and associate with other persons and in particular to form or belong to any political party, trade union or other association for the protection of his interests."

¹⁰⁰ Summary of the main recommendations of the constitution commission of Inquiry together with the Government reactions to the recommendations, (Lusaka, Government Printers, 1991, p.1)

¹⁰¹ No. 1 of 1991

¹⁰² National Democratic Institute for International Affairs, « The October 31st 1991, National Elections in Zambia" (1992) p. 8

The freedom of assembly and association, of course, is not absolute for any group any more than are the other freedoms guaranteed in the Constitution. The freedom of corporate life is always subject to some degree or regulation in the public interest.¹⁰³ The demands of the security of the state itself, of public morality, public health and the provision of social and economic services are no less worthy of recognition in this respect.¹⁰⁴ Thus Article 21 (2) of the Constitution states as follows: "Nothing contained in or done under the authority of any law shall be in contravention of this Article to the extent that it is shown that the law in question makes provisions"

- (a) that is reasonably required in the interests of defence, public safety, public order, public morality or public health;
- (b) that is reasonably required for the purpose of protecting the rights or freedoms of other persons;
- (c) that imposes restrictions upon public officers
- (d) for the registration of political parties or trade unions in a register established by or under a law and for imposing reasonable conditions relating to the procedure for entry on such a register including conditions as to the minimum number of persons necessary to constitute a trade union qualified for registration;

and except so far as that provision or, the thing done under the authority thereof as the case may be, is shown to be reasonably justified in a democratic society."

It is nevertheless, important to draw a line somewhere so as to leave ample room for the enjoyments of individual rights and at the same time make it possible for

¹⁰³ Pritchett C. H, The American Constitution, 2nd Ed., (New York: Mc Graw-Hill Book, Co. 1968), p 521

¹⁰⁴ Nwabueze, Constitutionalism in the Emergent States (New Jersey : Associated Univ. Press, 1973) p. 43

the government to discharge its obligations towards the society and the political community itself.¹⁰⁵ On the delicate issue of drawing a line, there is indeed, a need to scrutinise the relevant laws, on the enforcement of human rights.

The Interpretation and practice of freedom of assembly and association currently in Zambia leaves a lot to be desired. On the interpretation and practice of the freedom of assembly and association in Zambia, a lot can be gathered from the newspaper, speeches by government officials and indeed court cases.

In his opening speech of the first session of the Seventh National Assembly, President Chiluba expressed a desire by his government to uphold human rights in Zambia. In this respect he stated that:

*"Good government like charity begins at home. No longer can we afford to spout wisdoms on the world stage without practising them at home. Let there be no mistake, confusion or lack of clarity: the people of Zambia now have rights and the government is accountable to them. No less will suffice."*¹⁰⁶

Despite this beautifully worded statement by former President Chiluba, historically, the MMD government has had a poor record on the issue of respecting the freedom of assembly and association, e.g., it was reported in the press in May 1992, that Copperbelt Province Minister, Mr Kangwa Nsuluka had banned the issuing of permits to hold political rallies to opposition parties and pressure groups on the Copperbelt. This forced UNIP to cancel a rally in Luanshya which was to be addressed by former President Kaunda. He justified this on grounds that maintaining law and order was his-pre-occupation. The question however, is whether such a ban can be justified under the provisions of the law.

¹⁰⁵ Ibid, p 44.

¹⁰⁶ Ceremonial State Opening of Parliament of the First Session of the Seventh National Assembly by the President Mr F. T. J Chiluba, 29th November 1991," (Lusaka, Government Printers, 1991) p. 2

In another press report, the former Minister of Home Affairs, Mr Newstead Zimba, was reported to have issued an order banning the issuing of permits to former MMD members of Parliament until they were registered as a party. He stressed that as Minister who administered the Public Order Act, individuals who were not members of Parliament had no right to address public rallies. Section 5(4) of the Public Order Act then only mentioned the regulating officer appointed in accordance with section 5(1) of the same Act as having the discretion of issuing or refusing to issue permits to any person who may apply for them. It was not mentioned in the Act that the Minister may have power to order a ban on the issuing of permits to certain individuals. In that regard, it is submitted that the Minister's purported ban was void and only demonstrates how government officials in the Third Republic, like in the Second Republic, are eager to abuse their powers for purposes of suppressing the opposition. It has to be noted however that the position on the need to obtain police permits no longer applies after the supreme court ruled, in the landmark case, cited above of **Christine Mulundika and others V Attorney General**, that all that the law required was to notify the police of the details of the procession or demonstration.

The denying or cancelling of "permits" by the Police for no proper reasons especially to the opposition parties, is another example of the lack of commitment by the Third Republic government to uphold the freedom of assembly and association. For instance, late in the year 2005, the opposition and civil society leaders who gathered in the Kamwala area of Lusaka, to press for a new Constitution before the 2006 tripartite election, were brutally beaten by the Police. On refusing to sanction that procession, the police indicated that they did not have sufficient manpower to police the event. Yet on the day they came to crash the 'demonstration' they brought in

more manpower than was initially needed to police the whole event. On the other hand the ruling party cadres always enjoy unrestrained freedom to hold any procession or demonstration without any notice to the police as by law required. Such demonstrations are usually carried out against individuals perceived as being against the ruling party and its leadership. For instance, on 29th May 2006, the MMD cadres demonstrated on the streets of Lusaka in protest against former President Dr Kaunda's comments the previous day that seemed to be in support of the opposition United Democratic Alliance. Clearly, there has been no commitment to rule of law under the Third Republic. At this stage, it is submitted that part of the reason why the citizens cannot fully enjoy their rights (to freely assemble and associate) , is that the Third Republic government has not made any effort to embark on law reforms aimed at getting rid of oppressive colonial legislation that the first republic government inherited from the colonialists.

3.1 CONCLUSION

The form of government in the Third Republic has been analysed in this chapter emphasising on the extent to which constitutionalism has been incorporated in the legal structures of Zambia's new democracy. Generally speaking, although the Third Republican governments have scored some noticeable success in democratisation process, there is still a lot for the current government and the courts to do if the ordinary citizens of our land will have to appreciate and benefit from the ever expanding discourse of multi-party democratisation taking place in this country. the improvement in the democratisation of the human rights discourses by and large depends on the concept of 'limited government'.

In the next chapter, I shall discuss 'The Elections and The Opposition' in Multi-Party Zambia', since the main theme of discussion which is Multi Party Democracy, the

freedom of assembly and association prima facially entail that there are other political parties and political players other than the ruling party.

CHAPTER FOUR

4.0 ELECTIONS, THE OPPOSITION AND DEMOCRACY IN THE THIRD REPUBLIC.

The election process is the method by which the electorate are given an opportunity, by means of voting, to exercise their franchise to choose their representatives at local government level, national assembly and indeed the President of the republic.

Although the right to vote is not enshrined in the Bill of Rights in the Constitution, Article 75(i) (2) of the current Constitution does recognise the citizens' franchise to vote. It provides as follows:

- (1) Every citizen of Zambia who has attained the age of eighteen years shall unless he is disqualified by Parliament from registration as a voter for purposes of elections to the National Assembly, be entitled to be registered as such a voter, under a law in that behalf and no other person may be so registered.
- (2) Every person who is registered in any constituency as a voter for the purposes of elections to the National Assembly shall, ... be entitled so to vote in that constituency in accordance with the provisions made by or under an Act of Parliament and no other person may so vote.

Elections are therefore a cornerstone of any democratic government.

4.1 FREE AND FAIR ELECTIONS

The term free and fair election is the most prominent term often used before, during and after any democratic election. In earnest, it is usually used in declarations of elections by many organisations especially the election observer and monitor groups and individuals to assert the acceptability of the election outcome as either 'free and fair' or not free and fair'. The use of this term is so widespread that it has, in many instances, been used sometimes without understanding its meaning. Therefore, the question to ask is, what constitutes a free and fair election? In answering this question, it's worth noting that, after the 1996 Presidential and General elections, the leaders of the Zambia Independent Monitoring Team (ZIMT), AFRONET and Committee for Clean Campaign (CCC), were arrested for declaring that those elections were not free and fair.¹⁰⁷ This prompted human rights groups around the world, including the International Commission of Jurists, to appeal to President Chiluba's government to end its campaign against observers that questioned the conduct of the elections of 18th November 1996.¹⁰⁸

The term free and fair thus broadly implies that an election has been conducted in an environment that is acceptable to all and in a conducive atmosphere in accordance with the full requirements of democratic electoral regulations. Strictly speaking, a free and fair election is one held in an atmosphere, free of intimidation, bribery, violence, coercion and anything intended to subvert the will of the people.¹⁰⁹

¹⁰⁷ The Post 25th November 1996 "Elections Dissidents Persued."

¹⁰⁸ Monitor, 29th November, 1996 "Civic Bodies Get Furious"

¹⁰⁹ SACCORD Monitor's Manual for 2006 Tripartite Elections

4.2 THE ELECTORAL SYSTEM

In Zambia the subsisting electoral system, provides that election of all representatives shall be by direct and universal suffrage. For instance, the President and members of the National Assembly are, in accordance with Articles 34 (1) and 63 (2) of the Constitution elected directly by universal adult suffrage and by secret ballot. The subsistence of the electoral method by direct and universal suffrage is a basic aspect of a democratic electoral system. In the Zambian context as well as in other African countries, the existence of election by direct methods is commendable since such a system was rare in most post-colonial African states. Take for example, in Zambia, where the President, Kenneth Kaunda was always adopted by acclamation since he was always declared unopposed in practice. Arguably, the system in the Second Republic which ensured that the Presidential candidate adopted at the United National Independence Party (UNIP) congress was the one imposed on the rest of the Zambian electorate for election against an inanimate thing, contravened the democratic electoral requirement to elect by direct means. This is because all those electors who were not present at the UNIP congress never directly participated in electing the President.

The present system, in that respect, is laudable since it does not give a category of citizens more opportunities and rights than others to vote. All electors not only enjoy an equal right to choose and express preferences, but also an equal opportunity to do so. Furthermore, there is a sense in which one may say that the constituency method of representation ensures that the real choice of the majority is projected whilst also embodying minority views. This is because it has ensured that the decision of the majority of the constituency in matters of elections has been clearly shown – hence overwhelming majorities in the various constituencies of Zambia

showed clearly the person whom the constituents had decided to represent them as member of Parliament in 1991, and as President.¹¹⁰ This position has however been undermined by the election result of 2001. After the 2001 elections, the losing candidate Mr Andersom Mazoka, of the United Party for National Development (UPND), who many Zambians, including the international community believe won those elections, together with other losing candidates rejected the Presidential election and petitioned the results citing massive electoral malpractices.

As such, to promote democracy through a free and fair election, the choice for a candidate by electors must be made in conditions, which are as nearly equal for all contestants as is reasonably possible. The law in the Electoral Act prescribes such envisaged conditions. However, the enforceability of the Electoral Act still leaves a lot to be desired because in many instances, the law does not empower the Electoral Commission of Zambia to deal with complaints decisively, usually preferring such powers of dealing with electoral rules violators to the Police, who are usually scared of enforcing the law decisively against those in the ruling party for fear of victimisation. If the complaints are being made during the process of announcing the results or after such results announcements, the matters cannot be resolved immediately because any remedy would only arise under an election petition. Given the clog of cases at court, such cases usually take months or years thereby undermining justice, as justice delayed is justice denied.

Therefore, although there is the existence of such provision safe guarding equality of campaigning conditions among the contestants by making void an election result of a candidate guilty of corrupt or illegal election practices, in practice it is apparent that

¹¹⁰ As President, Fredrick Chiluba had won over Kenneth Kaunda by 85% - Times of Zambia, November 2, 1991.

there have been numerous cases of intimidation and tactics in effect coercing the voters into “choosing “ a particular candidate. Take for example, the then Republican Vice-President’s (now President of Zambia), Mr Levy P. Mwanawasa, speaking at a rally in Livingstone, said, “if Peter Muunga (MMD candidate), needs a health centre, and another MP from the opposition like Muyovwe also needs a health centre, but I have funds for one health centre, definitely priority will go to Muunga. It is a question of scratch my back, I also scratch yours”¹¹¹ clearly, the ruling party takes advantage of their privileged position to blackmail the electorates. On the other hand the opposition do not have monetary prowess even to successfully and exhaustively campaign. In view of this, as suggested in the Mwanakatwe Constitutional review Commission Report, political parties, with at least a certain number of votes are supposed to be assisted financially by the State. This will improve their capacity to compete and in turn strengthen checks and balances in Parliament.

In summation, the Third Republic election machinery has attained some relatively limited success in assuming a full democratic spirit. This is due to the existence of legal framework that does not promote equal and fair competition. There is therefore need to develop an electoral law that permits resolution of contentious election disputes before a winner is declared.

4.3 THE OPPOSITION IN THE THIRD REPUBLIC

In this field of Zambia’s young democracy, a number of commendable achievements have been made; firstly, since one of the essential requirements of a democracy is that there should be the existence of political opposition, it is commendable that Zambia is now a multiparty system with all the consequences that this should entail.

¹¹¹ The Weekly Post 24th – 30th september 1993 p3

Anybody is now capable of forming or belonging to a political party as provided under Article 22 of the Constitution. This legislation has led to the formation of several parties currently standing at about thirty in number.¹¹² To this extent, it can be argued that there is some level of tolerance between rival groups, since pluralism is one of the essential aspects of a democracy.

However, notwithstanding the above aspects, one of the greatest threats to the growth and development of Zambia's democracy is the extreme weakness of the opposition. The importance of a strong opposition at this stage cannot be over-emphasised. The government needs the stimulus of criticism to perform, and in a sustained way that can only come from a strong opposition. Unfortunately, there is a conspicuous absence, in Zambia's legal structures, of a piece of legislation providing for the support of even an official opposition party in parliament. The Constitution in its current form does not provide for the subsidisation of certain credible political parties in the opposition in order to enable them to compete favourably with the ruling party, which has considerable resources at its disposal. The various opposition parties are at a disadvantage and they do not only operate on a shoestring budget but the relatively meagre budget has to be met by dedicated members from their own pockets. As I have stated above, the ultimate result is a weakened system of checks and balances in Parliament. In the 2006 election, the above point was proven, when the combined force of three 'major opposition parties, namely (UPND), (UNIP) and The Forum for Democracy and Development (FDD), who in the previous election had won well over 62 seats in parliament, this time around only managed a paltry 26 seats, while the ruling party got more seats than they did in 2001.

¹¹² I.d, p1.

This scenario presents a sad picture for a young democracy as a lack of support for some of the small political parties creates a situation in which the only prominent party is the one with considerable resources at its disposal, herein lies a potential of reverting to a defacto one party system.

The situation appears even more potentially one party-defacto when it is realised that for most part of the Third Republic so far, the Second Republic mentality and hangover has been prevalent. For example, it has been reported that press coverage has been biased in favour of the ruling party.¹¹³

Therefore, for democracy to thrive, a viable opposition must be in place in order to provide the much needed checks and balances. It however has to be noted that, a viable opposition is not only necessary for purposes of offering credible opposition or checks and balances to the ruling party, rather, to present to the electorate an alternative with real chances of taking over power and capacity of offering better leadership to the country.

4.4 THE PRESS

World over, the Press is viewed as another form of opposition offering effective checks and balances. The Press, in the Third Republic is expected to play a pivotal role in supporting democratic values in the renewed multiparty system of government in which different parties will compete for power and the performance of the ruling party will be subject to far closer scrutiny. To this end, the question that may be asked is:

“To what extent has the Third Republic press been established

¹¹³ Foundation for Democratic Process (FODEP) cites vote bias (as there was apparently no fair coverage) - Times of Zambia April 13, 1994 at 1; Inequitable funding for all parties was cited - Zambia Daily Mail - 14.04.94 at 4.

as a strong, objective and independent professional institution?”

The government has initiated certain steps towards the realisation of a free press. One such laudable step has been the granting of permission to applicants for the setting up private radio and television stations in Zambia. There are privately owned radio stations across the country. This however does not mean that the Press has been professional and effective. This is due to a number of reasons;

Firstly, although there is a guarantee of the freedom of the press in the constitution, the derogations from this freedom are so wide and vague that almost any undemocratic law or act is capable of qualifying as derogation. The relevant article in the constitution, which guarantees freedom of the press, is Article 20(2). It states that:

- (2) *“subject to the provisions of this Constitution no law shall make any provision that derogates from freedom of the press.”*

However, Article 20 (3) permits a derogation, inter alia, that is either:-

- (a) *...reasonably required in the interest of defence, public safety, public order, public morality or public health; or*
- (b) *...reasonably required for the purpose of protecting reputations, rights and freedoms of other persons... or*
- (c) *...implies restrictions upon public officers.*

And except so far as that provision or, the thing done under the authority thereof as the case may be, is shown to be reasonably justifiable in a democratic society. These derogations are also permitted in respect of the article guaranteeing freedom

of expression.¹¹⁴ However, as a result of these widely and vaguely expressed derogations from the freedom of press, there is a danger that any act of harassment against the pressmen or indeed any undemocratic act may be justified as Constitutionally permitted. This is because the only test of such a derogation is that it has to be "reasonably justified in a democratic society", a phrase which is ambiguous. Furthermore, the phrases "public safety" "public morality" or "public health" are nowhere defined in the Constitution, an omission which bestows excessive discretion upon the authority derogating from either the freedom of press or of expression. Furthermore, a variety of statutory provisions which have the potential of effectively negating the above constitutional guarantee, because of their wide and vague expression, still exist, such as those prohibiting seditious publications. This may be used to suppress dissenting political opinions. Also, the appointment of Board members at the state run Zambia National Broadcasting Corporation (ZNBC) as provided for by the ZNBC Act, have unnecessarily generated litigation because of political greed by the ruling MMD government, who contend that the Minister in charge of broadcasting services should appoint the Board members and then take the names for parliamentary approval, which is contrary to the law. This has hampered the smooth implementation of the ZNBC Act and the Independent Broadcasting Authority Act intended to improve professionalism and transparency in the running of public broadcasting houses.

¹¹⁴ The Minister of Defence, Mr Ben Mwila, for example reportedly threatened to shoot a Post newspaper reporter - The Post No. 202 August 2, 1994 at 1; while Dr R Mushota Minister of Foreign Affairs, reportedly tossed out a journalist who wanted to verify a story from him - The Post No. 201, February 3, 1994 at 1.

4.5 CONCLUSION

Generally, it can be said that although certain steps have been taken to further democratise the operations of plural politics in Zambia's young democracy, there are still a number of legal structures existing, or absent, on Zambia's legal landscape that require attention. Prominent among the absent legislation necessary for further democratisation is a law providing for the funding of certain political opposition parties. This is likely to enhance the full participation of small political parties in the growing democracy of our country. The other area of utmost importance is the implementation of legislation relating to the operations of the media. There is need by those in Government to respect the rule of law and apply the regulations of the ZNBC Act and the IBA Act as provided in those respective pieces of legislation without tailoring them to the taste of the ruling party.

CHAPTER FIVE

5.0 GENERAL CONCLUSIONS AND RECOMMENDATIONS

This paper has explored the extent to which the legal framework of multi-party democracy and the freedom of assembly and association has developed over time. Particular emphasis has been placed on examining the extent to which the Third Republic legal order has divorced itself from the one party legal order. Since the subject has been approached from a legal point of view, the emphasis has been placed on the continued existence, or absence, of certain legislation in Zambia's legal structures, that oppress or promote the growth of multi-party democracy and the full enjoyment of the freedom of assembly and association. The legal exposition of the extent to which Zambia's multi-party democracy has developed has however been without political exclusion. This is because, the legal discipline is a somehow multidisciplinary exercise, as such, political allusions have been important in illustrating the point that there is a potential of subverting the will of the people as expressed by their rejection, in 1991, of the one party rule, and still maintain a defacto one party rule by maintaining the same laws upon which the one party government was founded and run. In short, the history of the Third Republic, is one of political self preservation, by maintaining, the second Republic legal order.

While it is not in dispute that Zambia is a multi-party democracy, it is a matter of fact, that, the tenets of democracy, such as constitutionalism, separation of powers and the rule of law have not been promoted and upheld by those wielding state power. These tenets give efficacy to the creation of an open democratic and accountable

political system, through the free participation of all citizens, which can give rise to an effective and equitable operation of the economic system of the country.

The Third Republic Government, after inheriting the Second Republic legal structures, has not made serious steps to transform relevant institutions and the laws in order to bring them in line with the requirements of plural democracy. For instance, the Public Order Act, which is an oppressive colonial piece legislation that continues to undermine the freedom of assembly and association has remained unchanged from its pre-independence contents, save for the amendments arising out of litigation in the courts of law. On enhancing checks and balances for instance, the executive, through the massive Presidential powers to appoint MPs, Cabinet Ministers, high judicial officers, power to suspend or pardon court sentences, power to dissolve Parliament during the course of an impeachment, power to veto legislation and power to authorise debate in Parliament on bills with financial implications as enshrined under Article 81, among others, have continued to subordinate both the legislature and the judiciary. The opposition on the other hand, who are expected to offer credible checks and balances to Government, operate under severe constraints, largely owing to financial difficulties. Despite the Mwanakatwe Constitution Review Commission recommending that some opposition parties should be subsidised by Government, such recommendations have been shot down. There is thus no legislation to that effect. In 2003, President Mwanawasa set up a Constitution Review Commission which collected various submissions from across the country, some of which will directly come to cure the defects of the current legal system and promote true plural democracy. The Government has decided, it will only facilitate the enactment of a new Constitution when they find money for that exercise as they say, the revision of the Constitution is not their priority.

5.1 PROPOSALS FOR FURTHER REFORM

The Zambian people, as most African people elsewhere are now aspiring for more democratic systems in which they can effectively participate in their own affairs and improve the conditions of their run-down economy. In fact, it has been realised that there is a necessary connection between a more democratic system of government and equitable operation of the economic system. This is because, this far, a potential of hijacking and subverting the young democracy exists ab initio, vis-à-vis the existing legal structure and the perpetuation of some second republic practices and attitudes, therefore the question is “what can be done to rescue our incipient democracy?” Admittedly, this is no simple question over which I can pretend to give a generally and widely accepted answer. However, I will suggest some possible solutions.

First, since it is the existence of laws inherited from the Second Republic, with their characteristic despotic texture, that have a potential of subverting and hijacking the prevailing democratic spirit, I suggest that these laws should be thoroughly examined and the necessary amendments made if not repealed. There is increasing need to enact legislation that will reduce on the enormous Presidential powers that the Presidents in the Third Republic have enjoyed and exercised.

Since representation is what a democracy is mainly about, laws enhancing representation must be provided in Zambia’s legal structures. In particular, the laws governing the operation of the opposition must include the subsidisation of any opposition party with a certain number of MPS in parliament. The subsidisation of political parties will enhance representation since the choice of representatives by the electors will be made in such conditions as to eliminate the marginalisation of certain potential representatives. The lack of funding of certain opposition parties by government is in effect marginalizing the operation of those parties with the potential

of forming an alternative government, there is thus, a potential of reverting to a defacto one party system.

But even beyond the subsidisation of political parties, it is also very important to enact a piece of legislation that will guarantee MPs the right to exercise a “free mandate” whilst in Parliament. Such an enactment must be embedded in the constitution so that any act or conduct on the part of anybody, which seeks to take away such a right, shall be unconstitutional.

This would not only ensure that the MPs of the ruling party are not unduly influenced by the executive of their party, but it would also check against any attempt to subordinate the legislative wing by the executive wing of the government in power. This would further enhance participation of MPs to freely represent the electorate's interests unlike now where, MPs from the ruling party want to impress the President in order to stand a chance of a cabinet appointment.

In the area of enhancing representation, it has to be emphasised that, any legislation that seeks to nip any steps by the led to employ direct democracy, vis-à-vis requiring that demos, protests and meetings should be officially permitted must be repealed. In that respect, the Public Order Act as long as it is intended to control demonstrations, protests and public meetings must be repealed. It does not only have the potential of nipping popular opinions of the people but it is a total juxtaposition with the quest for further democratisation of our political discourse.

Acts of Parliament alone do not make people to start behaving differently . Civil education must therefore be promoted so that leaders as well as the led come to grasp with what their rights are. Although funds would be a likely constraint in the promotion of civil education, that however, should not prevent the prioritisation of civic education in the financing of certain institutions intended to enhance democracy.

Lastly, the challenge falls back on the citizens to play their role in the political process by coming out in the open to defend their interests, because, as we have seen in chapter two above, man vested with power, would like to carry his authority as far as it can go. The citizens have a duty to vote for the leaders who should deliver on their promises.

REFERENCES

Chanda A W. (1990); Human Rights in commonwealth Africa, Thesis, Yale University.

Danida, (1990); Human Rights in Danish Development Cooperation Copen Hagen

De Smith S. A "Constitutionalism in the Commonwealth today" in Malaya Law Review, Vol 4.

Gertzel (ed), (1984); The Dynamics of the one Party State in Zambia, Manchester university Press.

Hatchard, J (1986); Emergency Powers in Zimbabwe: An Overview of Post Independence Development", In Zambia Law Journal Volume 18,.

Mubako V. S. , ("Zambia's Single Party Constitution – a search for Unt" in International Commission of Juristis, Human Rights in a One Party State. (London: Search Press, 1976)

Nwabueze B. O (1973); Constitution in the Emergent States, C. Hurst & Co. London.

Tordoff (ed), Politics in Zambia, (1974); Manchester University Press.

Pickels D. Democracy: (1970) London, B. t Batsford.

Pritchett C. H, (1968); The American Constitution, 2nd Ed., (New York: Mc Graw-Hill Book, Co

Robert I. Rotberg, 1963 – 1964, (Harvard University Press. The Rise of Nationalism in Central Africa: The making of Malawi and Zambia, Harvard University Press.

Tordoff (ed), Politics in Zambia, (1974); Manchester University Press.

Virman K. K. Zambia: (1989); The Dawn of Freedom, (Delhi: Kalinga Publications.

Zimba L, "One Party States in Commonwealth Africa, in M Ndulo (ed) Law in Zambia (Nairobi: East African Publishing House, 1984)