

**NULLIFICATION OF ELECTIONS IN ZAMBIA: A CRITICAL ANALYSIS OF
REQUIRED STATUTORY GROUNDS IN AN ELECTION PETITION.**

BY

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DEDICATION

This research is dedicated to my loving mother Pamela Simwinga for the unending support, love and encouragement she has rendered throughout my life.

And

To the loving memory of my father Robinson Mukoto Chungu and Grandfather Anderson Kansilye Simwinga who imparted the importance of education in me.

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My heavenly Father God Almighty, all praises belong to you. You gave me the strength to carry on all through my education and this through research. Luke 1:37....For with God nothing shall be impossible.

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ABSTRACT

Electoral malpractice is a contentious issue in a democratic state like Zambia. This is so because free and fair elections are an important tenant of a democracy. This research was aimed at investigated the effectiveness of the statutory grounds of proof for nullifying an election on grounds of electoral malpractice. Qualitative research methods were employed during this research. The data relied upon consisted of primary data, namely statute and case law and secondary data consisting of scholarly articles and other related literature. In order to achieve the aforementioned aim of this investigation an examination of the electoral systems which are applied in the world was undertaken in order to establish the extent to which the electoral systems are susceptible to electoral malpractice. This research also assessed the legal and institutional framework of Zambia's electoral system establishing the extent the legal framework promotes the curbing of electoral malpractice.

After the investigation this research discovered that the first past the post system that is practised in Zambia is highly susceptible to electoral malpractice and this implied that the legal framework which provides regulations for this electoral system has to extensively protect the electoral system. This research also found that the required statutory ground that electoral malpractice affected the majority of voters from voting for the preferred candidate was enacted to protect the electoral system. However, due to the fact that the electoral system in Zambia entails that a parliamentary election candidate can win an election by a minority the statutory ground is dangerous to the electoral system because an affected minority of voters can change an outcome of an election.

Agency in election campaigns was of relevance to this research. This research discovered that the court in Zambia follows the law of agency strictly. However, in a plural political system like Zambia political parties campaign for their candidates hence candidates may use the defence of party members not being their agents to avoid liability. Adducing evidence in election petitions has had a major impact on proving the required statutory grounds. The standard of proof in election petitions is higher than a balance of probabilities and taking into consideration the factual nature of elections the rules of evidence make it difficult for the petitioner to attain such a high standard and hence even though elections are marred with malpractice the election cannot be nullified.

This research recommends that; The Electoral Commission of Zambia as mechanism of enforcement of electoral regulations must be given power to punishment those who commit electoral malpractice; the scope of agency with regards election must be enlarged to carter for the electoral and political system. For purposes of deterrence of electoral malpractice so as to have political parties discipline their members from committing electoral malpractice.

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CHAPTER ONE

INTRODUCTION

1.1 Introduction

The aim of this research is to analyse the effectiveness of the statutory grounds of proof for nullifying an election on grounds of electoral malpractice in Zambia. The aim will be achieved by analysing case law on electoral malpractice to assess how the statutory grounds promote the goal of curbing electoral malpractice in Zambia's electoral system. This research begins with an analysis of electoral systems practiced in world, with the view to establish the extent electoral systems are susceptible to electoral malpractice. This is so as to lay a ground for the rationale of electoral regulation in Zambia. Secondly, the research analyses the legal and institutional framework of the electoral system in Zambia with the view to establish the extent the legal and institutional framework provide for the curbing of electoral malpractice.

1.2 Background

Zambia is a representative democracy. This means that citizens elect officials to make public decisions, formulate laws and administer programmes for public good¹. Article 1(2) of the Constitution of the Republic of Zambia as amended by Act no.18 1996(herein after referred to as the Constitution) provides that all power resides in the people who exercise their sovereignty through democratic institutions of the State in accordance with the Constitution. One such democratic institution of the state is Parliament which is responsible for enacting laws².

¹ Alfred .W. Chanda, *Constitutional Law Cases and Materials* (Lusaka: UNZA Press 2011) 64

² Article 62 of the Constitution Chapter 1 of the Laws of Zambia as amended by Act No.18 of 1995

The Electoral Reform Technical Committee (ERTC) was appointed in 2005 to review the country's electoral process and make recommendations aimed at ensuring the conduct of free and fair elections³. The ERTC drafted its report after wide consultation and submitted its report on 11 August 2004. The Minister of Justice then ordered the ERTC to subject the report to further public scrutiny⁴. The ERTC was governed with the principle that an efficient electoral process is a necessary condition and cornerstone for effective democracy and good governance⁵. As a result the work and recommendations of ERTC, a new Electoral Act was enacted in May 2006⁶.

Despite the enactment of the current Electoral Act elections in Zambia have over the past years been characterised by controversy, election petitions, frequent and costly by-elections including election boycotts for example as was the case during the 1996 presidential and parliamentary elections⁷. Campaigns have been marred by the ruling party and the opposition not having an equal political playing field⁸. For instance, it was alleged that state resources were misused by the ruling party in the 2011 election campaign and previously in the 2006 general elections⁹.

The advantage of the ruling party over the opposition parties was further enhanced by the exploitation, by the ruling party, of the benefits of incumbency¹⁰. Concerns were expressed

³ Peter Maregere and Brenda Mofya, *Electoral Reforms : Managing Conflicts in Zambia*, Conflict Trends Journal (2006) 29

⁴ Maregere and Mofya, *Electoral Reforms*, 29.

⁵ Maregere and Mofya, *Electoral Reforms*, 29.

⁶ The Electoral Act No.12 of 2006 was enacted.

⁷ Electoral Reform Technical Committee, *Final Report of the Electoral Reform Technical Committee (ERTC) Appointed to Review the Electoral System in Zambia*, (August 2005) 144

⁸ Commonwealth Observer Group, *Final Report of Zambia's General Election 20th, September 2011*, (September 2011) 11

⁹ Commonwealth Observer Group, *Final Report of Zambia's General Election*, 11.

¹⁰ Commonwealth Observer Group, *Final Report of Zambia's General Election*, 11.

by some opposition parties that activities of some senior functionaries of government blurred the distinction of what could be regarded as official duties and campaigning¹¹.

Challenging an election, its conduct or its results, should not be perceived as a reflection of weakness but proof of the strength, vitality and openness of the political system¹². Disputes regarding parliamentary elections are regulated by Article 72 (1) (a) of the Constitution which provides that the High Court shall have power to hear and determine any question whether any person has been validly elected or nominated as a member of the National Assembly or seat of any member has become vacant.

The election of a candidate as a member of the National Assembly can be challenged through an election petition presented to the High Court by any of the following persons: a person who lawfully voted or had a right to vote at the election petitioned, a person claiming to be nominated or elected at the election petitioned and a person claiming to have been a candidate at election petitioned and the Attorney General¹³. Section 93(2) of the Electoral Act sets grounds upon which the election of member of the National Assembly can be nullified. It provides that the High Court can only declare the election of a candidate as member of the National Assembly void if it is proved to the satisfaction of the Court among other grounds, that;

(a) by reason of any corrupt practice or illegal practice committed in connection with the election or by reason of other misconduct, the majority of voters in a constituency were or may have been prevented from electing the candidate in that constituency whom they preferred;

(c) that any corrupt practice or illegal practice was committed in connection with the election by or with the knowledge and consent or approval of the candidate or of that candidate's election agent or polling agent;

¹¹ Commonwealth Observer Group, *Final Report of Zambia's General Election 20th, September 2011*, (September 2011)11

¹² Denis Petit, *Resolving Election Disputes in the OSCE Area*, 16th August, 2012. <http://upan1.org/intradoc/group/public/documents/cite> visited on 8th November 2014

¹³ Section 94 of the Electoral Act No.12 of 2006

This research is particularly interested in the requirements established to prove the grounds set out in the subsections of section 93(2) of the Electoral Act above. The focus on the two subsections is motivated by the fact that perusal of several judgments of the Zambian Courts in election petitions show that a number of them are based on the said subsections.

The analysis of the statutory provisions is motivated by the case of *Kafuka v Mundia*¹⁴ which is an appeal against the decision of the High Court having dismissed the appellant's election petition and declared that the respondent was duly elected as Member of Parliament for Sikongo Constituency. One of the legal issues in that case was whether the alleged illegal practice committed by the Respondent affected the majority of electorates in constituency. It was submitted by Counsel for the respondent, that the evidence of distribution of mealie meal was restricted to one school in Liumena and there was no proof that this distribution at this one school which is among the many schools mentioned influenced the electorate in the Constituency. The Supreme Court held in favour of the Respondent.

This case highlights the importance of evidence in electoral petitions. The petitioner in this case failed to meet the required standard of proving that a corrupt practice affected the majority of voters in the constituency as provided in section 93(2)(a) of the Electoral Act . The appeal also failed on the ground that it was mainly based on evidence which the appellate Court could not hear. The above case will be used as a case study to analyse statutory provisions in particular section 93(2) of the Electoral Act vis a vis the standard of proof required for a petitioner to successfully prove incidences of electoral malpractice and satisfy the Court to nullify elections of candidates who engage in electoral malpractice.

¹⁴ SCZ/82/2012

1.3 Statement of the problem

The rationale of the 2005 electoral reforms was to curb electoral malpractice in the electoral system in Zambia in order to equal the playing field among political actors¹⁵. However, in most reported cases the statutory grounds a petitioner must prove to nullify an election appears to be contentious. The problem that has arisen is that where there are allegations of electoral malpractice in an election petition some elections are nullified while others are upheld depending on the statutory ground on which the petitioner relies. This has caused the public to question the democratic system and the credibility of the representatives who make decisions on their behalf. Thus, this research will analyse the effectiveness of the statutory grounds a petitioner must prove to nullify an election in curbing electoral malpractice.

1.4 Objectives

This research has the following objectives;

- (a) To examine the electoral systems which are applied in the world, with the view to establish the extent to which these electoral systems are susceptible to electoral malpractice.
- (b) To assess the legal and institutional framework of Zambia's electoral system with the view to establish the extent to which the framework curbs electoral malpractice.
- (c) To use a case study of *Kafuka v Mundia* to assess how the courts in Zambia have interpreted the statutory grounds as provided in section 932 of the Electoral Act. The analysis will assess whether the court's interpretation advances the object of the Electoral Act to curb electoral malpractice.

1.5 Research Questions

1. To what extent is Zambia's electoral system prone to electoral malpractice?

¹⁵Maregere and Mofya, *Electoral Reforms*, 29.

2. Does the legal framework effectively provide the necessary provisions to guarantee the prohibition of electoral malpractice?
3. How effective are the statutory grounds a petitioner must satisfy in nullifying an election in the curbing of electoral malpractice in Zambia's electoral system?

1.6 Significance

This research comes at the time when there have been several parliamentary election petitions in Zambia following the 2011 general elections due to alleged electoral malpractice by winning candidates. This research is important as it will elucidate on the grounds that a petitioner must rely on to successfully challenge an election on grounds of electoral malpractice. The research is necessary so as to ensure certainty on the grounds that a petitioner who seeks to nullify an election as an effective tool in curbing electoral malpractice in the electoral system of Zambia.

1.7 Literature Review

According to Naomi Ichino and Matthias Schunden¹⁶ In new democracies, popular elections are frequently marked by fraud and irregularities which affect public confidence in democracy, regime legitimacy, political participation, protest and political violence. An emerging body of scholarship on democratisation and new democracy argues that the extent of electoral fraud is affected by political competition, electoral rules, socioeconomic inequality, and the quality of the electoral management body that organises and conducts elections.

¹⁶Nahoni Ichino and Matthias Schunden, *Deterring or Displacing Electoral Irregularities spill over Effects or Observers in a Radomical Field Experiment Ghana*, The Journal of Politics Vol 74 No.1, January 2012. 2

According to Andrew Eggers and Arthur Spirling¹⁷ in Britain the electoral corruption that was widespread in parliament contests at the time posed several problems for contemporary political leaders. It was costly, undermined public respect for the institution of parliament and sometimes led to the elections of undesirable individuals.

The above arguments show that fair elections are required for citizens to have confidence in their representatives. Where the elections are characterised with malpractice, it is prudent that such elections are nullified to promote public confidence in the system of democracy and elected representatives.

Daniel Ziblatt¹⁸ further argues that the incidence of electoral fraud which comes in form of political violence, vote buying, influence and various forms of procedural rigging is the product of political actors' efforts to tilt the electoral playing field in their direction thereby aiming to reduce the indeterminacy of elections.

According to Sarah Birch¹⁹ elections are the building blocks of democracy; it follows that electoral integrity is a precondition for meaningful democratic competition at all levels. In as much as poor evaluations of the fairness of elections keeps citizens away from the polls, democratic legitimacy and performance will be compromised.

Luke Mbewe²⁰ argues that electoral corruption undercuts the crucial role that elections play in enabling citizens to select reward and punish rulers. Despite the enactment of new

¹⁷ Andrew Eggers and Arthur Spirling, *Legal Ambiguity and Judicial Bias: Evidence from Electoral Corruption Trial in 19th Century Britain*, Paper presented at Yale University Seminar 1st July 2012. 4

¹⁸ Daniel Ziblatt, *Shaping Democratic Practice and the cause of Electoral Fraud*, American Political Review Vol.103 February 2009.1

¹⁹ Sarah Birch, Perceptions of Electoral Fairness and Voter turnout
<http://www.essex.ac.uk/government>

²⁰ Luke Mbewe, *The effectiveness of Zambia's electoral system in curbing electoral corruption*, Obligatory Essay, UNZA, 2009.

Electoral Act and the code of conduct in Zambia, rampant electoral malpractice, continue to be reported during both parliamentary and presidential elections.

Joshua Banda²¹ argues that to have free elections means that voters have the freedom to participate in the election the way they want without fearing adverse effects on their own or families. In order to offer real possibilities of choice to the voters, the competition among participating candidates and parties, elections must be fair and undue advantage must be avoided.

Banda²² also argues that the concept of free and fair elections entails the absence of unfair interference or manipulation of the elections by way of bribes, the distribution of goods and services during campaign rallies such as foodstuffs, fertilizers, cash donations and so forth. Furthermore elections are free and fair if they are conducted in an atmosphere characterised by the absence of corrupt practice and intimidation.

From the above arguments the authors have focused on the effect of electoral corruption in a democracy concentrating on the importance of free and fair elections. This research will focus on the effectiveness of the required proof a petitioner of petitioned elections must satisfy the Court to nullify the elections in curbing electoral malpractice.

Further, the type of electoral system or model can have a bearing on causing electoral disputes. Representation of conflicts can occur when elections are organised as a zero sum game and losers are left out of participation of governance²³. This research agrees with this argument and will investigate the vulnerability of electoral systems to electoral malpractice to

²¹ Joshua Banda, *Corruption in the electoral process and its effect on democracy: The challenges of enforcement of electoral law*, Obligatory Essay, UNZA, 2009.

²². Joshua Banda, *Corruption in the electoral process and its effect on democracy*, 9.

²³SikaabaMulavu, *Electoral Disputes: An Evaluation of the Electoral Dispute Resolution System in Zambia*, Obligatory Essay, UNZA, 2009.

determine whether the electoral system should have a bearing on grounds on which elections should be nullified as well as necessary standard of proof.

1.8 Methodology

This research was conducted by qualitative research methods. The data relied upon consisted of primary data, namely statute and case law and secondary data consisting of scholarly articles and other related literature.

1.9 Chapter Outline

Chapter two examines the electoral systems applied in the world, in doing so this chapter will discuss the three main types of electoral systems outlining their advantages and disadvantages. Chapter three will then analyses the legal and institutional framework that governs Zambia's electoral system. It also evaluates the extent to which the legal framework contributes to curbing electoral malpractice in Zambia. Chapter four analyses *Kafuka v Mundia* as a case study to critically analyse the statutory grounds a petitioner challenges a parliamentary election must prove. Finally, Chapter five provides a conclusion of the research, showing how all the objectives of the research have been achieved and gives recommendations where necessary.

1.10 Conclusion

This chapter has introduced the research, showing the aim of the research and how the aim was achieved. It has also given the statement of the problem, objectives, methodology. Chapter two will focus on examining the electoral systems applied in the world, in doing so this chapter will discuss the three main types of electoral systems outlining their advantages and disadvantages.

CHAPTER TWO

ELECTORAL SYSTEMS

2.1 Introduction

The aim of this chapter is to discuss world Electoral systems namely; the First Past the Post, Proportional Representation and Mixed systems, with the view to establish the extent to which these electoral systems are susceptible to electoral malpractice. The chapter begins with discussing the concept of democracy and elections. Secondly, this chapter describes the electoral systems that are applied in different political systems in the world outlining their advantages and disadvantages. The chapter further discusses electoral malpractice in relation to the First Past the Post which is applicable in Zambia and compares it with the Proportional Presentation systems.

2.2 Democracy

The topic of democracy is important this research as Zambia has a democratic political system in which eligible citizens vote in periodic elections for members of parliament. Democracy is a form of government of a state and also a way of life¹. This research is particularly interested in democracy as a form of the state. As a form of a state, democracy means that the legal power in the community is vested in the people as a whole and the rule belongs to the majority in the electorate in communities which vote through elections².

¹Vidya.D. Mahajan, *Political Theory (Principles of Political Science)* (New Delhi: S.Chand& Company 2007)720

²Mahajan, *Political Theory*, 720.

Zambia is a representative democracy. This means that the people elect their representatives to carry out the administration of the country³. A representative government is a form of government which results where a legally sovereign electorate brings into existence an organ to represent and act for it⁴. The representatives run government on behalf of the people who do not have a direct share in it; they only control government through periodic elections⁵. The representatives make political decisions, formulate laws and administer programmes for the good of the public in the name of the people who elect them⁶.

2.3 Free and fair elections

Regular free and fair elections are one of the most significant pillars of democracy. Elections are the central institution in democratic representative government, as the authority of the government derives solely from the consent of the governed⁷. Elections are the recruitment of the representatives by the choice of voters, voters choose a representative by their votes in a direct election⁸. Zambia is one such country that chooses its representatives through a direct election. This is evident in article 75 of the constitution which entitles “every citizen of Zambia who has attained the age 18years unless disqualified by parliament from registration, as a voter for purposes of elections to the National Assembly.

The preconditions for democratic elections are demanding and should not be taken for granted. They include; universal suffrage, a secret ballot, impartial administration of voting and vote counting, free and equal access to the polls, freedom for candidates and parties to

³Mahajan, *Political Theory*, 722.

⁴Mahajan, *Political Theory*, 722.

⁵Mahajan, *Political Theory*, 722.

⁶Chanda, *Constitutional Law*, 64.

⁷ J.C Johari, *Principles of Modern Political Science*, (New Delhi: Sterling Publishers Limited 2009) 360.

⁸Johari, *Principles of Modern Political Science*, 360.

contest elections⁹. Free elections also require basic democratic rights, including freedom of speech, association and assembly, access to accurate and fair news reporting and political parties that are not too unequal in resources¹⁰.

2.4 Electoral systems

Elections are managed by electoral systems, according to Alfred Chanda¹¹ an electoral system refers to a method that a country adopts for choosing national leaders. It encompasses procedures, rules and regulations for the electorate to exercise their rights to vote and determine how elected Members of Parliament occupy their allocated seats in the legislature. The electoral system sets specific systemic rules which determine who votes and how votes are counted.

2.5 Types of electoral systems

One of the basic decisions for democracy is what electoral system it should have¹². The choice of an electoral system is crucial for the credibility of the election process, the acceptability of the election outcome and the legitimacy of rule itself, which elements are important ingredients for political stability¹³. Many electoral systems have been invented but it is no simple matter to say what is the best and most democratic¹⁴.

There are three main types of electoral systems which are the; Simple Plurality or First Past the Post (FPTP), Proportional Representation (PR) which allocates seats according to the

⁹Kenneth Newton and Jan Van Deth, *Foundations of Comparative Politics* (Cambridge: Cambridge University Press 2005) 202

¹⁰ Newton and Jan Van Deth, *Foundations of Comparative Politics*, 202.

¹¹Chanda, *Constitutional Law*, 68.

¹² Newton and Jan Van Deth, *Foundations of Comparative Politics*, 205.

¹³Chanda, *Constitutional Law*, 68.

¹⁴Newton and Jan Van Deth, *Foundations of Comparative Politics*, 206.

formula that tries to ensure proportionality and the Mixed System (MS)¹⁵. Each of the electoral system will be discussed in turn.

2.5.1 Plurality System

Plurality system known as First-Past-the-Post (FPTP) is used for election in 43 countries including the United Kingdom, Canada, India, the United States, and many Commonwealth states including Zambia¹⁶. The aim of plurality systems is to create a majority that is to exaggerate the share of seats for the leading party, in order to produce an effective working parliamentary majority for the government, while simultaneously penalising minor parties, especially those whose support is spatially dispersed¹⁷.

The focus of the FPTP is effective governance, not representation of all minority views. Under the FPTP countries are divided into territorial single-member constituencies¹⁸. Candidates contesting in constituencies stand in their own right as individuals and not as political parties even if their candidature is endorsed by parties¹⁹. Voters within each constituency cast a single ballot marked by an X for one candidate. The candidate with the largest share of the vote in each seat is retained to office and in turn the party with an overall majority of seats forms the government²⁰. Under FPTP candidates usually do not need to pass a minimum threshold of votes nor do they require an absolute majority to be elected. Instead all they need is a simple plurality; one more vote than their closest rival is enough to secure a seat in the National Assembly²¹.

¹⁵Newton and Jan Van Deth, *Foundations of Comparative Politics*, 203

¹⁶PippaNoris, *Choosing Electoral Systems: Proportional, Majoritarian and Mixed Systems*, International Political Science Review Vol13 July (1997) 3.

¹⁷Noris, *Choosing Electoral Systems*, 3.

¹⁸Noris, *Choosing Electoral Systems*, 3.

¹⁹Chanda, *Constitutional Law*, 69.

²⁰Chanda, *Constitutional Law*, 69.

²¹Chanda, *Constitutional Law*, 69.

Another FPTP system is the Alternative Vote, which is used in elections to the Australian House of Representatives and in Ireland for Presidential elections²². Instead of a simple 'X', voters rank their preferences among candidate. To win candidates need an absolute majority of votes. Where no one gets over 50 per cent after first preferences are counted, then the candidate at the bottom of the pile with the lowest share of the vote is eliminated, and their votes are redistributed amongst the other candidates²³. The process continues until an absolute majority is secured²⁴.

2.5.2 Advantages of the FPTP System

The FPTP is advantageous because it is simple to operate and understand this is because a valid vote requires only one mark beside the name or symbol of one candidate²⁵. Secondly, it produces representatives who are accountable to a defined geographical constituency, as countries are divided into constituencies and each constituency elects its own member of parliament. Hence, the system retains the link between the people in the constituency and their elected Member of the National Assembly²⁶.

Additionally, FPTP is also important in societies that are ethnically divided as it discourages political parties from being exclusionary²⁷. This is due to the fact the FPTP system discourages cases where parties enjoys concentrated localised support to become an effective national force but that a political party has to be more broadly represented geographically and socially in order to govern. Lastly, it affords an opportunity for popular independent candidates to be elected, as electorates elect on the basis of candidates and not parties²⁸.

²²Norris, Choosing Electoral Systems, 4.

²³Norris, Choosing *Electoral Systems*, 4.

²⁴Norris, Choosing Electoral System, 4.

²⁵Chanda, *Constitutional Law*, 69.

²⁶Chanda, *Constitutional Law*, 69.

²⁷Chanda, *Constitutional Law*, 69.

²⁸Chanda, *Constitutional Law*, 69.

2.5.2 Disadvantages of FPTP

One of the disadvantages of FPTP is that it produces winners with minority votes as a candidate needs not an absolute majority unless in the alternative system such as the absolute majoritarian system²⁹. This is because in the FPTP system candidates do not need an absolute majority to win an election. Secondly, it promotes a bi-party system as many opposition parties wither away when they perform poorly. The FPTP also excludes minority parties as parties put forward candidates they consider to be broadly acceptable hence discriminating groups such as the disabled, women and tribal minorities³⁰. Lastly under the FPTP there are a lot of wasted votes because votes that go to losing candidates even if the amount to an overall majority do not count towards determining representation³¹.

2.5.4 Proportional Representation PR

Whereas majoritarian systems emphasize on governability, proportional systems focus on the inclusion of minority voices³². This system has multiple variants but the commonly used is the party list which is used in Israel, Portugal, Spain and Germany³³. The essential features of the party list are that; the whole country is considered as one constituency for elections hence there is no need for dividing the country into election boundaries³⁴. Candidates contest as parties appearing on a prepared list and not as individuals in elections³⁵.

Additionally, the winner of an election is validly elected through a calculation of the total proportion of the votes of each party, relative to the overall valid cast votes³⁶. The principle of PR is that the seats in a constituency are divided according to the number of votes cast for

²⁹Norris, *Choosing Electoral Systems*, 4.

³⁰Chanda, *Constitutional Law*, 69.

³¹Chanda, *Constitutional Law*, 69.

³²Pippa Norris *Choosing Electoral Systems: Proportional, Majoritarian and Mixed Systems*, International Political Science Review Vol13 July 1997.4

³³Norris, *Choosing Electoral Systems*, 4.

³⁴Chanda, *Constitutional Law*, 72.

³⁵Chanda, *Constitutional Law*, 72.

³⁶Chanda, *Constitutional Law*, 69.

party lists, but there are considerable variations in how this is implemented in different systems.

2.5.5 Advantages of PR system

The PR system is advantageous as it leads to a few wasted votes, as almost where all votes cast go towards electing a party of choice and this brings about voters perception that elections are worth participating in³⁷. The PR system also facilitates minority party access to representation as any political party with even a few electoral votes could gain seats unless the threshold is high³⁸. Finally, in the PR system the number of seats a party has in parliament accurately reflects its national strength.

2.5.6 Disadvantages of PR

Nevertheless, the PR system is also disadvantageous in that, firstly, it does not provide room for independent candidates, as electorates vote for parties and not the individual candidates³⁹. Secondly, there is no effective link between voters and the Members of the National Assembly⁴⁰. Members of the National Assembly are accountable to the party rather than voters, as voters vote for parties and not a candidate. Lastly the PR system has a tendency to produce weak or unstable governments⁴¹.

2.4.5 Mixed Systems

The Mixed System is a hybrid of the elements of the FPTP and the PR systems. It allows some members of the National Assembly to be elected through the FPTP while others are elected through the PR closed party list system⁴². The mixed system is advantageous because

³⁷Chanda, *Constitutional Law*, 69.

³⁸Chanda, *Constitutional Law*, 73.

³⁹Chanda, *Constitutional Law*, 73.

⁴⁰Chanda, *Constitutional Law*, 73.

⁴¹Chanda, *Constitutional Law*, 73.

⁴²Chanda, *Constitutional Law*, 73.

it tends to maximise the positive aspects of both the FPTP and PR, which is broad representation and accountability⁴³.

2.5 Electoral System Applicable in Zambia

Zambia became independent in 1964 and is a republic governed by a president and a National Assembly. It is a unitary state with an executive president who is both the head of state and government. After two decades of one-party rule, Zambia returned to a multiparty system and general elections were held in November 1991.

Zambia has inherited the FPTP system from Britain⁴⁴. Under the FPTP a country is divided into relatively equal constituencies from which only one representative is chosen to occupy a parliamentary seat on behalf of that constituency⁴⁵. Zambia is divided into constituencies for purposes of elections to the National Assembly⁴⁶. Each constituency returns one member of the National Assembly⁴⁷. During presidential and parliamentary elections voters are registered in every constituency and elections are conducted in these constituencies⁴⁸.

There are 150 constituencies in Zambia. A person qualifies to be elected as Member of Parliament if they are a citizen of Zambia, have attained the age of 21 years and are literate and conversant with the official language of Zambia⁴⁹. The above constitutional provisions show the entrenchment of the FPTP system in the constitution.

2.6 Relationship between the Types of Electoral System and Electoral Malpractice

According to Alina Menocal⁵⁰ electoral malpractice concerning electoral system has three principal dimensions: manipulation of the rules governing elections that is non-compliance of

⁴³Chanda, *Constitutional Law*, 73.

⁴⁴Chanda, *Constitutional Law* 64.

⁴⁵Chanda, *Constitutional Law*, 64.

⁴⁶ Article 77 (1) of the Constitution as amended by Act No.18 of 1995.

⁴⁷Article 77(3) of the Constitution as amended by Act No.18 of 1995.

⁴⁸Article 77(9) of the Constitution as amended by Act No.18 of 1995.

⁴⁹Article 64 of the Constitution as amended by Act No.18 of 1995.

⁵⁰Alina .R. Menocal, *Why electoral systems matter: an analysis of their incentives and effects on key areas of governance* (2011) 13.

rules governing elections, manipulation of vote choice, and manipulation of voting (electoral administration). Menocal has further suggested that political actors are likely to resort to the first two forms of malpractice much more often than the third. In light of the above, when this research refers to electoral malpractice in this section is referring to the first two types of electoral malpractice that Menocal has alluded to.

With regard electoral malpractice in the FPTP, Staffan Lindberg argues that the aspect of the winner takes all creates clientistic voting behaviour through the close personal relationship between voter and representative in single-member districts⁵¹. This means that due to the fact that under the FPTP the country is divided into constituencies and candidates to election have a personal relationship with the electorate. Hence, candidates can easily entice the electorate to vote for them through dubious means, which is trading their votes for other incentives they require in their daily lives.

Lindberg further argues that in FPTP system the stakes of winning an election are higher than other electoral system, this so because the winner need only win by a simple majority making every single vote very significant as a one vote difference can determine an entire election. Hence, the incentives of using irregular practices to win an election are stronger than in proportional systems. These incentives are likely to present a strong temptation to political leaders especially those in emerging democracies than in established democracies⁵². Where the incentives for the personal vote are high in elections, candidates need larger baskets of individual campaign funds⁵³.

Candidates need money to advertise their individual candidacy. The relevant political activities vary across countries, but may include such things as the purchase of television

⁵¹Staffan.I. Lindberg, *Consequences of electoral systems in Africa: A preliminary Inquiry* 2005. 56 www.elsevier.com/locate/electstud

⁵²Lindberg, *Consequences of Electoral System in Africa*, 56.

⁵³Eric.C.Chang ,*Electoral system, District Magnitude and Corruption*(London: Cambridge Press,2007)8

advertising time, printing and distribution of campaign posters, gift-giving and the distribution of candidate-related trinkets⁵⁴. This makes the FPTP system highly susceptible to electoral malpractice.

PR systems are associated with higher shares of free and fair elections. In terms of incentives, as has been discussed, in PR systems, voters typically vote for parties, whereas in plurality systems voters select individuals⁵⁵. Under PR, parties stand together or fall together, both in terms of reputation and overall levels of electoral support and party leaders therefore have a greater incentive to enforce compliance with the electoral law to protect party reputation⁵⁶.

Additionally, PR systems also have greater ability to enforce party discipline than under FPTP systems⁵⁷. While in the FPTP, reputations are separable and sanctions are more difficult for the central party organizations to apply because of the greater autonomy afforded to candidates⁵⁸. Thus, malpractice could be made more often by an individual than on a collective basis, as the benefits of misconduct accrue directly to the candidate⁵⁹.

The automatic effect in electoral systems of turning votes into seats also leads to electoral malpractice⁶⁰. Under the FPTP votes are easily converted into seats as a candidate who attains the most votes wins the elections. In a close contest, only a limited number of marginal seats in FPTP system will need to be won to swing the election, and often, only a small number of votes will need to be manipulated in any individual district (Constituency) to alter the outcome in that constituency⁶¹.

This leads to election candidates committing malpractice in order to swing even a few electorates to vote for them and not their preferred candidate. In the PR system, by contrast,

⁵⁴Chang, *Electoral system, District Magnitude and Corruption*, 8.

⁵⁵Menocal, *Why electoral systems matter*, 13.

⁵⁶Menocal, *Why electoral systems matter*, 13.

⁵⁷Menocal, *Why electoral systems matter*, 13.

⁵⁸Menocal, *Why electoral systems matter*, 13.

⁵⁹Menocal, *Why electoral systems matter*, 13.

⁶⁰Menocal, *Why electoral systems matter*, 14.

⁶¹Menocal, *Why electoral systems matter*, 14.

relatively large proportions of the national vote will have to be switched to change the overall balance of power in the legislature⁶². This means that in the PR system it is difficult for electoral practice to be committed as it needs to be committed at a very large scale. Thus, FPTP system is more susceptible to malpractice than the PR system.

2.7 Conclusion

This chapter has discussed the concept of democracy stating that Zambia is a representative democracy. In order for Zambia to uphold its democratic political system there is need for elections. The chapter has also discussed the concept of free and fair elections in a democracy. It also discussed the three electoral systems in the world, outlining both the advantages and disadvantages of the electoral systems. Additionally, it has shown the relationship between electoral systems and electoral malpractice. Showing that the FTPT, due to its winner takes it is all nature, is more susceptible to electoral malpractice as compared to the PR system. Finally the chapter has shown that the electoral system that the FPTP system is applicable to Zambia making elections highly susceptible to malpractice. Hence, the chapter has laid the foundation for Zambia to have regulations that promote the curbing of malpractice.

Chapter three will discuss the legal and the institutional framework of the electoral system in Zambia. With the view to establish the extent electoral regulations established in the framework promote the curbing of electoral malpractice.

⁶²Menocal, *Why electoral systems matter*, 14.

CHAPTER THREE

THE LEGAL AND INSTITUTIONAL FRAMEWORK REGULATING ELECTIONS IN ZAMBIA

3.1 Introduction

The aim of chapter is to outline the legal and institutional framework regulating elections in Zambia, with the view to establish the extent to which the legal regime promotes the curbing of electoral malpractice. This chapter begins by examining the Constitutional framework of the electoral system;it also discusses the Electoral Act and Electoral Code of Conduct regulations made under it and the Anti-Corruption. Additionally, it also looks at the Electoral Commission of Zambia which is the institution responsible for the administration of elections in Zambia.

3.2 Legal Framework Regulating Zambia’s electoral system

In Zambia the relevant pieces of legislation which regulate the electoral system include the Constitution, Electoral Act, Electoral (Code of Conduct) Regulations, the Electoral Commission Act and the Anti-Corruption Act. Each piece of legislation will be examined in turn.

3.2.3The Constitution

The Constitution provides that the legislative power in the Republic of Zambia vests in Parliament which consists of the President and National Assembly¹. Pursuant to article 64 of the Constitution any person who is a Zambian citizen, has attained the age of 21 years and is literate and conversant with the official language of Zambia qualifies to be elected as a member of the National Assembly.

¹Article 62 of the Constitution

“Every citizen who has attained the age of eighteen unless disqualified by parliament from registration for purposes of elections to the National Assembly is entitled to register as a voter on one’s own behalf”². To this end the universal suffrage which is requirement of free and fair elections is fulfilled in the electoral system.

The Constitution also establishes an autonomous body called the Electoral Commission Zambia to supervise the registration of voters, to conduct presidential and parliamentary elections and review the boundaries of constituencies in which Zambia is divided for the purpose of elections³. With regards election disputes for parliamentary elections the Constitution grants the High Court power to hear and determine whether any person has been validly elected or nominated as a member of National Assembly or the seat of any member has become vacant⁴. Therefore, the Constitution lays the foundation for questioning the validity of elections as it grants the High Court power to determine whether an elected candidate has been validly elected.

3.3.4 The Electoral Act

The current Electoral Act was enacted in 2006 to repeal and replace the Electoral Act of 1991. The Electoral Act provides for a comprehensive process for elections to the office of President and National Assembly. The Electoral Act empowers the Electoral Commission of Zambia (ECZ) in matters relating to elections and enables the Electoral Commission of Zambia to make regulations providing for the registration of voters and for the manner of conducting elections⁵.

The Act also provides for the appointment of a Conflict Management Committee, which constitutes such number of conflict management committees as the Electoral Commission of

²Article 75 of the Constitution as amended by Act number 18 of 1995.

³Article 76(1) of the Constitution as amended by Act number 18 of 1995.

⁴Article 72(1) of the Constitution as amended by Act number 18 of 1995.

⁵ Part II and III of the Electoral Act No.12 of 2006.

Zambia may determine, for purposes of resolving electoral disputes⁶. Furthermore and of great importance to this research the Electoral Act provides for various types of electoral malpractice.

A malpractice in its ordinary meaning has to do with illegal or wrong behaviour while in a professional job⁷. Hence, electoral malpractice maybe defined as the illegal or wrong behaviour for the period of elections. Electoral malpractice is classified into two which are the pre-election manipulations and Post-Election manipulations⁸. However, this research is particularly interested in pre-election manipulation due to the fact that most reported election petitions are petitioned on the basis of pre-election electoral malpractice⁹.The Electoral Act provides for pre-election malpractice in part VIII of the Act which includes bribery, false statements published against a candidate, treating and undue influence each will be explained in turn;

Bribery- the act of bribery in accordance with the Electoral Act includes acts where; a person, corruptly either directly or indirectly gives, lends, procures, offers, promises or agrees to give, lend or procure money, to or for any person or on behalf of an another voter in order to induce any voter, to vote or refrain from voting or joining in any procession or demonstration before, during or after any election¹⁰. Secondly a person making a gift to procure the return of any candidate at any election and upon the consequence of any gift promises to endeavour the return of any candidate¹¹. Additionally, an act where a person

⁶Section 111 of the Electoral Act No.12 of 2006.

⁷OjoOlawole et al, *Electoral Malpractice and Problems in Africa: A critical Analysis, Journal of Research and Development* Vol 1, (2013) 13.

⁸Olawole et al, *Electoral Malpractice and Problems in Africa*, 13.

⁹Section 79 (a) of the Electoral Act of 2006.

¹⁰Section 79(c)of the Electoral Act of 2006.

¹¹Section 79(e) of the Electoral Act of 2006.

advances money to another person with the purpose of expending bribery at any election or repayment of any money expended in bribery¹².

False statements published against a candidate- the illegal practice of false statements includes acts where; a person publishes a false statement of the illness, death or withdrawal from election of a candidate. In order to promote or procure the election of another candidate, knowing that statement to be false or not believing it to be true who, before or during an election¹³. Additionally, where a person publishes any false statement of fact in relation to the personal character or conduct of a candidate in that election, unless they person can show that they had reasonable grounds for believing and did believe the statement is true, is guilty of an illegal practice¹⁴.

Treating- treating as a form of electoral malpractice occurs where, a person corruptly or by any person before, during or after an election provides the expenses of food, drinks, entertainment, lodging or provisions to in part or in whole to any person. For the purpose of corruptly influencing that person or any other person to give or refrain from giving another candidate a vote at an election shall be guilty of treating¹⁵.

Undue Influence- No person shall directly or indirectly make use of or threaten to make use of any force, violence or restraint upon any other person¹⁶. Persons are also prohibited from inflicting or threatening to inflict by oneself or by any other person any physical, psychological, mental or spiritual injury, damage, harm or loss upon or against any person¹⁷.

¹²Section 83(1)of the Electoral Act of 2006.

¹³Section 83(2)of the Electoral Act of 2006.

¹⁴Section 83 (2)of the Electoral Act of 2006.

¹⁵Section81 of the Electoral Act of 2006.

¹⁶Section 82(1)(a)of the Electoral Act of 2006.

¹⁷Section 82(1)(b) of the Electoral Act of 2006.

Persons must refrain from doing or threatening to do anything to the disadvantage of any person¹⁸.

3.3.5 Electoral (Code of Conduct) Regulations

The present Electoral Code of Conduct Regulations were issued by the Electoral Commission of Zambia (ECZ) as a replacement of the Code of Conduct of 1996 which was revoked in 2006 after consultations with political parties and civil society organisations¹⁹. The regulations regulate the conduct of all stakeholders before, during and after elections. The formulation of regulations followed concerns by various stakeholders that political field did not provide a fair environment for opposition political parties during election with the desired objectives of having free and fair elections²⁰.

With regards electoral malpractice, the Electoral Code of Conduct prohibits individuals from the cause violence or use of language which leads or is likely to lead to violence or intimidation during election campaigns or elections²¹. Individuals are also prohibited from carrying or displaying of arms of any kind at a political meeting or in the course of any march or demonstration or other public gathering or a political nature²². Further, the Electoral Code of Conduct prohibits individuals from making false defamatory or inflammatory allegations concerning any person or party in connection with an election²³.

Furthermore, individuals are prohibited from arranging public meeting at the same time and venue as similar political event organized by another political organization²⁴. Additionally individuals are also prohibited from removing any political campaign materials of any other

¹⁸ Section 82(1)(e) of the Electoral Act of 2006

¹⁹ Electoral Reform Technical Committee, *Final Report of the Electoral Reform System in Zambia* (August 2005) 405.

²⁰ Electoral Reform Technical Committee, *Final Report of the Electoral Reform System in Zambia*, 405.

²¹ Regulation 7(1) (a) of the Electoral Code of Conduct SI No.90 of 2006.

²² Regulation 7 (1) (b) of the Electoral Code of Conduct SI No.90 of 2006.

²³ Regulation 7 (c) of the Electoral Code of Conduct SI No.90 of 2006.

²⁴ Regulation 7(e) of the Electoral Code of Conduct SI No.90 of 2006.

person²⁵. Except for the president and vice president no one individual is allowed to use government or parastatal transport or facility for campaign purposes²⁶. Finally, discrimination during campaigns against any person on grounds of race, ethnicity, class, gender, religion or in any other manner in connection with an election or political activity is prohibited²⁷. To this end the Electoral Code of Conduct regulates the electoral system. However, in practice the Electoral Code of Conduct has not been fully complied with.

3.3.6 Anti-Corruption Act

The Anti-Corruption Commission (ACC) is established in section 4 of the Anti-Corruption Act No. 3 of 2012 (herein after referred to as the Anti-Corruption Act). The functions of the ACC include: Firstly, to prevent and take necessary and effective measures for the prevention of corruption in public and private bodies initiate²⁸. Secondly, receive and investigate complaints of alleged or suspected corrupt practices and subject to the directions of the Director of Public Prosecutions, prosecute²⁹. Thirdly, investigate any conduct of any public officer which, the Commission has reasonable grounds to believe may be connected with, or conducive to, corrupt practices. Lastly, the ACC must be the lead agency in matters of corruption co-ordinate or co-operate, as applicable, with other institutions authorised to investigate, prosecute, prevent and combat corrupt practices so as to implement an integrated approach to the eradication of corruption³⁰.

With regards electoral malpractice which is of importance to this research the Electoral Act mandates the ACC to investigate and prosecute any corrupt practice committed the Act in accordance with the ACC³¹. However, the Anti-Corruption Act limits the ACC jurisdiction to

²⁵Regulation7 (g) of the Electoral Code of Conduct SI No.90 of 2006.

²⁶Regulation 7(k) of the Electoral Code of Conduct SI No.90 of 2006.

²⁷Regulation7 (m) of the Electoral Code of Conduct SI No.90 of 2006.

²⁸Section 6(a) of the Anti -Corruption Act No.3 of 2012.

²⁹Section 6(b) of the Anti- Corruption Act No.3 of 2012.

³⁰Section6(c) of the Anti- Corruption Act No.3 of 2012.

³¹Section3 (5) of the Electoral Act No.12 of 2006.

investigate and prosecute any offence of bribery prescribed under section 79 of the Electoral Act³². Section 79 of the Act provides for the offence of bribery before, during and after election.

3.4 Institutional Framework

Having outlined the legal framework of the electoral system of Zambia, it is imperative that the institutional framework that administers the content of the legislation governing the electoral system is analysed. This is so in order to determine whether practically the legal framework is enforced to achieve free and fair elections. The institution responsible for the administration of elections in Zambia is the Electoral Commission of Zambia.

3.4.1 Electoral Commission of Zambia (ECZ)

In Zambia, elections are organised and administered by an independent commission, the Electoral Commission of Zambia (ECZ). The ECZ was established in 1996, just a month before those elections. Prior to the Constitutional Amendment Act 18 of 1996, the electoral commission and local government commissions respectively were organised as part time or ad hoc bodies responsible for the conduct and supervision of Zambia's presidential, parliamentary and local elections³³.

3.4.2 Composition and Functions of the ECZ

ECZ comprises a chairperson and not more than four other members, who are on full time³⁴. The members of the commission are appointed by the president subject to ratification by the National Assembly³⁵. The functions of the ECZ are to; conduct presidential and parliamentary elections. Before elections it is imperative that eligible voters register to vote and it is the

³²Section 35 of the Anti-Corruption Act No.3 of 2012.

³³Claude Kabemba, *Elections and Democracy in Zambia*, EISA Report No.6 (2006) 25

³⁴Section 4(3) of the Electoral Commission Act No.17 of the Laws of Zambia.

³⁵Section 5(3) of the Electoral Commission Act No.17 of the Laws of Zambia.

essential function of the ECZ to supervise the registration of voters³⁶. The registration of voters is conducted months preceding the presidential and parliamentary elections once every five years³⁷. To review the boundaries of the constituencies into which Zambia is divided for the purpose of elections to the National Assembly. The ECZ in the 2011 general elections did rebuke some offenders but such actions did not reverse the trend of media bias, misuse of state resources and clashes between party supporters³⁸. As a consequence, the Code of Conduct, while in theory providing a good regulatory framework for the conduct of the campaign and for regulating behaviour of stakeholders throughout the electoral period, proved inadequate and a weak deterrent due to a lack of substantive enforcement mechanisms³⁹.

3.4.3 Duties of the ECZ

The ECZ has been mandated with duties that help in the promotion of free and fair elections in Zambia in order to curtail electoral malpractice. These duties are pursuant to regulation 7 of the Electoral Code of Conduct regulation which provides that the ECZ shall where reasonable and practicable to do so; firstly, meet political party representatives on a regular basis to discuss all matters of concern related to the election campaign and election⁴⁰. Secondly, it is the mandate of the ECZ to ensure that political parties do not use state resources to campaign for the benefit of any political party or candidate⁴¹.

³⁶Article 76(1) of the Constitution as amended No.18 of 1995.

³⁷Article 77(9) of the Constitution as amended No.18 of 1995.

³⁸European Union Election Observation Mission to Zambia, Final Report on the General Elections, (2011) 19.

³⁹European Union Election Observation Mission to Zambia, Final Report on the General Elections, (2011) 19.

⁴⁰Regulation 10(1) (a) of the Electoral Code of Conduct SI No.90 of 2006.

⁴¹Regulation 10(1) (b) of the Electoral Code of Conduct SI No.90 of 2006.

Thirdly, the ECZ is to ensure that any campaign rally or meeting which is legally organized by any political party is not disrupted or prohibited⁴². Fourthly, the ECZ must ensure that no election officer is unjustifiably victimized in the course of their election duties. Additionally, ECZ must ensure police officers' act professionally and impartially during the electoral process⁴³.

Further, the ECZ must also ensure that traditional leaders, such as chiefs and headmen, do not exert undue or excessive influence on their subjects to support a particular political party or candidate⁴⁴. Finally, it is also the duty of the ECZ to see to it that equal opportunity is given to all stakeholders, particularly political parties to participate in and conduct their political activities in accordance with the law⁴⁵.

3.5 Conclusion

This chapter has examined the legal and institutional framework of Zambia's electoral system. The chapter has shown the constitutional framework of the electoral system showing the provisions of the Constitution that add to the legal framework. This chapter also shows that the constitution in regulating the electoral system is supplemented by other legislation namely the Electoral Act and the Electoral Code of Conduct issued under it and the Anti-Corruption Act which all provide laws which have been enacted to curtail electoral malpractice in Zambia.

Finally, this chapter has also shown the institutional framework of the Electoral system which is the ECZ. It has shown the composition and functions of the ECZ and it has discussed the mechanism of enforcement of the electoral rules in order to curtail electoral malpractice. Thus, this chapter has shown that the legal regime in Zambia adequately provides for the

⁴²Regulation 10(1) (C) of the Electoral Code of Conduct SI No.90 of 2006.

⁴³Regulation 10(1) (d) of the Electoral Code of Conduct SI No.90 of 2006.

⁴⁴Regulation 10(1) (e) of the Electoral Code of Conduct SI No.90 of 2006.

⁴⁵Regulation 10(1) (f) of the Electoral Code of Conduct SI No.90 of 2006.

curtailing of electoral malpractice in the electoral system however it has been noted that practically the ECZ lacks the full enforcement mechanism to curtail electoral malpractice. Chapter four is a case study of *Kafuka v Mundia* to assess how the courts in Zambia have interpreted the statutory grounds as provided in section 93(2) of the Electoral Act. The analysis will assess whether the court's interpretation advances the object of the Electoral Act to curb electoral malpractice

CHAPTER FOUR

KAFUKA V MUNDIA SCZ/ 80/2012(Unreported)

4.1 Introduction

The aim of the chapter is to analyse section 93 (2) of the Electoral Act using the case study of the case of *Kafuka vMundia*. This will be achieved by analysing case law on electoral malpractice, in order to assess how the statutory grounds as provided in section 93(2) promote the goal of curbing electoral malpractice in Zambia's electoral system. This chapter begins with a brief outline on the law concerning election petitions in Zambia. Thereafter it will use the case study of *Kafuka v Mundia* to assess whether the interpretation of the court advance the object of the electoral act to curb electoral malpractice.

4.3 Kafuka v Mundia

*Kafuka v Mundia*¹ was an appeal against the decision of the High Court which dismissed the appellant's petition and declared the respondent as the duly elected Member of Parliament for Sikongo Constituency. The petitioner was a candidate in the Parliamentary election for Sikongo Constituency in Kalabo District of the Western Province of the Republic of Zambia held on 20th September, 2011. The petitioner stood on the Patriotic Front ticket while the respondent stood on the Movement for Multi-Party Democracy ticket. The respondent was declared duly elected Member of Parliament for Sikongo Constituency.

The petitioner challenged the election of the respondent and alleged that the election campaign was characterised by treating contrary to Section 81 of the Electoral Act No. 12 of 2006 and undue influence on the electorate contrary to Section 82 of the Act. The petitioner relied on section 93(2) (a) of Electoral Act to challenge the election. Section 93(2) (a)

¹ SCZ/80/2012

provides that the High Court can only declare the election of a candidate as member of the National Assembly void if it is proved to the satisfaction of the Court among other grounds, that; by reason of any corrupt practice or illegal practice committed in connection with the election or by reason of other misconduct, the majority of voters in a constituency were or may have been prevented from electing the candidate in that constituency whom they preferred;

The petitioner failed to meet the statutory standard of proving that a corrupt practice affected the majority of voters in the constituency as provided in section 93(2) (a) of the Electoral Act as he could satisfy the court in the evidence adduced that the majority of the were affected by the corrupt practice and could not vote for a preferred candidate. Therefore, the Supreme Court dismissed the appeal and held for the Respondent did not satisfy the statutory ground to prove that the majority were affected by the Respondents illegal practice before elections.

4.3 Statutory Grounds of Proof

Section 93(2) of the Electoral Act supplements article 72 of the Constitution by setting grounds upon which the election of member of the National Assembly can be nullified. It provides that the High Court can only declare the election of a candidate as member of the National Assembly void if it is proved to the satisfaction of the Court among other grounds, that;

(a) by reason of any corrupt practice or illegal practice committed in connection with the election or by reason of other misconduct, the majority of voters in a constituency were or may have been prevented from electing the candidate in that constituency whom they preferred;

(c) that any corrupt practice or illegal practice was committed in connection with the election by or with the knowledge and consent or approval of the candidate or of that candidate's election agent or polling agent;

The subsections quoted above are independent and separate paragraphs and an election shall be held to be void if any of the paragraphs is proved to the satisfaction of the High Court². Therefore a petitioner can rely on either of the grounds when seeking nullification of an election.

The reliefs that may be claimed in an election petition are a declaration: that the election was void or that a candidate was duly elected³. Additionally, a petitioner may apply upon the trial of an election petition for a scrutiny of the elections to be carried out in such manner as the Court may determine⁴. An election petition must be tried and determined in open court, within one hundred and eighty days of the presentation of the election petition⁵. Appeals of election petitions lie to the Supreme Court.

4.3.1 Judicial interpretation of the statutory grounds of proof in election petitions

The courts in Zambia have interpreted the statutory grounds a petitioner has to rely on in order to nullify an election on the ground of electoral malpractice. *Kafuka v Mundia* and several other cases have been petitioned on the basis of statutory ground provided in Section 93 (2) (a) provides that the High Court can declare the election of a candidate as member of the National Assembly void if it is proved to the satisfaction of the Court among other grounds; “That by reason of any corrupt practice or illegal practice committed in connection with the election or by reason of other misconduct, the majority of voters in a constituency were or may have been prevented from electing the candidate in that constituency whom they preferred”.

²*Mlewa v Wightman* 1997 ZR 171.

³Section 95 of the Electoral Act No.12 of 2006.

⁴Section 95 of the Electoral Act No.12 of 2006.

⁵ Section 104 of the Electoral Act No.12 of 2006

The rule that the malpractice must affect the majority of the voters emanated from common law in the case *Woodward v Sarsons*⁶ which addressed administrative problems with newly enacted secret ballot legislation by invoking the common law of parliamentary elections. The bench in that case held that an election could be voided on two grounds. Firstly, if there was “no real electing at all” meaning the constituency did not have a free and fair opportunity of electing the candidate the majority might prefer. Secondly, if the election was “not really conducted under the subsisting election laws” meaning the errors were so fundamental that, in a sense, a different method of election was used to that laid down in the legislation

In the case of *Kafuka v Mundia*⁷ it was held that a petitioner relying on the statutory ground that the corrupt or illegal practice affected the majority of voters from voting for their preferred candidate during an election as provided by section 93 (2) (a). Must show that the prohibited conduct was widespread in the constituency to the level where registered voters in greater numbers were influenced so as to change their selection of a candidate for that particular election in that constituency⁸. Only then can it be said that a greater number of registered voters were prevented or might have been prevented from electing their preferred candidate.

The crucial point is proof that the majority of voters were prevented from electing the candidate whom they preferred⁹. Additionally the case of *Mlewa v Wightman*¹⁰ established that where there is a wrong doing of a scale or type which has adversely affected an election the election must be nullified if petitioned. Regardless of whom the wrongdoer is and even if the candidates personally were not involved, the election may be declared void.

⁶ [1875] LR 10

⁷ SCZ/80/2012

⁸ (1995) ZR 171

⁹ *Mlewa v Wightman* (1995) ZR 171

¹⁰ (1995) ZR 171

The test that the malpractice must affect the majority of voters is questionable in the electoral system of Zambia because as earlier alluded to Zambia's electoral system is the FPTP system and in this system the winner need not win by an absolute majority in order to secure a seat in the National Assembly. A candidate need only have a simple majority to secure a seat in the National Assembly and one vote more than another candidate secures a seat in the National Assembly¹¹. Under the FPTP votes are easily converted into seats as a candidate who attains the most votes wins the elections¹². And in a close contest only a small number of votes will need to be manipulated in any individual Constituency to alter the outcome in that constituency¹³.

In consequence where the minds of a number of voters who, not being in the majority are affected, it might affect the results of the election and a winning candidate who may have used electoral malpractice in one ward can scoop an election based on the votes from that ward which then affects the result of the whole constituency. Hence, through manipulation of a small number of votes an election can swing to another candidate whom the majority of voters did not prefer but the candidate needed a few voters to influence in order to scope the election.

*Mlewa v Wightman*¹⁴ also established that personal knowledge of the candidate is irrelevant and inapplicable under paragraph (a), it does not matter who the wrong doer is. The scheme of the law appears designed to protect the electorate and the system itself by providing for nullification whenever there is wrong doing which the court feels satisfied, perhaps because of the scale or type of wrong doing, probably adversely affected the election¹⁵. It can be argued that the corrupt practice alleged should not affect the majority in order to nullify an

¹¹ (1995) ZR 171

¹² Menocal, *Why electoral systems matter*, 13.

¹³ Menocal, *Why electoral systems matter*, 13.

¹⁴ (1995) ZR 171

¹⁵ *Mlewa v Wightman*(1995) ZR 171

election this is because by its nature the FPTP system is highly susceptible to electoral malpractice¹⁶. Therefore, a system like the FPTP has to be protected from malpractice even on a small scale because of its winner takes it all nature perspective which makes it susceptible to malpractice as one vote makes a difference¹⁷.

An important aspect of the statutory ground that the electoral malpractice must affect the majority of voters from voting for their preferred candidate, is that that the petitioner must adduce evidence to show that the majority of voters were affected. In the case of *Kafuka v Mundia*¹⁸ it was held that the evidence must indicate widespread vilification of the Respondent and also indicate that the majority of the registered voters were influenced against the Respondent. Statistics of registered voters who attended the rallies where corrupt or illegal practices were committed should be presented to assist the trial court on the extent of influence in the constituency.

However, according to Graeme Orr¹⁹ in Australia where the legislation requires proof that the election result was “likely to have been affected” by the wrongdoing²⁰. A judge adopting this approach will put the onus squarely on the petitioner to prove the result was probably affected²¹. Given the secrecy of the ballot, this may be a difficult onus to discharge in the case of people alleged to have voted who should not (or vice versa)²². This entails that that because a vote is a secret it is difficult for a petitioner to prove that the corrupt or illegal practice prevented the voter from voting for their preferred candidate

¹⁶Staffan.I. Lindberg, *Consequences of electoral systems in Africa*, 56.

¹⁷Lindberg, *Consequences of electoral systems in Africa*, 56.

¹⁸ SCZ 80 2012

¹⁹ Graeme Orr et al, *Australian Electoral Law: a Stocktale*, Election Law Journal, Vol 2 2003. 387

²⁰ Graeme Orr et al, *Australian Electoral Law*, 387.

²¹ Graeme Orr et al, *Australian Electoral Law*, 387.

²² Graeme Orr et al, *Australian Electoral Law*, 387.

In the more recent case of *Zulu v Kalima*²³ the High Court held that;

The Petitioner ought and should have adduced evidence before this Court to show an analysis of the number of persons in the wards where the said chitenge materials were distributed. The Petitioner ought to further to have produced before Court the results of the Parliament Elections in the individual wards by the parties. The analysis of the number of persons and the results in the specific wards would have armed the Court to weigh the same against the margin or difference between the votes polled by the Petitioner and the Respondent. This would have shown whether the Respondent did in fact receive the majority of votes in the wards where the said acts of alleged or illegal practices took place.

However, the Supreme Court of Zambia overturned this decision and held that it is patently clear that the learned Judge misdirected herself on the applicable standard of proof required of a petitioner under Section 93 (2) (a). Therefore, what is only expected of the petitioner is to show that the corrupt or illegal practice was committed on a large scale so as to affect the majority of voters from voting for their preferred candidate. Hence, a petitioner need not analyse the results of different polling stations in order to prove that electoral malpractice substantially affected the results. This means that a petitioner need not analyse the number of persons and the specific results what the court takes into consideration is the number of meetings or campaign rallies where the electoral malpractice were committed are a large number²⁴.

4.3.2 Burden and Standard of proof

The burden of proof is the obligation of a party to meet the requirement of a rule of law that a fact in issue be proved²⁵. In an election petition like any other civil claim the burden of proof is on the challenger to that election. The standard of proof is the degree of cogency which evidence must reach before a party is found liable²⁶. The degree of cogency of evidence a petitioner must reach in an election petition in Zambia is higher than on a mere balance of

²³ SCZ/2/2014

²⁴SCZ 2 2014

²⁵Cross and Tapper, *Cross on Evidence*, 101.

²⁶ Cross and Tapper, *Cross on Evidence*, 141.

probability²⁷. It was stated in the case of *Mabenga v Wina*²⁸ that the rationale for a standard higher than on a mere balance of probability is due to the fact that elections are of critical importance to the welfare of the people and their democratic governance.

The evidence adduced by the petitioner to prove the required grounds must be free from contradictions and truthful so as to convince a reasonable tribunal to give judgment in the party's favour²⁹. The court must cautiously and carefully evaluate all the evidence adduced by the parties. To this effect evidence of partisans must be viewed with great care and caution, scrutiny and circumspection³⁰. The evidence adduced must establish the issues raised to a fairly high degree of convincing clarity in that the proven defects and the electoral flaws are such that the majority of voters were prevented from electing the candidate whom they preferred³¹.

Despite the advantage above to the petitioner, a standard higher than a balance of probabilities has proved to be difficult for petitioners to prove especially those relying on the statutory ground that the malpractice committed has to affect the majority of electorates from voting for their preferred candidate³². Bearing in mind that election campaigns by their nature are a factual event which are witnessed by several individuals. The issuance of witnesses has been a major drawback for the petitioners the rules of evidence have all come to limit the adducing of evidence in campaigns.

For instance the court has held that it finds it difficult to believe that supporters of one candidate behaved in a saintly manner, while those of the other candidate were all servants of

²⁷ *Mabenga v Wina* (2003) ZR 110

²⁸ (2003) ZR 110

²⁹ *Kalenge v Munshya* 2011/HK/03

³⁰ *Brigadier General Kankinza v sayifwanda* 2011 /HP/17

³¹ *Brigadier General Kankinza v sayifwanda* 2011 /HP/17

³² *Kalenga v Munshya* 2011/HK/03

the devil³³. Additionally, the court has been of the view that in election contests witnesses are mostly motivated by the desire to score victory against their opponents deliberately resorting to peddling falsehoods³⁴. The evidence of both parties is, in its entirety subjective and cannot be relied upon without testing its authenticity from a neutral and independent source³⁵. Hence evidence of interested party members needs to be corroborated in order for a Judge to rely on it. This was seen in the case of *Kafuka v Mundia*³⁶ where the trial Judge refused to admit the testimony of an interested party because it was unsubstantiated and required a neutral and independent source to substantiate the testimony.

4.3.3 Election Agents

The law normally prevents a person acquiring rights under a contract unless they are a party to it³⁷. The long established exception to the above rule is the concept of agency³⁸. The most important feature of the relationship created by agency agreements is that where a contract is concluded by an agent on behalf of a principal the agent's acts are treated as if they were acts of the principal and the principal becomes a party to the contract through the agreement³⁹.

Agency in relation to elections is evident in election campaigns. Election campaigns are an event under which a candidate must spread out the campaign manifesto to a large number of voters. Thus, the candidate must have a group of people that must represent and assist him with the election campaigns. In reported election petitions the courts in Zambia have gone so far as to determine when an election may be nullified under the statutory grounds as provided in section 93(2) of the Electoral Act due to acts committed an election candidate's agent.

³³ Kalenga v Munshya 2011/HK/03

³⁴ Kalenga v Munshya 2011/HK/03

³⁵ SCZ/80/2012

³⁶ SCZ/80/2012

³⁷ MumbaMalila, *Commercial Law in Zambia: Cases, Texts and Materials*(Lusaka: UNZA Press 2011) 5

³⁸ Malila, *Commercial Law in Zambia*, 5.

³⁹ Malila, *Commercial Law in Zambia*, 5.

In the case of *Kalenga v Munshya*⁴⁰ the court stated that it has become established law that for a candidate is liable to have his election avoided for corrupt or illegal practices committed by his agents even though the act was not authorised by the candidate or was expressly forbidden and that the reason for this stringent law is that a candidate put forward agents to act for them; and if it were permitted that these agents should play foul, and that the candidate should have all the benefit of their foul play without being responsible for it in the way of losing his seat, great mischief would arise⁴¹. This means that a candidate's election can be nullified on the basis of the acts of an agent.

However, the crucial test to consider with regards agents is whether there has been employment or authorisation of the agent by the candidate to do some election work or the adoption of the work when done⁴². In the absence of authorisation or ratification the candidate must by oneself or their acknowledged agents be proved to have employed the agent to act on the candidates behalf⁴³. The candidate must have entrusted the alleged agent with some material part of the business of the election⁴⁴.

With the foregoing taking into consideration Zambia's electoral system of FPTP where the stake to win elections is high, as a candidate needs only to win an election by a simple majority. Several party members campaign for their party candidates and during campaigns these members commit illegal and corrupt practices hence practicably in the political system like Zambia's it is hard for a petitioner to pin point a legally appointed agent of a candidate. In Zambia political parties mobilise local people to form and spearhead the campaign and

⁴⁰2011/HK/03

⁴¹*Kalenga v Munshya* 2011/HK/03

⁴²*Brigadier General Kankinza and others v Saifwanda and ECZ* 2011/HP

⁴³*Kaleka v Antonio and ECZ* 2011/HP/17

⁴⁴*Kaleka v Antonio and ECZ* 2011/HP/17

political parties work out the campaign strategy⁴⁵. In the case of *Mlewa v Wightman*⁴⁶ the court held that in plural politics, it is the parties which mount the campaign for their candidates, the consequences of any illegal dealings will inevitably affect the candidates so that a defence of not being personally involved would not be upheld if shown that the illegal acts complained of affected the outcome of the election.

However, the Courts in Zambia seem to overlook the nature of election campaigns in Zambia and follow the law of agency to the letter. As was seen in the case of *Kalenga v Munshya*⁴⁷ where the court declined the petitioners submission that in plural politics parties mount the campaign of candidates and hence consequences of illegal dealings committed by party members must not be a defence to candidates that they were not personally involved. However, the court adopted the respondent's submission that a crucial test to consider with regards agents is whether there has been employment or authorisation of the agent by the candidate to do some election work or the adoption of work when done⁴⁸. In the absence of authorisation or ratification the candidate must by oneself or their acknowledged agents be proved to have employed the agent to act on their behalf⁴⁹.

It may be argued that the court must follow the strict law of agency because if they do not this will open the floodgates of the court, however, considering the fact that the FPTP electoral system is applied in Zambia. In the FPTP reputations are separable and sanctions are more difficult for the central party organizations to apply because of the greater autonomy afforded candidates⁵⁰. This means that in the FPTP system it is difficult for parties to

⁴⁵Jotham Mumba, *Political Parties and the Quest for Democratic Consolidation in Zambia*, EISA Research Report No.17 2005. 12

⁴⁶(1995) ZR 171

⁴⁷2011/HK/03

⁴⁸*Brigadier General Kankinza and others v Saifwanda and ECZ* 2011/HP/17

⁴⁹*Kaleka v Antonio and ECZ* 2011/HP/17

⁵⁰Menocal, *Why electoral systems matter*, 13.

discipline party members because each candidate stands for an election individually and not as a party and hence individuals may do as they wish during the campaigns.

In the FPTP electoral system stakes to win elections are higher than in other electoral systems as a winner need only win by a simple majority hence the incentive for using irregular practices to win is stronger. The incentives to use irregular means are likely to present a strong temptation to political leaders especially those in emerging democracies than in established democracies⁵¹. This entails that in FTPT because a winner need win only by a simple majority the members of a party will engage in illegal or corrupt practice in order to win an election as all they need is a simple majority to win an election.

Thus because of the nature of the FPTP system the court must protect the system by nullifying elections where agents, even though not employed by the candidate but are organised by the party the candidate belongs to commit corrupt or illegal acts. As this ensure discipline of political party members by political party leadership as it will effectively protect the electoral system.

4.4 Analysis of Section 92 (2) (c)

In the case of *Kafuka v Mundia* the petitioner did not petition the election on the basis of the statutory ground that an election can be nullified on the basis that the winning candidate or election agent was knowledgeable or consented to the electoral malpractice involves proof of even one or two proven instances of wrongdoing even though they could not conceivably have prevented the electorate from choosing their preferred candidate⁵². However this one of the contentious ground that most petitioners in most reported cases rely on to nullify an election hence this research seeks to shed analyse this ground also.

⁵¹Linderg, *Consequences of electoral systems in Africa*, 56.

⁵²*Mlewa v Wightman* (1995) ZR 171

According to Section 93 (2) (c) an election can be nullified on the ground that a corrupt practice or illegal practice was committed in connection with the election by or with the knowledge and consent or approval of the candidate. This ground is more inclined to the candidate and not the electoral system which makes it different from the required ground that a petitioner must prove that a corrupt or illegal practice affected the majority of voters. For this reason, clear and unequivocal proof is required before a case of bribery will be held to have been established. Suspicion is not sufficient, and the confession of the person alleged to have been bribed is not conclusive.

Under this ground the candidate contesting for an election or their election agent must have the knowledge of the malpractice or must consent to the corrupt or illegal practice. In relation to agency the strict law of agency is more applicable. In that the crucial test to consider with regards agents is whether there has been employment or authorisation of the agent by the candidate to do some election work or the adoption of his work when done⁵³. In the absence of authorisation or ratification the candidate must by oneself or their acknowledged agents be proved to have employed the agent to act on his behalf⁵⁴. The candidate must have entrusted the alleged agent with some material part of the business of the election⁵⁵.

The aforementioned strict law of agency is effortlessly applicable because an election agent has been defined is an agent of a candidate for the purpose of that election who has been specified by the candidate in that candidate's nomination paper⁵⁶.

4.5 Conclusion

This chapter has analysed the effectiveness of the required grounds when nullifying a parliamentary election in the curbing of electoral malpractice in Zambia. Showing that the statutory ground to show that the majority of voter's minds were affected not to vote for their

⁵³ *Brigadier General kankinza and others v Saifwanda and ECZ* 2011/HP/17

⁵⁴ *Kaleka v Antonio and ECZ* 2011/HP/17

⁵⁵ *Kaleka v Antonio and ECZ* 2011/HP/17

⁵⁶ Section 2 of Electoral Act No.12 of 2012

preferred candidate is questionable in Zambia's electoral system due to the fact that the FPTP system is based on the basis that the winner of an election need only win by a simple majority of even one vote to become the member of parliament.

The standard of proof in election petitions had also been analysed and this chapter has shown that a higher than a balance of probabilities with regards to the statutory ground that a petitioner must prove that the electoral malpractice affected the majority of minds in an election. Has proven to be difficult for the petitions owing to the fact that elections by their very nature are factual and rules of evidence have come in to limit the adducing of evidence. Agency being one of the critical issues in elections has also been analysed and this chapter has shown that the courts have followed the law of agency to the letter and in a political system like Zambia this has led to indiscipline of parties.

Chapter five will give a conclusion and recommendations for this research.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

This chapter provides a conclusion of the whole research based on the preceding chapters. Recommendations for the observations made in the entire research have also been highlighted.

5.2 Conclusion

Zambia is a representative democratic state. This makes the subject of elections crucial to the country as through elections Zambian citizens choose members of the National Assembly who govern the country on their behalf. Due to the political system in Zambia there has been public outcry over the years for free and fair elections.

This research has revealed that the electoral system that is applied in Zambia is the FPTP which is evidently entrenched in the Constitution. The FPTP is highly susceptible to electoral malpractice. Due to the FPTP being highly susceptible to electoral malpractice it is imperative that the electoral laws that regulate the electoral are enacted to curb the electoral malpractice that the system is vulnerable to. This is so as to ensure that political players are prevented from committing electoral malpractice because the stake of winning the election is high. As a winner has to win by a simple plurality, a margin of one vote in a tightly contested election is enough for a candidate to secure a seat in National Assembly.

In order to regulate the FPTP system, electoral laws have been enacted to regulate the electoral system in Zambia. The constitution provides for the forum of election disputes which is the high court to hear any election disputes. Further, the reforms of the Electoral Act have enshrined several types of electoral malpractice in the current Electoral Act. The

Electoral code of conduct Regulation lays down the prohibited behaviour of individuals and political parties in during the period of elections. The Anti-Corruption Act regulates the FPTP system by mandating the ACC to probe individuals that commit the bribery for purposes of elections. Overall the legal framework of Zambia's electoral provides sufficiently for the curbing of electoral malpractice in Zambia.

The institution responsible for maintaining and administering of elections is the ECZ. With regards electoral malpractice the ECZ has been given the mandate to enforce the regulations that govern elections. This research has shown that the ECZ has failed to enforce the regulations it has observed that the ECZ lacks the capacity to enforce the regulations. The ECZ has failed to overturn the impact of serious malpractice.

This research explored an analysis the effectiveness of required statutory grounds a petitioner must prove to the court for the nullification of an election on grounds of electoral malpractice as provided in section 93 (2) of the Electoral Act. A case study of *Kafuka v Mundia* was undertaken in order to analyse judicial interpretation of the statutory grounds a petitioner needs to prove in nullification of an election. Section 93(2) (a) of the Electoral Act of the required ground that the alleged malpractice must affect the majority of voters from voting for their preferred candidate in an election was investigated. This research established that the court has held that the aforementioned statutory ground was enacted to protect the electoral system, however it has been noted that by its nature the FPTP is highly susceptible to malpractice and only requires a simple majority to win. Hence an affected minority may affect the result of the elections. Hence, the majority rule can be argued to be more dangerous to the system than it is protective.

This research has shown that the topic of evidence is crucial to proving the grounds the petitioner must satisfy. Case law has established that the onus of proving malpractice is on

the petitioner and the standard of proof is higher than a balance of probabilities. However it has been established that petitioners who rely on the required ground that the malpractice must affect the minds of the majority of fail to meet the standard because of the highly factual nature of elections. This is so as the rules of evidence in proceedings must be adhered to regulate the adducing of evidence.

Agency in line with the statutory grounds a petitioner must rely on to nullify an election was discussed. This research has shown with reference to case law, that the law of agency has been followed strictly by the Courts. However this research has shown that the nature of elections in a plural political system like Zambia is that political parties organise campaigns in which local grass root committees of political parties' campaign for an individual. In order to discipline the political parties the rule of agency must be relaxed to fit the nature of plural politics in Zambia where political parties are involved in campaigns. This is so as prevent parties from negligently disregarding the law as their candidates' election will be affected

5.3 Recommendations

Electoral Systems

Firstly, the electoral system must be changed from Pure FPTP system to the mixed system which is a hybrid of the FPTP and PR systems that combine the advantages of the FPTP and PR systems. This is so as to adopt an electoral system that is less susceptible to electoral malpractice, as this research has shown that the FPTP is highly susceptible to electoral malpractice than other electoral systems.

Agency

Enlarge scope of agency to cater for the electoral and political system. For purposes of deterrence of electoral malpractice so as to have political parties discipline and prevent their

members from committing electoral malpractice during election campaigns. This will be so as ensure political parties have control over the acts of their grass root campaign committees. This means that the Electoral Act must be amended to include party agents.

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