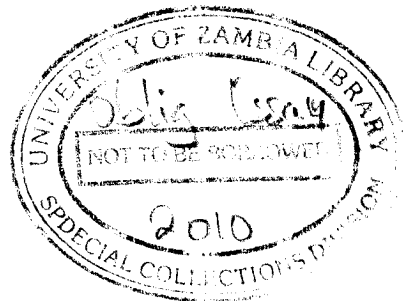


**A CRITICAL ANALYSIS OF THE APPOINTMENT OF CABINET MINISTERS  
FROM AMONG MEMBERS OF THE NATIONAL ASSEMBLY IN THE ZAMBIAN  
PRESIDENTIAL SYSTEM.**

BY



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A Directed Research Essay submitted to the School of Law of the University of Zambia in partial fulfilment of the requirements for the award of the Bachelor of Laws Degree [LLB].

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**DECLARATION**

**I, Kawila Lushinga Eliazer, Computer number 87802643, do hereby declare that Iam the author of this Directed Research Essay entitled A CRITITCAL ANALYSIS OF THE APPOINTMENT OF CABINET MINISTERS FROM AMONG MEMBERS OF THE NATIONAL ASSEMBLY IN THE ZAMBIAN PRESIDENTIAL SYSTEM, and confirm that it is my original work. I further declare that due acknowledgement has been given where other people’s work has been used and I verily believe that this research has not ever been presented in the School of Law before or indeed in any other learning Institution for academic purposes.**

**Date:**.....*1<sup>st</sup> APRIL, 2010*.....**Student’s Signature:**.....

**THE UNIVERSITY OF ZAMBIA**

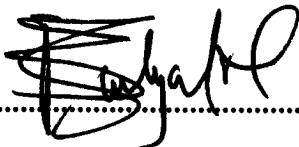
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## **ABSTRACT**

Since independence in 1964, Zambia has embraced a Constitution that gives the power to the Republican President to appoint Cabinet Ministers from among Members of the National Assembly in a presidential system. The Constitution has not fixed the number of Cabinet Ministers to be appointed, allows the President to create and abolish the positions of Cabinet Ministers on his/her discretion. The Zambian model appears to be a mix of the British System and the United States System.

This idea of appointing Cabinet Ministers from among Members of the National Assembly in the Zambian Presidential System has met two opposing views. On one hand, there are those that support the model, on the basis that the presence of the Executive in the National Assembly creates room in which the Executive can guide the House to pass laws that will facilitate the ruling party in implementing its desired developmental policies. While on the other Hand, the other group sees this system as a compromise and weaken the doctrine of separation of powers which is currently considered as an important ingredient of democracy. This later group further sees this model as a tool in which the State robs the electorate their representative, who no longer works and consult his/her electorate as he/she is usually busy doing State functions at the expense of the electorate.

It is important to note that, it is not just where the Cabinet Ministers are drawn which is an issue of concern only, but other factors too covering the degree of power given to the appointing authority in terms of discretion given to them by the Constitution, and the lack of specification of qualifications for one to hold the office of Cabinet Minister. One would argue that both systems, the British and the United States have their own advantages and disadvantages when implemented in an environment like Zambia where there is a high level of poverty and illiteracy among the citizens. These factors impact negatively on democracy and on the operation of the Cabinet drawn from among Members of the National Assembly in the Zambian Presidential System.

This essay seeks to demonstrate the rationale, essence and implications of appointing of Cabinet Ministers from among Members of the National Assembly in the Zambian Presidential System.

# DEDICATIONS

To my parents, Pastor Albert Musansha Kawila and Mrs Phebby Musonda Kawila who through their love and inspiration, tirelessly and without relenting encouraged and groomed me in life and in excellence, may God richly reward them. To my sons Lushinga Eliazer Kawila and Katungu Elijah Kawila who are a beacon of hope and honour, a true gift and light, for suffering the injustice of not having my attention during the research period, and to my sunshine darling wife Georgina Mwandu Kawila, who endured my long working hours and kept constantly encouraging me with love. To my other two (2) sons Ndumba Samahanda and Kalaba Chikwanda who were an inspiration. And to my heavenly father and God whose grace and strength has been sufficient for me and enable me to manage my time and accomplish the Essay, my love and thanks to Him.

## **ACKNOWLEDGEMENTS**

The author would like to extend sincere thanks to all those who have contributed directly and indirectly to the publication of this Essay. I am particularly indebted to my Research Supervisor Dr. Ngosa Simbyakula, Senior Lecturer at the University of Zambia, in the School of Law, for his patience and guidance, his criticisms and valuable comments that helped me to improve the structure and contents of this Essay. The author also wishes to extend special thanks to my Research Co-ordinator Dr. M. Munalula, Dean of School of Law, University of Zambia for her invaluable instructions on the requirements for the Essay. My colleagues in arms and fellow students, Gabriel Lesa, Evans Sodala, Yandwa Katebe, Thulason Kaira, Ivy Siamandumba, and many others who have provided the challenge and encouragement.

## TABLE OF LEGISLATION

1. The Constitution of Zambia, 1964, Chapter 1 of the Laws of Zambia, pp. 1, 12, 13, 15, 25, 26 and 27.
2. The Constitution of Zambia, 1973, Chapter 1 of the Laws of Zambia, pp. 13, 14, 15, 25, 26, and 27.
3. The Constitution of Zambia, 1996, Chapter 1 of the Laws of Zambia, pp. 16, 24, 25, 34, 35, 43 and 44.
4. The Constitution of Zambia, 1991, Chapter 1 of the Laws of Zambia, pp. 15, 16 and 20.
5. The Northern Rhodesia Constitution, Appendix 3 to the laws, 1964 Edition, Chapter iv, vi and vii, p. 11.
6. The Iquiries Act, Cap. 41 of the Laws of Zambia, p. 5.
7. Statutory Instrument No. 46 of 1972, p. 19.
8. Statutory Instrument No. 186 of 1990, 18th December, 1990, p. 19 and 22.
9. Statutory Instrument No. 56 of 1994, p. 21.
10. Statutory Instrument No. 42 of 2003, p. 22.
11. Statutory Instrument No. 86 of 2003, p. 22.
12. Statutory Instrument No. 98 of 2003, p. 22
13. Statutory Instrument No. 134 of 2003, p.22.
14. Statutory Instrument No. 56 of 2004, p. 22.



**TABLE OF CASES**

The numbers at the end of each case refer to the pages on which the case is cited.

- 1. Derrick Chitala [Secretary of the Zambian Democratic Congress] v. Attorney General SCZ No. 14 of 1995, p. 5.
- 2. Maxwell Mwamba and Stora Solomon Mbuzi v. Attorney General, SCZ, Judgement No. 10 of 1993, p. 44
- 3. Attorney General v. Jonathan Cape Limited [ 1976]1 QB 752, per Lord Widgery at 770 26, p. 28.
- 4. Egan v. Willis [1996] 40 NSWLR 650, p. 28.

**GLOSSARY OF KEY TERMS/ABBREVIATIONS**

- 1. CRC – Constitutional Review Conference
- 2. M.P – Member of Parliament
- 3. NA – National Assembly
- 4. UNIP – United National Independence Party
- 5. PM – Prime Minister
- 6. BSA – British South African Company.
- 7. SC – State Counsel.
- 8. PF – Patriotic Front
- 9. UK – United Kingdom
- 10. USA – United States of America
- 11. NCC – National Constitutional Conference

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# CHAPTER ONE

## INTRODUCTION

### 1.0 General Introduction

This Essay seeks to investigate the rationale and demonstrate the implications of the concept of the appointment of Cabinet Ministers from among Members of the National Assembly in the Zambian Presidential System. By virtue of the Zambia Independence Order made by the British Crown on 15th October, 1964, Zambia was granted its independence. On 24th October, 1964, the British Parliament passed to Zambia the first Constitution that had a lot of their traditions and practices which include the appointment of Cabinet Ministers from among Members of the National Assembly.<sup>1</sup> Within this legal document were provisions facilitating the appointment of Cabinet Ministers from among members of the National Assembly.<sup>2</sup> Coincidentally the same Constitution provided for a President to be Head of State.<sup>3</sup> This inevitably formulated a hybrid resulting in a Parliamentary Cabinet in a Presidential System. Further, this arrangement in the law entailed a disproportionate and skewed separation of powers of the three organs of government with the Executive encroaching on the legislature through Cabinet Ministers which is a reflection of the British system. As Montesquieu said, “power corrupts and absolute power corrupts absolutely”. Herein, in this imbalance of power, lies the potential for abuse of power, interference and undue influence of one government organ by another and imports wider ramifications for the separation of powers, the independence and autonomy of the National Assembly, the right to effective representation of the electorate by Members of Parliament of their choice, just to mention but a few.

It is a notorious fact that the appointment of Cabinet Ministers from among Members of the National Assembly has been a vexing issue in all the Constitutional Review Commissions [CRCs] so far conducted. These have been the Chona Constitutional Commission of 1973, the Mvunga Constitutional Review Commission of 1990 whose first term of reference was to examine and determine a system of Government that would ensure the separation of powers of the Legislature, the Executive and the Judiciary so as to enhance the roles of these organs. The Mvunga Commission recommended a Cabinet outside Parliament. The Mwanakatwe Constitutional Review Commission of 2001, also recommended for a Cabinet from outside Parliament; recently the Mungomba

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<sup>1</sup> The Constitution of Zambia, 1964.

<sup>2</sup> Ibid section 44 (2).

<sup>3</sup> Ibid section 31

Constitutional Review Commission of 2005 also recommended a Cabinet outside National Assembly<sup>4</sup>

That the appointment of Cabinet Ministers from among Members of the National Assembly has featured prominently in all Constitutional Review Commission submissions, underscores the under-currents of contention and dissatisfaction among the electorate on this law.

The research seeks to critically analyze this law, identify the weaknesses inherent in it and suggest remedies for effective and efficient composition of Cabinet to enhance the separation of powers and the development of a democratic governance system in Zambia.

### **1.1 Statement of the Problem**

It is evident from the almost identical submissions to all the four Constitutional Review Commissions sitting in Zambia so far conducted that most of the electorate do not identify with nor support the appointment of Cabinet Ministers from among Members of the National Assembly

Appointment of Cabinet Ministers from among Members of the National Assembly seriously undermines the independence and autonomy of the National Assembly, affects the representative Parliamentary System as well as weakens or undermines the system of Political pluralism.

This law further poses political, economic [in terms of the recurrent by-elections and inefficient representation]and social ramifications that deserve a detailed exposition to better understand its nature, rationale and the solutions that best address the mischief inherent in it.

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<sup>4</sup> Draft Constitution, 2005, Article 52 (1).

The research will attempt to critically analyze this law in the context of a Presidential System of governance and suggest recommendations that will make this law not only acceptable to all stakeholders but also make it more effective and efficient in Zambia.

## **1.2 Purpose of the Study**

This study will critically analyze the appointment of Cabinet Ministers from among Members of the National Assembly as compared to appointing them from the general public outside National Assembly where there is a rich variety of skills that may help to manage the public affairs of the Republic of Zambia. Part of Cabinet as part of National Assembly entails that this group plays two roles, that of the legislature and that of the executive whereby watering down the principle of separation of power which may affect the degree of democracy and good governance.

This research will attempt to focus on;

1. To investigate the historical origin and rationale of the law on Cabinet being a part of National Assembly;
2. To critically study the constitutional provisions on the law that entails the appointment of Cabinet Ministers from among Members of the National Assembly and examine its efficacy in Zambia.
3. To critically investigate whether the Zambian law on part of Cabinet as part of National Assembly creates an environment where democracy and separation of power can positively thrive and play a role to bring social, political and economic development in the nation.
4. The research will attempt to answer the following questions among others;
  - What is the genesis, nature and rationale for Cabinet from the National Assembly?
  - How has Cabinet from Parliament actually affected the independence and autonomy of the Zambian National Assembly?
  - What benefit will Zambia have in drawing Cabinet from the Zambian population instead of drawing Cabinet from the limited numbers in the National Assembly?
  - Does the Law that entail appointment of Cabinet among the Members of National Assembly in fact create an environment where the principle of

separation of powers can develop and thrive in order to play a role in achieving social, political and economic development in Zambia?

- Does the appointment of Cabinet from among the National Assembly in fact enhance the performance of executive functions?
- Does the appointment of Cabinet from among the National Assembly in fact create a de facto dictatorship?
- Does the appointment of Cabinet from among the Members of the National Assembly in fact promote representation of the electorate?
- Does the appointment of Cabinet from among the National Assembly in fact negate the principle of multi-party democracy by encouraging opposition members to defect?
- Is there a relationship between poverty in Zambia and the appointment of Cabinet from among the Members of the National Assembly?
- Is the appointment of Cabinet from among the Members of the National Assembly compatible with the Presidential System of Government?
- Does the appointment of Cabinet from among the Members of the National Assembly in fact promote democracy?
- What major drawbacks or mischief resulted from appointing Cabinet from outside the National Assembly instead of from among its Members and vice versa?

### **1.3 Significance of the Study**

The outcry against the appointment of Cabinet Ministers from among the Members of the National Assembly has been an outstanding issue of debate from all the Constitutional Review Commissions that have been appointed in the past, including the one that just ended in 2005. This study will generate documented information to show the merits and demerits of appointing Cabinet Ministers from among Members of the National Assembly. It will go further to gather information of the would be benefit of appointing Cabinet Ministers outside National Assembly among the general public which has a variety of skills to benefit the Presidential system of governance. This enquiry is further premised on the need to adequately investigate and suggest legal recommendations on the appointment of Cabinet Ministers in order to ensure that the law serves the needs and interests of society and acts as a vehicle to foster social, political and economic development.



#### 1.4 Review of related Literature

The appointment of Cabinet Ministers from among the Members of the National Assembly is a system based on the Zambian Supreme law and has been in existence since independence. The Independence Constitution specified the number of Cabinet Ministers to be appointed among the Members of the National Assembly. Using the Inquiries Act 41, of the laws of Zambia , the President is empowered to appoint a Commission of Enquiry. The four (4) Commissions of Enquires set at different times in Zambia have tended to recommend that Cabinet be appointed from outside National Assembly. The just ended Commissioin of Enquiry in 2005, popularly known as Mung’omba Commission recommendations are currently being discussed, at the National Constitutional Conference, recommended that “Cabinet Ministers and Deputy Ministers should come from outside the National Assembly, subject to Parliamentary approval, but their removal from office should not require ratification of the National Assmbly, and for avoidance of any doubt removal of a Cabinet Minister or a Deputy Minister from Office shall not require the approval of the National Assembly”.<sup>5</sup> One decided case of **Derrick Chitala [Secretary of the Zambia Democratic Congress] v Attorney General**<sup>6</sup>, attempted to challenge the Cabinet Ministers for removing the recommendation that Cabinet Ministers be appointed from outside National Assembly as the matter was being discussed on the floor of the house. Unfortunately, the Courts of Law, ruled that their was nothing wrong with the actions of the Cabinet Ministers removing the recommendation that intended to have Cabinet Ministers from outside National Assembly among other recommendations that were removed. This decision facilitated the robbing of the masses of their due recommendations.

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<sup>5</sup> Constitution Review Commission-Interim Report, 2005, page 134.

<sup>6</sup> SCZ No. 14 of 1995.

## **1.5 Methodology of the Study**

Due to limitation of time available for this research, the study was conducted by way of desk research in order to collect the requisite qualitative and quantitative data. The study has referred to the Zambian Constitution, internet sources, other Statutes, case law, newspapers and various reports on the subject by various bodies and stakeholders.

Much of the data found in this report, was collected from Statutes, CRC Reports, Case law and writings of some well known jurists.

## **1.6 Outline of the Study**

This paper seeks to investigate and demonstrate the implications of the concept of Cabinet from National Assembly, both from the legal, political and economic standpoint.

The Constitution of Zambia, **Chapter 1** of the laws of Zambia, particularly Article 46 [1] [2] and [3] which deals with Cabinet composition, as an instrument seeking to facilitate for Cabinet to be appointed from National Assembly, is subject to multifaceted criticisms ranging from the legal to the undemocratic political practices. Although its efficacy has not yet been tested in practice through Zambian Case law, a number of contentious issues can be gleaned from all the Constitutional Review Commissions on the subject and several facts stand out that question the legitimacy of this law in Zambia where the majority of the electorate does not identify with this law.

It cannot be denied that Article 46 [1] [2] and [3] is quite ambitious in its objects and broad in its scope, yet the instruments of its implementation raise more controversies than unanimity on the implications and legal issues involved. Among them for instance are: the Political challenges posed by the Cabinet from among National Assembly; the size of Cabinet and the indefinite number of ministries capable of being formed at the discretion of the President.

Questions have arisen whether the Cabinet from among Members of the National Assembly in fact promotes democratic governance; the effect of Cabinet from

National Assembly on the independence and autonomy of the National Assembly; whether Cabinet from National Assembly is in accord with the principle of separation of powers; whether there are alternatives to Cabinet from among the Members of the National Assembly and their likely implications; whether Cabinet from National Assembly in fact affects effective representation of the electorate by their elected Members of Parliament; whether Cabinet from National Assembly has meaningfully contributed to better governance envisioned under the Constitution.

Further, a comparative analysis of the law obtaining in Zambia and other jurisdictions like the United Kingdom and the United States of America, will be canvassed. Some stakeholders advocate either for its abolition or the complete autonomy and independence of the National Assembly from both Executive and Judicial influence.

This paper seeks to authenticate the perceived weaknesses in the law that provides for the appointment of Cabinet Ministers from among Members of the National Assembly and suggest possible solutions, which are of particular interest to the writer. The paper further attempts to demonstrate that even though the law may be defective in this respect and is not water tight in avoiding its abuse, there is nevertheless a way of benefiting from it.

**CHAPTER ONE : Introduction:** is an attempt to trace the genesis of the concept of part of Cabinet from among Members of the National Assembly, outlining its nature and rationale and then proceeding to epitomize the genesis of the Constitution of Zambia.

**CHAPTER TWO: The Zambian Cabinet:** attempts to study the nature of this law [these Constitutional provisions] and also to identify some of the weaknesses inherent in, coupled with its effectiveness in achieving its objectives. Further, the study seeks to discuss the effect of part of Cabinet from among Members of the National Assembly both on the separation of powers and on democratic governance in Zambia.

**CHAPTER THREE: Parliamentary System Vs Presidential System:** is an attempt at a comparative analysis of law on the composition of Cabinet as envisaged under the Zambian Constitution in contradiction with the British Parliamentary System and American Presidential System, and then proceeding to look at what lessons can be learned from their respective experiences.

**CHAPTER FOUR: The Electorate in a Parliamentary and Presidential System:** seeks to discuss stakeholder vigilance and concerted effort with a view to justify the assertion that such action could actually mitigate some of the perceived weaknesses and proceed to identify some desirable concerted efforts at such vigilance and ultimately suggest how we think efficacious Cabinet Composition could be attained.

**CHAPTER FIVE: Recommendations and Conclusion:** Seeks to conclude the matter by recapitulating the major weaknesses pointed out in the law under consideration and to show how benefits could still be derived from the same law in its present form and further suggest what action need to be taken to make the law an instrument for enhancing democracy as well as a political and an economically viable instrument for the people of Zambia.

## **1.7 Conclusion**

This Chapter has introduced the research topic, the problem statement, significance of the study, the literature review and the research methodology employed. The chapter further outlines the salient issues to be canvassed in the research essay. The following Chapter seeks to discuss the rationale and nature of the law on Cabinet Ministers appointed from among Members of the National Assembly, its genesis and effect.

## CHAPTER TWO

### The Zambian Cabinet

#### 2.0 Introduction

In Zambia, the word Cabinet may be said to mean an appointed body by the President for the purpose of assisting him in the execution of his executive functions, from among the Members of the National Assembly. Cabinet being a creature of the Constitution, the President is obliged to appoint only from among Members of the National Assembly in accordance with its dictates. To better appreciate and understand the genesis of this concept of appointing Cabinet from among Members of the National Assembly, it is imperative firstly to have regard to Zambia's historical legal background and secondly to the system of government that prevails therein.

#### 2.1 The History of the Origin of the Zambian Cabinet

The history of Cabinet in Zambia can be traced from English law which began to influence political and economic development in the region from 1924 when British administration took over from the BSA Company of the territory later to be called Zambia. Premised in part on its inherited British model<sup>7</sup>, Zambia accepted the principle that governmental powers should be allocated among the executive, legislative and Judicial branches. Cabinet as part of the executive branch was similarly modeled after the British Cabinet<sup>8</sup>.

Historically, Cabinets began as smaller sub-groups of the English Privy Council. The term comes from the name for a relatively small and private room used as a study or retreat room. In fact, the term "Cabinet" was first used as a term of reproach being regarded as an instrumentality of intrigue in the sovereign's interest [the name arising from the king's habit of receiving the members in a small private room, or Cabinet, in the palace]<sup>9</sup>.

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<sup>7</sup>Northern Rhodesia Constitution, Appendix 3 to the Laws, 1964 Edition, Chapters IV, VI and VII.

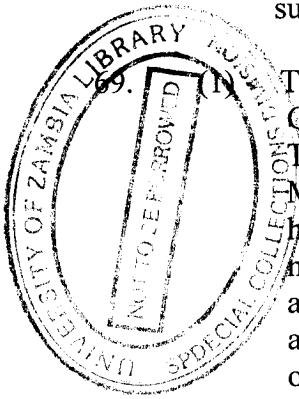
<sup>8</sup>Ibid, Section 71.

<sup>9</sup>Vishnoo Bhagwan & Vidya Bhushan, World Constitutions, 8th Revised Edition, 2004, p. 10.

Phrases such as “Cabinet Counsel”, meaning advice given in private to the monarch, occur from the late 16th Century , and, given the non-standardized spelling of the day, it is often hard to distinguish whether “Council” is meant. Charles I began a formal “Cabinet Council” from his accessioin in 1625, as his Privy Council, or “Private Coucnil”, was evidently not private enough, and the first recorded use of “Cabinet” by itself for such a body comes from 1644, and is again hostile and associates the term with dubious practices. The process has repeated itself in recent terms, as leaders have felt the need to have a Kitchen Cabinet.<sup>10</sup>

As English law was introduced into Northern Rhodesia by the English white settlers, with them came the System of governance which can be gleaned from the law of that time:

- 68. (1) The executive authority of Northern Rhodesia shall vest in Her Majesty.
- (2) Subject to the provisions of this Constitution, the executive authority of Northern Rhodesia may be exercised on behalf of Her Majesty by the Governor, either directly or through officers subordinate to him .



There shall be a Prime Minister who shall be appointed by the Governor.

The Governor, acting in his discretion, shall appoint as Prime Minister the member of the Legislative Assembly who appears to him best able to command the support of the majority of the members of the Assembly, and shall, acting in accordance with the advice of the Prime Minister, appoint the other Ministers from among the members of the Assembly or, subject to the provisions of subsection (4) of this section, from among persons who are not members of the Legislative Assembly but are qualified to be elected as such.<sup>11</sup>

It is clear that the British Parliamentary System was replicated in Northern Rhodesia with some of its attendant Conventions, such as the Governor acting in accordance with the advice from the Prime Minister in appointing other Ministers to the Cabinet. The Prime Minister and other Ministers could only be appointed from among the members of the Legislative Assembly with a provision of a limited number of those who were not members of the Assembly but were qualified to be elected as such. Herein lay the genesis of the present law facilitating the appointment of Cabinet from members of the National Assembly and nominated members of Parliament.

<sup>10</sup> <http://en.wikipedia.org/wiki/Cabinet> (Accessed Aug 11, 2009).

<sup>11</sup> Supra, note 1.

It is equally evident from the Provisions of the Northern Rhodesia Constitution that one could not perform one's functions either as Prime Minister if one was not a member of the Legislative Assembly. For section 70 (4) provided:

- (4) (b) If at any time the Prime Minister or a Minister is required under the provisions of Section 44 of this Constitution to cease to perform his functions as a member of the Legislative Assembly, he shall cease during such time to perform any of his functions as Prime Minister or a Minister, as the case may be.<sup>12</sup>

The tenure of the Prime Minister was dependant upon the vote of no confidence being passed by the legislature or his capability to command the support of the majority of the members of the Assembly.<sup>13</sup> further, another convention was provided under section 72 which provided thus:

The Governor, acting in accordance with the advice of the Prime Minister, may, by directions in writing, assign to the Prime Minister or any other Minister responsibility for the conduct [subject to the provisions of this Constitution and any other law] of any business of the Government of Northern Rhodesia, including responsibility for the administration of any department of Government.<sup>14</sup>

This actually meant that the advice [decision] of the Prime Minister was indispensable in running government affairs. He was the de jure head of government.

Again section 75 (1)<sup>15</sup> provided:

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<sup>12</sup> Supra note 1.

<sup>13</sup> Ibid, Section 70 (10).

<sup>14</sup> Ibid.

<sup>15</sup> Ibid.

In the exercise of his functions under this Constitution or any other law the Governor shall act in accordance with the advice of the Cabinet or a Minister acting under the general authority of the Cabinet.

It is clear that the Westminster type of Cabinet was envisaged under the Constitution of Northern Rhodesia. The use of the word “shall” employed in these sections of the Constitution imports a duty or an obligation so to act save where the Constitution provides otherwise. Thus the Governor could not disregard such advice with impunity.

However, on October 24th 1964, Zambia became an independent Republic and a Constitution,<sup>16</sup> was bequeathed on the Republic by the British Parliament. By section 13 of the 1964 Constitution the Office of the President as the Head of State was created. Check section 48 (1) of the 1964 Constitution provided:

The executive power of the Republic shall vest in the President and, subject to the provisions of this Constitution, shall be exercised by him either directly or through officers subordinate to him.

Whereas, previously, the Governor who was not part of Cabinet exercised executive power on behalf of Her Majesty, the 1964 Constitution vested executive power in the President. Cabinet which collectively had previously exercised enormous influence on the exercise of executive power and had been responsible to the legislature turned Cabinet into the President’s errand boys and answerable to him by the 1964 Constitution.

Further, section 45<sup>17</sup> of the 1964 Constitution Provided:

- (1) There shall be a Cabinet which shall consist of the Vice President and the Ministers.
- (2) There shall preside at meetings of the Cabinet-
  - (a) the President;
  - (b) in the absence of the President, the Vice President; or
  - (c) in the absence of the President and the Vice President, such Minister as the President may designate.

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<sup>16</sup> The Constitution of Zambia, 1964, Chapter 1 of the Laws of Zambia.

<sup>17</sup> Ibid.



The Constitution abolished the Office of Prime Minister [Parliamentary system], created the Office of Vice President and thus a presidential system of government. It is worthy to note that whereas the Governor never participated in Cabinet, the President henceforth actively took part and chaired all Cabinet meetings. It is equally apparent that whereas the Governor exercised executive power on the advice of the Prime Minister or Minister acting under the general authority of the Cabinet, the President under the 1964 Constitution was not obliged to exercise his executive functions in accordance with the advice given by any person or authority. The 1964 Constitution provided thus: section

48 (2) In the exercise of any function conferred upon him by this Constitution or any other law the President shall, unless it is otherwise provided, act in his own deliberate judgment and shall not be obliged to follow the advice tendered by any other person or authority.<sup>18</sup>

By implication this meant that henceforth Cabinet's advice would no longer obligate the Head of State to act in accordance with it save for Constitutional exceptions. The President could choose to ignore any such advice from Cabinet as he desired. With such a change in the law, so did Cabinet's influence in executive decisions wane towards insignificance. By section 51 (1),<sup>19</sup> the functions of Cabinet were couched thus:

The Cabinet shall be responsible for advising the President with respect to the policy of the Government and with respect to such other matters as may be referred to it by the President.

The 1973 Constitution altered somewhat the status and influence of Cabinet, although it maintained the practice of appointing its members from among members of the National Assembly. It provided the following provisions:

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<sup>18</sup>Ibid.

<sup>19</sup>Ibid.

48. (1) There shall be an office of Prime Minister and such offices of Minister of the Government and such offices of Junior Minister as may be established by Parliament or, subject to the provisions of any Act of Parliament, by the President.
- (2) Appointment to the office of Prime Minister shall be made by the President from among the members of the National Assembly.
- (3) Appointments to the office of the Minister or Junior Minister shall be made by the President after consultation with the Secretary-General of the Party and the Prime Minister from among the members of the National Assembly.<sup>20</sup>

The 1973 Constitution re-created the Office of the Prime Minister and that of President and recognized that of Secretary-General of the Party while maintaining the appointment of Ministers from among the members of the National Assembly.

47A. (1) The Central Committee shall consist of such number of elected and nominated members as the constitution of the Party provides.

47C. (1) The Central Committee shall formulate the policy of the Government and shall be responsible for advising the President with respect to the policy of the Party and the Government and with respect to such other matters as may be referred to it by the President.

(2) Where a decision of the Central Committee is in conflict with a decision of the Cabinet, the decision of the Central Committee shall prevail<sup>21</sup>

It is clear that the 1973 Constitution subordinated Cabinet to the Party in power and took away the role of formulating the policy of Government from Cabinet and assigned it with only the role of advising the President with respect to the execution of the policy of the Party and the Government. This was in marked departure from the 1964 constitutional law.

The 1973 Constitution again provided as follows:

50. (1) There shall be a Cabinet which shall consist of the Secretary-General of the Party ex officio, the Prime Minister and the Ministers.
- (2) There shall preside at meetings of the Cabinet -
- (a) the President;
  - (b) In the absence of the President, the Secretary-General of the Party

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<sup>20</sup> The Constitution of Zambia, 1973, Chapter 1 of the Laws of Zambia.

<sup>21</sup> Ibid.

- (c) in the absence of the President and the Secretary-General of the Party, the Prime Minister; or
- (d) in the absence of the President, the Secretary-General of the Party and the Prime Minister, such Minister as the President may designate.<sup>22</sup>

Thus the 1973 Constitution introduced the Secretary-General of the Party and party politics into the Cabinet and thereby subordinated Cabinet to the ruling Party.

Further, the 1973 Constitution provided:

- 56 (1) The Cabinet shall be responsible for advising the President with respect to the execution of the policy of the Party by the Government and with respect to such other matters as may be referred to it by the President.

The 1991 Constitution, however, almost returned Zambia's constitutional order back to Zambia's 1964 constitutional law save for minor differences. It provided:

- 46. (1) There shall be such Ministers as may be appointed by the President.
- (2) Appointment to the office of Minister shall be made from among members of the National Assembly.
- 49. (1) There shall be a Cabinet which shall consist of the President, the Vice President and the Ministers, other than Ministers responsible for the administration of Provinces.
- 50. The Cabinet shall formulate the policy of the Government and shall be responsible for advising the President with respect to the policy of the Government and with respect to such other matters as may be referred to it by the President.
- 51. The Cabinet shall be accountable collectively to the National Assembly.<sup>23</sup>

The office of Prime Minister was abolished as were the entrenched party politics and supremacy in and over Cabinet done away with. However, the practice of appointing Cabinet members from among the Members of the National Assembly was maintained.

Further, the Constitution provided

- 44. (6) In the exercise of any functions conferred upon him under this Article, the President shall, unless it is otherwise provided, act in his own deliberate Judgement and shall not be obliged to follow the advice tendered by any other person or authority.<sup>24</sup>

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<sup>22</sup>Ibid

<sup>23</sup>The Constitution of Zambia, 1991, Chapter 1 of the Laws of Zambia.

<sup>24</sup>Ibid.

In this way, therefore, Cabinet as the President's errand boys, was retained and perpetuated.

Similarly, the current 1991 Constitution as amended,<sup>25</sup> provides:

44. (6) In the exercise of any functions conferred upon him under this Article, the President shall, unless he otherwise obliges, act in his own deliberate judgement and shall not be obliged to follow the advice tendered by any other person or authority.

46. (1) There shall be such Ministers as may be appointed by the President.

(2) Appointment to the office of the Minister shall be made from among members of the National Assembly.

49. (1) There shall be a Cabinet which shall consist of the President, the Vice President and the Ministers, other than Ministers responsible for the administration of Provinces.

(2) There shall preside at meetings of the Cabinet-

(a) the President; and

(b) in the absence of the President, the Vice-President.

(3) The Cabinet may act notwithstanding any vacancy in its membership.

51. The Cabinet and Deputy Ministers shall be accountable collectively to the National Assembly.

It is evident that the 1991 constitutional law was maintained intact in the 1996 constitutional order as far as Cabinet composition was concerned and the system has become entrenched. It has remained the law to-date which the majority of Citizens want to have changed as several Constitution Review Commissions (CRC) attest to in their separate findings, which forms part of the subject of the following section.

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<sup>25</sup>The Constitution of Zambia, 1991, as (Amended) by Act No. 18 of 1996

## 2.2 The Nature and Rationale of Cabinet from the National Assembly

As discussed earlier, Cabinet is a body of high-ranking members of government, typically representing the executive branch. It can also sometimes be referred to as the Council of Ministers, an Executive Council or an Executive Committee. The day-to-day role of most Cabinet members is to serve as the head of one segment of the national bureaucracy, as the head Civil Servant, to which all other employees in that department report.<sup>26</sup> In Zambia it represents the policy makers, who are delegates of the President and are answerable to him. They are expected to exhibit “blind loyalty”, just to borrow a phrase coined by the former second President of Zambia, Dr. FTJ Chiluba, when he was swearing in some Ministers. They also serve at the pleasure of the President who may hire and fire at his will. This makes their tenure precariously linked to their ability to please the President. While in Zambia the members of the Cabinet are given the title of Minister and each holds a different portfolio of government duties e.g Minister of Labour, Education etc, in some governments, as in the case of the United Kingdom and the United States, the title of Secretary is used for some Cabinet Members, e.g Secretary of Education, Secretary of State Department of Defense, etc

In some countries, particularly those under the Westminster system, the Cabinet collectively decides the government’s policy and tactical direction, especially in regard to legislation passed by the parliament. In countries with a presidential system, such as the United States, the Cabinet does not function as a collective legislative influence; rather, their role is as an unofficial advisory council to the head of government, consisting of the heads of the executive departments they are appointed to lead. Instead of just one view, the President gets opinions and advice in upcoming decisions.<sup>27</sup>

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<sup>26</sup><http://en.wikipedia.org/wiki/Cabinet> (Accessed Aug 11, 2009)

<sup>27</sup>Ibid.

It is apparent that in Zambia, Cabinet does infact perform a dual function as an unofficial advisory council as well as a collective legislative influence. It is this collective legislative influence in the absence of any limitinig conventions that make the Zambian Cabinet's over-arching influence more powerful and intruding than those of its peers elsewhere, especially on the National Assembly.

It has been said that the size of Cabinets varies, although most contain around ten to twenty Ministers. Researchers have found an inverse correlation between a country's level of development and Cabinet size: on average, the more developed a country is, the smaller is its Cabinet.<sup>28</sup>

Zambia's Cabinet at independence started with a low number of members of the National Assembly but had grown to 22 members of Cabinet, ostensibly as poverty and underdevelopment grew.

The rationale of a Cabinet appointed from among members of the National Assembly can be gleaned from the hotly contested views and consistent submissions to subsequent Constitutional Review Commission [CRC] periodically constituted in Zambia.

From the colonial period, the Westminster model of Cabinet was entrenched as English law became the law practiced by the white settlers during that period. That was in fact a parliamentary system of government in which the executive is dependant on the direct or indirect support of the legislature, often expressed through a vote of confidence. That system is equally characterised by no clear-cut separation of powers between the executive and legislature, leading to a different set of checks and balances<sup>29</sup> and as such some of the members of one branch may perform functions and be part of another branch of government, hence Cabinet from Parliament.

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<sup>28</sup><http://en.wikipedia.org/wiki/Cabinet> (Accessed Aug 11, 2009)

<sup>29</sup>[http://en.wikipedia.org/wiki/Parliament\\_System](http://en.wikipedia.org/wiki/Parliament_System) (Accessed Aug 12, 2009).

The Prime Minister and Cabinet exercised executive power on a day-to-day basis, yet constitutional authority vested in the crown and was delegated to the Governor.

At independence, however, the Constitution of Zambia introduced a different Cabinet set up, with the active participation of the President who was both Head of State and Government. A Vice President was also provided for to assist the President and could chair Cabinet meetings in the absence of the President. Members of Cabinet were still to be appointed from among Members of the National Assembly.

However, on 1st May 1972, the first President of Zambia Dr. K. D. Kaunda appointed a Commission of Inquiry for the establishment of a One Party Participatory Democracy.<sup>30</sup>

In their report, they noted that the majority of the petitioners wanted a Cabinet from outside the National Assembly. However, in the amendment of the Constitution, this specific petition was ignored and deliberately left out. The Mvunga Commission reported that the Petitioners were mainly concerned with the size of Cabinet.<sup>31</sup> From the resultant law, the Party [UNIP] then had a representative in Cabinet in the form of the Secretary General of the Party. Further, the relationship between Cabinet and the Central Committee was ably defined. Also the Office of Prime Minister was re-introduced, to be appointed by the President from amongst Members of Parliament subject to Parliament's approval.<sup>32</sup>

In 1990, by Statutory Instrument<sup>33</sup>, then President of Zambia, Dr. K.D. Kaunda appointed a Commission of Inquiry to inquire into and report on matters relating to the re-introduction of political pluralism in Zambia, part of which involved the composition of Cabinet. The competing reasons advanced for Cabinet composition, according to petitioners were varied, prominent among them were:

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<sup>30</sup>By Statutory Instrument No. 46 of 1972.

<sup>31</sup>Report of the National Commission on the Establishment of a One-Party Participatory Democracy in Zambia, submission No. 55, p. 13.

<sup>32</sup>Ibid, Recommendation No. 57 (1).

<sup>33</sup>No. 135 of 1990, as amended by Statutory Instrument No. 186 of 1990, 18th December, 1990.

(a) Those in favour of a Cabinet from inside Parliament basically argued that a Cabinet should come from representatives of the people as Cabinet should be accountable to the people. They further argued that a Cabinet appointed by the President from outside Parliament will owe allegiance to the appointing authority and not the people. Some of these Petitioners added that such a Cabinet could easily consist of friends and relatives of the President.

(b) Those in favour of a Cabinet from outside Parliament advanced the following reasons:

- (1) it would allow the President a wide spectrum of choice which would include technocrats most of whom invariably shun politics although they have a calibre for government administration;
- (2) it will avoid a situation of dual allegiance on the part of the Minister towards his constituency and the Ministry, leading to instances where Ministers favour their constituencies in the distribution of resources;
- (3) the Ministry and a constituency are bound to be adversely affected by a Minister who always attends Parliament and thus has no time for his Ministry and constituency;
- (4) it will avoid the embarrassing situation of divulging confidential government information by a Minister who has lost his portfolio and becomes an ordinary member of Parliament.
- (5) Some Petitioners also expressed the view that appointment of a Cabinet should be subject to parliamentary ratification. Others felt that the President should be given a free hand and therefore parliamentary ratification was unnecessary.<sup>34</sup>

The Commission did not support the majority view of a Cabinet appointed exclusively from amongst the Members of Parliament because it found the reasons advanced for Cabinet outside Parliament convincing in the light of successive Cabinets. It did not also accept the reason advanced in relation to maintaining separation of powers for in the Commission's finding it is practically impossible to insulate these powers from each other entirely. It therefore recommended, that a Cabinet may be appointed from either outside and or inside Parliament subject to parliamentary ratification<sup>35</sup>

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<sup>34</sup> Report of the Constitution Commission, 1991, pp. 91-92.

<sup>35</sup> Ibid, p. 96,99.



Similarly, by Statutory Instrument<sup>36</sup> then President of Zambia, Dr. F.T.J Chiluba appointed a Commission of Inquiry to collect views from the general public, both in rural and urban areas and from Zambians abroad, on what type of Constitution Zambia should enact. The Mwanakatwe Commission, reported that the hotly contested positions were between those who wished to have a Cabinet appointed wholly from inside the National Assembly and those who wished to have a Cabinet drawn exclusively from outside the National Assembly:

- (a) In arguing for the appointment of Ministers from among members of the National Assembly, Petitioners pointed out that Zambia, unlike the United States, was not a pure presidential system but a hybrid of African Presidentialism and the Westminster model. These Petitioners felt that it was imperative for purposes of assuring Cabinet accountability to the National Assembly that Ministers were appointed from the members of the National Assembly. It was moreover felt that Ministers drawn from members of the National Assembly, had the advantage of portraying a broader, national image and were in terms of political legitimacy, beyond question. That this system has been with the Zambian people since independence and is universal, found throughout the Commonwealth.
- (b) Justifying the departure from the present practice and proposing a Cabinet drawn from outside National Assembly, argued that the present system has not delivered to expectations. The present system posed serious institutional challenges covering the degree of independence from undue executive influences. Contrary to the doctrine of separation of powers and the doctrine of checks and balances, it was felt that the present arrangement whereby Ministers were drawn from inside the National Assembly, implied that the legislature was fused through a very subtle manner with the executive branch. Bearing in mind that the executive power is the initiating and activist branch of all the three powers, the net result was a dominant executive with a subservient legislature. Presidential autonomy and patronage were inevitably encouraged where the appointment of Ministers remained the prerogative of the President and mainly confined to the legislature.<sup>37</sup>

The Commission unanimously recommended that Ministers should be appointed from outside the National Assembly, from among the citizens of Zambia on the basis of ability,

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<sup>36</sup>No. 151 of 1993 as amended by Statutory Instrument No. Of 1994.

<sup>37</sup>Report of the Constitutional Review Commission, 1995, pp.113-115.

merit and experience, and such appointments should be subject to ratification by the National Assembly.

Recently, by Statutory Instrument,<sup>38</sup> the then President of Zambia, Dr. Levy P. Mwanawasa, S.C., appointed Commissioners to collect views from the general Public both in rural and urban areas and from Zambians abroad, on what type of Constitution Zambia should enact. The Mung'omba Commission equally had similar findings and the majority view was that the Cabinet should be appointed from outside the National Assembly. It also found two competing positions:

- (a) that appointing a Cabinet outside the National Assembly would enhance the separation of powers and thereby strengthen the role of Parliament in providing checks and balances. MPs would no longer clamour for ministerial appointments, which compromise the effectiveness and independence of Parliament. That it would promote professional competence and efficiency among Ministers and to enable MPs to concentrate on parliamentary duties.
- (b) that appointing a Cabinet from among MPs is desirable in that they have the mandate of the people in representing their interests. Another reason was to avoid nepotism, tribalism and corruption in ministerial appointments.

The Commission noted that the merits of forming the Cabinet from outside Parliament as submitted were valid and that this practice was consistent with the Presidential executive system. Such a mode of appointment would also discourage defections, which are prompted by invitations to the Cabinet, and reduce by-elections. That it would also curb the practice of MPs leaving their constituencies on appointment. Further, on the separation of powers, it was noted that historically in Zambia, appointments of Ministers and Deputy Ministers have comprised about 43% of Members of Parliament, bringing them into the sphere of collective responsibility and therefore diluting the effectiveness of checks and balances.<sup>39</sup>

The Commission recommended that Cabinet Ministers and their Deputies should be appointed from outside the National Assembly subject to parliamentary ratification. This recommendation echoed and vindicated the previous recommendations by similar Commissions constituted in the past that Zambians desired to have a Cabinet outside the National Assembly.

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<sup>38</sup>No. 40 of 2003 as amended by Statutory Instrument No. 42 of 2003, 86 of 2003, 98 of 2003, 134 of 2003 and 56 of 2004.

<sup>39</sup>Interim Report of the Constitutional Review Commission, 2005, pp.340-341.

## 2.3 Conclusion

The Essay has discussed the legal historical background of the Cabinet in Zambia, its nature and rationale. The hotly contested positions on whether Cabinet should be drawn from inside or outside the National Assembly, which has so far been canvassed from the consistent submissions to the various CRCs form part of the subject in the following Chapter. From the foregoing, it becomes apparent that the law on Cabinet has evolved from the British Parliamentary System to a mixture of the Presidential System and the Parliamentary System. The resultant compromise, however, does not incorporate the safeguards inherent in Conventions of the British type. In short the law is fighting with shortcomings which are prone to abuse and presents potential for misconduct. The fact is that a Cabinet formed from the National Assembly actually subordinates the National Assembly to the Executive branch of government and thereby makes it less effective. The unmistakable chorus from the various Constitutional Review Commissions is that the majority of Petitioners advocated for a Cabinet appointed from outside the National Assembly. The Essay therefore, seeks to investigate the most appropriate and effective legal regime within which a Cabinet should be constituted and operate for enhanced national development and democratic advancement in the following Chapter.

PARLIMENTARY SYSTEM VS PRESIDENTIAL SYSTEM

3.0 Introduction

As discussed in the previous chapter, the Cabinet as envisaged in the Zambina context is a resultant mixture of the British Parliamentary System and the American Presidential System. In order to appreciate the nature of the Cabinet system currently in force in Zambia, regard must be given to the import of the parliamentary and presidential systems. This chapter attempts an exposition of the two systems and how they have shaped the Cabinet system in Zambia. Further the rationale for each system is used in attempting to settle the hotly contested positions of whether Cabinet should be drawn from among members of the National Assembly or from outside it.

3.1 The Parliamentary System

A Parliamentary System, also known as parliamentarianism or westminister model, is a system of government in which the executive is dependant on the direct or indirect support of the legislature [often termed the Parliament], often expressed through a vote of no confidence.<sup>40</sup> The Zambian Parliament knows no vote of no confidence as the Republican President is popularly voted into office and his tenure does not depend on direct or indirect support of the legislature, save for the constitutional power of the legislature to impeach him pursuant to Article 37 of the Constitution,<sup>41</sup> neither does Cabinet whose tenure is solely dependant on the pleasure of the President.

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<sup>40</sup>[http://en.wikipedia.org/wiki/Parliamentary\\_System](http://en.wikipedia.org/wiki/Parliamentary_System) (Accessed Sept. 16, 2009)

<sup>41</sup>Chapter 1 of the laws of Zambia.

Parliamentary systems are characterised by no clear-cut separation of powers between the executive and legislative branches, leading to a different set of checks and balances compared to those found in presidential systems.<sup>42</sup> In Zambia, the Constitution<sup>43</sup> vests all power in the people who shall exercise their sovereignty through the democratic institutions of the State in accordance with the Constitution. The Constitution by Part IV<sup>44</sup> creates the Executive to which Cabinet belongs,<sup>45</sup> and delimits its powers. By Part V, the Constitution creates the Legislature and also delimits the powers and finally by Part VI, it creates the Judicature for which it also delimits the powers. It is clear that in Zambia, although not expressly stated, a system of separation of powers is constitutionally entrenched. The people of Zambia, therefore, ideally ought to exercise their sovereignty through these three organs of government. By implication, the people's will ought to be effected and expressed through these organs of which the executive to which Cabinet belongs is part. Whether in practice, the people's will aforesaid, is exercisable in Zambia, is contestable. The issue of checks and balances is yet another phenomenon which poses a paradox of problems for Zambia. For example, how possible is it for an appointed Cabinet Minister who simultaneously sits as a member of the National Assembly, discharge his legislative functions without bias and effectively when at the same time he/she is bound to a collective responsibility as a Cabinet member and thereby expected to defend Government position on any issue before the National Assembly? Secondly, when Zambia adopted a parliamentary system of Cabinet without the attendant conventions of the British type, in effect making Cabinet's tenure the President's rather than the National Assembly's to determine, the President's powers were thereby further increased and made it possible for him/her to manipulate the legislature through Cabinet. This is done through the presence of Ministers and their deputies in Parliament who today add to more than seventy-two members.

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<sup>42</sup>Ibid note 1.  
<sup>43</sup>Ibid note 2, Art. 1 (2).  
<sup>44</sup>Ibid note 2.  
<sup>45</sup>ibid, Art, 49.

This becomes plain when one factor in Party politics, compelling members of the ruling party in the National Assembly to vote on party lines coupled with a puppet Cabinet. The executive almost always have an easy way in Parliament. This is further enhanced by the incentive dangled before the opposition members of the National Assembly to defect to the ruling party and be appointed to Cabinet or Deputy Minister. The politics of poverty in Zambia further makes it worse. Many members of the National Assembly in Zambia desperate for wealth have prostituted themselves to party after party, ostensibly with different ideologies, which confirms that most defections are not premised on noble convictions of public service but mere self aggrandisement.

Parliamentary systems usually have a clear differentiation between the Head of Government and the Head of State, with the Head Government being the Prime Minister or Premier, and the Head of State often being a figurehead, often either a President [elected either popularly or by the Parliament] or by a hereditary monarch [often in a constitutional monarchy]. Though in parliamentary systems the Prime Minister and Cabinet will exercise executive power on a day-to-day basis, constitutional authority will usually belong to the Head of State, giving that official codified or uncoded reserve powers.<sup>46</sup>The Constitution<sup>47</sup> further provides that the executive power of the Republic of Zambia shall vest in the President and, subject to other provisions of this Constitution, shall be exercised by him either directly or through officers subordinate to him. As outlined in the previous chapter, Zambia initially started with a President assisted by a Prime Minister heading Cabinet. Later, the position of Prime Minister was abolished and only the presidency was retained. The Constitution creates the Office of the President, declaring that there shall be a President of the Republic of Zambia who shall be the Head of State and of the Government and the Commander-in-Chief of the Defence Force.<sup>48</sup> The Zambian President, therefore, has much more powers than a parliamentary one, whereas a Prime Minister was only the Head of Government, the Zambian President is both Head of State and Government.

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<sup>46</sup>bid note 1.

<sup>47</sup>bid 2, Art. 33 (2).

<sup>48</sup>bid note 2, Art.33 (1)

The term parliamentary system does not mean that a country is ruled by different parties in coalition with each other. Such multi-party arrangements are usually the product of an electoral system known as proportional representation. Many parliamentary countries, especially those that use “first past the post” voting, have governments composed of one party. However, parliamentary systems in continental Europe do use proportional representation, and tend to produce election results in which no single party has a majority of seats. Proportional representation in a non-parliamentary system obviously does not have this result.<sup>49</sup> Zambia practices the first past the post, which is a zero sum game and a winner takes all. The government in Zambia is composed consequently of one party and not a coalition of parties. All the opposition parties can do if they have a strong enough voice in the National Assembly is to give checks and balances to the executive on many issues before the National Assembly. The Zambian experience, however, has shown that the sitting governments almost always seek to undermine and destroy the opposition which is perceived as enemies of the sitting government. For example, the late President Mwanawasa, appointed an opposition leader, Nevers Mumba, as Vice President, whom he later fired. The political standing of that opposition leader was damaged and his party died. He also appointed members of the opposition like Heritage Party to Deputy Ministers.

Heritage Party also crumbled. The current wrangles in the opposition Patriotic Front are also linked to government enticement to the opposition members of the National Assembly, by assigning them positions and seats in the National Constitutional Conference which has resulted in PF being watered down as a major opposition in the National Assembly.

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<sup>49</sup>bid note 1.

3.2 Cabinet

Cabinet is a body that has no formal legal status other than that of it being a creation of the principal law of the land. But it is the central institution for Executive government in Westminster-style system of governance. Its workings are largely governed by practice and conventions. The essence of its efficient operation is collective decision making. Many of the conventions and practices that have grown up around the institution of Cabinet are referable to the objective of efficient collective decision making. It is important, for example, that once government has made a decision, it speaks with one voice and presents a united position to the community, whatever internal differences there may be. To do otherwise would create uncertainty and even confusion in the administration and beyond. For example, conventions concerning Cabinet confidentiality are applied by the courts in holding that Cabinet documents are the subject of public interest, immunity or confidentiality requirements and that the legislature may not order the production of such documents.<sup>50</sup>

The convention that Ministers [and hence Cabinet members] be members of Parliament<sup>51</sup> finds its source in the principles of responsible government. These require that Ministers be collectively responsible to the Parliament and hold the confidence of the legislature. Ministers are also individually responsible to Parliament of which they are a member with respect to the administration of their portfolios. In order to be properly accountable to Parliament, a Minister must therefore be a member of it. There are circumstances, however, where this will not be the case. A common example is where the legislature is dissolved prior to an election.

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<sup>50</sup> Attorney General v. Jonathan Cape Ltd [1976] 1 QB 752, per Lord Widgery at 770  
<sup>51</sup> Egan v. Willis (1996) 40 NSWLR 650, per Gleeson CJ at 660.



Ministers who were Members of Parliament cease to be so upon its dissolution, but remain in office until a new government is commissioned. Ministers are also appointed by the crown on the advice of the Prime Minister. It can therefore, be said that each Minister must in essence retain the confidence of the Prime Minister. In Zambia, however, all Ministers serve at the pleasure of the President and can be hired or fired at his/her whim. It follows that as long as the Ministers retain the confidence of the President, they will continue to serve even if in reality, they are incompetent, and inefficient in their roles.

**3.3 The Presidential System**

A Presidential System, also called a Congressional System, is a system of government where an executive branch exists and presides [hence the term] separately from the legislature, to which it is not accountable and which cannot in normal circumstances dismiss it.<sup>52</sup> This quite appropriately defines the presidential system currently obtaining in Zambia only to the extent that the executive exists and presides separately from the legislature which cannot in normal circumstance dismiss it, where the legislature retains only a faint right, in extreme cases to dismiss the executive through a process of impeachment. However, such an intervention is so rare [there has been no impeachment of the executive in Zambia ever] as not to contradict the central tenet of presidentialism, that is normal circumstances using normal means the legislature cannot dismiss the executive. However, unlike the US executive, the Zambian executive apart from being itself independent of the legislature does itself encroach on the legislature and directs the business there through its Cabinet. Therefore, the Zambian presidency through its manipulative hand of Cabinet is more powerful and controlling than its American counterpart.

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<sup>52</sup>. [http://en.wikipedia.org/wiki/Presidential System](http://en.wikipedia.org/wiki/Presidential_System) (Accessed Sept. 18th 2009)

The defining characteristic of a Republican Presidential System is how the executive is elected, but nearly all presidential systems share the following features<sup>53</sup>

- a. The President does not propose bills. However, in systems such as that of the United States, the President has the power to veto acts of the legislature and, in turn, a super majority of legislators may act to override the veto. This practice is derived from the British tradition of royal assent in which an act of Parliament cannot come into effect without the assent of the monarch.<sup>54</sup> However, in Zambia, the President does propose bills through his Cabinet who are essentially at his beck and call. On top of this, his vetoing power unlike the American President, is final on the third veto and cannot be overridden even by a super majority of legislators. This effectively means the Zambian President legislates with the help of Cabinet.
- b. The President has a fixed term of office. Elections are held at scheduled times, and cannot be triggered by a vote of no confidence or other such parliamentary procedures. This remains true even in Zambia.
- c. The executive branch is unipersonal. Members of the Cabinet serve at the pleasure of the President and must carry out the policies of the executive and legislative branches. However, presidential systems frequently require legislative approval of presidential nominations to the Cabinet as well as various governmental posts such as Judges. A President generally has power to direct members of the Cabinet.<sup>55</sup> However, in Zambia, there is no requirement for legislative approval of presidential nominations to the Cabinet. The President is the absolute judge of who should or should not be in the Cabinet.

.....  
<sup>53</sup>Ibid

<sup>54</sup>Ibid.

<sup>55</sup>Ibid.

The unipersonal character of the executive branch is epitomised in Zambia, where the President's will in appointing Cabinet is final and in whom all executive power is vested. He alone is actually the executive and the rest are helpers. The Zambian President, therefore, exerts enormous power and influence than his American counterpart

- d. The term presidential stem is often used in contrast to cabinet government which is usually a feature of parliamentarianism. Zambia cannot be termed a Cabinet government as Cabinet does not share in the executive power but are mere delegates.
- e. Presidential governments make no distinction between the positions of Head of State and Head Government, both of which are held by the President. This is the position in Zambia.
- f. A presidential system establishes the presidency and the legislature as two parallel structures which supervise each other, preventing abuses. In a presidential system, the central principle is that the legislative and executive branches of government should be separate. This fundamental wisdom is not practiced in Zambia, where there is really no clear separation between the executive and the legislature. It is this absence of this central principle which raises questions whether Zambia actually practices a presidential system of government or something by another name. By contrast, in parliamentarianism, the executive branch is led by a council of Ministers, headed by a Prime Minister, who are directly accountable to the legislature and often have their background in the legislature. The Zambian executive cannot be parliamentarian either as it does not have its background in the National Assembly.

### **3.4 Conclusion**

It is clear from the foregoing that the Cabinet system currently obtaining in Zambia does not seem to be premised on the compromise of the rationales of the two discussed systems of government. This seems to be so having regard to the distinctive rationale peculiar to each system upon which their respective justification is premised. This chapter has attempted to ascertain the justification or plausible explanation for a system of Cabinet drawn from among the members of the National Assembly in a Presidential System of government. It is evident that the rationale for appointing Cabinet members from among the members of the National Assembly does not find support either from the electorate as catalogued by views represented in the electorates' submissions to the succeeding Constitutional Review Commissions, nor the ideological systems of government as above discussed. The following chapter will therefore, analyse the different issues raised in this chapter upon which recommendations and conclusion will be drawn.

## **CHAPTER FOUR**

### **THE ELECTORATE IN A PARLIAMENTARY AND PRESIDENTIAL SYSTEM**

#### **4.0 Introduction**

The rationale for appointing members of Cabinet from among Members of the National Assembly is investigated in this chapter by having regard to the CRC electorate submissions, the parliamentary and presidential systems of government are discussed in the previous chapter. This chapter attempts a critical analysis of the issues thus far canvassed in the previous two chapters and a comparative analysis of Cabinet composition laws in the respective systems of government together with the rationale upon which each is premised.

#### **4.1 The Parliamentary System**

A Parliamentary System being a system of government in which the executive is dependent on the direct or indirect support of the legislature often expressed through a vote of no confidence on the face of it seems foreign to Zambia as the Zambian parliament does not practice a vote of no confidence and the Republican President is popularly voted into office. Yet it is apparent that the Zambian Cabinet like that in a Parliament System draws its Members from among the Members of the legislature. In a Parliamentary System, however, as has been discussed in Chapter three, Cabinet Composition is premised on the convention that Ministers [and hence Cabinet members] be Members of Parliament which finds its source in the principles of responsible government. These require that Ministers be collectively responsible to the Parliament and hold the confidence of the legislature. Ministers are also individually responsible to Parliament of which they are a Member with respect to the administration of their portfolios. In order to be properly accountable to the Parliament, a Minister must

therefore be a member of it. This rationale for a Cabinet member to be a part of the legislature though prudent under a parliamentary system, cannot be justified in the Zambian set up where Cabinet in the true sense of the word is actually accountable to the President irrespective of what the black letter of the law says, because it is difficult to find otherwise. The National Assembly does not ratify or exercise a vote of no confidence in respect of Cabinet members and cannot discipline or dismiss them. In a nutshell, the legislature has no colour of power over Cabinet members.

The Constitution<sup>56</sup> provides that the appointment to the office of Minister shall be made from amongst members of the National Assembly. This effectively bars any appointment to the office of Minister of anyone other than a member of the National Assembly however qualified or suitable. The Constitution further mandates the Cabinet and Deputy Ministers to be accountable collectively to the National Assembly.<sup>57</sup> This attempt at legislative checks and balances of a parliamentary system guise seem to be obviously misconceived as the lack of separation of powers occasioned by the executive being drawn from the legislature makes criticism of one by the other considerably less likely. Coupled with the considerable numbers of the executive in the Zambian Parliament, with the attendant voting strength, the Zambian legislature is clearly subordinated to the executive. In a parliamentary system, a formal condemnation of the executive by the legislature is often regarded to be a vote of no confidence. The Zambian Parliament knowing no vote of no confidence and the legislature being so heavily subordinated to the executive, it is almost laughable to suggest that the legislature has any power to effectively check the executive under the present Cabinet composition law. The lack of checks and balances means that misconduct by the executive may not be exposed.

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<sup>56</sup>Cap 1, Art. 46 (2)

<sup>57</sup>Ibid, Art. 51.

This is made worse in Zambia by simultaneously having an executive that is unipersonal and the members of Cabinet serving at the pleasure of the President. The lack of security of tenure of the Cabinet members ensures “blind loyalty” by all of them to the President whether acting inside or outside the Parliament. Some writers,<sup>58</sup> while addressing the writings of Montesquieu, focusing on the subject matter of “the spirit of law” and how a government ought to be structured, postulated that power corrupts and absolute power corrupts absolutely, leading to the increased tendency towards authoritarianism. In support of the foregoing, another author<sup>59</sup> has also noted that when power is concentrated in the hands of the few, with no room for clear outlined checks and balances, the people in power become too powerful and authoritarians resulting in conflict with the ruled which hamper development in a State. This status quo also ensures that the Cabinet truly remains the President’s “errand boys and girls”. A Cabinet drawn from among the Members of the National Assembly also ensures that the legislative in the Zambian system of government is subordinated to the executive as the former continues to encroach on it.

Under the parliamentary system, the Prime Minister, advises the Head of State like the Queen in the UK in her appointment of Cabinet Ministers and together with them exercises executive power. In Zambia by contrast, all executive power is vested in the President.<sup>60</sup> The President exercises executive power himself or through officers subordinate to him. In reality the Zambian Cabinet is particularly accountable to the President and not the National Assembly and therefore, the rationale for being part of the National Assembly on account of accountability is misplaced.

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<sup>58</sup> Christopher Roederer, Darrel Moellendorf: Jurisprudence, Juta & Co. Ltd, USA, p. 505.

<sup>59</sup> R.K. Saprú: Public Policy, Formulation, Implementation and Evaluation, (2007), 2nd Edition, Sterling Publishers Private Ltd, New Delhi, India, pp. 20-27

<sup>60</sup> The Constitution of Zambia, Cap 1, Art 33 (2).

On the other hand, the parliamentary Cabinet in the UK is regulated by Conventions that have been developed over the years which work to prevent abuse of authority or positions. By contrast, the Zambian Cabinet is not subject to Conventions and individual Cabinet members are more likely to be led by self interests than that of the electorate or constituencies among which they campaigned for office in the National Assembly. For example, a Minister embroiled in a scandal would not even dream of stepping down but instead would shamelessly choose to cling onto power as long as the President is unperturbed by it. This tends to encourage corrupt and incompetent people to continue in power even if the general populace is dissatisfied with them. It is obvious that this goes against the tenets of democracy and is a recipe for autocratic governance.

**4.2 The Presidential System**

Winning the presidency is a winner-take-all, zero-sum prize. A prime Minister who does not enjoy a majority in the legislature will have to either form a coalition or, if he is able to lead a minority government, govern in a manner acceptable to at least some of the opposition parties. Even if the Prime Minister leads a majority government, he must still govern within [perhaps unwritten] constraints as determined by the members of his party – a Premier in this situation is often at greater risk of losing his party leadership than his party is at risk of losing the next election. On the other hand, once elected a President can not only marginalise the influence of other parties, but can exclude rival factions in his own party as well, [an example of which is Dr. Levy Mwanawasa SC of Zambia, who had to leave some of his perceived party rivals out of Cabinet] or even leave the party whose ticket he was elected under. An example of the later can be perceived in the Malawian President, Mbingu wa Mutharika who had to leave his original party and form his own due to differences after he was elected President. The President can thus rule without any allies for the duration of one or possibly consecutive terms, a worrisome situation for many interest groups.<sup>61</sup>

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<sup>61</sup> [http://en.wikipedia.org/wiki/Presidential\\_system](http://en.wikipedia.org/wiki/Presidential_system) (Accessed Sept. 18th , 2009)



Thus a President is capable of ignoring interest groups and still get away with it. Under such a Scenario it is an extremely dangerous situation to allow such a powerful individual to have access to manipulate the legislature by the use of his errand boys and girls in the guise of Ministers in Parliament. Unfortunately, this is the condition currently obtaining in Zambia, unless Cabinet is divorced from the National Assembly and replaced by one drawn from outside the National Assembly, Zambia will continue to suffer this disadvantage.

The danger that zero-sum presidential elections pose is compounded by the rigidity of the President’s fixed term in office. Winners and losers are sharply defined for the entire period of the presidential mandate. Losers must wait for four or five years without any access to executive power and patronage.<sup>62</sup> The Zambian situation, therefore, is potentially autocratic, and if a sitting President wished to be despotic, it would be very difficult to restrain or check him, especially with the legislature under his control through the Cabinet.

**4.3 The Electorate**

The Majority of the electorate in Zambia have been consistent in their call for a Cabinet appointed outside the National Assembly in all the CRCs that have been constituted in the past. The reasons for or against have been canvassed in Chapter Two and it is very clear that given a choice, the people of Zambia would vote for a Cabinet appointed from outside the National Assembly and the only salient reason why Cabinet is still appointed from among Members of the National Assembly is for political expediency to serve the interests of the governors and not the people.

The accountability of Cabinet and Deputy Ministers to the National Assembly under the Constitution<sup>63</sup> is difficult to appreciate when considered in the light of the fact that a Minister shall be responsible, under the directions of the President, for such business of the Government including the administration of any Ministry or Department of Government as the President may assign to such a Minister.<sup>64</sup>

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<sup>62</sup>Ibid.

<sup>63</sup> Cap 1, Art.51

<sup>64</sup>Ibid, Art. 46 (3).

it therefore, makes sense to have Cabinet subject to the directions of the President, but which does not interfere in the workings of the National Assembly. Such a Cabinet can only reasonably come from outside the National Assembly. Also going by the constitutional provision that all power is vested in the people who exercise it through organs of government, if the electorate have expressed their choice as to Cabinet composition law consistently through out all the CRCs, it is scandalous not to heed their voice, as doing so is clearly unconstitutional.

#### **4.4 Conclusion**

From the foregoing, it is apparent that the appointment of Cabinet Ministers from among the Members of the National Assembly does not appear to promote the development of democratic and effective government. This chapter has critically discussed the Parliamentary and Presidential Systems of government and also the Zambian electorate's views regarding the appointment of members of Cabinet and it has been established that taken together, all the arguments point to a Cabinet appointed from outside the National Assembly as the best option for Zambia. The following chapter shall attempt to make recommendations on what needs to be done to remedy the flaws in the law on cabinet composition and finally to conclude the matter.

**RECOMMENDATIONS AND CONCLUSION.****5.0 Summary**

The appointment of Cabinet Ministers from among Members of the National Assembly by the Republican President is based on the fundamental law of the land. This is law that needs changing so that the law may be able to reflect the will of the people and the current social trends. This is important as the law ought to be relevant to the aspirations of the people it is supposed to regulate. The four Constitutional Review Commissions that have been set up in Zambia have all collected submissions envisaging the appointment of Cabinet Ministers from outside National Assembly.

These views have not found expression in the three amendments to the Constitutions that have taken place in light of the submission to the three earlier Commissions. It remains to be seen whether these will feature in the soon coming Constitution which will be a product of Mungomba Commission. Many scholars and authors tend to argue that Zambia lacks a political will when it comes to enacting a Constitution driven by the people. Our National leaders tend to impose their will, resulting in the production of a Constitution which is foreign to the majority of Zambians there by forcing the leadership to initiate a review of the Constitution within a short spell of time. Those who criticize the appointment of Cabinet Ministers from within National Assembly, point to the limited numbers from which a choice is made and the fact that the system tend to water down the doctrine of separation of powers which enhances democratization and the rule of law. Those that advocate for the appointment of Cabinet Ministers from outside the National Assembly point to the large number of people outside National Assembly with varied skills among whom a choice can be made. Further they argue that Cabinet

Ministers in this form will not interfere with the legislature, thereby enhancing the doctrine of separation of power to a large extent.

The role of law in society is threefold. Firstly, law must ensure stability and conditions necessary for stability. The inability of law to maintain stability will result in the law giving force to other forces stronger than itself. Law must respond in time before a crisis sets in to warrant a revolution. Through the various CRCs, the electorate have made known their preference and the law should respond promptly and accordingly. Secondly, law is concerned with giving form to specific relations. Form assists in locating the substance. The law should provide guidance by effectuating resonant provisions respecting the people's views on Cabinet composition. And, thirdly, law's function is to ensure security from disorder. Law maintains social order and guarantees security. Law must be responsive to social changes otherwise there is dislocation of social order. The persistent calls from the majority of the Zambian electorate, for Cabinet to be appointed from outside the National Assembly is indicative of the undercurrents of social change. The law must respond to this change and Cabinet composition law amended accordingly.

## **5.1 Recommendations**

Since independence the legislature has been subordinated to the executive and has therefore failed to check executive excesses. Critics have described the National Assembly as a mere rubber-stamp. If Zambia has to improve its governance record and enhance accountability and transparency of government, the legislature needs to be strengthened.

“Underlying the litany of Africa’s development problems is a crisis of governance .... By governance is meant the exercise of political power to manage a nation’s affairs. Because countervailing power has been lacking, state officials in many countries have served their own interests without fear of being called to account. The leadership assumes broad discretionary authority and loses its legitimacy. Information is controlled, and voluntary associations are co-opted or disbanded. This environment cannot readily support a dynamic economy.”

The problem could not be put in more stark terms than these. If the question of governance has exacted huge developmental costs to Africa and Zambia in particular, it is high time that the establishment of democratic governance in Zambia is given priority. One of the elements of good governance is ensuring that the legitimacy of the government is regularly established by the will of the people at a given time. Cabinet being a part of a sitting government is not exempt from the requirement to be legitimate. Legitimacy is closely tied to the will of the people. The people through the CRCs have repeatedly made their will for a Cabinet appointed from outside the National Assembly expressly known. It follows, therefore, that pursuant to democratic principles and the need for good governance, a Cabinet appointed from outside the National Assembly is a must for Zambia. Any other option would be illegitimate. Premised on the arguments and issues raised in this Essay, the following proposed reforms are recommended:

1. That members of the Cabinet in keeping with the central principle of the presidential system of government, of which Zambia has adopted, be appointed from among the people outside the National Assembly.
2. That the Constitution be amended to reflect the will of the people as regards Cabinet composition as clearly articulated in the CRC Reports so far conducted in Zambia. This will create a wider nursery from which persons who are Zambians, suitably qualified and able could be appointed to the Cabinet. Instead of the President limiting his choice to only one hundred and fifty Members of Parliament, this extension will cover the whole population of citizens outside National Assembly.

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<sup>65</sup> World Bank, Sub-Saharan Africa: From Crisis to Sustainable Growth, (1989).

3. Appointment of members of the Cabinet from among people outside the National Assembly will enhance the separation of powers there by create an environment in which the rule of law will thrive. This has been implemented by many democracies, with a familiar example being the United States of America.
4. That the appointing power of Cabinet Ministers by the sitting President be limited to nomination only subject to ratification by the National Assembly before the appointment is confirmed. This will force the President to nominate candidates purely on merit based on previous performance by the candidates. This will also limit the power of the President in giving jobs to cadres, friends and family members.
5. That appointing Cabinet members from outside the National Assembly will give chance to the elected Members of the National Assembly to spend their energies on representing the electorates without compromise. This will enable the representatives of the people to devote their time and energy on issues besetting their constituencies, and promote accountability to the people that elected them.
6. Appointing Cabinet Ministers outside the National Assembly would curtail defections of the opposition Members of the National Assembly to the ruling party in search of Ministerial appointments. Further, the crossing of the floor will be a thing of the past, as those eyeing ministerial positions have to be outside National Assembly.
7. There is need for Article 46<sup>66</sup> to specify minimum academic qualifications and or experience required for one to be recommended to National Assembly for appointment as Minister.

.....  
<sup>66</sup> Constitution of Zambia, Cap 1

. Article 46 in its current form is subject to abuse as exemplified by **Maxwell Mwamba and Stora Solomon Mbuzi v. Attorney General**,<sup>67</sup> in which Mbuzi challenged the appointment of self confessed drug dealers to positions of Minister.

The concern of Stora Mbuzi and Maxwell Mwamba, was that the President had failed to discharge his duty with diligence by appointing the said persons to positions of Minister, whose characters and previous conduct were questionable in the eyes of the public. The ruling of the Supreme Court was that they could not entertain troublesome self appointed Attorney Generals who had no locus standi in the matter to challenge the discretion of the President in appointing members of his Cabinet. This was a clear case of the Courts of shying away from their responsibility. With the setting of specific qualifications, the discretion of the President and the power of the ruling Party and President through Cabinet in the National Assembly will be clearly checked.

8. It is also recommended that the post of Deputy Minister be abolished forthwith. The current practice where Deputy Ministers cannot act as full Cabinet Ministers, and in principle have no specific job description is wasteful and a way of subordinating the legislature to the executive. The government would make a lot of savings if this post was abolished. The presence of deputy ministers in the National Assembly, with their increased numbers is only a tool to champion and provide support to the Cabinet ministers in the House to toll the ruling party line.

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<sup>67</sup> SCZ No. 10 of 1993.

9. The veto power of the President like that of the USA President be limited and be overridden on the third veto by a super majority of the legislators. This will enhance the separation of powers and ensure that legislative power is truly vested in the legislature.
10. Cabinet is merely an advisory body, as the President is not bound by its advice. The gross abuse of presidential powers since independence makes it imperative to reduce presidential powers as well as subject them to more effective checks and balances. In this connection it is suggested that executive power should be vested in both the Cabinet and the President, as is the case in Namibia. Unless otherwise stipulated, the President should be obliged to act in accordance with the advice rendered by the Cabinet.
11. There should be no limitations on the number of times the National Assembly can decline to ratify unsuitable Cabinet nominees.
12. The President should have no power to dissolve the National Assembly.
13. There should be a bicameral legislature comprising the National Assembly and a House of Representatives elected by the Provinces. And that no one person should sit in both houses in the same period.
14. The Legislature should have prescribed times for its session and it should be in charge of its programmes.
15. The National Assembly should have power to pass a vote of no confidence in an individual Minister or the Cabinet. In such event the Minister should resign or be fired by the President.
16. As no member of the Executive should be a member of either House of Parliament, Ministers may attend and speak in either house but without having power to vote.



17. Article 81 which empowers the Speaker not to present Bills with financial implications being debated in the legislature if the President has not given prior permission in writing should be scrapped.

## **5.2 Conclusion**

For many years now, there have been two conflicting views as to where the Zambian Cabinet should be drawn from. One group has been of the view that the current system of drawing Cabinet Ministers from National Assembly should continue. The views of this group is that Cabinet Ministers in National Assembly will guide the house on policy of the ruling party, and thereby influence the enactment of laws that will support Policy and thereby enhancing consistency in implementation of the policy. While the other group, has the view that Cabinet Ministers be drawn from outside National Assembly where the number of citizens are many, with multifaceted skills to choose from. Further, they are of the view that this system will enhance the separation of powers, and also give chance to the representatives of the people to put all their efforts in representing the interests of the electorate.

There are other factors including the quality of Members of Parliament and how much power will be decentralized to Cabinet outside the National Assembly. Other factors will cover the degree of transparency and accountability among the Ministers. However, it may be obvious that Cabinet Ministers outside National Assembly will be effectively checked by the Honourable House, thereby strengthening accountability, transparency and separation of powers. This may result in the growing of democracy which may contribute to the growth of the economy and political maturity. Notwithstanding the various conceptual and drafting problems inherent in the Zambian Cabinet composition law, the foundation upon which it is erected though shaky, can be amended and

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