AN ANALYSIS OF THE DEVELOPMENT AND EFFICACY OF THE DOCTRINE OF THE SEPARATION OF POWERS IN ZAMBIA

BY

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A paper presented in partial fulfilment of the requirements for the degree of Bachelor of Laws of the University of Zambia.

UNZA 2012
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DEDICATION

I dedicate this obligatory essay to my parents Oscar and Given Daka who sacrifice so much in ensuring that they, in so far as they possibly can, provide the very best of everything to their children.
ACKNOWLEDGEMENTS

The concept of the separation of powers is one that is crucial to the establishment of a democratic country and the protection of the rights of the citizens of that county. In this regard, this topic is of importance to every citizen of the Republic of Zambia. I am therefore honoured as a student of Law to have the opportunity to contribute a drop into the ocean of knowledge on this subject and would therefore like to express my sincere gratitude to every person who has assisted in the compiling of this research paper.

I would like to acknowledge Jehovah God because who is the beginning and the end and to whom we owe our very being. It is through him that all blessings flow.

The completion of this essay will not have been possible without the support and guidance of Miss M Lwatula who has shown much patience and support over the months in which this research paper was put together. I appreciate all your efforts in your supervision.

My parents and siblings are a pillar of strength in my life. I acknowledge the moral and emotional support rendered not only through the period in which this essay was drafted but throughout my life. I would not be where I am if it was not for them.

I owe much gratitude to Mr James Mwanakatwe, my uncle who took the time and effort to assist me with much of the resources needed to research on this topic and who took the time out of his busy schedule to guide me through the issues highlighted in this research paper.

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May 2012
In Zambia, it has been observed that there exist some loopholes and lacunas with regards to the safeguards in ensuring that all the checks and balances are in place. There have been a number of instances in which the independence and integrity of the Judiciary appeared to be compromised. Further, there have also been numerous occasions on which the executive appeared to have too much power at its disposal resulting in one way or another, the abuse of powers. For example, the amount of discretionary powers vested in the president of the Republic of Government has the potential to result in abuse of this power.

These observations imply that there appears to be a lack of ‘checks and balances’ on the government which has rendered the autonomy of the Judiciary and the amount of power vested in the executive debatable.

In light of the above, this research paper seeks to discuss the effectiveness of the separation of powers in Zambia and how the doctrine has developed over the years. It compares the governance of Zambia to different jurisdictions in other parts of the world as well as provides some recommendations on the means in which a better checked and balanced democratic society can be achieved.
TABLE OF CASES

1. A.M Lewanika and others v. FJT Chiluba (Supreme Court of Zambia Judgment No. 14 of 1998)

2. Frederick Titus Jacob Chiluba and Faustine Kabwe v. The Attorney General (Supreme Court of Zambia Appeal number 102 of 2009)

3. Frederick Titus Jacob Chiluba v. The Attorney General (Supreme Court of Zambia Appeal number 125 of 2002)

4. Mulundika and others v. The People (Supreme Court of Zambia Judgement No. 25 of 1995)

5. The People v Fred M’Membe, Masutso Phiri and Bright Mwape (Appeal No. 87 and 197 of 1995)
TABLE OF STATUTES


2. the Judicature Administration Act, No. 42 of 1994, Cap 24 of the Laws of Zambia

3. the Judicial (Code of Conduct) Act, No. 13 of 1999 of the Laws of Zambia

4. The United States Constitution
TABLE OF ABBREVIATIONS

ACC – Anti Corruption Commission

DPP – Director of Public Prosecution

HRC – Human Rights Commission

MMD – Movement for Multi-Party Democracy Party

PF – Patriotic Front Party

UNIP – United National Independence Party
TABLE OF CONTENTS

PRELIMINARIES

Research Topic...........................................................................................................i

Declaration..................................................................................................................ii

Supervisors Recommendation......................................................................................iii

Dedication....................................................................................................................iv

Acknowledgements......................................................................................................v

Abstract......................................................................................................................vi

Table of Cases..............................................................................................................vii

Table of Statutes..........................................................................................................viii

Table of Contents.........................................................................................................ix

CHAPTER 1

Introduction..................................................................................................................1

Problem of Statement....................................................................................................4

Objective/Purpose of this study......................................................................................5

Significance of this study...............................................................................................5

Research Questions.......................................................................................................6

CHAPTER 2

Introduction..................................................................................................................7
Political and Social Context in Zambia..........................7
Assessment..................................................................14

CHAPTER 3

Introduction..................................................................17
Does the Judiciary act independent in practice..................18
The Powers of the Executive in Zambia.........................21
Effectiveness of the Legislature in Zambia......................22
Is there a need for the separation of powers in Zambia.......25

CHAPTER 4

Introduction..................................................................28
American Example..........................................................30
British Example.............................................................31
French Example.............................................................33
Canadian Example.........................................................34
Different systems compared..........................................36

CHAPTER 5

Introduction..................................................................38
Conclusion..................................................................38
Recommendations..........................................................39
APPENDIX

Bibliography.................................................................45
CHAPTER ONE

Title of the Study

An analysis of the development and effectiveness of the doctrine of the Separation of Powers in Zambia

Introduction

The "separation of powers" is a principle under which the political authority of a state is divided into legislative, executive and judicial powers according to which Charles-Louis de Secondat, Baron de La Brède et de Montesquieu, implies that to most effectively promote liberty, these three powers must be separate and act independently. ¹ The legislature acts as the law making body and therefore performs the legislative function, the executive performs the administrative function and the Judiciary performs law enforcement functions and therefore the fundamental need for it to be independent.

This study seeks to discuss the separation of powers in light of its purpose as highlighted by Montesquieu in relation to effectively promoting liberty and ensuring that the government carries its duties within the various powers vested in its different branches. Its area of focus is Zambia, providing an analysis of how the doctrine has developed over the years and whether or not it is actually effective in achieving its purpose. In order to provide a valuable analysis on this matter, the concept of the separation of powers in different jurisdictions in Africa and other parts of the world will be compared.

This paper explores an area of Administrative law one of whose fundamental functions is to keep the powers of government within their legal boundaries so as to protect the citizen against their abuse.² This highlights the importance of the control of governmental power

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(excluding the legislature as it is sovereign and beyond legal control). Administrative law can also be said to be a set of general principles governing the exercise and duties of public authorities.\(^3\) This again shows the strong need for there to be checks and balances in place which is provided for by the doctrine of the separation of powers as will be seen, this idea and area of administrative law forms the foundation upon which this study lays.

The Zambian legal system is built in line with the British system and both have strong foundation in the Rule of Law which according to A. V Dicey\(^4\) can be summarized into three principles, the most relevant to this study being the principle that no man is above the law, but every man, whatever his rank or class is subject to the ordinary law, linking it to the fact that functionaries of the State are subject to the same law and legal procedure as private citizens.\(^4\) Therefore, in countries such as Zambia and other democratic countries in which the Rule of Law exists, there is a need for the Constitution to ensure that the branches of Government work efficiently because if the distribution of political power in a democratic state is determined by the Constitution which can be said to be the most supreme law of the land, then it can be said that its power lies in the fact that there is no one above the law and everyone is subject to it.

One may ask why there is a need for there to be checks and balances. The simplest answer to give at this stage is that the executive should be controlled so as to avoid a concentration of power which may ultimately lead to the abuse of such power; however, more importantly, the Judiciary should be able to operate independently and uninfluenced by the other branches of government. The Zambian Constitution expressly provides for the autonomy of the Judiciary stating, "The judicature shall be autonomous and shall be administered in accordance with the provisions of an act of parliament."\(^5\) The provision on its own theoretically guarantees

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\(^3\) Wade, *Administrative Law* by HWR Wade, 5


the autonomy of an adjudicator in the delivery of Justice. The extent to which the various courts in Zambia have abided to this autonomy is however debatable.

According to a report on African governance\(^6\), in many of the African countries, Zambia included the executive has historically been the most powerful branch of government stating that the tendency of the executive to monopolize power and abuse discretionary authority has been universally observed throughout the ages in different forms and means. This leaves us with the question of why this is so? Possible reasons include the fact that the executive technically initiates the enactment of laws, rules and regulations, and at the same time, to a certain degree ensure their compliance. Further to this, they control the administration of the country, they are the biggest providers of the public goods and services and they ensure law and order. They formulate and implement national policies, control major material and financial resources, the list is extensive, however, the point is that the amount of power and discretion the executive possesses is absolutely immense. It is for this reason that there is a need for there to be checks and balances in place regarding the executive so as to ensure accountability and prevent abuse.

Abuse in this context is however not exactly malicious for the reason that due to the immensity in power, it may be that even members of the executive themselves may not know its limits to their own power.

Reference is made to the previous (and connected) point of there needing to be an independent and uninfluenced Judiciary for the reason that they are the law enforcers. They are meant to protect the rights and freedoms of the citizens and they are a means of ensuring that the power of the executive is controlled through the use of the ultra vires doctrine. According to David Herling and Anne Lyon, “A public body may only perform actions which

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are within its statutory, prerogative or common law powers, or are reasonable incidental to such powers.\textsuperscript{7}

In theory, a Constitution should serve as the foundation and basis for putting in place the principle of the separation of powers among the three branches of government. As earlier discussed, the Constitution of Zambia provides for the autonomy of the Judiciary\textsuperscript{8}, but it appears as though in practice this Constitutional provision and other government structures that ensure the independence of the Judiciary or the accountability of the executive have been systematically weakened.

**Problem of Statement**

Governmental powers and responsibilities will inevitably overlap; for the reason that they are too complex and interrelated to be neatly compartmentalized. While the separation of powers is crucial to the workings of the Government of Zambia, it seems unrealistic to state that there should be an absolute separation of powers or an absolute lack of it. However, there is a fundamental need for the different branches of society to operate efficiently in their duty in order to uphold the rights and freedoms of the citizens of that country as well as the Rule of Law. There is therefore a need for the following:

1. Independent and uninfluenced Judiciary.
2. Carefully monitored and limited executive
3. Constitution which provides a framework for (1) and (2) above.

In Zambia, it has been observed that there exist some loopholes and lacunas with regards to the safeguards in ensuring that all the checks and balances are in place. There have been a number of instances in which the independence and integrity of the Judiciary appeared to be

\textsuperscript{7} David Herling and Anne Lyon. *Briefcase on Constitutional and Administrative Law* (London: At Cavendish Publishing Limited, 2004), 109

\textsuperscript{8} The Constitution of the Republic of Zambia Act, No. 18 of 1999, Cap 1 of the Laws of Zambia, Art. 91 (3)
compromised.\textsuperscript{9} Further, there have also been numerous occasions on which the executive appeared to have too much power at its disposal resulting in one way or another, the abuse of powers. For example, the amount of discretionary powers vested in the president of the Republic of Government has the potential to result in abuse of this power.

These observations imply that there appears to be a lack of ‘checks and balances’ on the government which has rendered the autonomy of the Judiciary and the amount of power vested in the executive debatable.

\textbf{Objective/Purpose of the Study}

The overall objective of the study is to critically analyse the effectiveness and development of the separation of powers in Zambia, otherwise put, this study looks at whether there is sufficient checks and balances in Zambia and how this doctrine has developed over the years from the kind of governance that existed under the one party rule under Kenneth Kaunda through to the multi-party democratic governance that has also been developing since 1991. It is of further importance to this study to analyse whether these actual checks and balances actually achieve their intended purpose to protect the rights and freedom of the citizens. With regard to the Constitution, it is also one of the objectives of this study to critically analyse the current Constitution and the role it plays in ensuring that the different branches of government do in fact work separately from each other. If the separation of powers is not effective in performing its role and the Constitution does not do enough to ensure the rule of law, it will be of additional importance to this study to discuss why this is so.

\textbf{Significance of the Study}

This research is justified, in that it is important to expose loopholes and lacunas in the manner in which Zambia is governed. For instance a lacuna exists regarding the amount of power that is invested in the President. As earlier stated, the Constitution of Zambia does not provide

\textsuperscript{9} Frederick Titus Jacob Chiluba v. The Attorney General (Supreme Court of Zambia Appeal number 125 of 2002)
sufficient limits on the powers vested in the head of state and the Judiciary in theory is independent and uninfluenced by the executive,\textsuperscript{10} however in practice its autonomy is actually questionable as there have been instance in which its integrity appears to have been compromised such as the case involving the Attorney General v Frederick Chiluba.\textsuperscript{11} This study is justified because discussing certain issues such as this, is a way of bringing to the attention of the reader, the need for various reforms to the Constitution in order to ensure that we as a people are protected from the possible tyranny that may result from the lack of sufficient checks and balances on the government. The research also has the potential to precipitate law reform which could lead to a more efficiently and effective governance of Zambia.

**Research Questions**

This study seeks to investigate and answer many questions; however, the main ones are as follows:

1. How effective is the doctrine of the separation of powers in ensuring that checks and balances exist in the governance of a country?

2. In light of the answer to question one above, how effective is the doctrine of the separation of powers in ensuring that there are checks and balances of the different branches of the government of Zambia?

3. What measures can be taken to ensure that the Judiciary is independent and uninfluenced in exercising its function and to ensure that the executives powers are exercised within the limits prescribed to it?

\textsuperscript{10} The Constitution of the Republic of Zambia Act, No. 18 of 1999, Cap 1 of the Laws of Zambia, Art. 91 (3)

\textsuperscript{11} Frederick Titus Jacob Chiluba v. The Attorney General (Supreme Court of Zambia Appeal number 125 of 2002)
CHAPTER 2

Introduction

This chapter is a discussion and analysis of the development of the doctrine of the separation of powers in Zambia. It will look at how this doctrine has evolved over the years from a command economy under Kenneth Kaunda’s one party state through to the now multi party democratic state Zambia has become with particular focus on the independence of the Judiciary and the extent to which the executive has acted/does act within its powers or has abused/abuses it.

This chapter will seek to analyse the independence of the judiciary and the limitations of the powers of the executive in Zambia.

According to Margaret Munalula, A good legal system includes the accountability of a legal system.\textsuperscript{12}

Political and Social context in Zambia

Zambia attained independence in 1964 after which the country was governed through a multi-party system until 1972 when a one party state was declared. Within this system elections were held every 5 years with candidates competing for various positions including members of parliament but with only one presidential candidate. Zambia experienced 27 years of dictatorial and one party rule under the first president of Zambia, President Kenneth Kaunda until 1991, when multi-partism was reintroduced through a change of Government when MMD came into power under Dr Frederick Chiluba. Since then, the country has held five Presidential and General elections which have gone a long way in the establishment of

\textsuperscript{12} Margaret Mulela Munalula, \textit{Legal Process: Zambian Cases, Legislation and Commentaries} (University of Zambia; At the UNZA Press, 2004), 7
political democracy. Nevertheless, the electoral system and constitutionalism in Zambia is still somewhat questionable.\textsuperscript{13}

Zambia was deemed a model for democracy in Africa after the peaceful transfer of power from UNIP under Kenneth Kaunda to MMD under Frederick Chiluba in November 1991\textsuperscript{14}, when the latter gained a landslide victory over the former. In contrast to the dictatorial rule under Kenneth Kaunda, Zambia initially made overall progress toward respect for civil and political rights, with some liberalizing reforms. Ironically, this appeared to slow down until what appeared to be a stop in these reforms just a couple of years into the MMD rule and Frederick Chiluba began to rule the country in a similar manner to the same system used under Kaunda’s rule when he began to suppress criticism.\textsuperscript{15} This served as evidence to the fact that the one-party mentality that existed under the Kenneth Kaunda continued even after the end of this era. It was still deeply ingrained in a number of the leaders in Zambia; critics of the ruling party were/are often regarded as critics of "democracy." A political environment characterized by this one party mentality does not have clearly cut out boundaries amongst the different branches of Government.

The transition from the command kind of rule under Kenneth Kaunda to a market driven economy brought about both challenges and opportunities to both justice seekers and the administrators of justice in that under the command economy, law was first and foremost an instrument of state control.\textsuperscript{16} Judicial systems and institutions in a command economy enforced the various instruments of state control, often done in an arbitrary manner whereas

\textsuperscript{13}Patrick Matibini, “Access to Justice and The Rule of Law” (United Nations Development Programme - Commission on Legal Empowerment Of the Poor)
\textsuperscript{15} A.M Lewanika and others v. FJT Chiluba (Supreme Court of Zambia Judgment No. 14 of 1998)
law in market economies is, fundamentally different. It defines the rules of the game and gives individuals the rights and tools to enforce them. Where the rule of law is in force, the laws are applied fairly transparently and even-handedly to all. Under a market economy, individuals can assert and defend their rights. Similarly, the states powers are defined and limited by the law. As a result of this, the institutions that enforce the law in market driven economy need to be competent, reliable and seen to resolve disputes in a timely manner that fills in the inevitable gaps in the existing legislation.\(^\text{17}\) Where there is well-established rule of law, it acts as the centre to current institutions of public accountability. Jack Birner and Rudy Van Zijp stated as follows:

> Nothing distinguishes more clearly conditions in a free country from those in a country under arbitrary government than the observance in the former of the great principles known as the Rule of Law. Stripped of all technicalities this means that government in all its actions is bound by rules fixed and announced before hand-rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge The Rule of Law was consciously evolved only during the liberal age and is one of its greatest achievements, not only as a safeguard but as the legal embodiment of freedom..... Man (sic) is free if he needs to be obeying no person but solely the law...\(^\text{18}\)

The Zambian Judiciary has been in the middle of a major transitional period for the reason that it had to embark on a major re-orientation programming that was based on 30 years of experience in interpreting laws in the command economy as it was described above to the new challenge of interpreting laws in a market driven economy as it exists at the moment.\(^\text{19}\) After such a phase there is a need for some time to overcome the systems of the past. It also needs time to regain public confidence. To achieve public trust and confidence, the judiciary in Zambia requires to be competent and seen to be independent and trust worthy.

\(^{17}\) Honorable Mathew Ngulube, "Final Draft The Judiciary Strategic Plan for Period 2001 – 2003" (Judiciary Headquarters)


\(^{19}\) Honorable Mathew Ngulube, “Final Draft The Judiciary Strategic Plan for Period 2001 – 2003” (Judiciary Headquarters)
The protection and enforcement of human rights is the ultimate responsibility of the justice
delivery system. The Judicature stands as arbiter between the state and its citizens and
between citizens in their interactions with each other. In order to be truly effective and
relevant, the justice system should uphold the rule of law.\textsuperscript{20} No person should be above the
law and that the law should be applied equally to all persons, regardless of rank or status.

Zambia legislative framework for the promotion and protection of its citizens by the justice
system is governed by a number of statutes. The first piece of legislature that governs the
justice system is the constitution which sets out the rights and freedoms of an individual
which includes the right to protection of the law.

The constitution provides for the autonomy of the judiciary,\textsuperscript{21} stating that the Judiciary is to
be administered in accordance with the provisions of the Judicature Administrations Act of
1994. Under the provisions of this Act, the Judiciary is an autonomous institution and has no
link. The constitution is also very pertinent to the operations of the judicial system. It
provides for the independence and impartiality of judges, magistrates and justices who are
charged with the delivery of justice in the Supreme Court, high court, Industrial relations
court, subordinate courts and Local Courts.\textsuperscript{22}

The Courts in a country play a very crucial role in ensuring a number of things, one of which
is ensuring power holders in a country are made accountable to the democratic rules. In a
democracy, proper functioning and independent courts are crucial in achieving democracy.\textsuperscript{23}

They ensure that there is transparency; obliging public officials to justify that their exercise of
power is in accordance with their mandate and relevant rules (accountability); and imposing

\textsuperscript{20} Honorable Mathew Ngulube, "Final Draft The Judiciary Strategic Plan for Period 2001 – 2003" (Judiciary
Headquarters)
\textsuperscript{21} The Constitution of the Republic of Zambia Act, No. 18 of 1999, Cap 1 of the Laws of Zambia, Art. 91 (3)
\textsuperscript{22} The Constitution of the Republic of Zambia Act, No. 18 of 1999, Cap 1 of the Laws of Zambia, Art. 91 (2)
\textsuperscript{23} Siri Gloppen, Roberto Gargarella and Elin Skaar, \textit{Democratization and the Judiciary: the Accountability
Function of Courts in New Democracies} (London: At Frank Cass Publishers, 2005 ), 1
checks if the executive through government officials overstep their boundaries as is described in the constitution, violate basic rights or compromise the democratic process (controllability).

There is much debate if the courts in Zambia achieve this purpose as highlighted above. An example of the courts failure in this regard worthy of citing is the failure of the Zambian Judiciary to hold the executive to account in the First Presidential Petition which challenged former president Chiluba’s re-election. In this case, the executive appeared to have bowed to the pressure by the executive. The facts of this case are as follows:

the petitioners challenged the election that was held on 18 November 1996 of former president Chiluba (the respondent) as President of Zambia on the grounds that he was not qualified to be a candidate for election as president and be elected because neither he nor his parents were citizens of Zambia by birth or by decent as required by art 34(3) of Sch 2 to the Constitution of Zambia Act 1991 as amended in 1996. They pleaded that his identity and that of his parents had never been ascertained, contended that he was the illegitimate son of one of the witnesses born from an illicit relationship with the mother while she was married to a Mozambican and that he was born in the then Belgium Congo (Zaire) in 1944 when his father, the witness was an alien. They also gave evidence touching upon the respondent’s citizenship qualifications and of the possible nationalities of his father. There was no dispute that the respondent’s mother ‘belonged’ to the British protectorate of Northern Rhodesia, within the meaning of s 16(3) of the 1963 Constitution, before it became the Independent state of Zambia on 24 October 1964, and would therefore, but for her prior death, have become a citizen of Zambia at independence by virtue of the 1964 Order and the 1963 Constitution. The petitioners also alleged electoral flaws in the electoral system, and asked for the avoidance of the election on the ground that it was rigged and not free and fair. Certain preliminary points arose, namely (i) what would be ‘full bench of the Supreme Court’ to hear the case as required by art 41 of the Constitution; (ii) the propriety of Cabinet ministers who were lawyers holding practising certificates appearing as counsel for the respondent, and (iii) the standard of proof required.

The above petition was dismissed.

In May 1996, the government under former president FJT Chiluba forced a constitutional amendment through parliament which provided that there was a requirement that the presidential candidates must be Zambian citizens born to parents who are Zambian by decent, and also must not be the tribal chief. These were requirements that were believed to have

24 A.M Lewanika and others v. FJT Chiluba (Supreme Court of Zambia Judgment No. 14 of 1998)
been tailor made to disqualify specific opposition leaders as well as disadvantage the opposition with regards to their chances to effectively participate in the general elections that were coming up at the time, which was aggressively challenged by the opposition itself as well as civil society. The five opposition parties that fielded the petition in the above case challenged Chiluba’s election as president for failing to satisfy the laws as was amended by his own government. Former president Chiluba was demanded by the petitioners to take a DNA test to prove that his father did not in fact come from Zaire. The Supreme Court rejected this, a decision which may be deemed as politically motivated/influenced. The courts accepted that there were irregularities and instances of rigging, but that was not sufficiently grave and systematic to justify the invalidation of the election.

The Zambian government usually complies with court orders, amended unconstitutional provisions etc. However there have been occasions in which it has reacted harshly towards opposing rulings or ignored court orders. For example, the 1995 judgement on the Public Order Act with regards to Christine Mulundika attracted the wrath of the government and harsh oratory in parliament. The facts of this case are as follows:

The appellant challenged the constitutionality of certain provisions of the Public Order Act Cap 104, especially section 5(4). The challenge followed on the fundamental freedoms and rights guaranteed by art 20 and 21 of the constitution. A Subsidiary challenge related to the exemption of certain office-holders from the need to obtain a permit.

Held (by a majority, Chaila, J.S., dissenting):

1. Section 5 (4) of the Public Order Act Cap 104 contravenes articles 20 and 21 of the Constitution and is null and void.

2. The exemption granted to certain office-holders does not fall under the categories listed in the Constitution.

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26 Frederick N’gandu and Kabazo Chanda ‘The Role of the Judiciary in Promoting Transparency and Honesty in the Zambian Electoral Process’, (Norad/CMI/Inesor project on ‘Political Processes in Zambia’)

27 Mulundika and Others v. the People (Supreme Court of Zambia Judgement No. 25 of 1995)
What appeared to be a malicious campaign against the Chief Justice began and even went as far as including rape allegations. However, this lacked in credibility and therefore died down; however it is believed to have been a contributing factor to the Chief Justice’s change of attitude towards the president at the time.

In a separate instance altogether, Judge Kabazo Chanda was suspended after ruling that awaiting trial prisoners who had been charged within the set time limit, must be released. This decision did not appeal to the Government at the time stating that it was outside the judge’s jurisdiction and appointed a committee to investigate the ‘misconduct’. The pressure that resulted from this decision ultimately led to the resignation of the judge.28 In 2001 the chief justice set up a tribunal to investigate allegations against three cabinet members which included the Minister of Finance at the time for diverting approximately ZMK 2,000,000,000 (approximately US$ 389,500) from the treasury to pay for the pre-election congress for the party that was in power at the time (MMD) which was allegedly at the instructions of the then president Chiluba.29 The minister of Finance was cleared on a technical point, however, all the others were found guilty of theft of public funds. The tribunal ordered that the two be relieved of their parliamentary seats and one Minister be prosecuted. However, the president refused to dismiss them and the Director of Public Prosecutions refused to prosecute. Both were adopted as parliamentary candidates in the 2001 elections during whose campaign, the minister of information gave instructions to the Zambia National Broadcasting Corporation to cancel the televised debate that was taking place at the time. The organizers obtained a High Court injunction to prevent this, however, were met and turned away by armed police. Opposition parties also obtained an order to ban to ban district

28 Gloppen, Gargarella and Skaar, _Democratization and the Judiciary_, 87

administrator’s civil servants from taking part in MMD campaigns, but this was ignored by the government as well.30

The above goes to show two things. Firstly, in as much as the executive branch of the Zambian government abides and obeys the decisions of the Judiciary; there are still many occasions or instances in which they do not. Not only do they act outside their powers, they breach it as well. There appears to be a tendency for the executive to maliciously involve themselves in the administration of justice in selected situations. Secondly, the Judiciary appears to be unable to exercise their function independently and uninfluenced on some occasions, especially in the instances that involve high profile cases or cases that are linked to politics in one form or another such as the ones discussed above.

Assessment

As earlier discussed, the constitution provides for three branches of government; namely the executive, the legislature and the Judicature. Constitutions advocate for the separation of powers of these three branches of government in order to adhere to the principles of ‘rule of law’ and good governance.

The Zambian Constitution expressly provides for the autonomy of the Judicature and theoretically guarantees the autonomy of an adjudicator in the delivery of justice. It can be safely stated that the various courts in Zambia have to a great extent abided by this autonomy. However, certain lapses have been observed in certain sensitive or political cases in which the expected outcome of judicial decisions have gone contrary to appropriate legal reasoning. In such instances, one would suggest that non-legal considerations underlay the judicial decisions.

The problem, it would appear lies in the current legal framework in which the judicature operates. The first problem is associated with the issue of appointing authority. Members of

30 Frederick N’gandu and Kabazo Chanda ‘The Role of the Judiciary in Promoting Transparency and Honesty in the Zambian Electoral Process’ (Norad/CMI/Inesor project on ‘Political Processes in Zambia)
the Judicature are appointed by the Chief executive, the president, on recommendation of the Judicial Service Commission and ratified by the legislature of which the president is also a part. A subtle allegiance to the appointing authority, it is suggested, appears to influence certain judicial decisions in matters which the executive may have a vested interest.

On some occasions, the Judicature has had the opportunity to decide criminal matters involving alleged crimes committed by members of the executive or their family members, and passed decisions favourable to the accused, even in the apparent abundance of culpability as has been seen in a number of recent cases.

Total autonomy of the Judicature, without the influence of the executive, therefore may lie in restructuring the legal framework within which the Judicature operates. It is suggested that the executive role in appointments, should of necessity, exclude the president, even though he is part of the legislature. This it is suggested would reduce the executive influence over the judicature and enhance the checks and balances upon which the value of the separation of powers is based.

As already stated one of the roles of the courts is to keep political actors and public officials from engaging in unlawful or unconstitutional activities in accordance with the power vested in them.

In light of the cases discussed above, it can be said that there have been significant attempts from the judges in Zambia to hold the government to account, but they appear not to have developed a strong accountability function with respect to the government or political figures. This could be due to the following reasons:

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32 Frederick Titus Jacob Chiluba v. The Attorney General (Supreme Court of Zambia Appeal number 125 of 2002)
(a) According to March and Olsen, people are motivated by the 'norms of appropriateness prevalent in the institution in which they operate'\textsuperscript{33}. Therefore Judges' behaviour will be influenced by the collective conceptions within their communicative community of what a good judge should do or be. In Zambia, the majority of the judges would probably insist on the importance of the judicial independence, however with regards to their ability to provide checks and balances to the executive (or government) they appear to identify themselves as part of the British common law tradition which is central in defining their norms of appropriateness. The British common law position as regards this is that the courts are retreactive rather than proactive and can therefore only decide matter brought before them.\textsuperscript{34}

(b) One of the biggest factors behind the apparent lack of independence of the judiciary as well as their apparent lack of ability to set limits for government officials' exercise of power is the legal framework defining the courts' powers and jurisdiction, regulations and organisation of the judiciary, as well as the financial and professional resources available to them.\textsuperscript{35}

\textsuperscript{33} James March and Johan Olsen, *Democratic Governance* (Newyork: At Free Press, 1995),45

\textsuperscript{34} Gloppen, Gargarella and Skaar*, *Democratization and the Judiciary*, 88

\textsuperscript{35} Gloppen, Gargarella and Skaar, *Democratization and the Judiciary*, 88
CHAPTER 3

Introduction

This chapter of the paper will delve into analysing the effectiveness of the doctrine of the separation of powers in providing the much needed checks and balances. Effectiveness in this context means successfulness or efficiency. It will therefore critically analyse whether or not the Judiciary does in practice act independently and uninfluenced by the other branches of government as they are meant to. It will also seek to discuss the instances in which the independence and integrity of the Judiciary has appeared to be compromised in Zambia. Further to this, it will discuss the extent to which the executive does in fact act within its powers and it will seek to establish whether there is a need to limit the discretionary powers vested in them for the purpose of protecting the rights and freedom of the citizens. Thirdly, it will also be analysing the effectiveness of the legislature.

In Zambia, the separation of powers is principally observed. There are no significant constraints on the basic functions involved in the separation of powers. However, the executive’s dominance clearly extends beyond the stipulations of the constitution. The legislature and the legislators are poorly equipped to act as an effective check on government actions.\textsuperscript{36} In rare cases has the legislature vetoed executive decisions.

Regarding the separation of powers, mutual checks and balances are partially restricted in practice. The judiciary has been relatively independent in passing judgments against the legislature and the executive save for the few examples discussed in Chapter two above. However, there is a perception that its independence has tended to be compromised in cases involving the executive (the president). There is no evidence of judicial decisions that have demonstrated a check on the president.

Does the Judiciary act independent in practice?

The president (upon recommendation by the Judicial Service Commission) appoints the judges of the Supreme and High Courts. A judge of the Supreme Court, high court chairman of deputy chairman of the industrial relations court may be removed from office only for inability to perform the functions of his office whether arising from infirmity of body or mind, incompetence or misbehavior and shall not be so removed except in accordance with the provisions of the Constitution. There is a further provision in the Constitution which provides for the establishment of a tribunal which will investigate the case of a judge before removal in which the tribunal consists of a chairman and not less than the other members who hold or have held high judicial office such as the tribunal recently set up by current president Michael Sata to investigate the three high court and supreme court judges that he recently suspended. This tribunal can be biased in the sense that the judge whose perpetual removal has been influenced by the political motives can collude to remove him from offices in order to gain favor from the executive. The tribunal after a proper inquiry represents the matter to the president and advises the president whether the judge ought to be removed from office for inability or incompetence or for misbehavior for which the president has an obligation to remove such judge from office. Article 98 gives so much power to the president to remove and suspend judges and this compromises the independence of judiciary as narrated by article 91(2). A similar occurrence recently occurred in the recent suspension of the two high court judges Charles Kajimanga and Nigel Mutuna and Supreme Court judge Nigel Mutuna by

37 The Constitution of the Republic of Zambia Act, No. 18 of 1999, Cap 1 of the Laws of Zambia, Article 98 (1)
38 The Constitution of the Republic of Zambia Act, No. 18 of 1999, Cap 1 of the Laws of Zambia, Article 98 (2)
current president Michael Sata\textsuperscript{40} following a judgment that ordered Mutembo Nchito and Post Newspaper owner Fred M’membe to pay back the ZMK 14 billion (approximately US$ 2,721,088.44) loan they owe the Development Bank of Zambia through the non-operational Zambian Airways. Michael Sata is believed to have ties to Fred M’membe and therefore, the intention behind his decision to suspend these judges is questionable.

The judiciary can be said to be to a certain extent independent and established as a distinct profession. However, there appears to be a link between the more politically important a case is, to the more the courts’ rulings are prone to political interference by the government, this appears to be the case in a number a few crucial cases\textsuperscript{41}. The functions of the judiciary are partially restricted by corruption, especially in the lower subordinate courts. Inefficiency is also caused by understaffing, a lack of educated and trained personnel, poor remuneration and lack of equipment. In general, the judiciary is overstrained and suffers from a huge backlog of cases, insufficient courtrooms and overcrowded detention centers in which many suspects spend long periods of time before being brought to trial. In general, cases are slow to go to trial. Local courts continue to employ customary lawyers are not allowed to participate in these proceedings and local court judgments often do not comply with the country’s penal code. All these factors affect the judiciary negatively.\textsuperscript{42}

In Zambia, it appears as though Corruption is something that is widespread. Some Corrupt officeholders are not prosecuted adequately especially in the cases which involve high-

\textsuperscript{40} Joseph Mwenda and Ernest Chanda, ‘Sata suspends three judges for alleged misconduct,’ www.postzambia.com, (accessed on 4 May 2012)
\textsuperscript{41} Frederick Titus Jacob Chiluba v. The Attorney General (Supreme Court of Zambia Appeal number 125 of 2002)
ranking officials or politicians. Often those with such status accused of corruption often slip through political, legal or procedural loopholes, if they are even prosecuted at all.

During the period in which former president Mwanawasa was in power, he seemed to take a firm stance against the fight against corruption when he introduced his anti-corruption policy, which he announced at the beginning of his first term. However, the stance taken appeared to lose most of its credibility with time. Some of the corruption charges against leading members of the former Chiluba government were successfully concluded. By the first quarter of 2009, at least seven accused former members of Parliament were convicted and sentenced to prison terms, including the former president Chiluba’s wife Regina Chiluba. Former president Chiluba’s case remained pending for a long time and despite what would appear as overwhelming evidence against him, he was acquitted.\(^43\) Many former high-ranking officials of the same government, who were widely believed to be involved in the same corrupt practices, have not been prosecuted.

There could be a number of reasons for the above, many believe that Levy Mwanawasa’s anticorruption policy was a political scheme to victimize his opponents and was largely lacking in substance.\(^44\) However, it goes to prove the above stated position that there appears to be a link between the more politically important a case is and the more the courts’ rulings are prone to political interference by the government.

The government after Levy Mwanawasa under Rupiah Banda appeared to present new cases of corruption involving senior members of the Rupiah Banda administration, which

\(^43\) Frederick Titus Jacob Chiluba and Faustine Kabwe v. The Attorney General (Supreme Court of Zambia Appeal number 102 of 2009)
prompted the Chief Justice to appoint special tribunal to investigate corruption against a
government minister.\(^4\)

In the past two chapters of this paper, reference has been made to the case involving former
president Frederick Chiluba v the DPP. In this case, the dismissal of an application for
judicial review against the DPP Chalwe Mchenga’s decision to withdraw an appeal
challenging the former president Frederick Chiluba’s acquittal did not come as a surprise for
the reasons highlighted above. This is because the issues raised centre around the powers of
the DPP, which are enshrined in the Constitution and on the separation of powers, which are
an embodiment of constitutional democracy and governance.\(^5\)

The Powers of the executive in Zambia

Generally there has been a gradual decline in executive dominance in Zambia and many other
African countries which began to become apparent in the early 1990s and which was
triggered by the impulsive awakening of the civil society organisations and the African
media’s protests against dictatorship type of governance, the abuse of power and corruption
and demands for individual freedom, human rights and the right to participate effectively in
the development and democratisation processes of Zambia.\(^6\)

Since the 1990s a republican form of government has increasingly characterised the Zambian
political governance systems, with functional systems of vertical and horizontal
accountability.\(^7\) In the early 1990s Zambia began to accept and use elections as the only
legitimate process for assuming power and the foundations of accountability.

In Zambia, various reform measures have been undertaken to reinforce horizontal and
vertical checks and balances on the executive, including constitutional, legislative and

\(^4\) The Anti Corruption Commission Act, No
\(^5\) Frederick Titus Jacob Chiluba v. The Attorney General (Supreme Court of Zambia Appeal number 125 of
2002)
2005, pg. 513
judicial reforms. In addition, the introduction of decentralisation and local government reforms as well as empowering civil society organisations and the media have emerged in Zambia. These organisations attempt to articulate the voice of the people, which ultimately has led to the reinforcement of checks and balances on the executive and its various agencies.49

It must be stated that the executive in Zambia has undertaken several measures to ensure checks and balances both within its own institutions and in the wider governance system. The creation of institutions such as the HRC, the ACC and having an Auditor General have been steps in the right direction towards good governance. Nonetheless, in Zambia there still appears to be a lack of independence from the executive which has reduced the effectiveness of watchdogs and advocacy agents in performing their functions. There has been an increase in the numbers of civil society organisations, including those in the media and the private sector, that enjoy independence from the executive corresponding with their goals and objectives.50

Effectiveness of the legislature

In assessing the role of the legislature in checking and balancing the executive a distinction ought to be made between constitutional prescriptions and political realities. The constitution of Zambia may impose the separation of powers functionally dispersing the three branches of government; however the political realities on the ground may in fact be undermining the independence of the legislature. This described situation may occur when:

(a) in the event that the same political party controls the presidency and also holds majority in the legislature;

50 Economic Commission for Africa “African Governance Report” (2005), pg. 124
(b) the constitution may grant the president the power to dissolve the legislature which perpetually threatens the legislators and thus undermines the independence of the legislature.\textsuperscript{51}

In the above mentioned circumstances it is very difficult for the legislature to balance or regulate the discretionary authority of the executive—let alone check or censure its exercise of power.

The legislature has several important functions. It enacts laws, rules and regulations and appropriates revenue, allocates resources and oversees public expenditure. The legislature is supported by a system of standing and select committees. The legislature ensures that budgetary allocations have been utilized according to the established procedures, for the intended purposes and in the most cost effective manner, accountable and transparent.\textsuperscript{52} The legislature uses other committees—select and standing committees—to debate specific issues related to economic, social, political or any other matters of national interests. It is thus in these committees that most of the checking and balancing activities of the legislature are carried out.

Another key function of the legislature is to act as a forum for the representatives of the people to articulate the needs and aspirations of their constituencies, express their grievances and anxieties, demand that wrongs done by the executive be rectified, debate public issues and policy options and take decisions in the interests and welfare of all the people in the country.\textsuperscript{53} In Zambia, parliament or national assembly go through a fully competitive electoral process. Such a competitive system is likely to assure serious deliberations over policy matters and presumably will lead to decisions that address the interests and welfare of the people. In the parliamentary system of governance, "Question Time" is the most

\textsuperscript{51}Augustus Molade Akiwumi ' Towards an effective Judiciary in Africa' http://www.unea.org/adfiv/documents/speeches_and_presentations/speech_akiwumi.htm (accessed on 15 February 2012)

\textsuperscript{52}Frank Johnson Goodnow , \textit{Comparative Administrative Law}, (New York: G. P. Putnam's Sons, 1897), 6

\textsuperscript{53}Goodnow , \textit{Comparative Administrative Law}, 6
important opportunity for the legislators to confront the executive and ask a wide range of questions related to the exercise of its powers and discretionary authority.

In Zambia, to effectively check and balance the executive, the legislature needs capacity, competence and independence. In terms of capacity, research facilities are highly important for helping legislators better understand issues that come before them. Competence comes in the form of information, knowledge and experience. Without capacity and competence, the legislature risks becoming dependent on the executive. Zambia appears to be deficient in this area—they appear to lack members who are well informed and able to introduce issues that are relevant to the needs and aspirations of their constituencies or the country as is seen by a few members of parliament who attend all the sessions, but whose voices are never heard.

Legislative independence means that it is or can be said to be free from interference from the executive, or civil society and private sector influences, including organised religious groups, ethnic organisations and big business, as well as forces from outside the country. An independent legislature is able to debate and pass laws and approve programmes that the legislators judge to be beneficial to the country as a whole.  

Issues of integrity and corruption status are necessary foundations for building moral authority and credibility. The perception of a legislature’s integrity is critical for its own legitimacy and respect from the citizens.

According to a household survey, in many countries the performance of the legislature is not highly rated albeit for various reasons. According to the experts surveyed, rarely are the parliamentary debates informative and responsive to the needs of the people. This relative weakness may be attributed to strong executive power.  

Is there a need for the separation of powers in Zambia?

The Judiciary is meant to be a pillar of protection for the rights of individuals. It is meant to be a means by which redress can be sought.

Governance implies to the way people are ruled either with or without their consent, they do not choose, or as such, the way people are governed can be bad or good. This paper seeks to amongst many other things highlight the difference between good and bad governance for the reason that it is important that citizens should distinguish the difference between the two in order to fully understand the type of government, which rules them. Good governance is a set of ideas, which promotes legitimacy competence, transparency and accountability of the government in due respect for human rights and the rule of law. For any country to develop, there is need of having institutions, which promote ingredients of good governance.

The absence of legitimacy, competence, transparency and accountability gives room to bad governance which hinders the development of Zambia. Most countries in the developed world have developed as a result of a good government framework. Zambia needs good governance to act as the essential framework within which the economy can flourish through the expansion of business and increase in foreign investment which will ultimately result in the prosperity of all citizens.

Citizen participation in the affairs of their country is a very important aspect of good governance. These same citizens should hold their leaders responsible for all the actions. This requires a well-informed society which can substantiate facts and ensure that all forms of human rights are enshrined in a constitution and adhere to the separation of powers is another aspect of good governance which safe guards the interests of all citizens. Most governments consist of the executive, legislature and Judiciary.

These three arms of government are supposed to be independent so that there is no abuse of power by one section of government. In Zambia, the Separation of Powers is undermined due to excess powers given to the executive over the Judiciary and legislature. The President is empowered to appoint members of the Judiciary including the Chief Justice. People appointed by the president are likely to be blindly loyal to the appointing authority. It is not surprising that most people doubt the credibility of our judicial independence. Separation of powers leads to respect for the rule of law since those who go against the law are apprehended regardless of their status. Excessive power to one arm of government hinders transparency and accountability which can be said to be the real key to good governance. Accountability and transparency can only be achieved if government institutions like the ACC, DEC and Police work independently, so that they can make follow up to irregularities.

In our country, the office of the auditor general has done a commendable job by exposing all those who have misappropriated public funds. Nonetheless, I am of the view that more can be done to bring the culprits to book. This has further been tramped up by presidential appoints to higher offices of some people who have been found guilty of misusing national resources or who have cases that are still pending.

A free and fair electoral system which allows regular elections is also important in order to achieve good governance. In our country, elections are regular but cannot always said to be free and fair. This is due to corrupt vices which characterises election times, unfair media coverage as was observed during the last 2011 presidential elections in which the media appeared to be biased in favour of the then ruling party the Movement for Multi-party Democracy (MMD) and misuse of government property by the ruling party as was also observed in the same elections. Tolerance is another aspect of good governance which is regularly ignored. This can be seen in the political antagonism, which exists between the civil

society, political parties and the media. It is rare in our nation to hear of political parties amicably resolving issues. This has led to the expulsion of some MPs which result into unnecessary expenditure on by elections.

Furthermore, lack of tolerance has caused a lot of antagonism between government and the private media. Media institutions are supposed to be independent in a country with good governance. However, our leaders seem to want to be praised all the time and never criticised. It is cardinal that various views be tolerated. Additionally, the media also needs to balance their coverage. It is unacceptable just to rely on the negative. The private and state media ought to report on both the strengths and weaknesses of the government. In Africa, there is a very bad perception by most politicians. It seems what matters most is winning votes and clinging to power. Successful handling of power from one government leader to another cannot be said to be good governance alone. What is important is what is attained by the people during the tenure of office.

It is for this reason that former Ghanaian President Rawlings was given an award for good governance despite having taken over power by force.58 It is the desire of each citizen to get the benefit of paying tax and this can only be achieved by good governance which will foster the economic, social and political wellbeing of its citizens in respect of human rights and the rule of law.

CHAPTER 4

Introduction

This chapter will provide a comparison of the legal system in Zambia and other legal systems around the world such as American system, the continental system which exists in countries such as France and Italy and many more with particular regards to the extent to which the three branches of government act separately from each other.

As has been established in the first three chapters of this research paper, the Separation of Powers can be understood as a constitutional doctrine according to which political freedom is best guaranteed by separating the powers of government into legislative, executive, and judicial branches, each with its own jurisdiction. The purpose behind this policy or set up is to ensure that no single group or individual can control all the levers of power and, thereby, rule despotically. The legislature has primary responsibility for law making, while the impartial interpretation of the law and the application of it to particular cases falls under the purview of the judiciary. The executive must obey the rules established by the legislature and enforced by the judiciary.

In the first chapter, we discussed the theory of the separation of powers laid down by Charles-Louis de Secondat, baron de Montesquieu. However early intimations of the idea can be found in ancient Greece and Rome, where the systematic study of constitutions started. Aristotle was the first comparative political thinker to notice that all constitutions have deliberative, judicial, and executive elements. Although he did not argue that government should be organized into separate branches, he believed that different types of constitutions (democratic, aristocratic, or monarchic) should be "mixed," so as to

59 George Brenkert, Political Freedom (Canada at Routledge, 1991) 2, 3
60 D Herling, A Lyon, Briefcase on Constitutional and Administrative Law (London: At Cavendish Publishing Limited, 2004), pg. 109
counteract the tendencies to corruption inherent in all pure constitutions.\textsuperscript{62} Though this does not fall 'neatly' under the separation of powers as has been established in the rest of this essay, however the intention can be said to be the same which is to avoid any kind of corruption or abuse of power that may come into play when too much power is vested into a governing body.

Greek historian Polybius (c. 200-c. 118 BCE) used this theory to explain Roman history, as did Renaissance Florentine thinker Niccolo Machiavelli.\textsuperscript{63} This doctrine was celebrated in the Declaration of the Rights of Man and the Citizen (1789) during the French Revolution, and it was the subject of intense debate by the framers of the Constitution of the United States as will be discussed further below.

Over the course of the nineteenth century the doctrine lost relevance, and its meaning was gradually restricted to a more specific distinction among types of democratic constitutions—specifically, presidential versus parliamentary government. Critics of Montesquieu charged that he had misread the English constitution, by failing to appreciate how in Westminster parliamentary systems the legislature and executive were fused in the cabinet and in the office of the prime minister. Such a fusion of powers made parliamentary systems elective dictatorships, or so claimed the critics. The Constitution of the United States, with its separate election of president and congress, came to be seen as the closest approximation of the separation of powers as will be discussed further below.

German philosopher Jurgen Habermas argued that the various branches of government in constitutional democracies correspond to different logics of argumentation and their separation is necessitated by these discourses.\textsuperscript{64} The legislature is the chief deliberative body,

\textsuperscript{62} Gerard Conway, \textit{The Limits of Legal Reasoning and the European Court of Justice} (Cambridge at University Press, 2012), 175

\textsuperscript{63} David J Bederman, \textit{The Classical Foundation of American Constitution: Prevailing Wisdom} (Cambridge at University Press, 2008), 59 - 60

\textsuperscript{64} Jeffrey Flynn, \textit{Communicative Power in Habermas’s theory of Democracy – European Journal of Political Theory} ( London at Sage Publications, 2009), 433
yet it has little administrative power. The weakness of the legislature as an administrative body ensures that its deliberations are insulated from the temptations inherent in the exercise of such power and hence oriented toward the production of general laws for the public good. The purpose of the separation of powers according to Habermas is to bind the exercise of administrative power to the deliberative power of citizens acting in concert. The executive administers policies consistent with parliamentary law; it represents the need for action within the rule of law. Equally important is the separation of power between legislature and judiciary. The role of the judiciary is to impartially enforce the law, and court procedures reflect this imperative. The fact that judges can deny citizens their most basic liberties requires that the rules and procedures for doing so be established not by the judges themselves but by the legislature as a body that represents the collective, deliberative power of the whole community. Critics of deliberative democracy object to its highly abstract and normative tone, while exponents see it as a promising beginning for a renewed discussion of the separation of powers.

American example

The United States Constitution is deliberately inefficient.

The Separation of Powers devised by the framers of the American Constitution was designed to prevent the majority from ruling with an iron fist. The framers shied away from giving any branch of the new government too much power and thus the separation of powers in the American Constitution also provides a system which allows for Checks and Balances.65

Three branches are created in the Constitution. The Legislative, composed of the House and Senate;66 the executive, composed of the President, Vice-President, and the Departments;67

66 Article 1, The United States Constitution
and the Judicial, composed of the federal courts and the Supreme Court. Each of these branches has certain powers, and each of these powers is limited, or checked, by another branch. For example, the President appoints judges and departmental secretaries. But these appointments must be approved by the Senate. The Congress can pass a law, but the President can veto it. The Supreme Court can rule a law to be unconstitutional, but the Congress, with the States, can amend the Constitution.

All of these checks and balances, however, are inefficient. But that's deliberate and not accidental. By forcing the various branches to be accountable to the others, no one branch can grasp enough power to become dominant.

The following are the powers of the executive: veto power over all bills; appointment of judges and other officials; makes treaties; ensures all laws are carried out; commander in chief of the military; pardon power. Whereas the following are the powers of the legislature: Passes all federal laws; establishes all lower federal courts; can override a Presidential veto; can impeach the President. The following are the powers of the Judiciary: the power to try federal cases and interpret the laws of the nation in those cases; the power to declare any law or executive act unconstitutional.

The checks and balances for all these three branches of the American government can be summarized in the following table:

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**British Example**

The British Parliamentary system works like this: There are two houses of the legislature. The upper house, the House of Lords, has traditionally consisted of the nobility of Britain:

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67 Article 2, The United States Constitution
68 Article 3, The United States Constitution
dukes, earls, viscounts, barons, and bishops. The very existence of the House of Lords was called into question. There were some calling for its abolition, whilst others for a combination elected/lifetime appointment system. A popular proposal calls for 80% of the body to be elected and the name to change to the "Second Chamber." The House of Lords serves a judicial function as a court of final appeal, but as a legislative body, is widely regarded as ineffectual. It can delay passage of bills issued by the lower house, though it cannot veto them.

The lower house, the House of Commons, consists of MPs (Members of Parliament) elected from one of 646 electoral districts. In the House of Commons, majority rules. The majority party makes all the laws. The minority has little voice. The Prime Minister, Britain's closest approximation of the Zambian President, is an MP chosen by the majority.

The head of state, analogous still with the American President, is the monarch (King or Queen). The monarch must approve of all bills, though the process today is little more than a rubber stamp. The Speaker of the House of Commons, elected by the House, acts as the referee in debate between the majority and the minority. The MPs in the House of Commons sit for five years, or until the monarch (at the Prime Minister's behest) dissolves Parliament and calls for new elections. The Prime Minister also heads the Cabinet.

In Britain, the majority party in the House of Commons holds all of the power. The judiciary has no power of review. The House of Lords holds little more than delaying powers. By


tradition, the monarch does not veto bills passed by the Parliament. And the de facto head of state, the Prime Minister, is a member of the Commons.\textsuperscript{73}

**French Example**

In France, the President is elected for five year terms by the people to a powerful position. The President can, and has, dissolved Parliament and call for new elections.\textsuperscript{74} The President appoints the Prime Minister. Together, the President and Prime Minister head the executive branch. The President does not have veto power over legislation, but can ask Parliament to reconsider a bill. The Prime Minister heads The Government, akin to the American Cabinet. Most bills passed into law originate with the Government. The President presides over the Cabinet, and has vast emergency powers. The French President, de jure does not have many powers, but because of the French election system, he usually has great popular support and is able to leverage that into political power. When the President's party holds power in the legislature, he is quite powerful, but it is quite diminished when the legislature is not controlled by his party.\textsuperscript{75}

The Prime Minister, chosen by the President from the majority party in the National Assembly (the lower house), has power that varies in direct correlation to that of the President. The Prime Minister chooses the members of the Government and is head of the military and the civil service. Deputies of the Assembly are elected by the people for five year terms. There are currently 577 deputies. The Assembly can vote to dissolve the Government, but in reality, such a move is unlikely.

\textsuperscript{73} R Darlington, A short guide to the British Political System, http://rogerdarlington.me.uk/Britishpoliticsystem.html (accessed on 16 March 2012)

\textsuperscript{74} Eva Liu, "Systems of Government in Some Foreign Countries: France" (Hong Kong: At Research and Library Services Division, Legislative Council Secretariat, 2000), pg. 8

\textsuperscript{75} Eva Liu, "Systems of Government In Some Foreign Countries: France" (Hong Kong: At Research and Library Services Division, Legislative Council Secretariat, 2000), pg. 6
The Senate, the upper house, is more powerful than the House of Lords in Britain, but not by much. Senators are elected by the various local officials from across the country to six year terms. There are currently 321 senators.

There is a written French Constitution. Laws, after passage but before enactment, can be reviewed by the Constitutional Council. Review is either requested (for most laws) or mandatory (for laws affecting the Constitution). Its nine members consist of three appointed by the Government, three by the Assembly, and three by the Senate. The Council is designed almost like the U.S. Supreme Court, but it has little of the power of that court.

For the French, the majority of the power lies in the hands of the Government. If the President is of the same party as the Government, he can also wield considerable power. The Assembly is highly limited to legislate on topics specifically spelled out in the Constitution; the Senate has far less power than the Assembly. The Constitutional Council has not proven to be the force in French government that it appears to have been designed to be.\(^6\)

**Canadian Example**

Canada was a subject of Britain for several centuries, and its system has many similarities with the British system. Until 1982, Canada did not have full control over its own constitution. Prior to 1931, the British Parliament could still legislate for Canada, but in 1931, much of that control was passed to the Canadians. More control passed in 1949, but full control was not gained until 1982,\(^7\) when the Constitution Act of 1982 gave Canada full control over its own constitution. Officially, the monarch of Canada (also the monarch of the United Kingdom) remains the Canadian head of state and is represented in governmental affairs by a governor-general. *De facto*, however, the monarch has no real control of any kind

\(^6\) Eva Liu, “Systems of Government In Some Foreign Countries: France” (Hong Kong: At Research and Library Services Division, Legislative Council Secretariat, 2000), 4

\(^7\) R Darlington, A short guide to the Canadian Political System, http://www.rogerdarlington.me.uk/Canadianpoliticalsystem.html (accessed on 16 March 2012)
over Canada. In an interesting circular system repeated throughout the former British Commonwealth, the governor-general is "recommended" to the monarch by the Canadian Prime Minister and the governor-general in turn *de jure* appoints the Prime Minister from the members of the House of Commons.

Canada is a federal system akin to that of the United States, with each of its ten provinces having a great deal of control over internal policy. Canada's three territories have less autonomy. Canadian federalism differs from American federalism, however, in that the provinces have specific powers reserved to them and all other powers belong to the federal government. The federal government has veto power over all provincial law-making.\(^7\) The branches of government are a mix of the British and American systems. The legislature is parliamentary and bicameral, split between the House of Commons and the Senate. The members of the Senate are recommended by the House of Commons and appointed by the governor-general. Appointment is for life or until age 75. There are currently 105 members. Members of the House of Commons are elected by the people; elections must be held at least once each five years. There are currently 308 members. The executive is composed of a Prime Minister and a cabinet.

A privy council is in place that works to supplement and support the Prime Minister and the cabinet. The members of the council include the Chief Justice of the Supreme Court; the staff is comprised of career public servants, ensuring continuity even when there is a change in the leadership party in the parliament. The Privy Council Office is separate and distinct from the Prime Minister's Office. The former is concerned with the efficient running of the government and is generally considered non-partisan. The latter is completely partisan and is concerned with the advancement of the platform of the Prime Minister and the ruling party.\(^8\)

\(^7\) R Darlington, *A short guide to the Canadian Political System*, http://www.rogerdarlington.me.uk/Canadianpoliticalsystem.html (accessed on 16 March 2012)

\(^8\) R Darlington, *A short guide to the Canadian Political System*, http://www.rogerdarlington.me.uk/Canadianpoliticalsystem.html (accessed on 16 March 2012)
The judiciary is more powerful in Canada, much like that of the United States; the Supreme Court has nine members which serve for life or until age 75. Each province has its own judicial system as well; these provincial courts work at the lowest level in the system, with the Supreme Court at the highest level and with superior courts in between. Each province has a Court of Appeal, and in all cases, the Supreme Court is a final court of appeal. The federal courts also act as the sole courts of Canada's three territories. The constitution allows the Supreme Court to be used as an advisory court, issuing opinions on the constitutionality of laws without any actual dispute needing to be in play.  


Different Systems Compared

The French and the British might mock at the fact that the American head of state, the President, has no power to make laws. They might cringe at the thought that judges can render the will of the people, in the form of a duly passed law, null and void. Canadians might think that state powers ought to be more detailed. However at the same time, Americans may find the institution of the British monarchy amusing or strange, and its continued hold, if only on paper, on Canada. They may also find the fact that the British thought of majority rule with no written constitution to be used as a guide or rule book rather strange. Whereas some may also be of the view that the French Presidency has the potential to turn tyrannical by the misuse of emergency powers.

However in light of the above, Zambia including all of the examples highlighted in this chapter have political and social traditions that date back many years. For countries that are highlighted above in this chapter, their political systems date back many hundreds of years. Despite what Americans might think are odd institutions and traditions in France, Britain, and
Canada they are all still prosperous nations. The systems work in the context of each nation, even if the details could not work in some others.
CHAPTER 5

Introduction
This Chapter seeks to summarize the discussions in chapter 1 to 4 above. It further provides some recommendations in light of the above.

Conclusion
The concept of the separation of powers is so fundamental such that the Zambian Constitution guarantees it. The previous four chapters have discussed and analysed the doctrine of the separation of powers in Zambia as well as in other jurisdictions and have ultimately established why this doctrine is so important. There exists a fundamental need for there to be checks and balances in place with regards to the administration of a country, i.e. the governance of the country. The Judiciary should be autonomous, the executive should not be allowed to act in excess of their powers and the legislature should be effective in legislating laws that are in the best interests of the citizens of the country and in democracy. With these three separate branches working together, no single one may impose its own agenda that goes against the interest of the people.

If, for example, the Parliament attempted to enact a law that was unconstitutional or not in line with the interests of the citizens of Zambia, the President in theory could veto that law in accordance with his/her obligations under section 44 of the Constitution of Zambia. If the president didn't veto it, the Judiciary may then declare it unconstitutional. This then ultimately leads to better governance in country, for the reason that issues such as corruption are limited (in theory) since it is much harder to get an unfair agenda passed when it would have to go through three different entities.

Further, the separation of powers makes the administration of the country slightly easier so that the responsibility is divided up, so no one single branch has to control all aspects of

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81 Section 44, the Constitution of the Republic of Zambia Act, No. 18 of 1999, Cap 1 of the Laws of Zambia
governing a country. It would be virtually impossible to have a single branch in government dealing with all the aspects associated with the governance of a country such as the legislation, enforcement and facilitation of the laws of a country. It would be too much responsibility and power in one body and would be a breeding ground for tyrannical governance.

Chapter four above provides examples how this doctrine operates in different jurisdictions. Even though different countries have different systems in places, ultimately, they more or less ensure that the framework provides for checks and balances to whatever extent.

Further to the above, the findings of this research paper are as highlighted above in the previous chapters, that the separation of power has a certain purpose which is to ensure that they are sufficient checks and balances so as to protect the autonomy of the judiciary, control the powers of the executive and to ensure that they are not acting ultra vires of their powers.

In the same vein, however it has been established that despite the important function that this doctrine serves, loopholes and lacunas have been observed in Zambia. The judiciary has appeared to have been compromised on a number of instances and the executive as well has seen to possess a significant amount of power which must be curbed. There is a large amount of power vested into the president of Zambia, such that the country could potentially be left at the mercy of an individual and would then ultimately be subject to the aptitude of that particular individual at that particular time.

Recommendations

This paper recommends the following in relation to the issues outlined:

1. **Revision of the Appointment and Remuneration of the Judicature and the separation of powers.**

   Judicial corruption is defined as acts or behavior or attempts that impair either the search for or the submission of the truth in the delivery of justice. It includes
omissions from any source, whether bribery, intimidation or any other act committed with the intent or reasonable foreseeable result that any kind of judicial orders, judgments and other issuances and judicial treatments will result in corruption. It includes the acceptance of sponsorship offered by people in power leading to subversion of the administration of justice. This definition covers investigation and pre-trial processes in addition to the actual trial process. The consequence is unfairness in the criminal process from start to end.\textsuperscript{82}

If there is an absence of proper mechanisms in place which facilitate the separation of powers between the judiciary and executive it will result in politically motivated appointments, transfers, dismissals and disciplinary control of judicial officers. Where the appointment of judges is done by the executive and endorsed by politicians, this creates a debt of gratitude that they feel obliged to repay.\textsuperscript{83} This creates an opening which may lead to judges being called upon to perform functions and duties that are not judicial in nature and there being some kind of consequence for their incompliance.

This paper recommends:

(a) The separation in power of the judiciary and the executive is the basis upon which all rules relating to the judiciary should be developed.\textsuperscript{84} Therefore, the executive should not have a say in which judges may sit to hear a particular case and the legislature should not reverse a judicial decision with retrospective


effect. Judicial independence must be guaranteed and protected by law as is the case in Zambia, however, it must also be guaranteed in practice as well by the provision of an adequate budget for the judiciary, managed by the judicial arm itself. Judges must be provided with adequate security to ensure that they are able to fulfill these functions and maintain independence accordingly.

(b) There should be an independent body for the purpose of managing judicial appointments and transfers for all the courts of Zambia, which must be made up of suitably qualified and impartial persons. Currently, judges of the High Court and Supreme Court of Zambia are appointed by the president subject to ratification by parliament. However, the fact that the appointments came from the president originally may result in judges feeling some kind of obligation of gratitude towards them. Further, the ratification process would only be effective in the event that the ruling party does not hold the majority of the seats in parliament. If members of the ruling party are in the majority then they would not be effectively “checking” the powers or decisions of the president. The Judicature Administration Act, the approval of the president is required for the appointment to the office of Chief Administrator of the Judicature and any staff required to assist the Chief Administrator perform his functions. Further to this, the approval of the president is required in connection with the dismissal, disciplinary action or termination of appointment of any officer holding an office to which the commission appointed him. The president should not be included in any of the above processes.

(c) The Judicial Code of Conduct Act currently provides with regards to extra judicial activities that a judicial officer shall not conduct activities outside the

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85 Section 93, the Constitution of the Republic of Zambia Act, No. 18 of 1999, Cap 1 of the Laws of Zambia
86 Section 3 (3) and 4 (2), the Judicature Administration Act, No. 42 of 1994, Cap 24 of the Laws of Zambia
office that create conflict with judicial responsibilities; creates doubt on the
officer’s capacity to act impartially as a judicial officer; brings the integrity,
independence and impartially of the judiciary into disrepute; and interference
with the proper performance of judicial duties.\textsuperscript{87} However, there should be
adequate measures in place that do not allow judges to undertake any office for
profit within a stipulated period of time (for example six years) after the date of
retirement and no sitting judge shall under any circumstances accept any office
that requires the performance of non-judicial functions.

2. \textbf{The powers of legislation being delegated to Ministers or the permanent
secretary who have are part of the executive.}

Delegated legislation is legislation made by authority of an Act of Parliament,
commonly referred to as the Principle Act. It includes statutory instruments; by-
laws, ordinances, orders in council and various other ‘instruments’. These are made
by the executive. This allows parliament to concentrate on more significant issues
involving principles and policies\textsuperscript{88} as opposed to debating on every small rule of a
technical nature. However, the delegation of legislative power to the executive
blurs the line between the executive and the judiciary. It raises questions regarding
the separation of powers, including the possibility of the executive branch
overreaching, which makes it necessary for the adoption of mechanisms to better
supervise the exercise of the delegated legislative power.

This paper recommends the development and consolidating the mechanisms which
include:

(a) directions as to the manner and form of making of delegated legislation;

(b) the staged repeal of delegated legislation after a certain time;

\textsuperscript{87} Section 11, the Judicial (Code of Conduct) Act, No. 13 of 1999 of the Laws of Zambia
\textsuperscript{88} D Meyerson, ‘The Rule of Law and the Separation of Powers’
(c) provision for the disallowance of instruments by resolution of Parliament; and
(d) parliamentary committee review of the delegated legislation.

3. **Amending the constitution to reduce the amount of power vested into the president of Zambia**

Undoubtedly the amount of power vested into the president of Zambia is immense. The powers and office of the president is set up in the Constitution of Zambia.\(^8^9\)

The president to an extent plays a key role in the appointment of key positions in the Judiciary, the Executive, the Electoral Commission and the vast Cabinet.

The amount of power as described makes the concept of the separation of powers questionable in that the powers of the president extend beyond the executive.

As discussed above, the Judicature Administration Act, the approval of the president is required for the appointment to the office of Chief Administrator of the Judicature and any staff required to assist the Chief Administrator perform his functions.\(^9^0\) The approval of the president is required in connection with the dismissal, disciplinary action or termination of appointment of any officer holding an office to which the commission appointed him.\(^9^1\) This paper recommends that the president should have no input whatsoever in these processes.

4. **Ensuring that the Media has their freedom of speech**

The Media plays such an important role in the establishment of the doctrine of the separation of powers. It can be said to be a Fourth Estate in a constitutional democracy. However in order for this to be the case in practice there is a requirement for it to be independent and possess freedom of speech. It is only free and independent if it can play a watchdog role of counter-checking the three other branches of the government.

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\(^8^9\) Section 33, the Constitution of the Republic of Zambia Act, No. 18 of 1999, Cap 1 of the Laws of Zambia
\(^9^0\) Section 3 (3) and 4 (2), the Judicature Administration Act, No. 42 of 1994, Cap 24 of the Laws of Zambia
\(^9^1\) Section 5(1), the Judicature Administration Act, No. 42 of 1994, Cap 24 of the Laws of Zambia
This paper recommends that the media and the judiciary should work together as they are the only two branches that have no direct political mandate from the people to carry out their function. This usually puts the two branches in a very weak position compared to the other two, executive and the legislature. Members of parliament and the executive branches always derive their political mandate from the people through periodic elections. However, a judge does not seek direct political mandate through elections. Because of this, the executive and legislature usually think they are above the two because they consider themselves representing the views of the voters who voted them into power. 92

In Zambia, three reporters were arrested and charged under the State Security Act when they published a story, which exposed government plot to hold a spontaneous referendum to decide on the contentious constitutional clauses. 93 The police said the story breached state secrets because the matter was discussed in a secret cabinet meeting. However, the high court judges ruled in favor of the media stating the following quote:

Referenda are the known lawful ways of asking the general citizenry to decide by plebiscite certain contentious issues which the government does not want to decide on its own. I think it would surprise many and even jar their instincts to hear that in Zambia three nosy journalists have been imprisoned for twenty years for prematurely announcing government intentions to hold a referendum to decide a thorny constitutional issue.

The point of highlighting the case above is to portray the need for the independence of the Judiciary in checking the executive which was recognized by the courts. There is a need for the rest of the judiciary to take a firm stance such as this and ensure that the media is indeed acting as the fourth pillar of government.

92 The People v Fred M’Membe, Masautso Phiri and Bright Mwape (Appeal No. 97 and 187 of 1995)
93 The People v Fred M’Membe, Masautso Phiri and Bright Mwape (Appeal No. 87 and 197 of 1995),
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