
BY
Sugzo McBride Dzekedzeke
(97085308)

An Obligatory Essay submitted to the School of Law of the University of Zambia in partial fulfilment of the requirements for the award of the Degree of Bachelor of Laws (LL.B)

The University of Zambia
School of Law
P.O.Box 32379
Lusaka
A COMPARATIVE STUDY OF THE APPLICATION OF THE
DOCTRINE OF SEPARATION OF POWERS IN ZAMBIA, THE
UNITED KINGDOM OF GREAT BRITAIN AND THE UNITED
STATES OF AMERICA

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Dedication

To my Father and Mother, Mr Ostoph Aggrey Elliot Dzekedzeke and Mrs Catherine
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family for giving me an opportunity of graduating.
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be accepted for examination. I have checked it carefully and I am satisfied that it fulfils the requirements relating to the format as laid down in the regulations governing Directed research Essays.

Supervisor: [signature]
_Mrs H.Njovu Chanda_

Date: 27/12/03
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First of all I would like to extend my greatest gratitude to my supervisor Mrs Hope Njovu Chanda for her priceless guidance throughout this research.

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The University of Zambia

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Chapter One

INTRODUCTION

The doctrine of Separation of Powers has emerged in several forms at different periods and in different contexts. The great Greek thinker Aristotle (384-322) wrote that people in government must have knowledge that should enable them to act properly and make people live happily.\(^1\) But acting properly, he proceeded, is a difficult task and to him, only the ideal person is able to act properly. He however added that even ordinary persons, provided others guide them, are able to act properly. This was Aristotle’s basic foundation of the doctrine of Separation of Powers.\(^2\) John Locke did much to develop this doctrine when he declared, after the English revolution of 1888, that the final authority in political matters belonged to the people;\(^3\) not only people from the King’s palace, or from his courts, or from parliament, or indeed the ordinary person, but also all the people.\(^4\) It is the people who make up government and the government’s main purpose, he said, was to protect the lives, liberties and property of the people. To guarantee these therefore, it must be made possible for one organ of government to stop the other when that other has or is about to violate an individual’s right.\(^5\) The best-known formulation however was by the French philosopher Montesquieu,\(^6\) who held that governmental powers should be separated and balanced to guarantee individual rights and freedoms.\(^7\) Montesquieu’s

\(^1\) Aristotle and His Philosophy, page 46

\(^2\) Ibid., page 48

\(^3\) John Locke: A Biography. Page 86

\(^4\) Ibid, page 87

\(^5\) Ibid page 87

\(^6\) Constitutional and Administrative Law, page 49

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\(^6\) Constitutional and Administrative Law, page 49
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format of this doctrine, which format is also the basis of this paper, is that: (a) the same people should not form part of more than one of the three organs of government namely the judiciary, the legislature and the executive. For instance, a judge of the Supreme Court should never be a part of the executive branch of government by holding a ministerial position; (b) one organ of government should not interfere or control the exercise or functions of the other organs of government. For example, that the judiciary should be independent of the executive; (c) one organ of government should not exercise the functions of another organ of government. 8 The latter sentence entails that ministers therefore should not exercise the function of legislating. This research paper will look at the way the United States of America (U. S. A), Great Britain and Zambia apply this doctrine. The choice of the three countries is explainable. The United Kingdom of Great Britain has been chosen because that is the former colonial master of Zambia (Northern Rhodesia) and the latter modelled most of its system of government based on how the system is like in the United Kingdom, or to put it more accurately, based on how the system is perceived to operate. The United States of America has been included in this comparative study because it has a significantly different system of government and democracy than that of the United Kingdom and yet, quite similar to that in Zambia.9 The United States of America, additionally, is an established democracy and a self-acclaimed champion of democracy with the vision of encouraging all states in the world to believe and hail the democracy that they practice and prophecy. Further, the choice of America has

8 J.P Sangwa’s LLM Thesis,( On The Doctrine of Separation of Powers) page 26
9 The U.S system is different from that in the United Kingdom in that there is no monarch in the U.S and there is one in the U.K. Also because the latter country is a Parliamentary democracy while the former is a constitutional democracy. The U.S system on the other hand resembles the Zambian one in the sense that the two are both constitutional democracies.
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been made because of the American attitude towards governance, independence, freedom and democracy. Additionally, the author has chosen to use the American system as a comparing case because American democracy dates as far back as 1774. The author assumes that by virtue of its long age history of people’s participation in government, its democracy is the most advanced and experienced.

This essay is an inquisitorial of how the three countries adhere to the rules or the doctrine of separation of powers. The doctrine shall be shown to be a not so strict bunch of rules because of the likely adverse ramifications that would follow were the rules to be rigidly applied. At the same time, it will be argued with examples that should tyranny be avoided, should democracy be advanced, should civil liberties be protected, separating governmental powers must be done by all governments. However, at the same time, it will be shown that America, Britain and Zambia are three quite different systems of government, with different cultures and histories that make it impossible for the doctrine of separation of powers to be applied similarly.

But the most important point to be made in this essay is that separating governmental powers is one sure way of avoiding tyranny.

Chapter one is dedicated to propounding the doctrine of separation of powers and briefly explaining the value and importance of the concept. The chapter will also address the disadvantages of rigidly applying the doctrine. It will, additionally, briefly explain how the different organs of government act as checks on the other organs.

10 A Concise History of the American Republic, page 454
11 And so, any young democracy desiring to build itself and develop should always make reference to the American democracy and investigate how their system has developed over the years.
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This chapter will also briefly look at how different and similar the applicability of the doctrine of separation of powers is done in Britain and Zambia.

DEMOCRACY AND SEPARATION OF POWERS

Separation of powers entails that the three organs of government must be separated and composed of different and separate persons at all times so that, for example, one person does not perform legislative and judicial functions at the same time.

There is an unavoidable connection between democracy and the doctrine of separation of powers. Although the characteristics of democracy vary from one country to another, certain basic features are more or less the same in all democratic nations: freedom of expression, free elections, majority rule and minority rights, political parties and division of power. It seems certainly desirable to have a democracy in every state. Democracies have always attempted to preserve individual freedom and to promote equality of opportunity. And for individual freedom to be preserved and equality of opportunity to be promoted there must be the least of government interference in people's day-to-day life. At the same time it is accepted that some government regulation of society and the economy is necessary to preserve personal freedom and equality, as well as to improve the welfare of the nation. Brock points out that democratic societies ought to divide and spread out political power; that they ought to have various arrangements to prevent any person or branch of

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12 The World Book Encyclopaedia, D

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14 Democracy, page 121

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WHY SEPARATING POWERS

Montesquieu indicates that separating the three functions is the only means for guaranteeing of liberty. The real value of the concept lies in maintaining the balance of power between the various organs of government through checks and balances. The concept of separation of powers cannot be understood separately from the concept of checks and balances. Separation of powers does not mean a complete separation and absolute demarcation among different branches of the government. A complete separation will make the government chaotic, unworkable and potentially dangerous. This is why separation of powers has to be combined with checks and balances. The constitutional system of checks and balances are designed to prevent

\textsuperscript{16} ibid, page 14

\textsuperscript{17} It shall be shown for example how the Zambian President, and his cabinet have combined executive and legislative functions, to such an extent that the President wields a great amount of control and influence over the legislature which is composed of members of the legislature who are also appointed to executive portofolios (Ministers, Deputy Ministers and Provincial Deputy Ministers)
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one branch of the government from becoming too powerful and therefore dangerous. Checks and balances therefore work to prevent tyrannical concentration of power. For example, if there is no executive veto power, the legislature will eventually get all powers of the government. Or, if there was no judicial review of executive performance of power, the Executive and the Legislature will arbitrarily make decisions and rules without hindrance.

It is not too difficult to understand that different entities pursue different ends. All those who have power seek to abuse it. They seek always its increase so far as possible. To avoid arbitrariness it is necessary to confine the exercise of public authority to several powers so that one shall serve as a check on the other. Should the abuse of power be avoided, one holder of it must be able to check the other. Since Montesquieu’s time, scholars have taught that the separation of powers, and the distribution of the functions that make up the public power among several different holders really constitute the best way of guaranteeing the individual’s freedom.¹⁸ The writer of this paper however suggests that it is impossible to assure the absolute disappearance of abuses of power because holders of power are only human beings who are subject to their own desires, passions, inclinations, interests and aspirations. These personal interests are bound to frequently come into conflict with the interests of the state. But that is exactly why the concept of separation of powers has been aggressively taught and encouraged since the days of Montesquieu: that is, to make certain that the personal interests of the power holder, being the warmer and the more directly effective upon men, do not prevail over the more remote and abstract interests of the state when the two interests come to conflict. Separation of powers therefore

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It is not too difficult to understand that different entities pursue different ends. All those who have power seek to abuse it. They seek always its increase so far as possible. To avoid arbitrariness it is necessary to confine the exercise of public authority to several powers so that one shall serve as a check on the other. Should the abuse of power be avoided, one holder of it must be able to check the other. Since Montesquieu’s time, scholars have taught that the separation of powers, and the distribution of the functions that make up the public power among several different holders really constitute the best way of guaranteeing the individual’s freedom.\textsuperscript{18} The writer of this paper however suggests that it is impossible to assure the absolute disappearance of abuses of power because holders of power are only human beings who are subject to their own desires, passions, inclinations, interests and aspirations. These personal interests are bound to frequently come into conflict with the interests of the state. But that is exactly why the concept of separation of powers has been aggressively taught and encouraged since the days of Montesquieu: that is, to make certain that the personal interests of the power holder, being the warmer and the more directly effective upon men, do not prevail over the more remote and abstract interests of the state when the two interests come to conflict. Separation of powers therefore

\footnotesize{\textsuperscript{18} The General Theory of Law, page 383.}
should be seen as a solution to the natural defect of man’s selfish nature. It is impossible to change human nature and uproot from the human soul its passions and interests. These can only be controlled. Some guarantee of the state’s general interests is therefore needed. This objective will be achieved if the different functions of power are entrusted, not to a single person or organ, but to several, in such a way that each important act of power shall not depend exclusively on a single will. The general interests of the state have equal weight with all the citizens’ and are not paralysed when entrusted to several persons because they tend in the same direction, but they are thus, on the contrary freed from individual interests.\textsuperscript{19}

Korkunov\textsuperscript{20} goes to the length of suggesting that judicial power ought not to be given to a permanent body but to be left to chosen individuals elected by the people to hold such positions for a short time.\textsuperscript{21} The author of this paper seeks to differ with Korkunov on this point. The writer suggests that separation of powers does not mean the borders between the three organs of the government must be rigid, but rather there should be a strict line. The line must be strict enough to allow for the checking and balancing of powers but not so strict that the system becomes inflexible and so unworkable.\textsuperscript{22} The other implication read into the separation of powers doctrine is that

\textsuperscript{19}Ibid, page 49

\textsuperscript{20} Author of the book, General Theory of Law, on page 49

\textsuperscript{21} It shall in fact be argued that the judiciary looks to be the weakest of the three organs of government because of a number of reasons including that judges are not elected to their positions

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23 World Book Encyclopaedia, U

24 Article 88 of the Zambian Constitution

25 Ibid

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ROLE OF THE JUDICIARY

The judiciary of every legal system plays a vital role in balancing powers of the state. The judiciary plays the role of checking the limits or the extent of the exercise of the powers of the executive and the legislature through judicial review. Judicial review is the power of courts to review the legislative acts of the legislature and the administrative acts of the executive branch. In a federal system such as that of the United States, judicial review also includes the power of federal courts to review the acts of the state government (both legislative and administrative) for potential violations of the federal constitution and other federal laws. In the United States, one of the key authorities and the ultimate authority that the courts rely on in conducting judicial review is the American Constitution. American courts have the power to invalidate legislative or administrative acts of other departments for violations of the

27 Article 37(1)
28 Black's Law Dictionary.
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the American constitution, there are several constraints on the power of the judges.
One of them is that judges can be impeached by the Congress and removed by the
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Chapter two

DISADVANTAGES OF RIGIDLY APPLYING THE DOCTRINE OF
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30 ibid
31 Article 1 (3)
32 Section 4 (5)
33 Christine Mulundika and Others V the Attorney-General SCZ 1997
34 ibid
35 Article 98 (2)
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The true meaning of the maxim of separation of powers is entirely compatible with a partial intermixture of several departments for special purposes, preserving them, in the main, distinct and unconnected. This partial intermixture is not only proper but also necessary to the mutual defence of the several members of the government against each other. It was noticed for example that the Senate of the United States, conducted the impeachment trial of Bill Clinton, and not the Supreme Court. This is a case where the legislature performed a judicial function. A question can be asked whether the arrangement violated the principle of separation of powers. The author of this essay answers that it was a violation but one of those necessary violations. The author advances three reasons for accepting such a violation. First, the impeachment and removal of a president is essentially a political problem. A political problem should be solved through political processes in a democratically accountable way. Trial by judges, who are not democratically elected, is not democratically accountable. Second, the people elect the President, but the judges are appointed. Facing the extraordinary problem of whether to remove the democratically elected president, the un-elected judges lack the fortitude, credit and appearance of authority to make a decision. Third, for an issue of such a magnitude, some public support is very important. In order to garner public support, public opinion needs to be influenced. The court, with un-elected judges, is not equipped to influence the public opinion. Indeed, judges are by design insulated from public sentiment. In contrast, Senators and members of Parliament, being representatives of the people of various states and constituencies respectively, are very good at influencing the public opinion.

Another area, which can suffer, was the separation of powers doctrine applied rigidly is that area of judicial legislation or judge made law. It can hardly be a matter of
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serious dispute at the present day that, within certain narrow but not clearly defined limits’ law is created by the judiciary. This is a way in which the judiciary dispenses with its function of acting as a balance, although the practice by judges to make law is against the principles of separation of powers. But the author seeks to state that a progressive society has to keep adapting the law to fresh social and economic conditions. Judge made legislation can prove in modern times the essential means of attaining this end. The legislature cannot all the time draft laws that are all encompassing as regards particular kinds of situations. The way different circumstances of every case get affected by the same legislation will differ from time to time and those slight differences must be left to the judge to settle as they are presented to him. The judge cannot be expected to say ‘the law is silent over this matter therefore; your case cannot be settled. I will send this problem to parliament’.

John Austin\(^{36}\) could not understand how any person who has considered the subject (of judge-made-law) can suppose that society could possibly have gone on if judges had not legislated. The judges only make up for the negligence or incapacity of the legislator. In fact, he proceeds to say that that part of the law of every country, which was made by judges, has been far better made than that part which consists of statutes enacted by the legislature.\(^{37}\) And of course that is to be expected since the judge is a legally educated man/woman with a better understanding of how best a law should be drafted and interpreted.

If it had been insisted upon that judges should stick to interpreting the law and not making it, we would not have the rule in *Rylands v Fletcher*\(^{38}\) which is today an

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Applying the concept of separation of powers rigidly can easily land us in further problems of overburdening the legislature even where it is not capable. That would also mean that Ministers and their servants, including local councils would not be allowed to make by-laws through delegated legislation. Now, leaving all spheres of life to be governed by legislation emanating only from Parliament would be a situation that will produce a lot of unfavourable results. For the legislature does not, in many instances draft laws that are detailed enough especially if the law is about a technical subject. In such instances, it is desirable that the Minister responsible, who is assumed to be surrounded by a team of experts, sits down and makes the by-laws.

\textbf{BRITAIN AND ZAMBIA}

The two countries have been put under one head because they have a similar arrangement in terms of how the structure of their governments is organised. For the most part, Zambia purports to have built its system using the British model.\textsuperscript{39} The British Prime Minister is usually the leader of the political party that has the most

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\textsuperscript{39} It appears that Zambia could not successfully claim that it built its system of government based on the British model because the two systems are clearly different from the start. Britain is a monarch and Zambia is a Republic. The latter has a unicameral parliament while Britain is a bicameral. Also, the chief executive in Britain is the Prime minister who is not directly elected to No. 10 Downing Street while in Zambia, the chief executive is the President who is directly elected to State House.
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seats in the House of Commons. That means that the Prime Minister is a Member of Parliament. After each general election, the Monarch appoints the Prime Minister. The Monarch then asks the Prime Minister to form a government - that is, to select ministers to head governmental departments and to hold various offices. The prime minister selects 100 ministers. From them, the prime minister picks a special group to make up the cabinet. The prime minister chairs the cabinet, which usually consists about twenty ministers. The government draws up most bills and introduces them in Parliament. If the House of Commons votes against the government on an important issue, it gives the government a vote of no confidence. The prime minister then is expected to resign with his or her cabinet. But this seldom happens because the Prime Minister is the leader of the largest party. In addition the prime minister can advise the queen to dissolve Parliament. If Parliament is dissolved a general election is held. The queen appoints the judges on advice of the government.

There is something to note about the constitutional order of Zambia: There is no rigid application of the concept of separation of powers. The President, from amongst members of Parliament chooses ministers, who are members of the executive. And to be a Member of Parliament, there is no requirement that one has to be elected in that one can still become a Member of Parliament by being nominated to the House by the President. The current Vice-President Nevers Mumba is a nominated member of the

40 World Book Encyclopaedia, G 398
41 ibid, G 398
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45 Mr J P Sangwa’s Thesis, page 28  
46 Mr F. T. J Chiluba  
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judges of the High Court after consultations with the Judicial Service Commission, but the appointments are subject to ratification by Parliament. ⁴⁹

Chapter Three

UNDERSTANDING THE DOCTRINE OF SEPARATION OF POWERS IN THE UNITED KINGDOM

Introduction

In arguing the application of ‘The Separation of Powers’ in the United Kingdom of Great Britain in this chapter, two stages of the argument shall be followed. First, it is suggested that the separation of powers in American constitutionalism has three goals: to further democracy and the project of self-government; to facilitate professional competence and to protect and enhance fundamental rights. Secondly, the author will follow an argument to the effect that what is called “constrained parliamentarianism” is better able to attain these goals than is the constitutional practice of contemporary American presidentialism. But the most essential point to be made in this part is that the doctrine of separation of powers in the United Kingdom cannot be copied exactly by any system that does not have a Monarch. ⁵⁰

The Tradition of Separation of Powers

According to Geoffrey Marshall,⁵¹ the separation of powers as it is classically understood encapsulates the following five ideas – although, we should note, this is Marshall’s synthesis: no one writer can be pointed to as authority for all five of these

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⁴⁹ Article 95 of the Constitution

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⁵¹ Constitutional Theory, page 180
judges of the High Court after consultations with the Judicial Service Commission, but the appointments are subject to ratification by Parliament.\footnote{Article 95 of the Constitution}

\textbf{Chapter Three}

\textbf{UNDERSTANDING THE DOCTRINE OF SEPARATION OF POWERS IN THE UNITED KINGDOM}

\textbf{Introduction}

In arguing the application of "The Separation of Powers" in the United Kingdom of Great Britain in this chapter, two stages of the argument shall be followed. First, it is suggested that the separation of powers in American constitutionalism has three goals: to further democracy and the project of self-government; to facilitate professional competence and to protect and enhance fundamental rights. Secondly, the author will follow an argument to the effect that what is called "constrained parliamentarianism" is better able to attain these goals than is the constitutional practice of contemporary American presidentialism. But the most essential point to be made in this part is that the doctrine of separation of powers in the United Kingdom cannot be copied exactly by any system that does not have a Monarch.\footnote{And as such, Zambia cannot have a system that can exactly, or even closely resemble that of the United Kingdom}

\textbf{The Tradition of Separation of Powers}

According to Geoffrey Marshall,\footnote{Constitutional Theory, page 180} the separation of powers as it is classically understood encapsulates the following five ideas – although, we should note, this is Marshall’s synthesis: no one writer can be pointed to as authority for all five of these
ideas. Marshall provides the following list: "(1) The differentiation of the concepts, 'legislative', 'executive', and 'judicial'. (2) The legal incompatibility of office-holding as between members of one branch of government and those of another, with or without physical separation of persons. (3) The isolation, immunity, or independence of one branch of government from the actions or interference of another. (4) The checking or balancing of one branch of government by the action of another. (5) The co-ordinate status and lack of accountability of one branch to another."52

This traditional understanding of the doctrine of separation of powers famously emanates, of course, as we have earlier stated, from Montesquieu's misunderstanding of the British constitution in the early eighteenth century. How did twentieth century constitutional commentators fit this theory into their accounts of the UK constitution? Almost all the textbook writers take the same basic approach: they describe the doctrine, they drop Montesquieu's name, and then they assess the extent to which the UK's constitution fits the paradigm. In the earlier part of the century, writers seemed "to speak almost with one voice in denying that the separation of powers is a feature of the constitution."53 This is not surprising. The numerous instances of fusions, rather than separations of powers, are well known. The Lord Chancellor, for example, is not only the nation's highest judge, but also a key member of the House of Lords as legislative chamber, and also a senior member of the cabinet.54

52 Ibid at p. 100. Emphasis in the original.


54 Ibid, page 190
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\(^{52}\) ibid at p. 100. Emphasis in the original.

\(^{53}\) Studies in Constitutional Law, p 193.

\(^{54}\) Ibid, page 190
nation’s highest court is the judicial committee of the House of Lords. The judges who compose it also have a legislative voice (and a vote) in the House of Lords.\textsuperscript{55} Every single minister in the executive is also a member of either one of the Houses of Parliament\textsuperscript{56} (more on this point below). These are overlaps in terms of personnel. But there are also many functional overlaps: the (parliamentary) enforcement of parliamentary privilege; the role in criminal sentencing of the Home Secretary; the making of delegated legislation; the making of procedural rules governing judicial process; the growing use of senior judges to chair public inquiries, like the current enquiry headed by Lord Hutton (into the circumstances surrounding the suicide of a government inspector who had made comments to the BBC soon after the end of the US/UK-led invasion on Iraqi)\textsuperscript{57} and so forth. All of these and many more examples besides could be cited as evidence for what might be called the traditional view: that the UK’s constitution breaches the separation of powers just as much if not more than it respects it. But what is the reason behind these breaches of the simple rules of separation of powers? Or are they really breaches that should worry anybody at all? Are they capable of encouraging tyranny?

Munro\textsuperscript{58}, for example, traces the overlaps that exist in contemporary UK constitutional practice between the legislature and the judiciary, between the executive and the judiciary, and between the legislature and the executive – overlaps both in terms of personnel and in terms of function, back to the history of the struggle

\textsuperscript{55} Ibid, page 200

\textsuperscript{56} Ibid, page 200

\textsuperscript{57} The Guardian, page 11

\textsuperscript{58} Munro C, Studies in Constitutional Law, page 131
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for power between Parliament and the Monarch.\textsuperscript{59} But in his survey he lays at least as much emphasis on the restrictions placed on those overlaps as he does on the overlaps themselves. Thus, Munro’s conclusion is that while “we must grant ... that there is no absolute separation of powers in this country ... in a variety of important ways, ideas of the separation of powers have shaped constitutional arrangements and influenced our constitutional thinking, and continue to do so.”\textsuperscript{60}

Closely adopting the Munro line is Hilaire Barnett’s text, \textit{Constitutional and Administrative Law}\textsuperscript{61} that devotes thirty pages to the separation of powers (pp 127-156). In introducing the topic, Barnett states, “the separation of powers, together with the rule of law and parliamentary sovereignty, runs like a thread throughout the constitution of the United Kingdom. It is a doctrine which is fundamental to the organisation of a State”.\textsuperscript{62} Thirty pages later her conclusion is slightly more measured, although still rather odd: “the separation of powers is certainly neither an absolute nor a predominant feature of the British constitution. Nevertheless, it is a concept which is firmly rooted in constitutional tradition and thought ... [and it] exerts its influence on each of the fundamental institutions of the State.”\textsuperscript{63}

\textsuperscript{59} More on this below

\textsuperscript{60} Munro, Studies in Constitutional Law, pp 208-211.


\textsuperscript{62} Page 127

\textsuperscript{63} Page 156
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66 This change in terminology, from having talked thus far in this paper of the UK to talking now of England, is deliberate. The UK is the United Kingdom of Britain and Northern Ireland. It was formed in 1801 with the Act of Union between Britain and Ireland. It was subsequently altered with the partition of Ireland in 1922. Britain was formed in 1707 with the Act of Union between England and Scotland. Technically, England should be read as meaning England-and-Wales (Wales was annexed by England in 1536). My argument about the separation of powers in the seventeenth century is an argument about England. Scotland was, and remains, different.
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be based on an eighteenth century theory? It is nonsense to suggest that it could be.\textsuperscript{67}

But – and this is where this author differs from the early twentieth century writers – this is not to say that the English constitution is not based on a notion of the separation of powers at all. It is just that that notion must be a seventeenth century one. The seventeenth century was the formative period of the English constitution – the foundational moment. The English constitution was forged in the blood of civil war and its aftermath, not in the political idealism of the enlightenment. Civil war; regicide; interregnum, commonwealth and protectorate; restoration; and (allegedly) “glorious” revolution were the key components of English constitution making. By the close of the seventeenth century the foundations of the English constitutional order had been laid. The institutions of state, and the constitutional relations between the institutions of state and each other, were already in place in England by the 1690s. It is hardly surprising, therefore, that an eighteenth century political philosophy cannot really explain the English constitution – how could it? Sadly for British liberal constitutionalists, the English constitutional order had already emerged before the radical genius of Montesquieu and James Madison had become available.

\textsuperscript{67}The author is not suggesting, of course, that nothing has changed since 1700. Such an argument would be absurd. The constitution has developed considerably since 1700, particularly in terms of the relationship between the individual and the state. But I am suggesting that, at least in term of the relationship between the institutions of state and each other, that such development as there has been since 1700 is based on the foundations which were laid in the seventeenth century.
The civil war was fought between two equal powers. On the one side there was the crown, and on the other stood Parliament. It is this paper’s argument that separation of powers English style – to this day – reflects this historical reality. Separation of powers English style is a confrontational, bi-partisan, bi-polar separation, between the only two powers the constitution has ever recognized as enjoying any degree of sovereign authority, namely: the crown, and Parliament. Every constitutional actor is on one side or the other of this great divide. Ministers of the crown, it will be suggested, are on the crown’s side. Civil servants, too, servants of the crown, are on the crown’s side. And, most controversially for many lawyers at least, the courts are also on the crown’s side (the High Court and the Court of Appeal are, after all, housed in a building called the Royal Courts of Justice). In one sense, this dualism is typical of the period the paper talks about above: as David Underdown has written, “thinking in binary opposites was an almost universal habit of mind in the seventeenth century.” 68

I

The sovereignty of Parliament

As is well known, there is nothing higher in English law than an Act of Parliament. This rule of the hierarchy of legal norms is usually known as the ‘sovereignty of Parliament’, although the ‘legal supremacy of Acts of Parliament’ would be a better phrase. Dicey wrote in the late nineteenth century that the doctrine of the sovereignty of Parliament means two things: first, and positively, it means that Parliament may

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make or unmake any law whatsoever. Secondly, and negatively, it means also that no one may over-ride or set aside the properly enacted legislation of Parliament. In the last thirty years two legal developments have occurred both of which threaten, in some senses at least, these traditional understandings of the sovereignty of Parliament: first, the UK’s accession to the European Community as from 1 January 1973, and secondly, the UK’s having adopted, in 1998, a Bill of Rights. The former has resulted in courts in the UK being able to grant a remedy suspending the operation of an Act of Parliament where that Act is violative of directly applicable EC law (by virtue of European Communities Act 1972, ss. 2 and 3), and the latter will enable superior courts to grant a declaration of incompatibility which will have the effect of the court declaring that a provision of an Act of Parliament is violative of one of the human rights safeguarded under the 1998 Act. It should be noted, however, that, unlike the situation regarding EC law, declarations of incompatibility under the Human Rights Act do not affect the “validity, continuing operation, or enforcement” of offending Acts. It is important to understand what it is about Parliament that is sovereign – to appreciate what it is about Parliament that enjoys legislative supremacy. Because it certainly is not the case that everything which Parliament does is sovereign. It is not even the case that all parliamentary legislation is sovereign: the rule of the sovereignty of Parliament applies only to primary legislation, and not to delegated or secondary legislation. How is primary legislation made? Primary legislation is made by three bodies coming together to agree to the terms of a proposal, called a Bill. Those three bodies are the House of Commons, the House of Lords, and the Queen. Acts of Parliament are properly called, in law, Acts of the Queen-in-Parliament. As a matter of law, no Bill can become an Act unless it is passed in the requisite way by

69 Constitutional Law, page222
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The question is why? Why does the constitution provide that Acts of the Queen-in-Parliament should have a legal status higher than any other known in English law? The answer is probably connected to the seventeenth century notion of the separation of powers outlined in the previous section of this paper. An Act of Parliament represents the legal moment when the two sovereign authorities of England come together and agree: Parliament on the one hand, and the crown on the other. What could be a higher authority in this scheme of dual sovereignty than the formal agreement of England’s two sovereigns? But as has been seen above, the courts can now declare a statute invalid. That is an indication that the doctrine of separation of powers in the United Kingdom is now moving from its own unique style to that as experienced in Zambia and the United States.

\textsuperscript{70} It is for each House to determine the legislative procedures it will adopt, subject to the statutory restrictions on the legislative powers of the House of Lords where that House disagrees with the Commons as are provided for by the Parliament Acts 1911-1949. See \textit{Pickin v British Rail} [1974] AC 765.

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Ministerial responsibility and how it serves as checks and balances

A second well-known and prominent feature of the UK’s contemporary constitutional scene is that ministers are accountable to Parliament. Prime Minister’s Question Time is but the most dramatic (and televisual) tip of this constitutional iceberg. It is far more profoundly important – and more effective – than this deceptive tip would credit. All ministers are both collectively and individually responsible to their House of Parliament (all ministers must be members of either the House of Commons or the House of Lords: in most administrations there are about 90 from the Commons and 25 from the Lords). 72 This means that they must give account to Parliament for, and be responsible for, the development and operation of government policy, administration and expenditure. The obligations of responsibility and accountability are owed both to the chambers of the Houses (the floor) and to the various select committees, especially of the House of Commons, which have grown in importance and power since they were reorganised in 1979. It is suggested 73 that US constitutional practice would benefit from developing ideas of executive responsibility to Congress. In his Harvard Law Review article on the separation of powers, Bruce Ackerman suggested in the context of the Lewinsky scandal that “Bill Clinton would not have lasted a month as prime minister in a parliamentary system. His backbenchers would have revolted, or his coalition partners would have ushered him out the door in a desperate effort to move into the next election with a new face at the head of the old

72 These figures are not binding, although the House of Commons Disqualification Act 1975, s. 2 provides that there may not be more than 95 ministers in the House of Commons at any one time.

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The genius of the idea of ministerial responsibility, which Ackerman has spotted in this passage, is that it is a notion which, unusually in these days of focusing on constitutional law, recognises and acts on the first rule of politics. The first rule of politics is rather cynical. It suggests that ministers (and presidents) will do whatever they can politically get away with, so the task of a constitution should be to find ways of allowing them politically to get away with less. And that is what ministerial responsibility does. In American terms, it checks the power of the executive by finding ways of allowing the executive politically to get away with less. The point is not that it is perfect – contemporary British practice leaves a lot to be desired. The point here is not to explore this idea at any length but rather to ask the same question as asked above in relation to the sovereignty of Parliament: namely, why? Why are ministers constitutionally accountable to Parliament, and not to, say, each other, to the prime minister,75 to the people, or to the Lord Chief Justice?

Ministers are ministers of the crown. They are the monarch’s advisers. Their oath of allegiance is to the crown, and they may exercise considerable royal prerogative power on behalf of the crown. Whenever the foreign secretary signs an international treaty, he is exercising prerogative power. Whenever the home secretary issues a passport he is exercising prerogative power. There is a royal government in

74 Havard Law Review 1998 p 659

75 It may be that in current practice the doctrine of ministerial responsibility turns more on ministers’ rapport with the prime minister, or popularity with their party, than on their relationship with Parliament
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74 Harvard Law Review 1998 p 659

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England for one reason and for one reason only: Parliament says so. Parliament won the civil war in the 1640s, but found that it could not govern England alone. The monarchy was restored less than two years after Oliver Cromwell's death (in September 1658). But the monarchy was not restored on its own terms. Certainly it was not restored on anything like the same terms, religious, political, legal or constitutional, as had governed its reign in the period of the personal rule (Charles I called no Parliament and ruled without it between 1629 and 1640). The terms were to be laid down by Parliament – as is usual in the case of those who win wars – it is the victors who redraw the map, who divide the vanquished, who dictate the terms of the new world order, etc. So too with Parliament in the second half of the seventeenth century. To begin with, this was done cautiously and pragmatically. While this worked, after a fashion, with Charles II, after his death in 1685 his successor James II was a far more problematic case. Problematic cases did not last long in royal palaces in seventeenth century England, and in 1688 William and Mary of Orange, of good protestant stock, replaced James II. This time Parliament took no chances, and started rather more unambiguously to lay down the law. Two such laws, in particular, continue to form the backbone of the English constitution: the Bill of Rights of 1689 and the Act of Settlement of 1701. These documents lay down the terms on which Parliament will agree to continuing royal rule. The Bill of Rights is a list of matters which are the unique province of Parliament: only Parliament may authorise the taxation of the king's subjects; only Parliament may keep an army during peace-time, etc. The Act of Settlement goes even further and provides that Parliament may change the line of succession to the throne. So it is not just a matter of what the king may do which is now unreservedly a matter for Parliament: the question of the king's very identity is an issue for Parliament to determine. No more divine right. Kings
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and queens rule because Parliament says so, and not because they think their God has ordained it.

As we were saying, ministers are ministers of the crown. They are servants of the crown, and, since the seventeenth century settlement – symbolized as much by the regicide in 1649 as by the Bill of Rights forty years later – England’s Parliament has put up with royal government only on its (Parliament’s) terms. Earlier we saw that the orthodox, eighteenth century version of the separation of powers would view the fusion of legislative and executive personnel in the House of Commons as a breach of the doctrine of the separation of powers. Now, the reverse is going to be argued: namely, that the English vision of the separation of powers requires that ministers simultaneously be parliamentarians. If ministers operated outside of or beyond Parliament, how would Parliament go about its fundamental constitutional task of holding the crown’s government to account? Ministerial membership of Parliament in this way facilitates, rather than violates, the separation of powers.

The law and the crown

The third and final example of the apparently constitutionally curious, which is quite hard to explain without understanding the separation of powers seventeenth century style, but which makes clearer sense with this understanding, is the tortured relationship of the law to the crown. The relationship between the executive and judiciary is one which is based not on law, on force, on coercion, but on trust, grace, goodwill and a spirit of co-operation.
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The courts derive their authority from the same source as ministers: namely, the crown. They are the royal courts of justice. The judicial oath of allegiance is to the crown – not to the constitution, not to the people, and certainly not to Parliament – but to the crown. Senior judges, like cabinet ministers, are privy councillors. With this in mind, we can ask the question: can the crown’s courts find the crown’s ministers in contempt of the crown’s courts? Can one branch of the crown find that another branch of the crown is in contempt of the crown? The House of Lords in *M v Home Office*\(^{76}\) answered this question by severing the crown. By this it is not meant that the court severed itself from its font of royal authority, but that it severed the minister (against whom the proceedings were brought) as a servant of the crown from the crown itself. The Lords came to the conclusion that while they had no jurisdiction to find the crown itself in contempt of court, they did have the power to find a mere servant of the crown in contempt.

Before we prematurely run into the sunlight celebrating this decision as a vindication of the rule of law, let us remember three things about the Lords’ decision here: first, the House of Lords ruled that the old maxim ‘the crown can do no wrong’ means that whatever the crown does, it cannot be held to be wrong. This is not the only way in which the maxim could have been interpreted: it could have been interpreted to mean that the crown has no immune power to authorise wrong-doing. However the Lords ruled that in the case of ministers of the crown, while the courts had the power to find them to be in contempt of court, they had no power to punish them for it: a mere finding “should suffice”.

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When we suggest that the courts are in some sense part of, or dependant upon, the crown, and are not independent of it we do not mean that individual judges can be removed from office by mere royal whim, as James I and Charles I thought. The Act of Settlement put a stop to that in 1701.\textsuperscript{77} What we do mean is that the judiciary derives its constitutional power from that of the crown. Unlike the position under Article III of the US Constitution, in English law there is no independent source of judicial authority. The argument about the courts and the crown is complex, and is one for which there is not space to make more fully here. It is an argument which cannot be understood without an extensive historical excursus.

The separation of powers is concerned with the quality of government. In particular, in seventeenth century English political thought, and especially within that period in the 1640s, it is concerned with accountability. As early as 1642 in the Nineteen Propositions Parliament was keen to subject government ministers to parliamentary scrutiny and control – the emergence, perhaps, of the idea individual ministerial responsibility\textsuperscript{78}. The idea, that is, that ministers of the Crown are responsible to Parliament for their actions, policies, and decisions, and for the actions, policies, and decisions of their departments. Take as an example this quotation from

\textsuperscript{77} Actually, the Act of Settlement did not entirely stop all aspects of this practice. It was only after 1760 (when George II died and was succeeded by George III) that the death of the reigning monarch no longer put an end to all judicial patents. Before that, even after the Act of Settlement became effective, in 1714 (Anne to George I) and 1727 (George I to George II), a number of judges failed to be reappointed on accession of the new monarch

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The vision of the separation of powers which has begun to uncover in this paper is a very different separation of powers from the familiar, American, model. There is more than one way, evidently, to cut the constitutional cake. It is worth noting that this separation of powers is doing conceptually different work from that which is undertaken by the more familiar model. Adopting the taxonomy of political economists Geoffrey Brennan and Alan Hamlin, the English separation of powers I have outlined here is a "horizontal" separation, whereas the more orthodox separation is "vertical". Brennan and Hamlin suggest the following:

"The horizontal (or competitive) separation of power occurs wherever a single power is allocated to more than one agent. There are two major cases to


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“The horizontal (or competitive) separation of power occurs wherever a single power is allocated to more than one agent. There are two major cases to


consider. In the first a power is allocated to two or more bodies who operate side by side in the manner of rival firms. In the second a power is allocated between two or more bodies which compete for that power ... We argue, with the prevailing orthodoxy, that the horizontal separation of powers generally acts in the interests of citizens.”

The English model is a horizontal separation of powers, in which the one power of sovereign constitutional authority is shared between the two competing institutions and their agents: Parliament on the one hand and the crown on the other. Brennan and Hamlin continue:

“...The hallmark of the horizontal separation of powers is that a single power or bundle of powers is allocated competitively or in a manner that promotes competition. By contrast, the hallmark of the vertical separation of powers is that functionally distinct but related powers are unbundled and allocated to different individuals or groups of individuals. When powers are functionally separated between bodies each body has the power to act independently over at least some restricted domain. It is as if each body becomes a specialist in the use of some particular power and wields that power independently.”

Brennan and Hamlin argue, against the prevailing orthodoxy, that “the vertical or functional separation of powers generally acts against the interests of citizens”. Unlike the position in the USA, England knows no vertical separation of powers in

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82 Ibid.

83 Ibid.
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\textsuperscript{81} Brennan and Hamlin, 'A Revisionist View', \textit{ibid.}, p. 364.

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the sense in which Brennan and Hamlin define it here. The separation of powers as between Parliament and the crown is not a separation which was drawn up for functional reasons or along functionalist lines. On the contrary, there is one power: to exercise sovereign constitutional authority, which is shared between Parliament and the crown. Just as the seventeenth century English separation of powers is doing different conceptual work from the eighteenth century Franco-American model, so too is there a difference as to the kinds of constitutional behaviour which would constitute a breach of the doctrine. Perhaps the most troublesome aspect of present-day English constitutional practice which this paper should would want to argue is unconstitutional as being a violation of the separation of powers is the way in which highly centralized political parties blur parliamentarians’ loyalties and dilute their commitment to Parliament’s interests. We saw above that the constitution imagines that minister owe their principal obligations of constitutional accountability to Parliament. But twenty-first century Parliament is a thing dominated – especially in the Commons but increasingly also in the Lords – by professional political party. This results in two unfortunate consequences: backbench MPs from the same political party as constitutes the government of the day subject the government to too little serious and rigorous scrutiny, and opposition MPs are too carefree in their criticisms of the government, paying more attention to what will work well in the following day’s newspaper headlines than they do to what is genuinely in the interests of Parliament. Parliament is forced to play second fiddle to party.

How might this be reformed? It would be, of course, utterly fanciful to argue as a result of this that political parties should be declared unconstitutional, or even illegal. But some method short of this nuclear option does require to be found to revitalize and to sharpen Parliament’s authority over the government of the day.
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One area which would offend an American style separation of powers, but which not only does not violate, but is indeed a positive encapsulation of the English model as has been outlined here, is Parliament acting as its own court of law, as it were, in the enforcement of its privileges. A functional analysis of American separation of powers orthodoxy, of course, would posit that as enforcement of norms is a judicial activity, it should be practised by the judicial branch, and not by a legislature. But an historical analysis, which recognised the critical importance to the development of the English polity of insulating parliamentary privilege from scrutiny in the crown’s courts, would see privilege as a manifestation of – and not as a breach of – the separation of powers.  

Finally, it might be worth adding that, while judicial scrutiny of parliamentary privilege would be a violation of the separation of powers as has been sketched here, the recent attempts by senior judges, both on and off the bench, to augment the courts’ constitutional role by extending the judiciary’s scrutiny of the executive branch is not, in the view of this author, a development which affects the separation of powers at all. Rather, this is a development, which, in separation of powers terms, is nothing more than the realignment of one internal aspect of the crown’s authority (i.e. that which is exercised by the executive) over another aspect (i.e. that which is reviewed by the judiciary).

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This paper has so far attempted to show that in the UK, there is a good deal more to the separation of powers than simply dividing the world of government into three neatly packaged compartments labelled legislature, executive, and judiciary. Only when we remember this will the separation of powers again be allowed to do the constitutional work it was designed for, which is to say that it is only when we remember that the separation of powers is a fundamental check on power, rather than a mere division of powers, that a genuinely effective constitutional politics will re-emerge.

Chapter Four

THE DOCTRINE IN ZAMBIA

Introduction

The comparative analysis has been done from the realisation that one can gauge the direction of the Zambian system from the experiences of other well-established governments. As has been asserted in chapter one, a total separation of powers is virtually non-existent. The doctrine of separation of powers which is amalgamated with that of checks and balances should ensure that while the exercise of each power is entrusted to one institution, there is scope for minor participation by the other.
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The Legislature and The Executive

An example of the blending between the executive and the legislative authorities in Zambia is found in the fact cabinet ministers are also members of Parliament, where they are responsible for carrying through the legislative programme. Article 49 of the constitution states that there shall be a cabinet which shall consist of the President, the Vive-President and the Ministers. Article 46 requires the Ministers to members of Parliament. The constitution further states that the cabinet and the deputy ministers shall be accountable collectively to the National Assembly. There is no provision in the American constitution that requires executive heads to be collectively responsible to the legislature. The cabinet of the United States is not required to be composed of members of the legislative organ, who are at the same time members of the executive organ. And unlike in Zambia where the constitution gives full and total power to appoint cabinet ministers and their deputies, the United States president is required by their constitution to appoint executive heads only by and with the advice and the consent of senate. Even in Zambia however, it must be pointed out that although the executive authority vests in the President, certain executive actions require parliamentary approval, such as the ratification of presidential appointments to positions of high court and supreme court judges. It seems indisputable that the constitution does not purport to embody the classical principle of an absolute separation of the legislative, executive and judicial authorities. Article 62 of the constitution further blends the executive and the legislature when it provides: The

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legislative power of the republic of Zambia shall vest in Parliament, which shall consist of the President and the National Assembly. In chapter one it was indicated that no member of one organ of the government must be a member of another organ at the same time. Here however we see the President, in whom the executive power of the republic of Zambia is vested, also being a member of the legislature. The United States constitution, in article 1, section 4 grants all legislative powers in a congress of the United States, which consists of a senate and the House of Representatives. The president is not a member of congress, therefore no legislative powers are by the constitution granted to him. However, by section 7 of article 11 of the United States constitution, the president is effectively made a key player in the legislative process. The section provides as follows: “Every bill which shall have passed the House of Representatives and the senate, shall, before it become law a law, be presented to the president of the United States; if he approve he shall sign it, but if not he shall return it, with his objections to that House in which it shall have originated, who shall enter the objections at large on their journal and proceed to reconsider it. If after such reconsideration two thirds of that House shall agree to pass the bill, it shall be sent, together with the objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a law. . . If any bill shall not be returned by the president within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law” This provision effectively requires Congress only to consult the President on whether a bill will be ‘good law’. This is suggested because Congress does not depend on the President’s approval of the bill in that even if he did

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legislative power of the republic of Zambia shall vest in Parliament, which shall consist of the President and the National Assembly. In chapter one it was indicated that no member of one organ of the government must be a member of another organ at the same time. Here however we see the President, in whom the executive power of the republic of Zambia is vested, also being a member of the legislature.\textsuperscript{89} The United States constitution, in article 1, section 4 grants all legislative powers in a congress of the United States, which consists of a senate and the House of Representatives. The president is not a member of congress, therefore no legislative powers are by the constitution granted to him. However, by section 7 of article 11 of the United States constitution, the president is effectively made a key player in the legislative process. The section provides as follows: ‘Every bill which shall have passed the House of Representatives and the senate, shall, before it become law a law, be presented to the president of the United States; if he approve he shall sign it, but if not he shall return it, with his objections to that House in which it shall have originated, who shall enter the objections at large on their journal and proceed to reconsider it. If after such reconsideration two thirds of that House shall agree to pass the bill, it shall be sent, together with the objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a law. . . If any bill shall not be returned by the president within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law’\textsuperscript{89} This provision effectively requires Congress only to consult the President on whether a bill will be ‘good law’. This is suggested because Congress does not depend on the President’s approval of the bill in that even if he did

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not approve but sent back the bill to Congress with his objections, Congress can still make the bill into law if after reconsideration two thirds of both houses agree to pass the bill. It is as if the president is a mere consultant on whom Congress can rely on to giving productive objections only. But Congress can choose to repeatedly ignore the president’s objections and enact bills into laws. Thus, Congress enacted some certain policies in spite of Andrew Johnson’s repeated vetoes.\textsuperscript{90}

The Zambian President on the other hand cannot be considered to be a mere consultant because unlike his American counterpart, his assent to the bill is vital. If he does not assent to the bill but instead requests the National Assembly to reconsider it, and the National Assembly fail or refuse to make any amendments, the President may choose to dissolve Parliament, a thing that his American counterpart is not allowed to do.\textsuperscript{91} Section 78 (1) of the Zambian constitution provides that bills passed by the National Assembly and assented to by the President shall exercise the legislative power of Parliament. Subsection (4) of the same article further provides: ‘... where the President withholds his assent to a bill, the President may return the bill to the National Assembly with a message requesting that the National Assembly reconsiders The bill or any specified provision thereof and, in particular, any such amendments as he may recommend in his message, and when a bill is returned, the National Assembly shall reconsider the bill accordingly, and if the bill is passed by the National Assembly on a vote of not less than two thirds of all the members of the National Assembly, with or without amendment, and presented to the president for

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assent, the President shall assent to the bill within twenty-one days of its presentation, unless he sooner dissolves Parliament. And whenever the National Assembly has been dissolved, there shall be general elections and elections to the National Assembly.\textsuperscript{92} So we see that the President is very key in the legislative process in Zambia, and that he can easily have his way. The Zambian President has been seen thus, to be a key, real and dominant player in the legislative making process, even though he is a member of the executive. Thus it can be stated that the American President is more separated from the legislature than is his Zambian counterpart. In America, it is Congress alone that represents the legislative branch\textsuperscript{93} while in Zambia, as we have seen from the provisions of the constitution, the President and the National Assembly represent the legislative branch. But this is not to say that the American President has no influence on the legislative process. The President, a legislative leader in fact influences the development of many laws passed by Congress. At the beginning of each session of Congress, the Chief Executive delivers a state of the union address to the lawmakers.\textsuperscript{94} In this message, the President discusses the major problems facing the nation and recommends a legislative programme to solve them.\textsuperscript{95} The President also gives Congress detailed plans for new legislation at other times during the year.\textsuperscript{96} As a result of this, inevitably, the President may become involved in a struggle over a key bill. However, the constitution allows the President to veto any bill passed by Congress. And if each House re-passes the vetoed bill by a two-thirds majority, the bill becomes law despite the President’s

\textsuperscript{92} Article 88 of the Zambian Constitution.

\textsuperscript{93} World Book Encyclopaedia page 762

\textsuperscript{94} Ibid, page 769

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\textsuperscript{97} See above where the author details the procedure for the passage of a bill in the American legislature.

\textsuperscript{98} Op.cit, page 769

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appointment of any such member appointed, and then appoint any other member in that member’s stead.\textsuperscript{104} Such nominated members may feel very warmly towards the President so that they may find it difficult to vote against the President’s proposals. One may further be scared not to vote as the President wishes because of the open voting system adopted by Parliament. Further, the President, in his discretion, appoints the members of cabinet in the National Assembly to their cabinet portfolios.\textsuperscript{105} This is another group that will be in the National Assembly, but with a high degree of allegiance to the President, thereby susceptible to be influenced by the latter. This is exactly what the principle of separation of powers endeavors to avoid. As if that is not enough, the President may again appoint such Deputy-Ministers, as he may consider necessary to assist ministers.\textsuperscript{106} And the appointment to the office of the deputy-minister can only be made from amongst members of the National Assembly.\textsuperscript{107} And then the President further appoints Provincial Deputy Ministers who are equally supposed to be members of Parliament.\textsuperscript{108} So we see a Parliament that is composed of a number of presidential appointees to executive portfolios. Or in short, we see members of the National Assembly being loyal to the President, by virtue of the fact that he is the appointing authority to the other several executive portfolios that our constitution requires. This is derogation from the principle of separation of powers.

\textsuperscript{3} Article 68 of the Constitution of Zambia
\textsuperscript{4} Article 74 of the Zambian constitution
\textsuperscript{5} Article 46 of the Zambian Constitution
\textsuperscript{106} Article 41 (1) of the Zambian Constitution
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On the speaker of the National Assembly – the members of the National Assembly elect him. And as we have attempted to show, members of the National Assembly are susceptible to be influenced by the President, thereby making it easy for him to influence the members to vote for a candidate of his preference if he has any. The speaker of the National Assembly, once elected, has to face the fact that the President, once displeased with the speaker’s action, can possibly cause the speaker to be voted out. This is so because it is the Members of Parliament again who have the power to cause the speaker vacate his or her office, if not less than two-thirds of all of them vote in support of a motion to remove him. We can safely say that the powers conferred on the President by the constitution regarding the appointment of executive officials from amongst the members of Parliament makes it possible for him to create a small ‘army’ of legislative officials in the National Assembly, thereby weakening the spirit of the doctrine of separation of powers.

As for Parliament and the judiciary, mild skirmishes do, and have occurred. When we answer such questions: Are Parliamentary privileges subject to review by the courts? Should resolutions of Parliament be beyond judicial inquiry? Can Parliament assume the functions of a court of justice? Can we easily draw the boundaries between the jurisdiction of the legislature and the courts in dealing with corrupt practices of members of Parliament, it emerges that there is an uncertainty an overlap of authority between Parliament and the judiciary. In a constitutional democracy like that of Zambia and the United States, the constitution is an original and direct act of the people and so is the supreme law of the land.\(^{109}\) The courts, being the legitimate interpreters of the law, have the power to strike down constitutionally incompatible primary legislation so that it appears that they (the courts) have the ‘final’ word over

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In discussing the applicability of separation of powers with respect to the judiciary, the independence of the latter is cardinal to dwell on. The other point that is necessary to point out is that of the autonomy of the judiciary. The autonomy of the judiciary is supposed to strengthen its independence.\footnote{Zambia Law Journal, Vol. 29. page 67} It is universally accepted that to be independent of the executive, a judge must be secure from the risk of dismissal by the government of the day.\footnote{Ibid} His or her salary and other conditions of service should also be safeguarded. Although judges have no obligation to give advice to the executive, they are sometimes appointed to hold inquiries into matters of public concern, which may involve politically sensitive issues; or they may be called upon to head commission.\footnote{Like judge Bobby Bwalya was appointed to head the Electoral Commission of Zambia} One can argue that this places the judge in the political spotlight and so can threaten judicial independence. When the President appoints a judge to an executive position which pays him well, the President may be sending subtle messages to the rest of the serving judges that should they please him, he may
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In theory, the concept of governmental trinity means that the political system is not like a pyramid but an isosceles triangle; a partnership of equals; an interlocking system of mutual oversight and mutual checking.\textsuperscript{114} The reality however is that the judiciary appears the weakest in that trinity. It is an institutionality practically removed from the democratic process.\textsuperscript{115} It is not elected so it lacks popular legitimacy.\textsuperscript{116} It depends on the executive for the efficacy of the decisions it reaches, since it is the executive that enforces the law after the courts have interpreted it. There is not much therefore, that the bench can do should the executive refuse or ignore to respect court orders and/or judgments. Thus, the Chief Justice of Swaziland could only resign after what he described as the on-going defiance of court orders by government officials.\textsuperscript{117} Further, the members of the judiciary are appointed by the President, subject to ratification by the National Assembly, and on the advice of the Judicial Service Commission.\textsuperscript{118} And in case of the Supreme Court judges, the President does not need advice from the Judicial Service Commission but the National Assembly must still ratify the appointments.\textsuperscript{119} But as we have seen above, the President wields a lot of influence over the National Assembly so that in effect, the House has become nothing more than a rubber stamp.

\textsuperscript{114} Zambia Law Journal, Vol.31 page 103

\textsuperscript{115} Ibid

\textsuperscript{116} Ibid

\textsuperscript{117} The Guardian, 7 April, 2003

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114 Zambia Law Journal, Vol.31 page 103
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Of the three branches of government the judiciary is apparently the least dangerous. Yet it has final interpretative powers over all laws, including the law of the constitution. The judiciary is the protective barrier against unconstitutional acts, against political usurpations of power and against subversion or erosion of constitutionally guaranteed rights.\textsuperscript{120} This is what Madison\textsuperscript{121} meant when he said that to separate governmental powers is a sure way of guaranteeing liberty and avoiding tyranny. Powers of government must be separate to a significant extent.\textsuperscript{122} The courts must try legal matters and interpret the law, the executive must execute that which has been written down by Parliament and interpreted by the courts, and the legislature must draft laws. One can but only imagine a situation where Parliament not only enacted laws, but also interpreted them and tried citizens a court of law does. This kind of Parliament’s ‘unseemly’ exercise of power was roundly criticized in Zambia when our Parliament in the matter of Fred M’membe and Bright Mwape V The Attorney-General assumed the functions of a court of law. On 23rd February 1996, Parliament summoned two editors from the Post Newspapers, and one civic leader, to inform them that Parliament had found them guilty of contempt of Parliament and that they would be remanded in custody until they apologized or Parliament decided to release them.\textsuperscript{123} On 26th February, the Speaker issued an order of arrest for the three after the Standing Orders Committee also found them guilty of contempt of Parliament.\textsuperscript{124} In an application for habeas corpus, the applicants

\textsuperscript{120} Zambia Law Journal page 89

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challenged the action taken by parliament to imprison them, stating that it was unconstitutional and therefore, null and void.\textsuperscript{125} The applicants based their argument on the fact that the Zambian Parliament did not have the power to imprison anyone for contempt or indeed any other alleged offence. The court held that in Zambia, the decisions and actions of Parliament are subject to scrutiny by the courts to ensure compliance with the constitution.\textsuperscript{126} The court ordered that the duo\textsuperscript{127} be released stating that Zambia’s Parliament was not a court and thus did not have the power to imprison anyone.\textsuperscript{128} In a constitutional democracy, the judiciary occupies center stage as the interpreter and guardian of the constitution and other laws. In Zambia, the truth of the above statement is unquestionable as has been illustrated by the case of \textbf{M’membe and Bright Mwape V The Attorney-General} above. This state of affairs can only be enhanced if the judges, members of the Industrial Relations Court, magistrates and justices shall be independent, impartial and subject only to the constitution and the general law of the land. Suffice here to mention that in Zambia, it would appear, there are adequate provisions in the constitution and other Acts of parliament which should ensure the independence of the judiciary and an efficient court system manned by contented judges, magistrates, justices and judicial staff.

\textsuperscript{129} The constitution of Zambia for example, in Article 91 provides for an independent, impartial and autonomous judiciary. Judges of the Supreme Court and High Court, the Chairmen and his Deputy of the Industrial Relations Court, are all protected and can

\begin{itemize}
  \item \textsuperscript{125} Ibid
  \item \textsuperscript{126} Ibid
  \item \textsuperscript{127} One ‘alleged offender’ the civic leader was not apprehended as she had managed to go into hiding in order to evade the arrest.
  \item \textsuperscript{128} Zambial Law Journal Vol. 31
  \item \textsuperscript{129} zambia Law Journal Vol. 30
\end{itemize}
challenged the action taken by parliament to imprison them, stating that it was unconstitutional and therefore, null and void. The applicants based their argument on the fact that the Zambian Parliament did not have the power to imprison anyone for contempt or indeed any other alleged offence. The court held that in Zambia, the decisions and actions of Parliament are subject to scrutiny by the courts to ensure compliance with the constitution. The court ordered that the duo be released stating that Zambia’s Parliament was not a court and thus did not have the power to imprison anyone. In a constitutional democracy, the judiciary occupies center stage as the interpreter and guardian of the constitution and other laws. In Zambia, the truth of the above statement is unquestionable as has been illustrated by the case of

M’membe and Bright Mwape V The Attorney-General above. This state of affairs can only be enhanced if the judges, members of the Industrial Relations Court, magistrates and justices shall be independent, impartial and subject only to the constitution and the general law of the land. Suffice here to mention that in Zambia, it would appear, there are adequate provisions in the constitution and other Acts of parliament which should ensure the independence of the judiciary and an efficient court system manned by contented judges, magistrates, justices and judicial staff.

The constitution of Zambia for example, in Article 91 provides for an independent, impartial and autonomous judiciary. Judges of the Supreme Court and High Court, the Chairmen and his Deputy of the Industrial Relations Court, are all protected and can

125 Ibid

126 Ibid

127 One ‘alleged offender’ the civic leader was not apprehended as she had managed to go into hiding in order to evade the arrest.

128 Zambial Law Journal Vol. 31

129 zambia Law Journal, Vol. 30
only be removed after formal proceedings before a tribunal. Further, the Judges Conditions of Service Act No. 14 of 1996 provides for the conditions of service, including emoluments and pensions. The conditions of service currently available include provisions for payment of municipal rates for a judge's house, if the judge owns it, non-private practice allowance, leave and leave benefits, armed guard, first class and business class travel, car and house loans, payment for telephone bills and water bills, medical treatment, leave insurance, funeral grants and benefits, transportation on retirement, house servants, gardeners, cooks and laundry men etc. However this piece of legislation requires the President by statutory instrument to prescribe the emoluments. The exact details of the actual emoluments are within the discretion of the President and judges can only rely on the good sense of the President for better emoluments. Retirement benefits, gratuity, benefits due on death or dismissal and pensions are guaranteed by a provision that they should not be altered to the disadvantage of any judge. This means that the President cannot alter the conditions of service of the judges when they pass judgments that he does not like. The latter provision enhances the independence of the judiciary in that judges do not get the feeling that they may offend the President in passing judgments and so risk their emoluments to be reduced. The judiciary in Zambia is thus fairly independent and fairly well remunerated.

Of the three organ of government in the United States and Zambia, the executive is the biggest player. We agree that institutions such as the Presidency play the major role in the success of any effective government. The essential elements with which the institution of the President is tasked with are fiscal policy, including control of

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130 See also Article 93, 94 and 97
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expenditure, taxation, and the use of these to accomplish social ends; the closely related function of economic planning; coordination of agencies (ministries); personnel policies; liaison with the legislature and the public; administrative organization; investigations of the sphere of advisable government operations; or simply, planning and control. The point being made here is that the President in both Zambia and the United States is tasked with a lot of functions, duties, responsibilities and powers so that their influence, even though not always directly, is always felt in the other organs of government.

The executive branch wields significant authority within the Zambian political system. Although the constitution gives the National Assembly substantial powers, in practice it has historically proved only a limited check on presidential authority. For example, prior to the 2001 tripartite elections, the National Assembly failed to check the President and the ruling party from abusing public resources. While the presidential campaign was not overtly fraudulent, international electoral observers indicated that pre-election manipulation of the process and numerous administrative hitches had distorted the playing field in favour of the candidate of the ruling party. The Movement for Multi-Party Democracy's abuse of public resources in campaigning and its control over the state-run media gave the current president Mwanawasa an unfair advantage while logistical and administrative shortcomings

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132 The American System of Government, page 81 and 82

133 IRIN, Separation of Powers and politics

134 Ibid
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\textsuperscript{134} Ibid
disenfranchised thousands of people across the country.\textsuperscript{135} Both the European Union
and the Carter Center have indicated that the election results did not reflect the will of
the people.\textsuperscript{136} The opposition is currently challenging the legality of President
Mwanawasa’s victory in three separate electoral petitions. The matter now is really
between the judiciary and the executive. Here is an opportunity for the executive to

either influence the judiciary or not. This is the point where the judiciary can stand
out or not. But depending on the evidence that will be given in court the matter is

with an amount of certainty going to be adjudged objectively and without fear or

favour. This is so said because the Zambian judiciary has over the past decade

exhibited itself with professionalism and legality. While in a few instances, the

judiciary was unable to stop Dr Chiluba from manipulating the constitution for

political ends; it has shown some autonomy from the executive branch.\textsuperscript{137} This

autonomy has been observed in the 1997 case against Sikota Wina and Princess

Nakatindi Wina. Charged by the state with misprision of treason, along with most of

the opposition members, including first republican president Dr Kaunda, the High

Court dismissed the case citing a lack of evidence. Moreover, the High Court

threatened the head of police with contempt of court charges when he tried to re-

arrest the defendants.\textsuperscript{138} The latter statement shows that the judiciary does sometimes

check the executive, so that tyranny may be done away with. In light of the foregoing

thus, one can trust that the election petition now in court will be considered

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CONCLUDING REMARKS AND RECOMMENDATION

The doctrine of separation of powers must not be taken to mean that governmental powers are to be in three separate and distinct compartments. One the doctrine entails is that the three organs of government must work independently of one another. The ideal situation must be for the organs to be staffed by different personnel at all times. The functions of the three organs must always be clearly separated so that the legislature makes laws; the judiciary interprets them and the executives execute them. Should the three functions of the three organs be left to be performed by one organ, that organ will have an excessive amount of power. And such an amount of power is a breeding platform for tyranny. But as we have seen, it has proven difficult to adequately observe the rules of the principle of separation of powers especially in the United Kingdom and in Zambia. We have seen a number of instances where members of one organ of government are also members of another. This puts such persons in positions whereby there can arise some conflict of interests. Separation of powers works to maintain the balance of power in any system. In a government system, clearly, it serves the purpose of checking those authorities that have a power to alter laws, people’s ways of life and people’s legal positions. ‘Checks and balances’ is a commonly used whenever we are talking about separation of powers and it cannot be omitted in any meaningful discussion of separation of powers.

One organ of the government checks the extent of use of power of another organ. For example, the court checks the extent of the discretionary power that lies on a minister in judicial review. Thus, all matters that may have even the slightest question of law have to be settled by the courts of law so that no decision is final unless given by the highest court of the land. That also means that the court can compel a litigant to
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produce documents even though the documents may have been declared by the Minister to be classified.\textsuperscript{139} Thus we see that no organ of the government has unfettered powers. We have noted that the American system of government is such that there is not much overlapping of personnel of two or more organs. The group of people that takes care of the executive affairs of the Union is not composed of members of the legislature. They are not elected by the people to represent them in Congress, but are mere presidential appointees. They are interested only in running their respective executive departments and so, it seems that the only reason why they can be removed from office is when they fail to perform to their duties in their executive capacities. In Zambia and in the United Kingdom on the other hand, members of the cabinet are also members of Parliament so that a basic rule of the doctrine is disrespected. This practice has the tendency of undermining the independence of the thinking of these officials who share two appointments. They owe allegiance to the House while at the same time they are grateful to the President and the Prime Minister for having given them an opportunity to take part in the running of the executive affairs of the country. This has proved a menace to good governance and democracy especially in Zambia where the President appoints so many members of Parliament to executive positions.

\textsuperscript{139} See the case of Duncan V Crammwell (1942) A.C This case created the law that the decision of the minister to declare the disclosure of certain information to be against the interest of the public is final. This decision was criticised and not followed by the same court in the case of Conwell (1962). It was stated that the decision whether to disclose the information was detrimental to the interest of the public lay with the executive. But that the decision whether to disclose that information in a court of law rested upon the courts because the court now had to weigh between the two conflicting interests: (1) whether it is safe to disclose the information and (2) whether the non-disclosure of the information will do a party an injustice.
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We have also seen that the judiciary plays a pivotal role in the Separation of Powers. It is the umpire of justice, making sure that both the legislature and the judiciary are functioning within their legal bounds. At the same time the executive and the legislature in that the president, subject to ratification by the National Assembly, appoints many judicial officers, also check the judiciary. Further, in Zambia, the judiciary does not determine the remuneration of its officers. The President determines this. We have also noted that the application of the separation of powers in Zambia and the United Kingdom should necessarily differ because of the different histories of governments that the two countries have. The United Kingdom has a monarch and Zambia has not. This is important to note because it helps us understand why in the United Kingdom members of the cabinet are also members of Parliament. They are also members of Parliament because they have to be accountable to Parliament. They are the Queen’s officials and Parliament is interested in knowing what it is that the Queen and her servants are doing. And Parliament asks to get an account of what the Queen is doing because it is Parliament that won the last struggle for power between the Crown and itself. It therefore set the terms and condition on which the Crown could be allowed to continue ruling. And making the Crown accountable to Parliament was one of the conditions set by Parliament. Therefore, it is the argument of this author that there is no justification for members of the cabinet to be members of Parliament at the same time because cabinet Ministers are officials of the President, who have no duty to be accountable to Parliament. It is the Members of Parliament, and only in that capacity, who should have a duty to be accountable to Parliament. Cabinet ministers must account to the President for their activities because it is him that can dismiss them. It is this author’s recommendation therefore that the Cabinet be composed of persons who are not Members of Parliament, and
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preferably, who are not politicians too. These should be appointed by the President with the advice of specially constituted select committees from the National Assembly. The President himself must then be accountable to Parliament for the deeds of his Ministers or for his own deeds. After all, the people appoint (elect) him and he is a Member of Parliament. The American system is more or less like the author is proposing. The Americans realized that there was no need to get Executive officials to be accountable to Congress, even though that practice is prima facie necessary for purposes of accountability. It is suggested that it is those same practices that unjustifiably make the office of the President overly powerful.
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