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THE EFFECTIVENESS OF CHECKS AND BALANCES IN ZAMBIA'S THIRD REPUBLIC

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THE EFFECTIVENESS OF CHECKS AND BALANCES IN ZAMBIA'S THIRD REPUBLIC

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An obligatory Essay submitted to the School of Law of the University of Zambia in partial fulfillment of the requirements for the award of the Degree of Bachelor of Laws (LLB).

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DEDICATION

First to God Almighty for his grace, which is always sufficient for me. Secondly to Dad and Mom for their love and support, and lastly to my elder brother and sisters for their encouragement.
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ABSTRACT

The need to limit presidential powers in Zambia has been a growing concern for a long time now. Zambia has been independent for forty years and yet the problem of excessive presidential powers still remains unresolved. Due to the excessive powers of the President, the other two organs of government, namely the Legislature and Judiciary have been unable to effectively check the executive branch of government headed by the President.

This essay is an attempt to discuss the effectiveness of checks and balances in Zambia, particularly in the third Republic. The contention of the essay is that the President in Zambia has got too much power, conferred on him by the constitution, thereby rendering checks and balances ineffective. The development of Executive powers is traced from history, dating back to the colonial era when all power was vested in the governor for the territory. In 1964 when Dr. Kaunda took over power from the colonial era, the institutional framework left by the colonial administration was substantially maintained, to the extent that Kaunda too, wielded a lot of power. Moreover in 1993 Zambia became a one party state headed by Kaunda himself.

The one party state was done away with in 1991, when the Movement for Multi-Party Democracy (MMD) came to power. Thirteen years have passed since Zambia riveted to Multi-Party politics yet the President still remains the most powerful government official in the country.
This position retards good governance and the separation of powers because almost all senior or key government officials serve at the mercy of the President, who has power to remove them from office of influence their appointment to any such office.
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CHAPTER ONE: THE THEORIES OF POWER AND THE HISTORICAL DEVELOPMENT OF EXECUTIVE POWER IN ZAMBIA.

1.0 INTRODUCTION

"Government is universally accepted to be a necessity, since man cannot fully realize himself – his creativity, his dignity and his whole personality – except within an ordered society. Yet the necessity for government creates its own problem for man, the problem of how to limit the arbitrariness inherent in government and to ensure that its powers are to be used for the good of society."

As has been often tritely repeated, one of the basic tenets of democracy is that government should be made up of three arms that are separate and equal – the Legislature, the Executive and the Judiciary. These organs of government should represent three sites of power and authority in the nation. The three should balance each other so that one site of power is not overbearing on the life of the nation. If this position is attained by any democratic society, then it is expected that the concept of checks and balances will be effective and government will thereby run efficiently.

It is the contention of this essay that in Zambia however, the Republican Constitution determines that the country has one super site of power called the Presidency, heading the Executive wing of government. The Constitution and indeed other statutory provisions have

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conferred on the President the power to appoint and dismiss literally every key and senior
government official\textsuperscript{3}, to the extent that the Judiciary, the Legislature and other officers serving
within the Executive, serve at the pleasure and mercy of the ultra powerful Presidency.

Therefore, in chapter one this piece of work will discuss the theoretical basis of executive
power, and which theory is applicable to Zambia. The objective of the essay will also be
stated in chapter one wherein also the historical development of executive authority in Zambia
will be discussed.

In chapter two there will be discussed practical instances of how the excessive powers of the
President have rendered checks and balances ineffective in the third Republic. Chapter three
will discuss the enormous powers of the presidency conferred by the Constitution and how
these powers have negatively impacted the Legislature and the Judiciary, thereby rendering
the said organs incapable of effectively checking executive power. The chapter will also
discuss concepts that are critical to the study of checks and balances, namely; the separation
of powers, supremacy of the constitution and judicial independence. Finally in Chapter four,
conclusions of the whole work will be drawn and recommendations for the future or solutions
to the problem will be suggested.

\textbf{1.1 THEORITICAL BASIS OF EXECUTIVE POWER}

As pointed out in the introduction to this essay, its thrust is that for any government to operate
effectively and efficiently in a democratic society, executive power should not be excessive

\textsuperscript{3}Cabinet ministers as well as judges are all appointed by the President
but should effectively be checked and exercised within the framework of the law. This applies to judicial powers as well as legislative powers of the state.

Like any concept of law executive power has developed as a result of theories expounded by jurists whose task has included the provision of justifications for the existence of this concept in modern day modes of governance.

Professor Nwabueze has asserted that unlike legislative and adjudicative power, executive power is a term of uncertain meaning- "perhaps no other term in the science of government is so much taken for granted and yet so difficult of precise delineation."

It is therefore crucial at this stage to analyze some of the theoretical justifications for the concept of executive power.

1.1 (1) THE RESIDUAL POWER THEORY

According to this theory executive power is every power which by its nature is neither legislative nor judicial.⁵

"Executive power is what remains of the functions of government after the legislative and judicial powers have been taken away. It is not limited to execution of the laws and provided it is not forbidden by law, action by government need not wait upon legislation expressly empowering government to do it."⁶ Executive power, according to this theory need not be

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⁴ Supra note 1
⁵ Supra note 4
⁶ Per Professor Alain Gledhill, in Nwabueze: Presidentialism in Commonwealth Africa. (1974) p 1
expressly provided for by legislation. Provided a power is neither judicial nor legislative, and it is not forbidden by law, it qualifies to be executive power. It is perceived by this theory that legislation cannot provide for every minute detail as to what executive power is, therefore, the executive should be allowed to do certain activities that do not fall in the realm of judicial or legislative powers.

The theory also extends executive power to the thinking-out of a plan or policy in the sense that the filling in of the details of complex legislation and the determination of a variety of issues arising in the administration of government can only be undertaken by the executive.\(^7\)

To this extent the theory has merit in that, by classifying the thinking out of policy and the administering of laws it conforms to the general practices of modern government. One cannot imagine an executive that is excluded altogether from the thinking out of policy and its formulation. The executive has the primary responsibility for government, and policy is squarely implicated in government.\(^8\)

1.1 (2) THE INHERENT POWER THEORY

According to this theory, executive power confers an inherent authority to exercise any function that is inherently executive in nature. It presupposes, therefore, that the function in fact partakes of the nature of execution; this would exclude functions that are not inherently of

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\(^7\) Supra 6
\(^8\) Supra note 4 p 2
that nature, such as policy and administration of law.⁹ Actions such as the expropriation of land by the state and the keeping of peace and order, would, according to this theory qualify as executive power because in both cases the executive is executing an action. On the other hand, where an administrative agency such as a local authority refuses to grant planning permission in pursuance of planning law, its action cannot be considered as an exercise of executive power because there is no execution done by the agency.

There is an overlap between the inherent power theory and the residual power theory, with respect to their assertion that within its proper field, the executive has an inherent authority to act without prior authority conferred in every case by a specific legislation on or other law.¹⁰ The inherent power theory however, asserts that the executive function is to do that which is inherently executive excluding functions that are not inherently executive. In this respect it differs from the residual power theory

1.1 (3) THE SPECIFIC GRANT THEORY

It is clear that the preceding two theories do not provide sufficient control measures in so far as the exercise of executive power is concerned. It is therefore, submitted that the specific grant theory provides a more realistic explanation of what executive power is and how it can possibly be exercised and controlled.

⁹ Supra note 8
¹⁰ Supra note 9
Executive power according to this theory is simply the power to execute the laws, either by enforcement against persons contravening them or by doing work or taking some other action required thereunder. In other words all governmental actions must be justified within the framework of the law; there must be an enabling law for government to act. Nwabueze writes that the laws, which the executive is to execute, are not confined to laws enacted by the legislature only. There is also the law of the constitution as well as the law of Nations. He also observes that in all common wealth constitutions the executive authority is defined to extend to the execution and maintenance of the constitution. Thus in *Cunningham V Neagle*, it was admitted by both the minority and majority of the U.S Supreme Court that the laws the President is to see executed are manifestly those contained in the Constitution and those enacted by Congress.

A critical question that arises upon this view of executive power is whether the authority to execute a law must be specifically granted by the law in question or whether the authority flows from the general executive power clause.

There are two views held on this question. The first view holds that the true view of executive function is that the President can exercise no power, which cannot fairly and reasonably be traced to some specific grant as proper and necessary to exercise. Such specific grant must be either in the constitution or in an Act of Parliament passed in pursuance thereof.

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11 Supra note 10  
12 Supra note 11  
13 135 U.S. (1890) P.83  
14 For example clause 2 of Article 33 of the constitution of Zambia  
15 Supra note 12 p 13
It is submitted that this view is true in Zambia’s case. The clause vesting executive power in the President is not such a specific provision and cannot therefore operate as a grant of power. The Constitution, after declaring that the executive power shall be vested in the President, goes on to empower him to do specific things such as accredit, receive and recognize ambassadors, and to appoint ambassadors, pardon or reprieve offenders, create or dissolve government ministries etc.\textsuperscript{16} It is from these specific grants and not from the general executive power clauses that the President derives whatever executive power he has under the Constitution. For if the general executive power clause was a grant of power, the specific enumeration in the subsequent clauses would be a mere surplusage, serving no purpose except perhaps as an emphasis.\textsuperscript{17}

The second view or school of thought holds that the clause vesting the executive power in the President is a grant of power. This view cannot find sufficient support in Zambia. The practice in Zambia is that once the legislature enacts a law vesting power in the President it also expressly or by necessary implication provides for the extent to which such power is exeriscable.

On the other hand however, the U.S Supreme Court held that the vesting of the executive power in the President was essentially a grant of power to execute the laws.\textsuperscript{18} But Nwabueze has written that this view is clearly to be preferred only as according more with a common sense of interpretation of the clause.\textsuperscript{19}

\textsuperscript{16} See Article 44(2) of the constitution
\textsuperscript{17} Supra note 15
\textsuperscript{18} Myers \textit{v} U.S.A. (1926) 292 4.5.52
\textsuperscript{19} Supra note 17 p 14
1.1 (4) A CRITICAL ANALYSIS OF THE THEORIES

The residual and inherent power theories have been criticized heavily especially on their attributing to the executive power to do anything that is not prohibited by law. By so doing they equate the executive to a natural person. The executive is an artificial legal person, and like all artificial legal entities, whether a registered or statutory corporation, its power is limited by the doctrine of ultra-vires to what is authorized by law to do, a natural person, on the other hand, is not subject to the limitation of the doctrine. Also by claiming that the executive can do any action so long as law does not prohibit it, the two theories presuppose that the executive can interfere with private rights without legal authorization. But according to Lord Atkin,

"The executive can only act in pursuance of the powers given to them by law... no member of the executive can interfere with the liberty or property of any person except on the condition that he can support the legality of his action before a court of justice."

Nwabueze has further criticized the inherent power theory, as being incompatible with the idea of a written Constitution, but in agreement with a Monarchy. In a Monarchy the Monarch can do as he pleases since he is not limited by any written Constitution. It is difficult to equate the position of a head of government created by a written constitution with that of a hereditary Monarch whose office and powers have their origin in unwritten custom. Nwabueze has observed that to argue therefore, as the advocates of the inherent power theory

20 Supra p 8
21 In Eghubayi Eleko V Government of Nigeria (1931) A.C 662 at 670.
do, that the vesting of executive power in the President confers upon him all that power which, in any age of the world and under any form of government has been vested in the Chief Executive functionally…. is a startling and untenable proposition. For it would mean implying into a written Constitution all the prerogatives, originating in immemorial custom, which appertain to and adorn the kingly office.  

Several classical writers as being in support of the inherent power theory have cited the renowned John Locke. Locke wrote that the legislature cannot foresee and provide by laws all that may be useful to the community, thus the executive having power in its hands, can make use of that power for the good of society, till the legislature provides for it.  

This claim by advocates of the inherent power theory has been disputed as erroneous because what Locke wrote about is the doctrine of necessity. The doctrine is well recognized and does not operate from outside the law, but is implied in it as an integral part thereof. It is implicit in the constitution of every civilized community. Its rationale is that in an emergency imperilling public order, the safety of the people is the supreme law. By this supreme law of necessity, the organs of the state are entitled, in the face of such an emergency, to take all appropriate actions, even in deviation from the express provisions of the constitution; in order to safeguard law and order and preserve the state of society.  

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22 Supra note 20 p 6.
23 Supra note 22 p 7
24 Supra note 23
In order to understand which theory of power is applicable to Zambia, it is first of all important to note that the constitution vests the executive power of the Republic in the President. The constitution does not define executive power and what activities fall within that scope; neither does it provide any guidance on the functions of the executive branch of government.

In the light of no precise definition of executive power in Zambia, it has been taken to mean the remainder of the power after the legislative and judicial powers are removed, (residual power theory). Executive power therefore in this regard will include: the power to formulate policy and implement it, the initiation of legislation, the maintenance of law and order, the protection and enhancement of economic and social welfare of the people, the direction of foreign policy, and generally the carrying on of the general administration of state.

Article 44(2) of the constitution gives power to the president to do certain specific things. These are not specific grants of power, but a merely illustrative list of the things the President has the power to do. Given the language of the constitution, the President has the power to do things, which may not be specifically provided for by either the constitution or an act of parliament, provided the acts in issue are not in conflict with the constitution or any other law in force.

This lack of definition of executive power is partly responsible for the problem of the ineffectiveness of checks and balances. It also partly explains why it is sometimes not possible

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25 see article 33(2)
to successfully challenge certain decisions or actions by the President, questionable and morally unacceptable though they may be. The specific grant theory on the other hand may not be invoked in Zambia because it confines executive power to what is specifically or expressly provided for by law. This may not always be sufficient because sometimes situations may arise that require the immediate response of the state, where there is no enabling legislation empowering the state to act.

1.2 STATEMENT OF THE PROBLEM

Having discussed the theories of power and determined which one is applicable to Zambia, and having seen how that theory (the residual power theory) is partly responsible for the ineffective check of Presidential powers, this work will now assess the effectiveness of checks and balances in Zambia. But before that a brief history of the development of Zambia’s institutional and organizational framework of the executive will be discussed in order to appreciate how the problem of immense executive power has emerged.

1.3 HISTORY OF THE DEVELOPMENT OF EXECUTIVE AUTHORITY IN ZAMBIA.

Zambia gained its independence in 1964 and from independence to date it has had a record of four constitutions, yet the institutional framework of the executive has substantially remained the same.

Before independence Zambia was under British rule for almost five decades.\(^27\) The territory was governed by orders in council and royal instructions but these were not concerned with

\(^{27}\) From 1924 to 1963
defining and limiting the exercise of governmental power. However, the ultimate authority was reserved in the governor for the territory.28

The vesting of all authority in the governor marked the beginning of the problem. All organs of the government were subordinated to one individual, namely, the governor. Thus from the very inception of colonial influence in Northern Rhodesia the system of government introduced was authoritarian, it was premised on the fact that good men and not good laws make good governments.29 Moreover, some of the laws that were introduced by the colonial government were intended to suppress any advocacy for independence by the black majority. For example the Public Order Act of 1955 was used by the Northern Rhodesia Parliament to combat the stirrings of indigenous nationalist leaders who advocated independence from Britain.30 However, the independence constitution upon which the country had its first Black African government was premised on the limitation or restraint of arbitrary power. It sought to support the rule of law, supremacy of the Constitution, constitutionalism and good governance. But these virtues came too late in the history of the country; the authoritarian nature of British colonial government was too deeply entrenched to be eradicated through constitutional prescriptions.31 Thus the independence constitution despite introducing these democratic ideals was designed in such a way that it co-existed with all oppressive laws which were in place before independence.

The Constitutional changes introduced immediately after independence were meant to get rid of the conditions left by the colonial masters. The government justified these changes as

28 Sangwa, J.P. LL.M Thesis (UNZA) 1994 p361
29 Supra note 28
31 Supra note 30
necessary for the use of institutions of government and resources to address the economic and social needs of the people, but the changes had negative implications. The powers of the President increased the effectiveness of most of the institutions whose function was to control the executive authority decreased and in certain instances the institutions and practices were eliminated.\textsuperscript{32} This was essentially the beginning of the one party rule, which was ushered in 1973.\textsuperscript{33} During the one party state the President had such immense powers that all institutions of government and officers therein served at the mercy of the President. One Party rule was in itself a negation of good governance.\textsuperscript{34}

By 1990 majority of the Zambian people were fade up of the oppression of Kaunda and UNIP. They rose up to the occasion and opposed the arbitrary power of the UNIP government. Fortunately Dr. Kaunda heeded to the calls of the people and in 1991 Section 4 of the One-Party constitution was amended and henceforth, Zambia reverted to multi-party politics.

Thirteen years have passed since the re-introduced of multipartism and Zambia’s political, social and economic order is not any better, in fact it keeps on deteriorating. The same old structures, which supported and sustained authoritarianism in the past, are still in place and there are no indications that serious democratic reform will ever be effected.\textsuperscript{35}

1.4 THE PROBLEM
From the brief history given above it is apparent that the problem lies in the powers conferred on the President by the Constitution. It will be shown shortly how the constitution empowers the President to appoint literally all key government officials to the extent that such officials so appointed fail to render the necessary checks and balances on the President. Just like in the Colonial era and the One Party State, where the leader was vested with excessive authority, there is still too much power vested in the President today.

Moreover Article 33 (2) of the Republican Constitution which vests executive power of the Republic of Zambia in the President does not define what executive power really means. Article 44 (1) of the republican constitution provides as follows: “As the Head of State, the President shall perform with dignity and leadership all acts necessary or expedient for, or reasonably incidental to, the discharge of the executive functions of Government subject to the overriding terms of this constitution and the laws of Zambia which he is constitutionally obliged to protect, administer and execute.”

The inherent power theorists would argue that such a provision empowers the President to do all what is inherently executive. But as already noted supra, the doctrine of necessity overrides this belief by the inherent power theorists. It is important to note that the latter part of article 44 (1) qualifies the first part. The first part gives the President the discretion to do such acts as are reasonably incidental to the discharge of executive functions. The latter part qualifies or limits the scope within which acts are to be discharged. It provides that all acts to be done as of necessity are subject to the overriding terms of the constitution and the laws of Zambia. In other words, all acts done by the President pursuant to this Article should be justified within the provisions of the Constitution and the laws of Zambia.
It is apparent therefore, that Article 44 (1), to this extent seems to underpin the residual power theory to the extent that Presidential functions, notwithstanding that they are not expressly provided for in the constitution, have to be supported by the overriding terms of the constitution itself or the laws of Zambia.

1.5 CONCLUSION

Having discussed and assessed the theories of power and established that the residual power theory is applicable to Zambia, the conclusion to be drawn firstly is that residual power is by nature difficult to control because executive power according to this theory need not always be expressly provided by legislation. Therefore it is quite difficult sometimes to challenge executive action because even if it may not expressly be provided, it may rightfully be exercised provided it is not illegal. The requirement by Article 44 (1) is simply that the President shall perform all acts necessary for the discharge of executive functions.

The second conclusion to be drawn from this chapter is with respect to the excessive powers of the President in Zambia. This is traceable from the history of the country during the colonial era. The laws that governed Northern Rhodesia vested too much power in the governor for the territory to the extent that he literally controlled all the organs of government. After the colonialists left, the constitution that was introduced in 1964, was a document drafted in Britain and was not well acquainted with the local situation. Therefore, it did not adequately address the problem of executive power in Zambia. Moreover the same old structures responsible for creating an all-powerful executive are still in existence. To this
extent therefore, the President in Zambia wields excessive power due to inadequacies in its constitutions in addition to the maintenance of the colonial structures, which were used to suppress the natives.
CHAPTER TWO: ASSESSMENT OF USE OF EXECUTIVE POWER IN THE THIRD REPUBLIC

2.0 INTRODUCTION

The coming into power of the movement of multi-party democracy (MMD), in 1991 brought a sigh of relief to the people of Zambia. The majority of the Zambians were disillusioned with the One Party-State. Thus the formation of the MMD was seen as the solution to the flaws of the Kaunda era and as a hope to the re-introduction of multi-party politics in Zambia.\(^{36}\)

Soon after coming into power, the MMD government led by Frederick Chiluba, made so many pronouncements to the effect that the government was committed to ensuring democratic principles were upheld in the governance of the state. For example, the MMD manifesto provides inter alia that, "the MMD is committed to.... the maintenance of the rule of law and the independence of the judiciary, further the MMD is committed to upholding democracy based on a multiparty system with effective checks and balances as offering the best source of government."\(^{37}\) Notwithstanding this provision in the MMD manifesto, most of the values provided therein are yet to be realized. The MMD has been in power since 1991 and during this period the constitution has essentially been changed twice and yet the issue of excessive executive power is still unresolved.


When Frederick Chiluba ascended to power one of the important things his government pledged to do was to enact a legitimate constitution. One which the people of Zambia would identify as their own document. To this end, the President appointed a Constitution Review Commission (CRC) pursuant to the Inquiries Act. The Commission was under the Chairmanship of Mr. John Mwanakatwe.

One of the terms of reference of the Commission was to determine the most desirable means of adopting the Constitution. The response was that the constitution should be popularly adopted through a Constituent Assembly and a referendum. The Commission reported as such, but the government preferred adoption through the National Assembly. It is submitted that Government’s position was essentially the President’s wish. Thus the Constitution that was finally adopted by parliament was ‘tailor made’ to suit the wishes of those in power and suppress all perceived enemies of the M.M.D. The President wished to perpetuate his stay in power, therefore adoption of the Constitution through a predominantly M.M.D. National Assembly was the most ideal. Moreover most recommendations which sought to circumscribe the powers of the President, where rejected.

When it became clear that government was going ahead to adopt the constitution through parliament one opposition political party, namely the Zambia Democratic Congress (ZADECO), sought to challenge this. Therefore in Derrick Chitala V The Attorney General

38 CAP 181 of the Laws of Zambia


40 (1995- 1997) ZR 91
the appellant argued inter alia that the decision to have the Constitution enacted by the National Assembly had been unreasonable and in bad faith in that it was contrary to the recommendations made by the Mwanakatwe Constitution Commission after touring the country and receiving submissions from the people. The court dismissed this argument stating that the Government gave a reason for wanting to proceed in a different manner and it could not be said that such reasons were ‘wednesbury’ unreasonable.\textsuperscript{41}

It is submitted that the decision in this case denied Zambia an opportunity to enact a legitimate and durable constitution. The court should have surely found Government’s refusal to adopt the Constitution through a Constituent Assembly as unreasonable because Government itself specifically asked the Commission to receive submissions on the mode of adoption.\textsuperscript{42} Nine years have passed since the courts decision in \textit{Chitala V Attorney General} was made. The Supreme Court has not been vindicated to date. Infact many Zambian are still desirous of a popularly adopted constitution. Civil society and indeed other stakeholders have made this view known to the current constitution Review Commission.\textsuperscript{43} The court’s decision in this matter not only denied Zambia an opportunity to have a popularly adopted Constitution, but it is submitted that the courts failed to question the real motive behind government’s insistence to have the constitution adopted by parliament. Checks on the executive in this instance were ideally supposed to be provided by the courts, but due to timidity on the part of the judges, a constitution that was only desirable to those in power was enacted.

\subsection*{2.2 THE CHALLENGE OF JUDICIAL INDEPENDENCE IN THE CHILUBA ERA}

\textsuperscript{41} Supra note 40 p 97
\textsuperscript{42} Term (9) of the terms of reference provided for the mode of adoption.
\textsuperscript{43} Zambia Episcopal Conference – submission to the Mung’omba CRC (2004) p 3
In any democracy, an independent judiciary is essential for the enhancement of checks and balances among the organs of government and for the promotion of the rule of law.

During the reign of Chiluba, the Courts were faced with a number of high profile political cases. In a few instances, the courts made quite valid decisions which, upheld the rule of law\textsuperscript{44}, yet in others some judges were timid or afraid to rule against the state, even in the light of binding precedents. For example in the case of \textit{Mushota & Katyoka V The Attorney General}.\textsuperscript{45} Judge Sakala at the Ndola High Court held that Kaunda, the first Zambian Republican President, who ruled Zambia for 27 years was stateless. Counsel for the defendant, cited a Supreme Court decision of the Presidential Petition case of 1996\textsuperscript{46}, where it was held that every person living in Zambia immediately before independence had become a Zambian citizen. The High Court ignored this Supreme Court decision, making this a clear case of ‘Judicial insubordination.’

Also in \textit{Dean Mung’omba V The Attorney General},\textsuperscript{47} the applicant challenged the declaration of a state of emergency by the President, following the 1997 attempted coup ‘detat, and soon afterwards the President assured the Nation that his government was in control as the coup plotters had been captured.

The Court held that it had no jurisdiction to inquire into the reasons for the declaration of a state of emergency. Judge Kabalata said, “I find that the President is not obliged to furnish

\textsuperscript{44} For example see the case of \textit{Mulundika and seven others V The people...} (1995) ZR
\textsuperscript{45} 1997/HN/357.
\textsuperscript{46} SCZ selected judgment No. 10 of 1998.
any reason for making a declaration, such inquiry would in my view be ultra-vires the powers of this court because the only condition that the President is required to fulfill is to meet and consult his cabinet before declaring that a state of emergency exists.

It is apparent from this decision that the judge did not address his mind to the facts surrounding the case. If he had he would have arrived at a different conclusion. This case involved an exercise of power by the President. It was thus incumbent upon the courts to render an impartial decision so that the President’s powers under the Emergency Security Act\textsuperscript{48} and regulations made there under were not abused. This was however, not the case shortly afterwards, perceived political opponents were detained and tortured, only to be discharged after entry of a nolle prosequi by the state.

The purported ouster of the Courts jurisdiction by Justice Kabalata was wrongful because the courts in Zambia have inherent power to review any decision made by a public body, including the President himself\textsuperscript{49}. The foregoing cases illustrate the extent to which several judges gave decisions that were favourable to the President for fear of intimidation and reprisals. It was seen for example after the Supreme Court decision in Christine Mulundika, how former Chief Justice Ngulube was removed from the position of director of the Legal Practitioners Institute, amidst condemnation from senior government officials. The courts have a duty to uphold the constitution in addition to reviewing any exercise of power, which might be challenged. In the foregoing cases the courts had a duty not to undermine the authority of the President, but to ensure that the President did not abuse his authority.

\textsuperscript{47} 1997/HP/2617 (unreported).
\textsuperscript{48} CAP 105 of the Laws of Zambia.
2.3. THE SALE OF GOVERNMENT HOUSES AND THE APPOINTMENT OF DISTRICT ADMINISTRATORS (DAs)

Towards the run-up to the 1996 General elections, President Chiluba announced the sale of government houses. It is submitted that this decision was unsupported by law and it was an abuse of authority by the President. It may be argued by the residual power theorists that nothing stopped the President from selling the houses, but this argument is watered down by the fact that a legally established body such as the National housing Authority would have appropriately handled the sale of the houses. It is further submitted that the move by the President was a ‘cheap’ campaign strategy meant to solicit for votes from the public.

The other questionable exercise of power by Chiluba was the introduction of the office of District Administrator (D.A) Much as it is acknowledged that the President has power to constitute and abolish offices under the constitution, the decision to create the office of D.A. was designed to advance the interests of the MMD in general and the President in particular. This was seen in the role the D.A.’s played in advancing Chiluba’s desire to go for a third term of office.

Another exercise of Presidential power, which went unchecked, was the disbursement of the presidential discretionary fund, commonly known as the slush fund. Although the fund was approved by Parliament, its disbursement was abused. Since disbursement was at the President’s discretion, the fund was usually given to social clubs, schools, churches and other

49 As held in Chitala V The Attorney General, supra.
50 As provided in Article 61 (1) of the Republican Constitution.
social institutions, especially those situated in areas where by-elections were scheduled to be held.

It is submitted that the introduction of the slush fund was unjustifiable because Zambia’s system of financial administration has always been such that, the line Ministries receive budgetary allocations every financial year for development projects and other needs. Moreover the MMD dominated parliament could not question this anomaly, notwithstanding that it was an usurpation of power that could competently be exercised through line Ministries.

2.4 CHECKS AND BALANCES THROUGH THE PARLIAMENTARY COMMITTEE SYSTEM.

Ideally Parliament is supposed to hold the Government accountable to it and through it to the public, for its actions\textsuperscript{52}. This is done to a great extent through the Committee System. For Example, the Select Committees, which are adhoc Committees, are part of the Zambian parliament and are better, placed to ensure that every area of public administration is scrutinized by Parliament\textsuperscript{53}.

Since 1991 a select Committee to scrutinize Presidential appointments has been in place. Inspite of the existence of this mechanism, there is yet to be any person appointed by the President to any public office being rejected by the National Assembly. Both the Committee

\textsuperscript{53} Supra note 52
and the Assembly have more often than not endorsed presidential appointments without much debate. The reason for this is a notorious fact – Most of these individuals in Parliament or in the Committee have their jobs tied to the President’s discretion to hire and fire whomsoever he wishes. Therefore, the rejection of a nominee is considered an affront to the President as the appointing authority.

The requirements to ratify Presidential appointments by the Committee and indeed the National Assembly, has been put in place to check the President’s exercise of this authority to appoint, so that he does not abuse it. The Mechanism has also been established to ensure that the right and qualified people occupy those positions. In this vein the Committee on Presidential appointments is empowered to receive representations from concerned groups or appropriate stakeholders in the appointment so that a thorough scrutiny is done. For example in 1995, President Chiluba appointed Mr. Mebeelo Kalima as Director of Public Prosecutions, (D.P.P). The Law of Association of Zambia (L.A.Z) did not support his nomination, but his appointment was ratified by the National Assembly. Several months later the D.P.P was suspended and a Committee was set up to investigate various allegations brought against him for possible removal from office. It is indeed quite ironic that a person who had met the President’s and the Select Committee’s approval would be found unsuitable a few months later.

The preceding account presents selected instances of how presidential powers in the Chiluba regime went unchecked especially by Parliament, and sometimes by the Judiciary itself, especially in those cases that bordered on Presidential authority and political power of the
MMD. The account that follows will discuss how power has been abused by the current President even in the light of express limitations or restraints in the constitution.

2.5 THE DAWN OF THE NEW DEAL GOVERNMENT

The Presidential and Parliamentary elections of 2001 that saw Levy Mwanawasa emerge as Presidents were characterized by a lot of election mal-practices. As a result several political parties petitioned the Presidential elections. Some parliamentary elections were also petitioned and the Courts have since nullified some election results.

A significant outcome of the 2001 general elections was that for the first time in the history of Zambian Politics the opposition had more seats than the party in power. Moreover the winning Presidential candidate only managed about 29 per cent of the total votes cast making him essentially in illegitimate President. It was therefore not surprising that soon after wards, Mwanawasa in an unprecedented fashion, appointed some opposition M.Ps as Cabinet Ministers and others as Deputy Ministers. The President retorted amidst criticism from sections of the Zambian Community that the constitution empowered him to appoint Ministers from among Member of Parliament.  

The move by Mwanawasa despite his legal justification was morally wrong because firstly it divided the opposition and then secondly the opposition was destabilized as most of those who accepted these appointments were expelled from their parties hence losing their seats as opposition Members of Parliament.  

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54 As provided in Article 46 (2) of the Constitution.
55 Most of those expelled were from U.P.N.D the major opposition political party in Parliament.
Those who lost their seats recontested on MMD tickets and in most cases won. As a result the once opposition dominated Parliament which had long been awaited to offer effective checks and balances on the executive was no more. On the other hand those opposition M.P.s who were not expelled from their parties but were appointed as Cabinet Ministers could no longer effectively oppose Government for fear of losing their jobs and due to collective responsibility which restrains Cabinet Ministers from opposing government policy in parliament as agreed in Cabinet.

As if this was not enough, soon afterwards President Mwanawasa appointed Dr. Nevers Mumba as Vice President. The said Nevers Mumba was one of the Presidential Candidates in the 2001 general elections from which Mwanawasa emerged the controversial winner. He was nominated as M.P. and subsequently appointed as Vice President.\(^{56}\) According to Article 68 (3) of the constitution a person may not be appointed as a nominated member of parliament if he was candidate of elections in the last preceding general election or in any subsequent by election.

The terms of this provision are clear; they need not any special rule of statutory interpretation other than the literal meaning itself. Mwanawasa was forbidden by law from appointing Nevers Mumba. However, notwithstanding this express constitutional provision our lawyer President defied it. It is submitted that this was an abuse of power. It was the rule of Man rather than law contrary to what Mwanawasa himself had pledged to do.\(^{57}\)

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\(^{56}\) Nomination to Parliament is on account of special interest or skill as provided in Article 68 (1). Mumba possessed neither of these requirements.

\(^{57}\) See Presidential Speech for the Official Opening of the 2\(^{nd}\) Session of the 9\(^{th}\) National Assembly. January 17\(^{th}\) 2003 at p 12.
2.6 THE REMOVAL OF PRESIDENTIAL IMMUNITY

On 11\textsuperscript{th} July 2002, President Levy Mwanawasa addressed the National Assembly and made a number of serious allegations about certain wrongs alleged to have been committed by the former president Fredrick Chiluba. The President never made mention of any wrongs committed by his predecessor in his personal capacity but he called upon the National Assembly to sanction the prosecution of Chiluba.\textsuperscript{58}

On 16\textsuperscript{th} July 2002, the National Assembly reconvened to debate the removal of Chiluba’s immunity from prosecution, pursuant to Article 43(3) of the Constitution. Before the debate could start, the Speaker of the National Assembly cautioned government that in accordance with Parliamentary Procedure the motion to remove Chiluba’s immunity should have been tabled before the House 24 hours before being debated. In addition Legal Affairs Minister, (now Minister of Justice), also cautioned the Members of Parliament that they could not debate the removal of Chiluba’s immunity without affording him an opportunity to be heard as required by the rules of natural justice. In this vein the Minister advised that Chiluba could appear before a select committee since the house was not open to strangers.\textsuperscript{59}

The House ignored this advice and on the same day, Chiluba’s immunity was removed by a unanimous resolution of the house. Chiluba thereupon applied for judicial review of Parliament’s decision to remove his immunity on the grounds of illegality and procedural impropriety. Counsel for the applicant argued inter alia-that National Assembly abdicated its

\textsuperscript{58} See application for Judicial Review: Fredrick Chiluba V The Attorney General. 2002/HP/0630 PP 2 - 3
\textsuperscript{59} Supra. Note 58
responsibility under Article 43(3) of the Constitution. It was the duty of the house under the said Article to “Check Culpable motives” by the Executive branch of Government (in particular the President) to seek vengeance on his predecessor. Counsel also contended that by appearing before the National Assembly and calling for the prosecution of the applicant the President usurped the powers of the D.P.P. who was empowered under Article 56 (3) of the constitution to decide whether to prosecute anyone in Zambia or not.

In response to the above arguments, the Attorney General Mr. George Kunda submitted inter alia before Court that there was no provision under Article 43 (3) for the applicant to be heard before or during the passing of the resolution. The Attorney General also argued that Parliament or the National Assembly had a right regarding its conduct over its own internal procedures. He also averred that the comments or contribution of the Honourable Minister of Legal Affairs were purely an internal matter.

It is quite startling that the Attorney General, who in his capacity as Minister of Legal Affairs cautioned his fellow MPs that they could not debate the removal of the applicants immunity without hearing him, could now aver that his comments were purely an internal matter. This stance taken by the Attorney General was not only immoral, but was a denial to the nation as a whole to know the real motive by Mwanawasa of sanctioning the prosecution of his predecessor.

2.7 ESTABLISHMENT OF THE TASK FORCE ON CORRUPTION
Following these events Mwanawasa instituted a task force to investigate the so-called plunder of national resources. The task force comprised members form the Police, DPP, DEC, ACC and the Office of the President (Special Division). Leadership of the Task Force rotated between the Inspector General of Police and the Director General of the DEC but later an independent person was appointed by the President to head the task force.

The formation of the task force presents another wrongful exercise of power by the President which has gone by unchecked. It is submitted that the constitution vests prosecutorial powers in the office of the DPP or those that the office delegates to. It is therefore illegal and an abuse of authority to allow the task force to do both investigation and prosecution without any blessing of the law.\(^6^0\)

Another questionable exercise of power by the President was seen in the removal of the DPP Mr. Mukelabai from office. The Constitution guarantees and protects the tenure of office of the DPP. Moreover a person holding the office of DPP may only be removed from office for incompetence or inability to perform the functions of his office whether arising from infirmity of body or mind or misbehaviour.\(^6^1\)

The removal of Mr. Mukelabai from office of DPP was a complete circus. First the media reported on the forced leave of the DPP, the Minister of legal Affairs issued a public denial in the company of the DPP. The President then held a press conference at which he alleged suspicious behaviour on the part of the DPP and told the media that the DPP would go abroad on a scholarship after which he would not resume his position. The DPP later issued a

\(^6^0\) The Post News Paper. June 1, 2004 issue No. 2784 p 1
statement repudiating the President's statement and at this stage a tribunal was appointed by the President to investigate the propriety of the Director of Public Prosecution.\(^{62}\)

After completing its investigations, the tribunal observed that facts before it did not establish misbehaviour which would warrant the removal of Mukelabai from office. The tribunal, however, stated in is recommendations that although there was merit in some of the allegations against the DPP, on the whole, misbehaviour had not been established by the facts before it.\(^{63}\) The tribunal nonetheless recommended that Mukelabai should be retired with full benefits in public interest and his suspension revoked with immediate effect. President Mwanawasa admitted that he did not have concrete evidence as to the DPP's Misbehaviour, but he nonetheless agreed with the tribunals report.\(^{64}\)

The above account is a rather disturbing state of affairs. The tribunal comprising three judges failed to live to its expectations of checking whether the removal of the DPP by the President was constitutional or not. It was highly anticipated that the tribunal would be impartial in its work so that the rule of law is upheld and arbitrariness curtailed. Unfortunately the tribunal disregarded the supreme law of the land and instead it made a finding that was not supported in law but was favourable to the President.

Actions such as the one exhibited by the tribunal investigating the DPP are responsible for creating dictators. It is therefore required as of necessity, that Judges should exhibit professionalism, integrity and above all bravery especially in high profile political cases or

\(^{61}\) Article 58 (2) of the Constitution.


matters that concern the President, for the purposes of controlling the exercise of power by him.

2.8  DICTATORIAL TENDENCIES IN THE PRESIDENT, A NEGATION OF CHECKS AND BALANCES

On 17th January 2003 during the second session of the ninth National Assembly, President Mwanawasa committed himself to the promotion and observance of the rule of Law, Democracy and good governance. Despite this assurance, the events that subsequently followed did not attest to Mwanawasa’s pledge. Mwanawasa has turned himself into a tyranny that will work at stamping out legally or illegally all those who are opposed to his views. For example MMD M.Ps have on some occasions been fore warned at state house Caucus, not to oppose government policy in parliament. This has threatened the MPs hence eroding parliament’s role of making the executive accountable to it.

Some Non Governmental Organization (NGOs) have also been issued with threats for opposing the adoption of the constitution through Parliament. Justice Minister George Kunda maintained that the constitution review process was going to remain government driven and has issued threats of treason and deregistration to the Oasis forum. On 16th November, 2004, Home Affairs Minister Ronnie Shikapwasha deregistered the Southern Africa Centre for the constructive Resolution of Disputes (SACCORD) on the grounds of threats to national

65 Supra note 59.
67 Supra.
security. President Mwanawasa supported this move and stated, referring to Shikapwasha, "he is not required by law to give reasons for his action. He can do so if he so wishes."\(^{69}\)

President Mwanawasa's dictatorial tendencies were finally confirmed when he dismissed Nevers Mumba as Vice President of whom eight months earlier he said, it would be a sin for him to reject Mumba.\(^{70}\) In an emotional address to the press, Mwanawasa who was visibly annoyed emphasized the importance of loyalty and explained that Mumba had breached his oath of allegiance to him. Mwanawasa categorically stated that he was the government, and forth with Mumba was replaced by Lupando Mwape.\(^{71}\)

Just like the appointment of Nevers Mumba was controversial, that of his replacement was also controversial. There were no justifiable reasons for appointing a junior Minister as Vice President, who had previously been fired for unexplained reasons.\(^{72}\) It is submitted that Mwanawasa appointed Lupando Mwape so that he could have a Vice President who would be loyal to him, who he could use at his disposal and who could not oppose his Presidency.

The instances cited above are evident of the fact that President Mwanawasa has abused his authority to the extent that the other wings of government have failed to effectively provide checks on the President. Faced with a Presidential petition, Mwanawasa feels that he has too many enemies hence his confrontationist and combative political style. In his bid to establish his authority and regain legitimacy, Levy has antagonized so many groups, including

\(^{70}\) The Post News Paper. February 22\(^{nd}\) 2004. Issue No. 2686 p 1
\(^{71}\) The Post News Paper. October 11\(^{th}\) 2004. Issue No. 2916 p 11
\(^{72}\) Supra note 71
opposition political parties, church organizations, trade unions and professional groups, among others.

2.9 CONCLUSION

The introduction of multiparty politics in 1991 presented a lot of hope for Zambia in the sense that the new leaders of that time pledged to enhance democracy, by upholding the rule of law, judicial independence and supporting a system with effective checks and balances. This chapter has advanced some practical instances from the Third Republic of how abuse of executive power has sometimes gone unchallenged by both the courts and Parliament. The main preoccupation by those that have wielded power in Zambia has been to perpetuate their stay in authority. To this extent they have intimidated Judges, and manipulated the constitution making process to fulfill their selfish political ambitions. Proposed constitutional changes that have advocated for reducing Presidential powers have been rejected and seen as an affront to the Presidency. As a result an all-powerful President has been created in Zambia such that several members of both Parliament and the Judiciary are afraid to challenge or question abuse of power by the President, for fear of being hounded out of office.
CHAPTER THREE: THE SEPARATION OF POWERS, SUPREMACY OF THE
CONSTITUTION AND JUDICIAL INDEPENDENCE: THEIR
IMPACT ON CHECKS AND BALANCES IN ZAMBIA

3.0 INTRODUCTION

Having established the problem to the ineffectiveness of checks and balances, and having assessed the extent to which executive power has been abused in both the Chiluba and Mwanawasa regimes, in the preceding chapters, this part of the research will discuss key concepts or doctrines that underscore checks and balances. The relationship between the executive and the other two organs of government, namely, Judiciary and Legislature will also be considered.

3.1 SEPARATION OF POWERS

From the arguments hereinbefore presented it is ascertainable that executive power is the power to take and enforce decisions within the boundaries defined by law and it is one of the three powers of the state. The three powers of the state is a concept articulated by Charles de Secondat, Baron de Montesquieu, in his work The spirit of the laws. In this work he argued that the three powers of a state are the legislative, the executive and the Judicial and that this division is necessary to avoid the abuse of power because when man is vested with power his tendency is to carry this authority as far as it will go. Montesquieu’s division of powers did not closely correspond except in name with the classification which has become traditional,
for although he followed the usual meaning of Legislative and Judicial powers, by executive power he meant only “The power of executing matters falling within the law of Nations.”

The doctrine of Separation of Powers in its application in modern government does not mean that a rigid three-fold classification of their functions is possible. Its value lies in the emphasis placed upon those checks and balances which are essential to prevent an abuse of the enormous powers, which are in the hands of rulers. In politics the principle of checks and balances underlies many democratic governments. The term was also coined by Montesquieu during the enlightenment. The principle is an out growth of the classical idea of separation of powers, and the first national system of checks and balances was outlined by the United States Constitution in 1789. Wade thus writes “it is in the United States that there is a real division of powers between the three organs and strict adherence to the doctrine of separation of powers. The framers of the American constitution intended that the balance of powers should be attained by checks and balances between separate organs of government.”

Therefore for a state to remain democratic, the powers of the State should not only be separated, but there must be checks and balances to prevent a single group form acquiring control over two or more of them. To ensure the effectiveness of checks and balances, the following are essential:

The same persons should not form part of more than one of the three organs of government, e.g. that members of Cabinet should not sit in Parliament. One Organ of government should not control or interfere with the exercise of its function by another organ e.g. that the Judiciary

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76 Supra p 23
77 Supra 22
78 Supra note 75
79 Supra note 78 pp 24 - 25
should be independent of the Executive, and, one organ of government should not exercise the functions of another e.g. that Ministers should not have Legislative powers.\footnote{Supra note 79 p 23}

3.2 CHECKS IN A DEMOCRACY

Checks and balances in a democratic society are not only limited to the three organs of government. There are several entities that provide checks on government actions or inactions. These include Political Parties, the Church, the Press and interest groups or Non-Governmental Organizations (NGOs).

In a well developed democratic government these organizations and associations should not be perceived as enemies of the state, but should be viewed as groups that may offer support to the government and give constructive criticism whenever the government goes wrong.

It has been asserted by Henry Ehrmann that one of the principles of democracy is the balancing of the separation of power between government, Parliament and the Judiciary.\footnote{Ehrmann, H. Democracy in a changing society. Pall mall Press: London, (1965) p 10.} But he also adds that political parties are a must in a democracy. They must aggregate special interest and embed them into the general structure of the state, alternative groups such as the church, Non-Governmental Organizations and other communities help in this task.\footnote{Supra note 79 p 23} Thus the importance of political parties and other interest groups lies in the fact that the criticisms they offer may act as a control on how government exercises its authority in pursuance of the realization of its policy.
In many societies where the population is generally literate the press is an important medium through which government or indeed public policy is communicated. In several states associations especially press organizations have taken center-stage in criticizing state control over the dissemination of information, thus a free press has become one of the hallmarks of democracy. The press acts as a watchdog over governmental actions and in the most developed Western democracies it has become customary for their constitutions to guarantee freedom of the press.\textsuperscript{83}

In a nutshell, democratization is supposed to result in greater accountability and transparency, which should in turn, have a positive impact on the formulation of, and implementation of new policies. A free press and active opposition are important in a democratic society because they can criticize government when it abuses its authority.

3.3 THE LEGAL JUSTIFICATION OF THE CONCEPT OF SEPARATION OF POWERS AND CHECKS AND BALANCES

The concepts outlined hereinbefore would have no effect if they were merely based on the theories raised above, because they would then lack binding legal character. Therefore most countries with written constitutions make provision for the three organs of government\textsuperscript{84} and may stipulate the extent of authority of each organ, or such authority may be provided for in an Act of Parliament. For example in Zambia Article 91 of the Constitution acknowledges that

\textsuperscript{82} Supra note 81
\textsuperscript{83} See the first amendment to the U.S. constitution
The courts outlined therein shall exercise their power in an impartial way while enjoying independence from other interferences.

3.4 SUPREMACY OF THE CONSTITUTION

The constitution of Zambia is the Supreme law of the land. This means that all organs of government are subject to the Constitution. Also all government officials whose offices and functions are stipulated in the Constitution must justify their actions within the Constitution. It is submitted that in the Zambian experience in addition to the excessive powers conferred on the President by the Constitution, there have been incidents, when the President has abused his authority and acted ultra-vires the Constitution. It is further submitted that such abuses have mainly resulted from the excessive powers wielded by the president, which in some cases are not clearly explained or defined by the Constitution itself.

3.5 THE RELATIONSHIP BETWEEN CABINET AND THE PRESIDENT

The Cabinet is established pursuant to Article 49 of the Constitution and it consists of the President, the Vice President and the Ministers. The functions of Cabinet are stipulated in Article 50 of the Constitution. The functions include inter-alia advising the President with

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84 See for example articles 33 and 62 of the constitution.
85 See Article 1 (3) of the constitution
86 See Chapter Two supra.
87 For example the establishment of the Presidential Housing initiative (P.H.I), by former President Chiluba in 1999.
respect to the policy of government. The President however, may act in his own deliberate judgment and is not obliged to follow any advice tendered by any other person or authority.  

This state of the law is unjustifiable especially in a country that purports to be democratic because the President can act arbitrarily even in the face of advice by cabinet to the contrary. It is also worth noting that the President has power to appoint and remove all members of cabinet and none of them have security of tenure. The fact that the President can remove all the cabinet members is a problem in itself. For how can the cabinet members legitimately oppose the hand that appoints them? It is quite inconceivable to expect the members of cabinet to oppose the President who is empowered by the constitution to remove them at any time.

There is nothing wrong for the President to appoint members of cabinet, but the problem arises in him having to remove them at any time without any legal justification. This position places them in a predicament whereby they have to choose between either criticizing the President at the expense of their jobs or keeping quiet to protect their cabinet positions. It is therefore proposed that in order to fully realize checks and balances in this relationship, cabinet members should be accorded protected tenure of office, as is the case with Judges. Moreover their appointment should be scrutinized and ratified by Parliament so that they are accountable to the National Assembly and ultimately to the people.

3.6 THE LEGISLATURE VIS A VIS THE PRESIDENT

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88 See Article 44 (6) of the constitution
89 See Article 44 (5)
In Zambia the legislative powers vest in Parliament which consists of the President and National Assembly. The National Assembly is composed of one hundred and fifty elected members, not more than eight nominated members, and the Speaker of the National Assembly.

From 1973 to 1991 Zambia was a de jure one party state. When it reverted to multiparty politics in 1991 it has been mostly a de facto one party in the sense that the party in power returns the highest number of seats in Parliament, in addition to this, the Vice President, Cabinet Ministers and their deputies who are all appointed by the President, are part of the legislature. This scenario abrogates the doctrine of separation of powers, which demands that members of one organ should not be members of another branch of government. If members of Parliament are also members of cabinet it is likely that conflict of interest will arise hence checks and balances may be rendered ineffective. For example before government policy is presented to Parliament for possible enactment into law, cabinet ministers would have already discussed the policy and taken a collective position, such that when policy is formulated into a bill, the Cabinet Ministers are obliged to support it as agreed in Cabinet, notwithstanding their personal opinions.

The Members of Parliament who are also part of the executive (Cabinet) and belong to the ruling party are constrained to support government policy in Parliament due to the concept of collective agreement in addition to paying allegiance to the party and the President as the appointing authority. This in turn has made Parliament to be used as a “rubber stamp” to the

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90 Article 62.
extent that bills that are retrogressive to a maturing democracy have gone through the house without being subjected to sufficient scrutiny.

Parliament is a ‘Watchdog’ organ that is ideally supposed to make the executive accountable before it, and ensure that the executive does not abuse its authority. In reality however, and particularly in the Zambian experience, Parliament and indeed the Parliamentary Committee system have been dormant in terms of providing checks and balances and putting the executive on its feet and ensuring the executive is efficient and does not act arbitrarily.

The Constitution also empowers the President to assent or veto bills passed by the National Assembly. This is good in so far as it ensures checks and balances; however, the President has power to dissolve the house before the expiration of twenty one days after the bill is presented to him for the second time, \textsuperscript{91} if he withholds his assent. This state of the law puts the National Assembly in a precarious position because if the house does not approve the bill as the President may require, then it faces the risk of being dissolved. This position retards democracy because the Members of Parliament are precluded from questioning the real motive behind the President’s refusal to assent to a bill, thereby impinging on the doctrine of Separation of powers. Therefore checks are available only so far as the President can veto a bill passed by Parliament. Parliament on the other hand can not question the President in this regard because the constitution empowers the President to dissolve it. Consequently, Members of Parliament especially those from the ruling party are hindered from opposing the position of the President for fear of intimidation and possible loss of jobs.

\textsuperscript{91} See Article 78 (4)
The powers of the President in Article 78 (4) have never been exercised in Zambia before. The reason is obvious — the party in power has always dominated in Parliament, as a result government policy, which is essentially party policy, goes through Parliament with the greatest of ease. Moreover Members of Parliament from the ruling party serve at the President’s pleasure and are careful not to tow party lines. For example following the court’s decision in Christine Mulundika, the MMD dominated Parliament passed a bill amending the Public order Act in record time, hurdling all the stages to become law in one sitting, an unprecedented feat.\textsuperscript{92}

3.7 THE PRESIDENT VIS A VIS THE JUDICIARY

“The public has the right to have independence of the Judiciary preserved, the absolute freedom and independence of judges is imperative and necessary for the better administration of justice.\textsuperscript{93}”

Democracy demands that the judiciary has the crucial role of being the sentinel of the law amidst the various power struggles that arise in the area of governance. It is submitted that pursuant to the above assertion, the Judiciary must be free from influences that are unsupported by any provision of the law.

\textsuperscript{93} Per Sakala, J. In Miyanda V Chaila (1985) ZR 193
The Judicature in Zambia consists of five courts and is established pursuant to article 91 of the Constitution. The Constitution empowers the President to appoint the Chief Justice, the Deputy Chief Justice and the Judges of the Supreme Court. The President also has power to appoint High Court or Puisne Judges and the Chairman and Deputy Chairman of the Industrial and labour Relations Court, on the advice of the Judicial Service Commission.

As a way of checking the President’s appointments of Judges, the above appointments are subject to ratification by Parliament. It is however, submitted that ratification by Parliament is not as significant as it ought to be because as already noted the President has quite a lot of indirect control over parliament.

3.8 WHAT IS JUDICIAL INDEPENDENCE?

In 1937 former American President Roosevelt was condemned strongly for a proposal he submitted to congress for altering the size of the federal Supreme Court by appointing new Judges on a temporal basis before the ones aged over seventy years retired. His proposal was condemned by a cross - section of the American Society as they termed this an act to interfere with the Judiciary clearly premised on ideas to destroy the great American tradition of judicial independence. This example illustrates how important the independence of the judiciary is

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94 The courts are: The Supreme court, High court, Industrial Relations court, subordinate courts and the Local courts.
95 Article 93
96 Article 95
held in democratic societies. The proposal by Roosevelt was met by animosity as it was seen as a deliberate move of the executive interfering in the structure of the Judiciary.\(^{98}\)

Judicial independence has been described as being, “that every judge is free to decide matters before him in accordance with his assessment of the facts and his understanding without any improper influence, inducements or pressures, direct or indirect from any quarter or for whatever reason.”\(^{99}\) What its precise meaning must always include is a state of affair in which Judges are free to do justice in their communities, protected from the power and influence of the State and also made as immune as possible from all other influences that may affect their impartiality.\(^{100}\)

An independent Judiciary is critical in so far as an effective system of checks and balances on both the executive and the Legislature is concerned. In Zambia, Judicial independence has sometimes been compromised especially in high profile political cases, at the expense of providing effective checks and balances. The mere fact that the President is empowered to appoint senior members of the bench is a compromise in itself. Also the President sets salaries for Supreme Court and High Court Judges, thereby enabling him to influence superior Court Justices.\(^{101}\)

The lack of adequate funds for the Judiciary is another area that has undermined the independence of the Judiciary in Zambia in the sense that the Judges and Magistrates of the

\(^{98}\) Supra note 97  
\(^{99}\) Sakala, E. Independence of the judiciary. (2002),  
\(^{100}\) Stephen N. "Judicial independence": The Inaugural Oration in Judicial Administration. The Australian Institute of Judicial administration. (1989) p.45
various courts country wide are subjected to poor conditions of service making them vulnerable to corruption or any form of bribery even from the government.\textsuperscript{102}

3.9 THE PROBLEM RE-STATE\textsc{D}

In a nutshell this Chapter has endeavoured to state the problem which is responsible for the ineffectiveness of checks and balances in Zambia. Of course there are several other reasons, but it is submitted that the main cause is the fact that the Republican Constitution confers on the President such immense powers as to enable him influence or control other organs of the state, that is, Cabinet, Parliament and the Judiciary.

Some officials of the above mentioned branches of government are appointed by the President, some though elected by the people are indirectly influenced by the President in the sense that they either belong to the party in power or can lose their positions through dissolution.\textsuperscript{103} This position renders the said organs of government weak to the extent that the timid officials cannot dare, or legitimately oppose the President for fear of intimidation, reprisals or loss of position. In the end those checks and balances have not adequately been availed hence making the President the most powerful government official.

\textsuperscript{102} Supra note 101
CHAPTER FOUR: CONCLUSION AND RECOMMENDATIONS

4.0 SUMMARY

This piece of work has attempted to assess the effectiveness of checks and balances in Zambia's Third Republic.

In chapter one was discussed the theories of power, and the historical development of executive power in Zambia. It was seen that of the three theories of power, the specific grant theory corresponds to a written constitution like we have in Zambia, but that the residual power theory applies to Zambia because executive power is not just limited to what is expressly provided for in law, but it extends to all those actions which, even if they are not sanctioned by legislation can be justified within the general framework of the law. However, in Zambia the executive has more often than not taken advantage of this and done acts which are unjustifiable by law, either expressly or impliedly.

The vesting of excessive power in the President was traced through history from the time Zambia was colonized by the British. The territory was administered by a Governor through ordinances and orders in council promulgated by the king or queen of England. These orders and ordinances gave a lot of power to the governor, to the extent that they were used to suppress the natives. Therefore, soon after independence in 1964, the UNIP government led by Dr. Kaunda was eager to empower the black Africans. In the process however Kaunda desired to remain in power forever, hence he engineered the establishment of the One Party State which saw him become the sole Presidential candidate in subsequent elections until 1991 when the MMD came to power.

103 i.e. Members of Parliament
In Chapter two was discussed selected instances of how Presidential power was abused and went unchecked. It was discussed therein how both Chiluba and his successor Mwanawasa purported to exercise power in flagrant disregard of express provisions in the Law. The Chapter also discussed how Parliament was or has been used to rubber stamp the wishes of the President, and how Members of Parliament have in several instance failed to legitimately oppose and check the executive.

With regard to the leadership of Mwanawasa, the Chapter brought to the fore how the President has systematically suppressed his political opponents and how he has acquired some tendency to be a dictator at the expense of democracy and the rule of Law.\textsuperscript{104}

In Chapter three the reason behind the ineffectiveness of checks and balances was identified, namely the excessive powers of the President conferred on him by the constitution. In this regard was discussed the power of the President to appoint literally all key government officials to the extent that most of them are unable to offer checks and balances on Presidential power for fear of being removed from office. The chapter also discussed the doctrine of Separation of powers, supremacy of the constitution and Judicial independence vis a vis the concept of checks and balances. With respect to the Separation of powers, it was established that the efficacy of this doctrine lies in those checks and balances which ensure that the three organs of government operate within the confines of the Law. It was also established that when the same individuals are members of more than one organ of government, checks and balances are eroded due to conflict of interest and, or collective responsibility. With regard to supremacy of the constitution it was noted that all organs of
government are subject to the constitution. For there to be an effective system of checks and balances each organ of the state should not encroach on another organ but should operate as provided by the constitution which is the supreme law. An independent Judiciary is also crucial if checks and balances are to operate effectively. It has been noted however that in the case of Zambia judicial independence is compromised by the fact that the President not only appoints Judges but he determines their remuneration too. From some of the cases cited above, it is apparent that some of the Judges are not brave enough to rule against the state for fear of intimidation and possibly being hounded out of office.

4.1 CONCLUSION

The conclusion to be drawn from the arguments presented in this essay is that checks and balances are not as effective as they ought to be in Zambia due to the excessive powers of the President. Just like the Governor had too much power in the colonial days, so does the President today. The President has power to remove cabinet members at any time without any reason. This makes them too timid to oppose the President when he acts arbitrarily. Parliament on the other hand, has been unable to effectively check the powers of the President, because some of the Members of Parliament also seat in cabinet as ministers. To this extent they are inhibited from opposing the government or indeed the President who appointed them. Additionally ever since Zambia reverted to multiparty politics, Parliament has largely been dominated by the party in power. To this extent both Parliament and its committee system have not offered enough opposition to government policy, even if such policy is not beneficial to the country as a whole.

104 For example, the castigation of Judge Nyangulu after he erroneously issued an injunction against the state.
The excessive powers of the President are also seen in the appointment of both Supreme Court and High Court judges and in the determination of their salaries. This state of affairs is also responsible for the ineffectiveness of checks and balances on the President as illustrated hereinbefore.

Having identified the problem, and discussed the reasons for the ineffectiveness of checks and balances in Zambia, this piece of work now makes the following recommendations and solutions to the problem:

4.2 THE RELATIONSHIP BETWEEN PRESIDENT AND CABINET

One of the tenets of the doctrine of separation of powers is that a member of one branch of government should not be a member of another branch. In this vein it is proposed that cabinet Ministers should be chosen from outside the National Assembly and ratified by the National Assembly.\(^\text{105}\) This will ensure autonomy of the National Assembly in the sense that the MPs will not be persuaded to support government policy. Also debates in Parliament will be carried out freely without fear of reprisals from the executive particularly the President because the executive will no longer influence Parliament. It is also proposed that the members of cabinet should only be removed from office through a rigorous procedure established by law, as is the case with the D.P.P, for example.

In order to have a Vice President who will not serve at the mercy of the President, it is recommended that there should be an adoption of the practice of a Presidential running mate who would serve as Republican Vice President, and whose qualifications for elections would

\(^{105}\) Mwanakatwe CRC draft Constitution at p 10
be similar to that of President. \textsuperscript{106} If this is implemented, Zambia would be assured of a Vice President who would owe his loyalty to the people as the electorate and not the President.

As regards other public officers, namely the Attorney General, the Solicitor General and the DPP, it is proposed that the three officers be appointed by the Judicial Service Commission and ratified by Parliament. This will ensure that they carry out their work effectively without fear of being fired by the President.

4.3 THE RELATIONSHIP BETWEEN PRESIDENT AND JUDICIARY

Real autonomy and Independence of the Judiciary will only be achieved if the President does not play a part in the appointment of High Court and Supreme Court judges. There have been instances in this country when judges have failed to cite the President for contempt of court for commenting on cases before the courts. It was also shown in Chapter two how certain Judges have exhibited timidity in high profile political cases. In light of this it is strongly recommended that Supreme Court Judges, Puisne Judges, Industrial Relations Court Chairman and Deputy Chairman should be appointed by the Judicial Service Commission and ratified by two-thirds majority of the National Assembly. This will ensure that judges serve freely without any feeling of allegiance to the President as the appointing authority. In order to enhance judicial independence, the salaries for judges should be determined by Parliament or by law, as is the case in India.\textsuperscript{107} This will ensure judicial autonomy and impartial judgments especially in cases that involve or question Presidential power.

4.4 THE RELATIONSHIP BETWEEN PRESIDENT AND PARLIAMENT

\textsuperscript{106} Supra note 105
\textsuperscript{107} See article 125 of the constitution of India.
In order to ensure that the President has no control over Parliament, it is recommended that
the power to dissolve Parliament by the President if a bill is not approved as the President may
require, should be abolished. The existence of such a power places members of Parliament in
a position whereby they may omit to oppose the President for fear of a dissolution which may
consequently result in them losing their parliamentary privileges. In this vein Zambia may
learn from what obtains in the United States of America where the President has power to
veto legislation but can not dissolve Parliament.\footnote{See article 1 (7) of the U.S. Constitution}

Finally it is pointed out that the need to control executive power in Zambia is a matter of
urgency. The powers of the President should be limited as herein recommended so that
democracy is enhanced. The executive and in particular the President should only act in
pursuance of the powers expressly or impliedly given by law and should not interfere with
other organs of the state, except on condition that such interference is supported by law.
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