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OBLIGATORY ESSAY TITLED:

THE STATE PROCEEDINGS (AMENDMENT) BILL 2000:

A CRITIQUE

BY

SINDISO NGATSHA

COMPUTER NO.: 95065776

UNZA

2001



**THE STATE PROCEEDINGS (AMENDMENT) BILL 2000:**

**A CRITIQUE**

**BY**

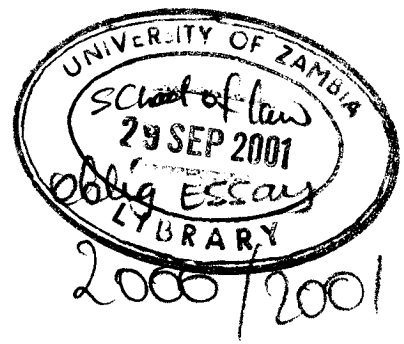
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**SCHOOL OF LAW**

**2001**



**THE STATE PROCEEDINGS (AMENDMENT) BILL NO.17 OF 2000: A  
CRITIQUE**

**BY**

**SINDISO KHUMALO NGATSHA  
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*An Obligatory Essay submitted to the University of Zambia Law Faculty in  
partial fulfillment of the requirements of the Bachelor of Laws Degree.*

**THE UNIVERSITY OF ZAMBIA  
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**JULY 2001**

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*I recommend that the obligatory essay prepared under my supervision by*

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**THE STATE PROCEEDINGS (AMENDMENT) BILL NO.17 OF 2000: A  
CRITIQUE**

*be accepted for examination. I have checked it carefully and I am satisfied  
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**DR. F. NG'ANDU (SUPERVISOR)**

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## DEDICATION

*To my father, the late Misheck Khumalo Ngatsha, who started it all.*

*To my mother, Rosemary Moonga Ngatsha, who had to be strong suddenly  
for my sake.*

*To my two children, Timothy Jiranda and Makole Chilufya Kankasa, who  
made it such a challenge.*

*To my husband Kajoba Mwewa Kankasa, who assured me well through his  
encouragement that the sky was the limit*

*To my sisters and brothers, Nhlanhla, Moses, Litini, Corbet, Boniwe,  
Zwelihle and Situlile, for being there for me.*

*May the almighty God richly bless you all.*



## ACKNOWLEDGEMENTS

*I wish to express my heartfelt gratitude to my supervisor Dr. F. Ng'andu for the amount of patience, keen interest and valuable time he spent going through my work. I also wish to thank him for his valuable ideas, comments and suggestions that have greatly improved this paper.*

*I also wish to thank my husband Kajoba Mwewa Kankasa for assisting me in my research by giving me access to the Parliamentary Information and Research Library, by giving me computer lessons that enabled me type this essay and by assisting me edit the final manuscript of this Obligatory Essay.*



## INTRODUCTION

Public Administration operates through institutions created by statutes, which are enacted through political process. They are created by Parliament for specific purposes and endowed by words of statute with powers deemed necessary and sufficient for the fulfillment of these purposes. Statutes are legal instruments, which confer legal powers and impose legal duties. In these institutions' exercise of power, the courts have the mandate to ensure that the said exercise of power is done in conformity with the rules laid down in the statutes. Put differently, one of the roles of the courts is to ensure that these public institutions and officers exercise their power according to the empowering statute. All developed legal systems seek to control the actions of public bodies and the most important method by which the courts seek to control the said actions is judicial review. Judicial review has been defined as

*“the means by which the High Court exercises a supervisory jurisdiction over inferior courts, tribunals or other public bodies, it is a specialized remedy in public law.”<sup>1</sup>*

Judicial review has been seen to be necessary to ensure that the exercise of statutory powers conferred on public authorities will be adequately controlled and to ensure that those public authorities both do the job for which they were

designed and do not acquire an autonomy which will make them masters rather than servants of their creator. The aim of judicial review is to achieve as much as possible a balance between on the one hand the need for the public authority to be given the full reign which parliament intended it to have in the making and execution of policy and on the other hand, the need to prevent it from either exceeding or failing to fulfill the purpose for which it exists.<sup>2</sup>

The courts exercise control over the said public institutions by making one or more of the three prerogative orders namely Certiorari, Prohibition and Mandamus and it is also possible for an Applicant to be awarded a Declaration and or an Injunction as well as or instead of the prerogative orders. Certiorari is a means of quashing or invalidating decisions of inferior courts, tribunals and public authorities where there has been an excess of jurisdiction, or an *ultra vires* decision, a breach of natural justice or an error of the law. According to Wade and Bradley<sup>3</sup>,

*“Certiorari serves a purely negative purpose, since by setting aside a decision it prepares the way for a fresh decision to be taken.”<sup>4</sup>*

An Order of Prohibition is made to prevent an inferior court or tribunal from exceeding its jurisdiction, or acting contrary to the rules of natural justice where something remains to be done which something can be prohibited. Mandamus

on the other hand is an order from the High Court commanding a public authority or official to secure the performance of its or his public duty, in the performance of which the applicant has sufficient legal interest.

It has been observed that the functions of public authorities and institutions are such that they are not susceptible to adjudication by courts. However they have the power to regulate private activities through various methods like licensing and other controls, and to confer benefits and impose burdens upon individuals. It is principally for this reason that judicial review is important in the control of excesses or abuses of power by these public authorities and officers.

The issue of judicial review is especially important in Zambia considering Zambia's constitutional arrangements, which gives the executive branch of government vast powers. In fact, it is more powerful than both the Legislature and the Judiciary. For example the president appoints some members of the judiciary including judges. He also appoints Cabinet Ministers in his own discretion. Further, Ministers are members of the legislature and are governed by the principle of Collective Responsibility. The judiciary is funded by the Ministry of Legal Affairs, which is headed by a Minister who is a member of both the executive and the legislature.

During the course of the year 2000, the Zambian public's attention was drawn to the State Proceedings (Amendment) Bill No. 17 of 2000, which was tabled before

Parliament by the Minister of Legal affairs. The Bill was aimed at extending the definition of civil proceedings to include proceedings for Judicial review and also to provide that the granting of leave to apply for Judicial review shall not act as a stay to the decision of the state or public officer to which the proceedings relate. To be precise the bill intends to amend section two and sixteen of the State Proceedings Act, Cap 71 of the laws of Zambia.

This paper discusses and analyses the ramifications this amendment is likely to have on any aggrieved person's ability to obtain any judicial review relief against the state. It also discusses and analyses the various views that have been expressed by members of the public, which have been obtained through interviews and the public and private media, and also the views of the members of the legislature as expressed during the parliamentary debates on the Bill on the proposed amendments contained in the Hansards. The paper will look at the legal implications of the amendments if the Bill is assented to and becomes law.

**Chapter One** highlights the problems, which the Bill will raise if it becomes law and will also include the statement of the problem the author is researching and the methodology that will be used.

**Chapter Two** of the essay examines the existing law and compares it to similar statutes in other jurisdictions.

**Chapter Three** examines the attendant arguments for and against the amendments.

In **Chapter Four** of the essay, the author concludes by analysing the position and making necessary recommendations.

## **CHAPTER ONE**

This chapter will look at the State Proceedings (Amendment) Bill and the likely consequences it is going to have on the individual who will have a claim against the State that can only be addressed through proceedings for judicial review. The chapter will look at the law, as it is obtaining today and the proposed amendment to the law.

### **THE STATE PROCEEDINGS (AMENDMENT) BILL NO. 17 OF 2000 AND ITS EFFECTS**

This Directed Research focuses on section two and section sixteen of the State Proceedings Act hereinafter referred to as the Act. Section two which is the definition section provides that

*“Civil proceedings includes proceedings in the High Court or Subordinate Court for the recovery of fines and penalties”*

It follows therefore that “Civil Proceedings” as defined by the Act does not include Judicial Review. Section sixteen subsection 1 of the Act further provides that

*“in any civil proceedings by or against the state the court shall, subject to the provisions of this Act have power to make all such orders as it has power to make in proceedings between subjects and otherwise to give such appropriate relief as the Case may require”*

Provided that

- (i) where in any proceedings against the state any such relief sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order for specific performance’ but may in lieu thereof make an order declaratory of the rights of the parties; and*
- (ii) in any proceedings against the state for the recovery of land or other property the court shall not make an order for the recovery of land or the delivery of property but may in*

*lieu thereof make an order declaring that the plaintiff is entitled as against the state to the land or property or to the possession thereof.*

Section 16 subsection 2 further states that

*“the court shall not in any civil proceedings grant any injunction or Make any order against a public officer if the effect of granting the Injunction or making the order would be to give any relief against the state which could not have been obtained in proceedings against the State.”*

The courts cannot therefore grant an injunction against the state and a public officer. The rationale behind this piece of legislation has been to protect the state from injunctions that may impede the smooth running of government machinery. The effect of section sixteen as it stands today is simply that an injunction or order for specific performance cannot be made by any court of law against the state. An injunction is defined in Black’s Law Dictionary as

*“A court order prohibiting someone from doing some specified act or commanding someone to undo some wrong or injury.”*

The question that arises then is what does the State Proceedings (Amendment) Bill No.17 of 2000 seek to amend? The Bill seeks to amend section sixteen referred to above by the addition of the following new subsection 3, which states that.

*“Subject to the other provisions of this section in any proceedings commenced by way of judicial review against the state, the grant of leave to commence those proceedings shall not operate as a stay of the decision of the state or public officer to which the Proceedings relate.”*

The Amendment Bill also seeks to amend the definition of civil proceedings to read as follows

*“Civil proceedings includes proceedings in the High Court or Subordinate court for the recovery of fines and penalties and any proceedings commenced by way of judicial review.”*

The procedure of the subordinate and High Court is regulated by the Subordinate and High Court rules respectively. These rules govern lawsuits from the time they are instituted to the time judgment is delivered and enforced and are thus comprehensive. However, there are instances when there is a lacuna in the law and resort is had to British laws by virtue of section 10 of the High Court Act, Cap 27 of the laws of Zambia, which provides that

*“the jurisdiction vested in the court shall, as regards practice and procedure be exercised in the manner provided by this Act and the criminal procedure code or by any other written law, or by such rules, order or directions of the court as may be made under this Act or the said code or such written law and in default thereof in substantial conformity with the law and practice for the time being observed in England in the High Court of Justice.”*

The procedure relating to judicial review is not covered by the High Court or Subordinate Court rules. It is for this reason that resort is had to the Supreme Court Practice rules of England as provided for under section 10 of the High Court Act. The Supreme Court rules are sometimes referred to as “ The white book.” Order 53 of the said Supreme Court rules outlines the procedure for

making an application for judicial review. Order 53(3) provides that no application for judicial review shall be made unless leave or permission of the court has been obtained. An application for leave is made ex parte to a judge who may determine whether or not to grant the leave for Judicial review without a hearing. In the case of **DERRICK CHITALA V ATTORNEY GENERAL**<sup>5</sup>, the court referred to the White Book and had this to say

“the purpose of requirement for leave is

*a) to eliminate at an early stage any applications which are either frivolous, vexatious or hopeless and*

*b) to ensure that an applicant is only allowed to proceed to a substantive hearing if the court is satisfied that there is a case fit for further consideration.”*

The purpose for requirement of leave to apply for judicial review was stated in the case of **INLAND REVENUE COMMISSIONERS V NATIONAL FEDERATION OF SELF EMPLOYED AND SMALL BUSINESSES LTD**<sup>6</sup>. The applicants, a federation of self employed persons and small businessmen which claimed to represent a body of taxpayers applied for judicial review seeking, inter alia, a

declaration that the Revenue had acted unlawfully in making certain arrangements regarding the collection of tax from the said group of taxpayers and an order of mandamus directing the Revenue to assess and collect tax on certain employees as required by law.

Lord Diplock (as he then was) in his obiter stated that

*“The need for leave to start proceedings for remedies in public law is not new. Its purpose is to prevent the time of the court being wasted by busybodies with misguided or trivial complaints of administrative error, and to remove the uncertainty in which public officers and authorities might be left whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived.”<sup>7</sup>*

Order 53 rule 10 provides that where leave to apply for judicial review is granted, then the grant of leave shall operate as a stay of the proceedings to which the application relates, until the determination of the application or until the court otherwise orders.

This is where the controversy is located and is the genesis or basis of the State Proceedings (Amendment) Bill No.17 of 2000. A stay of proceedings would

basically have the same effect as an injunction in that the moment leave to apply for judicial review was granted, the public authority or officer would be obliged to refrain or to stop the action or inaction which is the subject of the application. In Zambia therefore, even though the State Proceedings Act prohibits courts from granting injunctions against the state under section sixteen of the Act, learned counsel have gone around this provision and have used Order 53 rule 10 to achieve the same objective.

If the Bill is assented to by the Republican President, the amended section sixteen of the Act will supercede the provisions of Order 53, particularly to the extent that the grant of leave to apply for judicial review shall not act as a stay of the decision of the state or public officer to which any civil proceedings relate. Further, the extension of the definition or meaning of the term "civil proceedings" to include proceedings for judicial review means that the State Proceedings Act will not only relate to lawsuits involving contracts and tort but also to judicial review. One of the most crucial aspects of judicial review is that in for the court to grant a remedy like an injunction, an aggrieved person must show the court that he is going to or that he has suffered irreparable damage as a result of the action of the public authority or officer.

The fact that there is a possibility that an applicant will suffer irreparable damage should be a reason to give the courts the power to intervene when the need arises and protect such a person from the action of the authority. The question

that arises then is whose interest does this amendment seek to serve? The answer is obviously Government.

The problem that the author sees arising is that the Amendment will protect an already too powerful executive from the people in that it will reduce the powers of the courts further. It is also the author's considered opinion that with Zambia's constitutional arrangement already alluded to, the ordinary citizen needs protection from the State rather than the other way round. For example, if an investor was to be deported from the country as a result of personal differences with the Minister of Home Affairs, the state would go ahead and deport him even after leave to apply for judicial review has been granted.

In such a situation the entire court action would merely be academic once the investor is deported. With such a law in place government's immense powers would be unfettered. The government can do a lot of other things and victims of such actions cannot effectively litigate to seek remedies, if the government will have implemented the decision. The state is very powerful probably because there has been very little change in the constitution *vis a vis* the powers of the executive since independence. It basically has the same powers that the Governor of the then Northern Rhodesia had, prior to independence.

## **CHAPTER TWO**

In this chapter the existing law will be looked at and will be compared to similar statutes in other jurisdictions. This is necessary in order to show that the amendments that the Minister of Legal Affairs proposed to make to the existing law cannot be justified. Through research, the author has found that similar statutes exist in some countries but none of them have the amendments that have been proposed. It should also be noted that the current law is taken word for word from the Crown Proceedings Act 1947 of England.

### **THE EXISTING LAW AND SIMILAR STATUTES IN OTHER JURISDICTIONS**

Zambia's State Proceedings Act is taken word for word from the Crown Proceedings Act of 1947. The only difference lies in the fact that the former Act has been adapted to suit Zambia's constitutional arrangement. In this chapter the author will look at the similarities between the state Proceedings act and the Crown Proceedings Act and similar legislation in other jurisdictions in their application.

Under the general rule of Common Law no criminal or civil proceedings could be maintained against the crown for the courts could have no jurisdiction over the Crown as they belonged to it. However, with the passing of the Crown

Proceedings Act 1947, the law governing the rights and liabilities of the Crown was substantially altered. As a consequence, proceedings by and against the Crown were now governed by the same rules as proceedings between subjects, subject to certain special provisions. Civil Proceedings can now be commenced against the Crown in the same circumstances as they can be commenced against a subject.

This provision can be found under the State Proceedings act. The Law reform (Limitation of Actions) Act<sup>8</sup> applies to proceedings by and against the State as they apply between private individuals. The British statute of Limitations also applies to Proceedings by and against the Crown. The Attorney General who can sue or be sued in the Zambian context can obtain relief by way of interpleader proceedings in the same way that a private individual would obtain relief by way of such proceedings.

This situation obtains under section sixteen of the Crown Proceedings Act. Claims against the Crown, which might before the enactment of the British Act have been enforced by any statutory provision repealed by the Crown Proceedings Act, can be enforced by legal proceedings taken against the Crown. This situation does not arise because the Zambian Act came into force immediately after independence. Under the British Act, no proceedings in tort will lie against the crown unless the officer or servant concerned was appointed by the Crown and was wholly paid out of the consolidated fund of the United

Kingdom, money provided by Parliament or by other fund certified by the treasury for this purpose.

The State Proceedings Act does not define who a public officer is. The procedure under the Crown Proceedings Act is similar. In both instances, civil proceedings are proceedings for the enforcement or vindication of any right or the obtaining of any relief by an action at the suit of the state or Crown. The proceedings include proceedings in the High court or Subordinate Court or County court in the case of the United Kingdom. In both Acts, certain proceedings are specifically excepted from the scope of procedural provisions of the Act. An example of such proceedings is proceedings that are brought by the Attorney General on the relation of some other person.<sup>9</sup>

All civil proceedings by or against the Crown or State in the High Court are to be instituted and proceeded with in accordance with the rules of the court. It is also possible to institute proceedings against the Crown or State in a County or subordinate Court unless an enactment exists that limits the jurisdiction of the lower courts. Proceedings instituted in the lower courts are proceeded upon using the Subordinate or County courts' rules.

In the United Kingdom, provision may be made by Order in Council with respect to civil proceedings by or against the Crown in any court other than the High Court or county Court. Subject to such order, the procedural provisions of the

Crown Proceedings Act do not apply to any such court. In Zambia, there are only two courts that can entertain proceedings by and against the State. Under the State Proceedings Act, the parties to any civil proceedings include the Attorney General and any other person while under the British Act it may be the Attorney General or any authorised government department in its own name.

In both instances, proceedings do not abate and are not affected by any change in the person holding the office of Attorney General or in (in the case of the United Kingdom) in the person or body of persons constituting the department.<sup>10</sup> The courts also have the mandate to substitute the Attorney General or another government department for a department, which has been made defendant and once the court, makes such an order, the proceedings continue as if they had been commenced against the substituted defendant.

Under section thirteen of the State Proceedings Act, all documents required to be served on the state for the purpose or in connection with any civil proceedings by or against the State are to be served on the officer of the Attorney General's Chambers or if the State has engaged the services of a legal practitioner in private practice on such a legal practitioner. Under the Crown Proceedings Act, such documents must, if the proceedings are by or against an authorised government department be served on the Solicitor for that department or the Treasury Solicitor if the Proceedings are brought against the Attorney General.

Under both Acts no application for summary judgment may be made against the State or the Crown nor an application for summary judgment be made on a counterclaim in any proceedings against the State or Crown. However, the State or Crown can make an application for summary judgment. This provision is aimed at protecting the State further and is one of the exceptions to the rule that civil proceedings against the state should be conducted in the same manner as between subjects. The courts are also prohibited to enter judgments in default of appearance or pleading against the State Crown.

This provision may work well in the British context but this might not be the case in Zambia as the chances that such a provision would be subject to a lot of abuse on the part of the State are in order to delay proceedings are quite high. In Britain, judgment in default of appearance or pleading may be entered with the leave of court. It is submitted that the difference between Zambia and Britain lies in the fact that British Courts are more independent than the Zambian courts, especially that the funding and appointment of senior members of the judiciary is largely done by the executive. The executive also has powers to appoint a tribunal to investigate certain members of the judiciary, although this power is necessary to check on the judiciary it is subject to abuse.

Under section twenty-five of the State Proceedings Act, the state may be required by the court to make discovery of documents and produce documents for inspection and it may also be required to answer interrogatories provided that

the disclosure of the documents or the answering of the questions would not be injurious to the public interest. The Minister responsible determines what would be injurious to the public interest.

The problem with this provision is that it gives the Minister discretionary powers in determining what is and what is not injurious to the public interest. Discretionary powers have their own disadvantage in that it is very difficult to check their abuse and in a situation that Zambia is in, this provision would be subject to a lot of abuse if for any reason, disclosing certain documents or information would be disadvantageous for the politicians in power. This provision also exists in the British Act. Under the said provision the State or Crown ideally is supposed to lose immunity from making discovery of documents and answering questions. However, in principle, the "*immunity*" still exists in that the Minister can declare that releasing certain information would not be in the public interest.

In the case of **DUNCAN V CAMMEL LAIRD AND CO. LTD**<sup>11</sup>, the appellants asked for an order for the production of certain documents on which the first Lord Admiralty had made an affidavit stating that such production would be contrary to the public interest. The court in refusing the order held that documents otherwise relevant and liable to production need not be produced, if, owing to their actual contents the public interest requires that they should be withheld. It further went

on to state that an objection to the production of the documents duly taken by the head of a government department should be treated by the courts as conclusive.

The courts under both the Crown Proceedings Act and the state Proceedings Act may make any such order against either the Crown or the State as it may against subjects. However this provision is subject to some exceptions. The Courts, under sections twenty-one and sixteen of the Crown Proceedings Act and the State Proceedings Act respectively, cannot grant an injunction or make an order for specific performance against the State or Crown but instead can make an order declaratory of the rights of the parties.

The courts are also prohibited against making an order for the recovery of land or the delivery of property but instead may make an order declaring the plaintiff to be entitled as against the State or Crown to the land or property or to the possession of it. This provision does not raise any problems in the United Kingdom, as the definition of "civil proceedings" in the Crown Proceedings Act does not include proceedings for judicial review as the case is going to be in Zambia if and when the Amendment Bill 2000 becomes law. The law as it stands today in Zambia is similar in its application to that of the British Act. In order to elucidate this point, it is important to look at case law, especially case law that looks at sections twenty-one and sixteen of the Crown Proceedings Act and the State Proceedings Act respectively.

In the case of **R V SECRETARY OF STATE FOR THE HOME DEPARTMENT EX PARTE HERBAGE**<sup>12</sup>, the applicant sought an interlocutory relief against the respondent. The form of relief sought was an interlocutory interim injunction. In opposing this application, counsel for the respondents argued that the application ought to fail because an interim injunction does not lie against an officer of the Crown and both the Secretary of State and the Governor were such officers. The court held, inter alia that it was prohibited by section twenty-one of the Crown Proceedings Act from granting injunctions against the Crown. The court in its judgment referred to the case of **INTERNATIONAL GENERAL ELECTRIC COMPANY OF NEW YORK AND ANOTHER V COMMISSIONERS OF CUSTOMS AND EXCISE**<sup>13</sup> In this case, the court held that an order declaring the rights of parties must in its nature be a final order and, subject to appeal, *res judicata* between the parties; and that in proceedings against the Crown it was not possible to obtain an injunction or an interim declaration which did not determine the rights of the parties but which was only intended to preserve the status quo.

Upjohn L J stated

*“Speaking for my part, I simply do not understand how there can be such an animal...as an interim declaration which does not finally declare the rights of the parties. It seems to me quite clear that in proceedings against the Crown, it is*

*impossible to get anything that corresponds to an interim injunction. When one comes to the question of a final injunction, no doubt a declaratory order may be made in lieu thereof, for that finally determines the rights of the parties but is only meant to preserve the status quo."*

In **MERRICKS V HEATH COAT-AMORY AND ANOTHER**<sup>14</sup>, the holding was similar to that in the above case in as far as the courts cannot grant injunctions against the Crown. The foregoing case law has shown the effect of section twenty-one of the British Act and it is therefore necessary to look at case law in the Zambian context in order to show the similarities between the two Acts.

In the case of **MIFIBOSHE WALULYA V THE ATTORNEY GENERAL AND HON. F.M. CHOMBA**<sup>15</sup>, the plaintiff applied for an interim injunction to refrain the Minister of Home Affairs from deporting him from Zambia pending the trial of his claim against the State. In the alternative, to order the Minister to make an undertaking that he should not deport the plaintiff until matters were settled by the court. Counsel for the defendants submitted that the application was misconceived in that by virtue of section sixteen of the State Proceedings Act, an applicant cannot obtain an injunction against the State.

The Court held that in any civil proceedings against the State, the court has no power to grant any injunction or make an order against a public officer if the

effect of granting the injunction or making such an order would be to give any relief against the State, which would not have been obtained in proceedings against the State. Sakala J further went on to cite the case of **INTERNATIONAL GENERAL ELECTRIC COMPANY OF NEW YORK AND ANOTHER V THE COMMISSIONER OF CUSTOMS AND EXCISE**<sup>16</sup>, which case has already been discussed above. The foregoing cases have shown the similarities between the two acts especially in as far as section twenty one and section sixteen of the Crown Proceedings Act and the State Proceedings Act are concerned.

It is now important to look at the similarities in the application of the Crown Proceedings Act and the State Proceedings Act. This comparison is necessary because the State Proceedings Act is taken word for word from the Crown Proceedings Act. Comparing the two Acts has been necessitated by the fact that the Zambian and British constitutional arrangements are different and this has a direct bearing on how the Acts are applied. Zambia, unlike Britain has a written constitution, which is the supreme law of the land and any law that is inconsistent with the constitution is, to the extent of its inconsistency void.<sup>17</sup> In the United Kingdom exists the doctrine of Parliamentary Supremacy and the courts have limited powers in as far as reviewing Acts of Parliament is concerned. The Crown unlike the State in the Zambian situation is not liable in contract for it is not provided for under the Crown Proceedings Act.

Orders made in favour of the Crown or the State against any person in any civil proceedings may be enforced in the same manner as orders in actions between subjects and in no other way.<sup>18</sup> Consequently, the State or Crown can obtain a Writ of *Fieri Facias* against any person whom an order is made against in order to enforce a judgment. The State and the British Crown are immune from all ordinary modes of enforcing judgments against them and the rules of the court relating to enforcement of judgments do not apply in respect of any order against the Crown or State. An individual does not have the same rights as the State or Crown in enforcing judgments.

Satisfaction of an order made against the State or Crown may be done by means of a certificate containing particulars of the order issued by the court and served on the person acting as Solicitor for the Crown or on the Attorney General in Zambia, which payment shall be effected by the Permanent Secretary in the Ministry of Finance. This provision is aimed at protecting government property and the State but it obviously puts the individual at a disadvantage in that he has to wait for the Ministry of Finance to pay him in its own time and there is nothing that he can do to compel the Ministry to pay him on time. Generally, the Crown is in the same position as subjects as regards interest on judgment debts and costs.<sup>19</sup> In Zambia, the interest on a judgment debt cannot exceed six per centum per annum from the date of judgment until the money or costs are paid. The courts have the discretion to award costs.

Having looked at the similarities between the State Proceedings Act and the Crown Proceedings Act, the author will now look at similar legislation in other jurisdictions. This is necessary in order to show what the Zambian legislature is trying to achieve by approving the controversial Amendment Bill, considering that the Bill has gone through all the three readings and is, at the time of this research awaiting Presidential assent.

Looking at similar legislation is also necessary in order to show that the Amendment Bill is not in the best interest of the country and that it is simply a political move by over-excited politicians to use the law as a means of crushing what they would perceive to be to be a political threat. For example, unlike the Crown Proceedings Act, the State Proceedings Act contains a provision that limits the orders that the courts can make. Under section 4A of the Act, the courts are prohibited against making an order for damages or compensation against the State in respect of anything done under or in the execution of any restriction or detention order signed by the President. This amendment to the Act was obviously meant to protect the State and most especially the Executive branch of government. The consequence of this provision is that a person who is wrongfully detained under such detention order cannot seek redress in the courts of law.

Kenya has a similar Act known as the Government Proceedings Act.<sup>20</sup> According to the preamble of this Act, it is an Act of Parliament to amend the law relating to

the civil liabilities and rights of government and to civil proceedings by and against the government. It is also an Act to amend the law relating to civil liabilities of persons other than the government in certain cases involving the affairs or property of the government. The definition of “civil proceedings” in the Kenyan Act is word for word the definitions of “civil proceedings” in both the Crown Proceedings Act and the State Proceedings Act. Section three of this Act gives any person who has a claim against the government the right to enforce his claim “as of right” by proceedings taken against the government in accordance with the provisions of the act.

Under section sixteen of the Act, courts cannot grant injunctions to an aggrieved party against the government. In the case of **THE ATTORNEY GENERAL OF KENYA V M.R. SHAH t/a TANGA TRADING COMPANY**<sup>21</sup>, the court refused to join the Attorney General to proceedings that had been commenced by the respondent on the ground that there was nothing in the Government Proceedings Act enabling the respondent to join the appellant as a party to the proceedings.

However, the provisions of any written law empowering a court to amend interest or costs applies to orders made in any proceedings by or against the government. Apart from these few and minor differences, the Government Proceedings Act is basically a replica of the Crown Proceedings Act.

Uganda also has a State Proceedings Act<sup>22</sup>, which is also a replica of the Crown Proceedings Act. The Act sets out the procedure for bringing suits by or against the government or public officers. Section three of the Act confines liability of government to contract and tort. Some provisions of the Indian Code of Civil Procedure Act VIV OF 1882 have been reproduced in this Act.<sup>23</sup>

The Islands of Barbados also have a Crown Proceedings Act,<sup>24</sup> which is also a replica of the Crown Proceedings Act of 1947. "Civil proceedings" in this act includes proceedings in the Supreme Court or Magistrates Court sitting in the exercise of his civil jurisdiction for the recovery of fines and penalties

The State Proceedings Act and other similar Acts in other jurisdictions have worked well in those countries simply because they have, perhaps a different historical background and cannot therefore be compared to Zambia. All the Acts that the author has looked at define civil proceedings in the same manner but none of them try to disadvantage the individual who has a claim against the government as much as the Zambian Act has. This can be seen through the inclusion of section 4A in the Act and the recent attempt to amend the definition of civil proceedings to include proceedings for judicial review. Further, the interest on a judgment debt cannot exceed six per centum, which is much lower than the interest that would be awarded in proceedings involving subjects. The proposed amendments of the State Proceedings Act will not help matters but will

make them worse. An individual will be powerless against the State, a State that is already too powerful

While the British Act does not use the definition of civil proceedings to include proceedings for judicial review, the question arises as to why the Zambian legislature is trying to amend the definition. As Bean has observed,

*“It should be noted that while section 21 (1) (a) prohibits the grant of an injunction against the Crown itself in any proceedings, section 21(2) only prohibits the grant of an injunction against an officer of the Crown in civil proceedings. This expression does not include applications for judicial review.”*<sup>25</sup>

## **CHAPTER THREE**

### **ARGUMENTS ON THE AMENDMENTS**

This Chapter will look at the arguments that were advanced for and against the Bill. This is necessary because as the author has already submitted, the Bill was a controversial one. It is therefore necessary to look at both arguments in order to clearly show that this Bill will not benefit the individual but the State and those who govern in that it will make obtaining judicial review remedies such as prohibition, certiorari and mandamus an academic exercise as the decision of government would already have been implemented.

### **ARGUMENTS FOR THE AMENDMENTS**

The State Proceedings (Amendment) Bill No.17 of 2000 has been a controversial topic with many people giving their views as to whether it is a good and progressive piece of legislation or not. The author in this chapter will look at the views that have been expressed concerning the proposed amendments by people from various sectors of society, especially the legal fraternity. The chapter will first consider arguments aimed at justifying the Bill and will then look at the views that have been expressed by those opposed to the Bill.

The State Proceedings (Amendment) Bill was presented to Parliament by the then Minister of Legal Affairs Mr. Vincent Malambo on the 24<sup>th</sup> of July 2000 for its first reading. The second reading was done on the 2<sup>nd</sup> of August 2000. According to the Minister, the object of the Bill was to provide that in any proceedings commenced by way of judicial review against the State, the grant of leave to commence the proceedings should not operate as a stay of the order or decision of the State or public officer to which the proceedings relate. According to him, the Bill was straightforward and non-controversial.

He further stated that the amendment that the State was seeking to provide would effectively insulate or protect the State from the issuance of stays against its decisions, which have the same effects as an injunction, and it would also enforce the provisions of the State Proceedings Act. The Bill was therefore extremely progressive and deserved the full support of parliament.<sup>26</sup> It would appear that the Minister was operating on the premise that grant of leave to apply for judicial review would automatically operate as a stay to the proceedings to which the application relates. This is, however not the case. A judge has to direct whether a grant of leave to apply for judicial review will operate as stay or not.

According to the Minister, the Bill was aimed at removing contradictions in the existing provisions so as to continue protecting public interest. The Bill did not take away any rights enshrined in the Constitution nor the remedies available under judicial review. The issue that is at hand is whether with the amendments,

the effect of getting the remedies under judicial review would remain the same as getting the same remedies without the amendments. Without the amendments to the law, a person can apply to court for leave to apply for judicial review in order to obtain either one or more of the prerogative orders, namely, certiorari, prohibition or mandamus. With the amendments even though a person applies for leave to apply for judicial review, leave to apply will not act as a stay on the decision of the public officer or the State.

This simply means that even though the matter will, at the material time be in court, the State or the public officer would have a right to proceed and implement the decision to which the proceedings relate such that if the courts were to rule in favour of the plaintiff, the decision would already have been implemented and the entire exercise would have been nothing but an academic exercise.

As the author alluded to earlier on in this essay, the State does not need further protection because it is already too powerful. Unlike in other democracies, the system of checks and balances in Zambia is ineffective. In fact, in the case of **ZAMBIA NATIONAL HOLDINGS COMPANY LIMITED V UNITED NATIONAL INDEPENDENCE PARTY AND ANOR**<sup>27</sup> the court commented in obiter that there is a growing school of thought against continued existence of State immunity against injunctive relief and other coercive orders. The fact that the system of checks and balances does not work in Zambia has led to the serious abuse of power at the highest levels of government by politicians. Much as the

author concedes that there is a lacuna in the law as regards making applications for judicial review, it is also the author's contention that this lacuna, which makes recourse to be had to Order 53 of the White Book in matters concerning judicial review necessary, is of significant importance to the common citizen in that it at least gives him some protection.

The Minister in his interview with the Political Editor of one of the Daily Newspapers, Samuel Ngoma blatantly tried to mislead the public by saying that the State Proceedings Act or similar legislation is found all over the world including the amendment.

“ Ngoma: Where else in the world is this Proceedings Act and the Amendment there at?

Malambo: It is there in England, it is there all over the world

Ngoma: Even the Amendments?

Malambo: Oh yes.”<sup>28</sup>

In the preceding chapter the author looked at a number of similar statutes in other jurisdictions including the Crown Proceedings Act, which is an English Act and compared them to the Zambian Act. None of these Acts defined the term civil proceedings as to include proceedings for judicial review nor do they state that the grant of leave to apply for judicial review shall not act as a stay of the proceedings or decision to which the application relates.

The Minister further went to say that the public would still be able to get orders of certiorari, prohibition, mandamus or any of the final reliefs obtainable under judicial review. The Minister's statement however does not make sense especially when you consider what each of these prerogative remedies aim to achieve. According to Bradley and Wade,

*"Mandamus is an order from the High Court commanding a public authority or official to secure the performance of its or his public duty, in the performance of which the applicant has sufficient legal interest...Certiorari is a means of quashing decisions of by inferior courts, tribunals and public authorities where there has been*

- *An excess of jurisdiction or an ultra vires decision*
- *A breach of natural justice or*
- *An error of law on the face of the record*

*An **Order for Prohibition** issues primarily to prevent an inferior court or tribunal from exceeding its jurisdiction, or acting contrary to the rules of natural justice, where something remains to be done which can be prohibited."*<sup>29</sup>

From the foregoing, it is clear that obtaining these remedies that the Minister refers to would simply be an academic exercise in that the decision of the public authority or public officer would already have been implemented since grant of leave to apply for judicial review would not operate as a stay of the decision of the public authority or public officer. An aggrieved person must be able to obtain any of these final reliefs and this means that grant of leave to apply for judicial review must operate as a stay on the decision until the matter is heard.

The Minister of Legal Affairs further went on to say that the recourse to justice has remained and that nothing had been taken away contrary to misleading insinuations by members of the public opposed to the Bill. The protection of fundamental rights under the Constitution was still obtainable through the Courts by virtue of Article twenty-eight of the Constitution. This Article provides that

*“Subject to clause (5), if any person alleges that any of the provisions of Articles 11 to 26 inclusive has been, is being or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply for redress to the High Court which shall*

a) *hear and determine any such application*

- b) *determine any question arising in the case of any person which is referred to it and which may, make such an order, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of Articles 11 to 26 inclusive.”*

Articles eleven to twenty-six of the Constitution are part of the Bill of Rights, which is Part III of the Constitution. However, it is not all aggrieved persons that have grievances based on the Bill of Rights. The Bill of Rights would not address a situation where an individual was about to be deported, for example. Since government acts on behalf of the people, according to the Minister, it was important to strike a balance between the legitimate interest of the state in managing the society and those of the individual. The Bill was prompted by the case of **AERO ZAMBIA LIMITED V THE ATTORNEY GENERAL**<sup>30</sup>, in this case, the airline was granted leave to apply for judicial review after the Minister for Transport and Communication suspended its license because its planes were not air-worthy. Under Order 53 of the Supreme Court Rules of England, the leave to apply for judicial review was granted and the court directed that it would operate as a stay on the Minister's decision to suspend the license. The airline therefore continued operating without a license for a considerable period of time.

The other case that was said to have had an influence on the proposed amendment was that of **THE ATTORNEY GENERAL AND THE SPEAKER OF THE NATIONAL ASSEMBLY V THE PEOPLE**<sup>31</sup>. This was an appeal by the appellants against a High Court decision granting the respondents leave to apply for judicial review and granting an order of stay of proceedings relating to the University Bill 1999 in Parliament. In the court below, the respondents took out a motion under Order 53 of the supreme Court Rules of England for judicial review of the University Bill 1999. The application was supported by an affidavit, which stated that the applicants feared that the proposed Bill would encroach upon their rights and freedoms enjoyed under the current Act.

This application was however dismissed and the respondents renewed the application before another judge who heard the matter and ruled in their favour. On appeal, the Supreme Court held that the respondents should have brought their matter before court by way of petition according to Article 28 (1) of the Constitution. The decision was based on the fact that since the respondents had referred to the fear of their rights and freedoms being encroached upon if the new Bill was passed into law, they should have brought the matter under Article 28 (1) of the Constitution by way of petition.

The Minister Without Portfolio referred to the above cases in his contributions during the Parliamentary debates on the Bill. It should be stated that the author does not find any problems with this case in that some citizens feared that their

rights and freedoms would be encroached upon and as a result turned to the courts to try and stop Parliament from enacting the Bill. The fact that Parliament would have been stopped from going ahead with enacting the new Bill does not mean that government's operations would have come to a standstill. Since Zambia is a democratic State, its citizens should be able to have recourse to the courts of law whenever they have a legitimate claim against any individual, including the State.

According to Mr. Sata, the most important thing for every Parliamentarian to do whenever an amendment is proposed is to look at the principle Act to avoid misunderstanding the amendment.<sup>32</sup> This argument is, to some point valid. However, looking at the principle Act alone is not sufficient especially when the Bill seeks to remove a right that was previously enjoyed by individuals or seeks to limit the powers of the courts as such an amendment would have far reaching consequences on the individual.

The broad and general effects of the Bill have to be looked at before it is passed into law. In this case, if the Bill does become law, the grant of leave to apply for judicial review will not operate as a stay on the decision of the State or public official to which the proceedings relate. In a country like Zambia, will such a piece of legislation be in the best interest of the majority of Zambians or will it further undermine a citizen's protection from state machinery? The issue is not whether the right or privilege to sue the State has been removed but what would be the

point in suing the State after one has, for example, already been deported and has suffered irreparable damage?

What the honourable Minister Without Portfolio forgot or deliberately ignored was the fact that before leave to apply for judicial review is granted, an application for leave must be made *ex parte* to a judge and as earlier alluded to by the author, it has been held that the purpose of the requirement of leave is to eliminate frivolous, vexatious or hopeless applications for judicial review without the need for substantive inter parties judicial review hearing.

## **ARGUMENTS AGAINST THE AMENDMENTS**

The Bill has been condemned in no uncertain terms by the Law Association of Zambia. An interview with the Chairman Mr. Christopher Mundia revealed this. According to him, the amendment if and when it became law would take away the rights of subjects or citizens and is therefore retrogressive. He further stated that with the Amendment, an overzealous public officer could, through malice or other ulterior considerations threaten to inflict an injury on a subject but the subject will have no recourse to stay of proceedings

According to Mr Mundia, it has already been seen that in Zambia, the provisions of the State Proceedings Act have been imposed in certain statutes. He gave an example of the fact that no execution of judgment can be levied against the

property of the Central Bank, the University of Zambia, Hospital Boards, the Tanzania-Zambia Railway Authority and others even in commercial transactions. He further called for the condemnation of these developments by all democratic societies as there was no justification whatsoever for these acts or omissions.<sup>33</sup>

An attempt to obtain any formal submissions from the Law Association of Zambia Secretariat by the author was unsuccessful as the Secretariat did not have any formal documents on the matter that could have been prepared by members of the Association. The views of the Association have been aired mostly in the private and public media.<sup>34</sup>

The former Transport and Communications Minister Mr. Andrew Kashita also opposed the Bill. He is of the opinion that since “government” or “State” have not been defined and since the Bill or the principle Act does not give a floor or ceiling as to which public officer’s or public authority’s decision it refers to, this invariably entails that any public officer up to the Head of state could make decisions on behalf of the State. Mr. Kashita argues that under this new Bill, a police road patrol officer can confiscate one’s drivers’ license and a Lands Officer can seize a farm and it would not be possible to obtain a stay pending judicial review proceedings. He further submitted that

“ *the amendment is no different from the public security regulations which become operational when a State of Emergency has been declared.*”<sup>35</sup>

Some lawyers have also argued that the Bill if enacted is going to shield the government from the courts' scrutiny, thereby undermining the system of checks and balances. No person or government is infallible and no person or government has the monopoly of truth or wisdom. By passing the Bill, the government will be saying that it does not err and that government has the monopoly of truth and knowledge. In a nutshell, the ultimate effect of the Bill would be to eclipse the staying of contentious government decisions.

Some Members of Parliament were also against the amendment and this can be seen from the Parliamentary Hansards that were obtained by the author. For example, Dr. Ludwig Sondashi<sup>36</sup> gave a number of examples of how this Bill could be used by the state to achieve certain objectives even if it was, in law wrong and even if a person later on carried the day in court, the most that government could give would be damages which would not be an appropriate remedy because by their nature damages were not always an appropriate remedy in that a person would have already suffered irreparable damage which cannot be atoned by damages. As such the House<sup>37</sup> could not introduce such a law.

Dr. Sondashi wondered why government was trying to get rid of a civilised way of suing the State for judicial review. According to the Honourable Member of Parliament, laws should not be made to address a current problem the moment it arises, laws should be made for posterity and for the future and they should not be directed at individuals.<sup>38</sup> Dr. Sondashi contended that the Bill was removing the powers of the courts to decide on certain matters and it would therefore be pointless to say that the courts were independent and could protect the ordinary citizen. He further stated that the Bill aimed at giving powers to the State, which are already too great and removing powers from the individual.

*"I would have been happier if this Bill provided that individuals be given more protection from the State than giving the State which is already too powerful. I do not think that this law is worth the paper on which it is written. It is a bad law. It is retrogressive, repressive and unwarranted and must be rejected with the contempt it deserves."*<sup>39</sup>

Another Member of Parliament who was opposed to the Bill was Mr Robby Kasuba<sup>40</sup> who stated that the "State" is not its officers and the people who serve it. According to him, the State is the individuals in the Republic of Zambia that comprise it. The individual members of this country including those who pay tax in order for state machinery to continue operating comprise the state and they

are the ones that ought to be protected. In his concluding remarks, Mr Kasuba summarised his submission in the following words

*“...my argument is that it is a bad law and I concur with my colleagues who have spoken before me. It is bad in the sense that it is being made with an ulterior motive and I am not afraid to state this fact.”<sup>41</sup>*

Perhaps one of the most interesting things to note from the debates on the Bill was that even some Members of Parliament of the ruling Movement for Multiparty Democracy were opposed to the Bill, something that rarely happens in the Zambian Parliament. One such Member of Parliament was Mr. Enoch Kavindele.<sup>42</sup> According to Mr Kavindele, the Bill was a mischievous arrangement by government to insulate itself from being questioned on injustices that it may commit against its people. Mr Kavindele stated that

*“I know why now government wants this to be law. Late last year, we had cases of serious investors in this country that, because of competition tendencies by those in government, used the law to fight them. A case in point is that one of Aero Zambia and Zambian Express Airways. This law can easily turn the country into a police state.”<sup>43</sup>*

According to him, there was already a situation where government was using the Zambia Revenue Authority to harass perceived opponents of the government. Individuals who are being so harassed will have no recourse to the law because Parliament would have approved a law that allows the State to harass people and get away with it. Since the State is very powerful as compared to an individual citizen, there has to be a system of regulating its actions and this can only be done through the courts of law. In a democracy, the legislature should not take away powers from the courts unnecessarily even though it has the powers to enact any law provided it is not inconsistent with the Constitution. In order for the system of checks and balances to effectively work, the courts need powers or the mandate to effectively check on both the Executive and Legislative arms of government.

This chapter has looked at the arguments that have been advanced for and against the Bill. The Minister of Legal Affairs, Members of Parliament, the Law Association of Zambia and members of the public, advanced the arguments that we have looked at generally. From the foregoing arguments, both for and against, it is the author's considered opinion that the Amendments cannot be justified considering the fact that the State does not need further protection since it is clear that the state and its machinery is more powerful than an individual. Further, the State Proceedings Act as it stands today puts an individual with a legitimate claim against the State at a disadvantage as we have shown under Chapter Two of this Directed Research. The disadvantages include the fact that

a citizen who obtains a judgment against the State cannot enforce the same in the same manner as he would against a fellow subject and the fact that interest and costs on a judgment debt cannot exceed six per centum per annum. A subject cannot also have recourse to the law in matters involving detention or restriction under a detention order signed by the President of the Republic.

## **CHAPTER FOUR**

### **RECOMMENDATIONS AND CONCLUSIONS**

In the previous Chapters, we have discussed the State Proceedings Act and the State Proceedings (Amendment) Bill No.17 of 2000 and have shown the effects that the Bill will have if and when it becomes law. We have also shown that the Bill is really not in the best interest of the nation but is aimed at perpetuating governance not by law but by the whims and caprices of overzealous politicians. This chapter aims at finally putting across some recommendations as to what should be done to protect an individual against the abuse of power by the State instead of increasing the State's powers.

Zambia has a written Constitution, which creates the executive branch of government under Part IV of the constitution. The Executive branch has immense powers, which make the system of checks and balances necessary. Parliament should be able to check on the actions of both the Executive and the Judiciary, while the courts should also be able to check on the Executive and Parliament through declaring some of their actions unconstitutional, invalid or void. One of the methods that the courts use to do this is through judicial review which refers to the jurisdiction of courts to keep the actions of the public authorities within their confines as provided for by Statute. We have already

looked at the remedies that are available under judicial review, which includes certiorari, mandamus, prohibition, injunctions and declarations.

The State Proceedings (Amendment) Bill seeks to amend the definition of civil proceedings and section sixteen of the principal Act and we have submitted that this is not a progressive piece of legislation for the reasons that have already been outlined in the foregoing Chapters. Similar statutes in other jurisdictions have been looked at and the author has observed that it is only the State Proceedings Act which is different in the sense that it has limited an individual's and the courts' powers to effectively litigate against government and in cases where the individual obtains judgment in his favour, the State has the discretion to pay in its own time and the ordinary rules of enforcing judgments do not apply against the State. We submit that the State Proceedings (Amendment) Bill would not help matters but make the situation worse for an aggrieved citizen.

The rationale behind proposing this Bill was to protect or insulate the State from stays being obtained as this allegedly brought state machinery to a standstill as a stay of proceedings has the same effect as an injunction. Bringing in a new law that would eliminate the courts' powers to order a stay will not solve the problem. What the State needs to do in order to avoid the proliferation of applications for judicial review cases against it, is to come up with a mechanism to ensure that public bodies created by parliament act within the ambit of the empowering statute. We are aware that there are certain institutions and mechanisms that are

established to supervise the administration and ensure that administrative agencies and officers work within the law. For example, the President has authority to appoint commissions of inquiries in the exercise of powers conferred on him by the Inquiries Act<sup>44</sup>, the various administrative tribunals established under different Acts of Parliament and the Commission for Investigations are some of the non-judicial institutions and mechanisms designed to keep the administration within its legal ambit.

We therefore contend that a mechanism should be found to make them more efficient in order to reduce on the incidences of people applying for judicial review. In the case of the Commissions of Inquiries for example, the president should not be the appointing authority since this influences how critical a commission is likely to be of the Executive. The Commission for Investigations also has its weaknesses in that its investigations are held in-camera and it should be empowered to move on its own motion. As the law stands today, unless directed by the President it can move only when an allegation of abuse of authority has been made and the Commission is of the view that it ought to be investigated.

As it has been observed, the legislative branch of government appears to be an appendage of the executive branch of government in that some members of the legislature are appointed by the executive, including Ministers. The legislature has therefore not been an independent institution with power to check on the

possible excesses of the administration. Further, party politics in Zambia has shown that elected members of parliament owe their allegiance more to the party than to the people and it is for this reason that the State Proceedings (Amendment) Bill went through all the three readings in parliament with little opposition. In fact the Member of Parliament for Chingola Mr. Enoch Kavindele who had argued so forcefully against the Bill during the second reading voted for the passing of the Bill. This is just one of the numerous examples showing how Members of Parliament are expected to tow the party line during voting. This is made worse by the fact that in Zambia, the procedures laid down for voting on a Bill do not make provision for a secret ballot.

Some changes in the legislature have to be made. Members of Parliament should be made to understand their role in parliament, which includes representing the interests of the electorate and checking on the excesses of executive power. The existence of the opposition should be seen as necessary for the survival of not only the system of government but of democracy as well. There is also need to create independence between the Executive and the Legislature. Some petitioners before the Mwanakatwe Constitutional Review Commission called for the appointment of Ministers from outside parliament as opposed to from the National Assembly.<sup>45</sup> This was aimed at strengthening the position of the National Assembly by making it independent, separate and distinct from the executive, so that it could effectively play its role and check administrative actions.

The State Proceedings (Amendment) Bill seeks to reduce the powers of the courts by stating that the grant of leave will not operate as a stay of proceedings and this can be seen as an attempt by the executive, through its control of the legislature, to further weaken an already weak judiciary. The judiciary is said to be weak in the sense that it is funded by the Ministry of Legal Affairs which is headed by a member of the executive and the appointment of senior members of the judiciary is done by the executive, ratified by the legislature, which legislature is controlled by the executive.

This lack of independence or “weakness” of the judiciary can be seen in decisions like that in the case of **THE PEOPLE V THE SPEAKER OF THE NATIONAL ASSEMBLY, EX PARTE FRED M’MEMBE, BRIGHT MWAPE AND LUCY BANDA SICHONE**<sup>46</sup> in which the court held, in refusing the application for leave to apply for judicial review, that the National Assembly, which is the equivalent of the British Parliament was superior in that sense and therefore the High Court had no power to quash the decision or an order of the Speaker of the House in so far as the decision concerned the exercise of the House’s powers and privileges.<sup>47</sup> This decision was obviously erroneous in that there are fundamental differences between the Zambian and British Constitutional arrangements that should have been considered.

It is therefore recommended that instead of further weakening the judiciary and an individual's ability to have effective recourse to the law by introducing Bills like the State Proceedings (Amendment) Bill, the legislature should be interested in empowering it to ensure its independence to enable it be able to check on the executive. Parliament can only do this if its members understand and appreciate their role.

As has already been stated, the citizen needs protection from the abuse of state machinery and the protection can only be there if he can have recourse to the law. By recourse to the law, we mean that he should not only be able to obtain judgment in his favour when he has a legitimate claim, but that the judgment should be effective in the sense that he should be compensated for the loss suffered. There would be no point in him obtaining an order of prohibition from the courts when the decision complained of has already been implemented because the grant of leave to apply for judicial review did not operate as a stay of the decision complained of.

It is therefore the author's considered opinion that the Bill does not even deserve to go back to the drawing board but should be discarded with the contempt that it deserves. As the court observed in the case of **ZAMBIA NATIONAL HOLDINGS COMPANY LIMITED V UNIP AND ANOR**<sup>48</sup>, the continued existence of state immunity against injunctive relief and other coercive orders is undesirable. The chances that the Bill will receive Presidential assent are quite slim considering

that this is an election year and the Republican President has assured the nation that he has no intentions of standing for a third term. This means that very soon he will become an ordinary citizen and he would not want to be a victim of the amended law.

## **ENDNOTES**

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<sup>1</sup> Gordon R J F Judicial Review: Law and Procedure Sweet and Maxwell London (1985) Pg 3

<sup>2</sup> Emery C S and Smythe B Judicial Review: The Legal Limits of Official Power Sweet and Maxwell London (1986) Pg 18-19

<sup>3</sup> Constitutional and Administrative Law Longman London 1985

<sup>4</sup> IBID at Pg 657

<sup>5</sup> (1995) ZR Pg 91

<sup>6</sup> (1981) 2 ALL E R Pg 93

<sup>7</sup> IBID at Pg 105

<sup>8</sup> Cap 72 of the Laws of Zambia

<sup>9</sup> Section 2 (3) of the State Proceedings Act and Section 23 (3) (a) of the Crown Proceedings Act

<sup>10</sup> Lord Hailsham of St Marybone (Ed) Halsbury's Laws of England Butterworths London, (1976) Pg 750

<sup>11</sup> (1942) 1 All E R Pg 58

<sup>12</sup> (1986) 3 WLR Pg 504

<sup>13</sup> (1962) ChD Pg 785

<sup>14</sup> 1955) 2 ALL E R Pg 453

<sup>15</sup> (1981) ZLR Pg 329

<sup>16</sup> (1962) Ch D Pg 329

<sup>17</sup> Article 3 of the Constitution

<sup>18</sup> Sec 26 (1) of the Crown Proceedings Act and Section 23 of the State Proceedings Act

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- <sup>19</sup> Section 24 of the Crown Proceedings Act
- <sup>20</sup> Cap 40 of the Laws of Kenya
- <sup>21</sup> (1959) East Africa L R Pg 375
- <sup>22</sup> Act 51 of the Laws of Uganda
- <sup>23</sup> Katikiro of Buganda V The Attorney General of Uganda (1958) East Africa L R Pg 765 at Pg 766
- <sup>24</sup> Cap 197 of the Laws of Barbados
- <sup>25</sup> Bean David Injunctions Longman London (1987) Pg 42
- <sup>26</sup> Parliamentary Hansards 2<sup>nd</sup> August 2000 Pg E1
- <sup>27</sup> Times of Zambia, Thursday, September 7<sup>th</sup> 2000 Pg 6
- <sup>28</sup> Constitutional and administrative Law, Longman London (1985) Pg 655 and 656
- <sup>29</sup> 1999/HP/137
- <sup>30</sup> SCZ Judgment No.34/99, SCZ Appeal No. 158/99
- <sup>31</sup> Parliamentary Hansards 2<sup>nd</sup> August 2000 Pg Q4
- <sup>32</sup> 25<sup>th</sup> June 2001
- <sup>33</sup> For example, see Article by Secretary of LAZ Mr P Matibini in the Sunday Mail of 20<sup>th</sup> August 2000
- <sup>34</sup> Times of Zambia, Thursday September 7<sup>th</sup> 2000 at Pg 6
- <sup>35</sup> (1996) ZR (SC)
- <sup>36</sup> Member of Parliament for Solwezi Central
- <sup>37</sup> Parliament
- <sup>38</sup> Parliamentary Hansards Wednesday 2<sup>nd</sup> August 2000 Pg I 2
- <sup>39</sup> IBID Pg J1

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<sup>40</sup> Member of Parliament for Nkana

<sup>41</sup> Parliamentary Hansards, Wednesday 2<sup>nd</sup> August 2000 Pg K1

<sup>42</sup> Member of Parliament for Chingola

<sup>43</sup> Parliamentary Hansards 2<sup>nd</sup> August 2000 Pg E1

<sup>44</sup> Cap 41 of the Laws of Zambia

<sup>45</sup> Article 107 (2) of the Draft Constitution

<sup>46</sup> 1996 HP/1026 (Unreported)

<sup>47</sup> IBID Pg 2

<sup>48</sup> (1996) ZR Pg. 125

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