

**THE UNIVERSITY OF ZAMBIA  
SCHOOL OF LAW**

**L410 DIRECTED RESEARCH**

**TITLE: IMPACT OF RULING PARTY DOMINANCE IN THE  
EXECUTIVE AND LEGISLATURE ON HUMAN  
RIGHTS AND THE RULE OF LAW – A REVIEW OF  
THE AFRICAN PRESIDENTIAL-PARLIAMENTARY  
SYSTEMS OF GOVERNMENT.**

**By**

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**This thesis is submitted in partial fulfilment of the award of a Bachelor  
of Laws Degree (LLB) in the School of Law at the University of Zambia.**

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## SUPERVISOR'S CERTIFICATE

This is to certify that this Directed Paper entitled: Impact of Ruling Party Dominance in the Executive and Legislature on Human Rights and the Rule of Law – A Review of the African Presidential-Parliamentary Systems of Government., has met the academic standard and has satisfied the regulations governing the presentation of a Directed Research Paper in the School of Law at the University of Zambia.

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## TABLE OF CONTENTS

	<b>Page</b>
Declaration .....	iii
Dedication .....	iv
Acknowledgement.....	v
Preface.....	vi
Abstract.....	vii

### CHAPTER ONE

<b>1.0</b>	<b>The Presidential-Parliamentary System: Conceptual Framework</b>	<b>1</b>
1.1	Introduction.....	1
1.2	Raison d'être vis-à-vis Human Rights and the Rule Law...	2
1.3	The Doctrine of Separation of Power: Relationship to Human Rights and the Rule of Law.....	3
1.4	Qualification of the Thesis of Separate Power.....	7
1.5	Conclusion.....	9

### CHAPTER TWO

<b>2.0</b>	<b>Party Politics and Human Rights Protection in the Legislature</b>	<b>12</b>
2.1	Introduction.....	12
2.2	Party Discipline: the Concept.....	13
2.3	The Void Legislator: Party Politics in the Legislature – The Zambian Case.....	14
2.4	Legislative Realities and the Rule of Law.....	20
2.5	Conclusion.....	23

## **CHAPTER THREE**

<b>3.0</b>	<b>Government and Human Rights Violations in Zambia and Zimbabwe</b>	
3.1	Introduction.....	25
3.2	Party-Oriented Executive and Human Rights Protection....	25
3.3	Political Trends in Human Rights Protection in Zambia.....	26
	3.3.1 Freedom of Assembly and Association.....	27
	3.3.2 Freedom of Expression.....	30
3.4	Party Aligned Human Rights Violations in Zimbabwe: Case Summaries.....	34
3.5	The Executive and the Rule of Law: Cases in Zambia And Zimbabwe.....	37
3.6	Conclusion.....	44

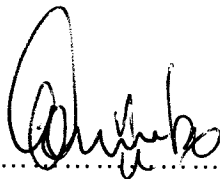
## **CHAPTER FOUR**

<b>4.0</b>	<b>Inferences and Proposals for Reform</b>	<b>45</b>
4.1	Conclusions.....	45
4.2	Recommendations.....	47
<b>5.0</b>	<b>List of References.....</b>	<b>50</b>

## DECLARATION

I, **TEMBO KONDWELANI CUTHBERT – COMPUTER No. 99338181** do declare hereby that I am the author of this Directed Research Paper entitled: Impact of Ruling Party Dominance in the Executive and Legislature on Human Rights and The Rule of Law – A Review of the African Presidential-Parliamentary Systems of Government, and confirm that it is my original work. I further declare that due acknowledgement has been given where other scholars' work have been used. I verily believe that this research has not been previously presented in the School for academic purposes.

Student's Signature:.....



Date:.....

21<sup>st</sup> December 2014

## **DEDICATION**

### **To my late Father, Phillip K. Tembo;**

(I thank God for allowing me to have you for a larger part of my life. It's never been too easy since you left but what you stood for and preached still means so much to me. This peace of work is for you)

### **To my Mother;**

(The ever shining light in my life. It's not easy to be brought up by a single parent. For all you have been, I can never thank you enough. Take this work to remember that I will always be indebted to your love)

### **To my Brothers and Sisters, Boyd and his allies;**

(Your friendship is greater than the greatest. Called me talkative when I fought for my rights, see this, I can write too)

### **To Phillip, Nyemba, Blair, Kachi, and Taonga;**

(Truthfully, they deserve the fruits of this work)

**To the many Africans who continue fighting for the Human Rights cause.**

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## PREFACE

This paper has been written that it may show that the African version of the presidential-Parliamentary system of government incubates dominance of government by one political party and consequently impacts negatively on human rights and the rule of law. It will prove helpful to both human rights activists as well as governments in countries such as Zambia where the reforms suggested herein are desperately needed.

The paper is divided into four chapters. The first chapter provides the conceptual framework of the presidential-parliamentary system of government and discusses its relationship to human rights and the rule of law. Chapter two focuses on the relationship between party politics and government and also establishes how dominance of the legislature by the party oriented executive branch has been achieved drawing examples from Zambia.

The third chapter focuses on particular cases of human rights violations and disregard for the rule of law at the hands of party politics as it manifests itself in government. The chapter contains case studies from Zambia and Zimbabwe.

In the fourth and final chapter, the paper provides a synopsis of the preceding chapters highlighting the research findings and providing proposals for reform of the Presidential-Parliamentary system as applied in the countries here used as an example.

## ABSTRACT

*The Presidential-Parliamentary system of government was designed primarily to bridge the gap that the Presidential and Parliamentary systems leave in their respective forms. But in any system of government, the most important thing is that government must essentially be run for the benefit of the governed. It follows that the governed hold for their own, inherent rights which they seek to protect by law. Therefore, any mandate to govern must be derived from the ability to guarantee these values. Hasten to mention however, that government is a system and like any system, it has organs tasked to perform particular acts of governance. In presidential-parliamentary systems of government, these organs intertwine so that government policy is effectively implemented while ensuring that these organs act within the confines of their mandate and for the benefit of the governed. Yet it is so hard to conceive such an ideal in certain African countries where the executive branch has assumed the name government and has rendered the other two organs, namely, the legislature and the judiciary, subordinate in the governing mandate. This having been achieved by political party dominance and consequent control of the executive branch by party dynamics, the governmental system has been reduced to a political forum through which the aspirations of these power-hungry African political parties prevail at the expense of effective government for the benefit of all. As a result, human rights are no longer guaranteed and the 'rule of law' is overtaken by 'rule by man.' This been the case, government loses its mandate to rule and the law is challenged to aid the situation. In such a case, there is need to reform the system of government so that the creeping control by African political parties of the executive branch of government is rendered impossible. The law also needs to be changed in order that the unchecked power of the executive can be more effectively checked owing to the possibility of arbitrariness in the handling of such power. Further, reforms are needed to strengthen the role of the legislature and the judiciary in so far as government is concerned. Electoral reforms are also needed to ensure that government encompasses all, majority and minority. Such reforms would ensure that the human rights violations perpetrated by the political party oriented executive branch of government no longer exist and also the violation of the rule of law would be almost unthinkable.*

## Chapter One

### 1.0 THE PRESIDENTIAL-PARLIAMENTARY SYSTEM: CONCEPTUAL FRAMEWORK

#### 1.1 Introduction

The history of political and legal thought portrays the development and elaboration of a set of values- justice, liberty, equality, and the sanctity of the rights of the social aggregate - the implications of which have been examined and debated down through the centuries. Just as important is the history of the debates on the institutional structures and their contribution to governing relations, which are necessary if these values are to be realized in practice, and reconciled with each other. For the values that characterize political thought are not self-executing, they have never been universally accepted in the societies most closely identified with them, nor are their implications by any means so clear and unambiguous that the course to be followed in particular situations is self-evident.<sup>1</sup> On the contrary, these values are potentially contradictory, and the clash of interests to be found in the real world is so sharp that the nature of the governmental structures through which decisions are arrived at is critically important for the actual content of these decisions. There has therefore been, since earliest times, a continuous concern with the articulation of the institutions of the political system, and with the extent to which they have promoted those values that are considered central to the social aggregate.

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<sup>1</sup> M.J.C Vile, Constitutionalism and the Separation of Powers (1967)  
p. 10

## 1.2 The Presidential-Parliamentary System: Raison d'être vis-à-vis Human Rights and the rule of law

Madison asked a strikingly important question: "What is the common welfare of the social aggregate if it does not in the prime consist of the rights of the individuals that make up the unit here termed - social aggregate."<sup>2</sup> A study thus into the impact of a governmental system on human rights and the rule of law requires one to set out the general conceptual framework of the system of government and thus far establish the relationship borne by this system of government to issues of human rights and the rule of law. This chapter does exactly that.

The Presidential-Parliamentary system of government is in general terms a fusion of two different systems of government from which the term derives. Summarily, Parliamentary systems are characterized by the legislature being the principal arena for both lawmaking and (via majority decisions) for executive power.<sup>3</sup> Presidential systems are characterized by the separation of the executive and legislative branches, with executive authority residing outside the legislature. Here, no member of the executive branch is also a member of the legislature and the executive is a distinct entity.<sup>4</sup> The simplest definition of the differences between the two approaches can thus be summed up by the degree of relative independence of the executive, with pure presidentialism being characterized by executive independence and pure

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<sup>2</sup> Federalist 78

<sup>3</sup> G. Greaves, *Governing Relations and Impact on Political Systems,* (1981) p.32

<sup>4</sup> Ibid

parliamentarism by the mutual dependence and intertwining of a state's legislative and executive capacities. Aiming to address the shortcomings of these two systems of the government, the presidential-parliamentary system combines the advantages thereon of the two distinct systems of government to achieve effective government, fitting for what might be nascent fragile democracies. In Presidential-Parliamentary systems, the members of the executive, that is the President and his cabinet, are part of the legislative process. In fact, cabinet ministers are drawn from amongst members of the legislature. The author being squarely interested in the relationship subsisting between the legislature and the executive, this work will not indulge in a duplication of various works that have espoused the basic postulation of this system of government in detail.

However, one cannot safely discuss the very essence of the presidential-parliamentary system in context without highlighting under such head, the basic tenets to which the rest of the paper shall refer and which in fact hold the system together.

### **1.3 The Doctrine of Separation of Powers: Relation to Human Rights and the Rule of Law**

At the centre rather than the periphery of a study of this sort, it is important that the role of the doctrine of separation of powers be spelt out with regard to the system of government under consideration. Western institutional theorists have concerned themselves with the problem of ensuring that the exercise of governmental power, which is essential to the realization of the values of their

societies, should be controlled in order that it should not itself be destructive of the values it was intended to promote or protect. The great theme of the advocates of constitutionalism, in contrast either to theorists of utopianism, or of absolutism, of the right or of the left, has been the frank acknowledgment of the role of government in society, linked with the determination to bring that government under control and to place limits on the exercise of its power.<sup>5</sup> Of the theories of government, which have attempted to provide a solution to this dilemma, the doctrine of the separation of powers has, in modern times, been the most significant, both intellectually and in terms of its influence upon institutional structures. A "pure doctrine" of the separation of powers might be formulated in the following way: It is essential for the establishment and maintenance of political liberty that the government be divided into three branches or departments, the legislature, the executive, and the judiciary.<sup>6</sup> To each of these three branches there is a corresponding identifiable function of government, law making, execution of policy, or the administration of justice. Each branch of the government must be confined to the exercise of its own function and not allowed to encroach upon the functions of the other branches.<sup>7</sup> Furthermore, the persons who compose these three agencies of government must be kept separate and distinct, no individual being allowed to be at the same time a member of more than one branch. In this way each of the branches will be a check to the others and no single group of people will be able to control the machinery of the State. It is true, of course, that the

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<sup>5</sup> Supra 1 at 12

<sup>6</sup> Carl J. Friedrich, Constitutional Government and Democracy, revised ed., (1950) p. 123

<sup>7</sup> Ibid

The unchallenged nature of the thesis of separate government is in vivid support of the upholding of the rule of law and is itself conclusive of the need for the rule of law rather than the 'rule of man.' No academician, politician, nor philosopher is prepared to accept that government can become, for any inviting reason, an agglomeration of purely pragmatic relationships nor can it be expected to be a single monotholic structure.<sup>9</sup>

Professor Vandoepp aptly espoused the centrality of this doctrine to the presidential-parliamentary system as well as to human rights in a few words.

He wrote:

*"the whole essence of the presidential parliamentary system of government is to limit the dangerously couched powers of the presidency while ensuring that policy issues receive effective legislation. In so doing, there has got to be an assurance that the president shall not also be, either personally or by his agents (the executive), the Chief Justice as well as the sole legislator. Doing so would amount to a grave legalization to the presidents trampling of the very role of government including the protection of the basic human rights of the people which protection is determined by the effectiveness of the distinct organs of the government."<sup>10</sup>*

Noticeable in the discussion of separation of powers as it relates to the presidential-parliamentary system and human rights, is the close relationship subsisting between separation of powers and the principle of checks and balances. The need to check and balance the government is vital for human

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<sup>8</sup> Ibid

<sup>9</sup> O.B Nwabueze, Constitutionalism in the Emergent States (1973) p. 13

<sup>10</sup> P.M Vandoepp, Africa: Political Systems and the Human Rights Discourse (1988) p. 11

rights and the rule of law. Governments, Locke wrote, "are the biggest threat to the needs of the social aggregate. So long as government remains legitimate it must protect individual rights and control its own power through a system of checks and balances."<sup>11</sup> It will be seen later how the system of checks and balances as employed in presidential-parliamentary systems has impacted on human rights and the rule of law. However, its importance vis-à-vis human rights and the upholding of the rule of law can never be overemphasized. History avers that governments ought to have self-restraint.<sup>12</sup> But more than enough authors have taken time to espouse the importance of this restraint to the liberty of the governed. An argument to the effect that that this liberty is not made up of the rule of law rather than 'rule of man' as well as the protection of human rights *in toto*, must fall flat on its face. As already seen in the writings of John Locke as quoted elsewhere, governments are in fact the greatest threat to these values here under discussion. To quote Milberg, "Our founding fathers had several goals, foremost among those goals was to avoid tyranny. To do so they devised a system of checks and balances, which every government henceforth has diligently observed,<sup>13</sup> not because they cannot change but because doing so would amount to a declaration of irresponsibility over the values that led to the American Revolution."<sup>14</sup> Early in his work, Milberg explicitly underscored the values that led to the American Revolution to include "failure to respect the

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<sup>11</sup> J. Locke, *Second Treatise on Government*, p. 79

<sup>12</sup> K. J. Harriger, "Separation of Powers and the Politics of Independent Counsels," *Political Science Quarterly*, Vol. 109, No. 2, summer 1994.

<sup>13</sup> Obviously this was a matter of opinion. One would wonder if Milberg had at the time of making the statement considered the situation under a dictatorship or a military government.

<sup>14</sup> K.L Milberg, *An Outline of Government (1979)* p. 113

rights of the individuals that ensured the existence of society."<sup>15</sup> But obviously a more specific reference made to the role of the three branches of government as regards human rights and the rule of law is to be found in Professor Nwabueze's writings. On the role of the executive branch, he wrote: "the function of execution creates a good deal of room for and a tendency towards arbitrariness; it is this aspect of government which brings government into the closest contact with the individual."<sup>16</sup> This being the case, it is trite that the executive branch is the aspect of government that stands squarely in need of restraint. Separating it from the law-making function, insisting that every executive action must, in so far as it affects an individual, have the authority of some law, the arbitrariness of the executive branch is put under check.

#### **1.4 Qualification of Thesis of Separate Power**

Obviously in the presidential-parliamentary system of government, the separation of the branches of government is not in the absolute sense so that there is fusion between the legislative branch and the function of execution. The Presidential-Parliamentary system was designed in this manner to effect this restraint while allowing government policy to get the force of law in order to achieve effective government.<sup>17</sup> Even as it is regarded as a fusion, the employ of separate procedure in law making and execution will necessarily operate as a restraint upon the incidence of arbitrariness.<sup>18</sup> Effective government as already espoused elsewhere includes in the main, a guarantee and protection of the basic rights of the human beings that form the social

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<sup>15</sup> Ibid at 63

<sup>16</sup> Supra 9 at 13

<sup>17</sup> Quentin Skinner, *The Foundations of Modern Political Thought*, Vol. 1, *The Renaissance*, Cambridge, 1978, p. 11

<sup>18</sup> Supra 9 at 15

aggregate for which government is conducted. However, it will be seen later how this fusion has impacted on human rights and the rule law in most presidential-parliamentary systems of government. Though members of the executive are also members of the legislature, separation is maintained by the fact that such members form a very small proportion of the total membership of the legislature and more importantly by the existence of an effectively organized opposition whose role makes the legislature more than a mere reflection of the executive.<sup>19</sup> However, suffice here to mention that this statement represents an ideal and mature political system. The same may not be true as will be seen later in African presidential-parliamentary systems where political engineering has effectively defeated these virtues and where the numbers of the opposition in the legislature have been compromised thereby crashing the very system of separation of powers as ideally endowed. How that has been achieved is a question whose answer forms the gist of another later chapter of this work. The role of the doctrine of separation of powers and the principle of checks and balances in the presidential-parliamentary system of government as regards human rights cannot be overemphasized. The law-making function demands a responsible law-making regime couching laws in good taste with the requirements of the social aggregate the prime of which are their rights. There is need for legal guarantee of the inherent rights of the social aggregate. The role of the executive branch of government may be the execution of policies for the benefit of the governed but it will be a misconception to think also that it ends there. The role of the executive branch includes, in furtherance, the protection of human rights and an observance of

the rule of law.<sup>20</sup> The Executive plays a central role in protecting and ensuring the respect of human rights. The Executive is expected to provide the requisite degree of principled, ethical leadership, and exercise oversight over the bodies responsible for executing its policies and programmes. While discharging its considerable responsibilities, the Executive must ensure that it provides clear leadership and political will to maintain clean government and its own actions are lawful, transparent and fully accountable to the social aggregate.<sup>21</sup> Thomas Jefferson remarked once to Baron Von Humboldt in 1807 to the effect that: *"when a man assumes a public trust, he should consider himself as public property and whatever he does must not harm the public interest."*<sup>22</sup> All through the preceding paragraphs, the public interest has been explained to include in the main—the protection of human rights and the upholding of the rule of law.

## 1.5 Conclusion

In different historical epochs, governments have endeavoured to achieve the common welfare by various means. Any mature political system assumes institutional forms; resting on defined legal bases that catalyze the discharge of governmental functions. This chapter concerned itself with a basic study of the presidential-parliamentary system of government with biasness towards ideal issues of human rights and the rule of law. It is clear that all systems of government employ certain minimum values by which government is undertaken. But even with the differences as regards the degree to which

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<sup>20</sup> A.V Dicey, *The Law of the Constitution (1914)* p. 98

<sup>21</sup> O.B Nwabueze, *Presidentialism in Commonwealth Africa. (1974)* p 43

<sup>22</sup> B. Hurst, *Madison, Jefferson and the Early Constitutionalists,*

each system employs these doctrines, it is undisputed that government must be carried on primarily for the benefit of the governed. It is also undisputed that the central benefit of the governed relates mainly to their rights. Protection therefore of the rights of the humans that lie at the core of the social aggregate is an enormous concern. In order that it be guaranteed, in ideal terms, the employ of the doctrine of separation of powers and the principle of checks and balances in the presidential-parliamentary systems, ensure that limits are placed upon the branches charged with the conduct of government while also ensuring effective governance. Professor de Smith avers that a contemporary liberal democrat may not be easily persuaded to accept that there could be any constitutionalism, which is cardinal for effective governance in any country, which does not place restraints on government and where the conditions that include effective guarantees of liberty are lacking.<sup>23</sup>

The protection of human rights and the upholding of the rule of law do not happen in a vacuum. This takes place in defined political and governmental systems, employing well-established doctrines and deep-rooted principles intended to achieve effective governance. Whether the result is always as intended is another question to which the paper devotes a chapter in answer later. Constitutionalism, which also embodies effective guarantees of human rights and the upholding of the Rule of Law, is not a matter of seizing a short-term advantage; it is a belief in the need to establish and support those values in the political system, which provide for stability and to maintain the procedures, which protect the liberty of the individual in a democratic society.

At this point, it is beyond argument that government is tasked to protect human rights and guarantee the rule of law and its failure to do so may be regarded as a failure to govern. The Presidential-Parliamentary system is by its very nature designed to keep the administration in check and doing so is desirable to the social aggregate owing to the natural tyrannical tendencies of governors over the governed.

## Chapter Two

### 2.0 PARTY POLITICS AND HUMAN RIGHTS PROTECTION IN THE LEGISLATURE

*“Decades of military rule and authoritarian regimes were gradually yielding to a new era of democracy, and popular participation in governance began to emerge. During the last decade, some 42 African countries have held multi-party presidential or parliamentary elections, with mixed results. But the party has retained its authoritarian nature whereas many to date are yet to appreciate the full values of human rights and the rule of law.” (ADB: 2001)*

#### 2.1 Introduction

In the preceding chapter, the author discussed issues of human rights and the rule of law in ideal terms, as the same relate to political institutions set up under the presidential-parliamentary system of government. It has already been established that the government is charged with the protection and guarantee of human rights and the upholding of the rule of law. The guarantee and protection of human rights must begin with laws that define these precincts and executive policies that are aimed at meeting those ends, which are cardinal to human welfare. Hasten to mention though, both laws and policies are not formulated in a political vacuum. All these activities take place in a party-oriented political system, which imports certain virtues that ordinarily come with party politics. This chapter focuses on the role of party politics in the legislature and the executive in so far as the same impacts on human rights and the rule of law.

Various writers have explored the evils as well as the advantages of party politics in the presidential-parliamentary system. Some argue that the dominance of a political party under this system of government is essential for

its (the system) effectiveness. On the other hand, others argue that such dominance itself destroys the inherent system of checks and balances as legislators toe party lines and consequently infracts on human rights and the rule of law. A study into two concepts that relate to legislative politics will be vital in this chapter. These are: - a. the concept of party discipline and b. Collective responsibility.

## **2.2 Party Discipline: The Concept**

So much literature exists which raises but only defines the concept of party discipline without going further to study its impact on human rights and the rule of law. In the main, not many writers have let alone implored a study into internal party dynamics to ascertain for sure the very core and effect of the concept in question.<sup>24</sup> One issue that is of considerable importance in this regard is how such dynamics can affect the nature and exercise of executive power – a subject that has been a major concern for many observers of governments given the apparent weakness of legislatures,<sup>25</sup> and the perceived tendency for these governments to degenerate into forms of dictatorships and hence impact negatively on human rights and the rule of law.

Given this issue, the effort to make sense of comparative propensities toward coherence or fractionalization is likely to benefit less from proposing the causal significance of specific kinds of institutional forms, than by reference to one question: do institutions give power to party leaders who might seek to

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<sup>24</sup> P. Vandoepp; *Party Dynamics in Southern African Democracies* (2002)

punish disloyal or potentially disloyal elements in the legislature?<sup>26</sup> By meaning, the question itself bares the inherent meaning of the concept of party discipline. Here, legislators toe party lines and do not necessarily legislate based on their objective convictions.<sup>27</sup> The party's position with regard to particular legislation or issues for which the legislator is supposed to pose a check through the various committees put together for that purpose, has to be within the spirit of his party or else such a legislator invites sanctions, the climax being usually expulsion from the party. As will be seen later, in many countries, including Zambia, the consequence of expulsion from the party is a loss of the parliamentary seat. The ability to do so hinges not only on institutional factors, but also reflects internal party rules as well as the peculiarities of individual situations.

### **2.3 The Void Legislator: Party politics in the Legislature – The Zambian Case**

At this stage, it is important to engage a study into the manifestation of political party dominance in the legislature. A study into the political myths underlying the legislature in Zambia reveals *prima facie* three ways by which the executive usurps the power of the legislature thereby creating a single party legislature and consequently crashing the system of checks and balances. As a result, as will be seen later, human rights and the rule of law are greatly compromised. These three ways can be enumerated as: - (1) Invoking the concept of party discipline proper; (2) Collective Responsibility; (3) Appointment of opposition party members as cabinet ministers.

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<sup>26</sup> Ibid

In the first instance, party discipline has mainly been used for an awesomely disheartening purpose. While in countries like the United Kingdom where party discipline is necessary to hold the party together whilst allowing particular members of parliament to argue objectively on matters in the legislative assembly,<sup>28</sup> the same is not true in many Presidential-Parliamentary systems of government such as Zambia. Where the party in Zambia considers its member a dissent in the house, they have the power to discipline him or her by expulsion from the party in accordance with party rules.<sup>29</sup> The effect of such expulsion is loss of the parliamentary seat in question. Consequently, backbenchers are essentially party cronies extremely afraid of being laid square on the chopping board. The situation is extremely complicated by the raging economic difficulties many Zambians are facing, including the backbench members of parliament. Losing the parliamentary seat and its privileges is therefore an intolerable thought in the heads of most of these members of parliament.<sup>30</sup> This however, should not be taken to exclude other members of parliament. Every Member of Parliament, with the exception of independent members of course, is at the mercy of his or her political party.<sup>31</sup> In this way, the legislature is extremely weakened in its standing on the power balance scale of governance. Moreover, it has been argued by some that this prevalence itself poses an indirect but serious violation of the rights of the members affected in this manner as it attempts or does in fact legalize the

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<sup>28</sup> P.H Kelly; *An Outline of British Government* (1987) p. 32

<sup>29</sup> Professor A. W. Chanda delivering a lecture on Human rights and the ways of establishing control under the one party state.

<sup>30</sup> *Ibid*

taking away of these members' freedoms of expression and assembly.<sup>32</sup> The sweeping effect of this result is that the legislature essentially presupposes an extension of the political forum on which the various political parties meet to advance their political ambitions whatever the result.<sup>33</sup> Disheartening to mention that all this happens at the expense of the citizens. The legislature instead of living up to its expectations as regards the upholding of the rule of law and human rights through offering effective checks on the executive power of the state, takes a role akin to a boxing ring only fiercer in which political opponents fight for power.

The second and third ways of establishing control of the legislature by the executive may be discussed as one due to the thin line that bridges them. Collective responsibility means that cabinet ministers cannot disagree in public on matters of government policy. Once a cabinet meeting has decided, whether in fact one disagreed with the policy or not, in public or in parliament they will vote as a bloc.<sup>34</sup> In this day and age of what is termed 'political engineering,' governments in many presidential-parliamentary systems in Africa have used this concept together with that of party discipline to get control of the legislature. It will be seen later how this control has affected human rights and the rule of law but suffice it to mention how it has been done by using Zambia as an example. In the Zambian case, it was easy for the government and the ruling party in general to acquire control of the legislative branch of government, as the constitutional provisions had no impediments that could be used to stop the same from happening. After the December

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<sup>32</sup> See generally *supra* Note 6

<sup>33</sup> *Supra* Note 8

2001 tripartite elections, the ruling Movement for Multi-Party Democracy had lesser seats as compared to the opposition as a whole.<sup>35</sup> This being the case, it became difficult to obtain the necessary backing for certain policies that required majority votes in parliament. President Levy Patrick Mwanawasa (S.C) turned the tables in his favour by appointing opposition members of parliament as cabinet ministers thereby forcing them to vote with the government (which is essentially the party) by reason of collective responsibility. This put together with the strict party discipline ensured that not only did the MMD have control over the backbench but also destabilized the opposition. Elsewhere, it will be seen that this control of the legislature by the party-oriented-executive branch of government impacts negatively on human rights and the rule of law.

The compromise suffered by the legislature at the hands of collective responsibility is itself perpetrated inherently by the legislative assembly.<sup>36</sup> In this regard, the freedom that ministers should ordinarily have as members of parliament is completely usurped. Since the executive branch of the government is headed by the President<sup>37</sup> and the cabinet members are like his agents since all executive power vests in him (the president), it follows that while in parliament, the ministers continue in their capacity as ministers bound

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<sup>35</sup> The MMD had won just about half of the seats, a phenomenon which is unprecedented in Zambia. For the first time, there was a real chance of constructive debate in the house

<sup>36</sup> Eskine May; Parliamentary Practice, 431 In fact, speaker of the National Assembly Amusa Mwanamwabwa while leading the House in the condemnation of Akashabatwa Mbikusita Lewanika on the occasion of his expulsion from the National Assembly reiterated the rules that apply to both back and Front (Ministers) benchers stating clearly that the latter were bound by Collective Responsibility. (Daily Parliamentary Debates, 1996)

<sup>37</sup> Article 22(1) of the Constitution of Zambia Chapter 2 of the Constitution of Zambia

by the authority of the chief executive (the president) thereby diluting the strength of the legislative arm of government to which they are also members. In this case, separation of powers is by far dishearteningly crashed thereby leaving no safeguard against the arbitrariness that ordinarily goes with executive power when unchecked. This can have a devastating impact on the upholding of human rights and the rule of law as will be apparent in the next chapter. In the metaphor of Kadar Asmal,<sup>38</sup> “when a party is in charge of the executive branch of government and goes on to bestow upon itself, control of the legislature, there, human rights are compromised for it becomes a case of darkness masquerading as light.”

Boyle<sup>39</sup> contributes to the issue of party politics in the legislature by averring that to let the party-oriented executive branch hold grips of the legislature is itself to allow for a departure from the doctrine of separation of powers and a compromise of legislative supremacy. It has been argued elsewhere that a direct link exists between human rights, the rule of law and the doctrine of separation of powers. Consequently, a departure from the doctrine of separation of powers is the very basis of tyranny, which in turn is alien to the human rights protection and the rule of law. The doctrine of the legislative supremacy of Parliament is the very keystone of the law of the constitution. But it is, we must admit, a dogma, which does not always find ready acceptance, and it is well worthwhile to note and examine the class of opposition, which impede the admission of its truth. In the main, it will be the

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<sup>38</sup> East African Journal of Peace and Human Rights; Vol. 4. No. 4 1995, p. 13

<sup>39</sup> Francis A. Boyle: *Separation of Powers, The Legislature and Human*

executive branch of government, full of party ideologies, seeking control of the lawmaking agency.<sup>40</sup> Professor A.V Dicey in his early writings in the Law of the Constitution had warned of the danger posed by executive power to human nature and good governance. In his words, "*executive power is bound to abuse. It is by far the power that requires a check as it is being exercised. Tyranny takes hold where this power goes unchecked...*"<sup>41</sup> What then becomes of governments in African countries where the executive branch of government, with its strong, inseparable ties with party politics, have gained control of the legislative arm of the state? The answer lies elsewhere, but in sum, the same results that learned writers have warned about will manifest themselves. In that regard, no justification could possibly lie for party discipline and collective responsibility to continue operating in the manner highlighted in this chapter. To sum up, Nash once averred:

*"Political institutions (however the proposition may be at times ignored) are the work of men, owe their origin and their whole existence to human will. Men did not wake up on a summer morning and find them sprung up. Neither do they resemble trees, which, once planted, are "aye growing" while men "are sleeping." In every stage of their existence they are made what they are by human voluntary agency. To let the will of a few manifest itself in more than one organ of government, is to render that government a facade."*<sup>42</sup>

It is accepted in this regard, that control by the party-oriented executive of the legislative branch of government is beyond doubt, undesirable where its effect is in the manner discussed under this chapter.

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<sup>40</sup> Ibid at 69

<sup>41</sup> A.V Dicey, *Law of the Constitution* (1885), Part I, para. 201

## 2.4 Legislative Realities and the Rule of Law

The importance of the legislative arm of government in so far as upholding the rule of law cannot be overemphasized. Sometimes equated with constitutionalism, the "Rule of Law", holds, from amongst its many meanings, that government can and should be legally limited in its powers, and that its authority depends on enforcing those limitations. John Locke intelligently espoused such a thesis in the following quote:

*"... Freedom of men under government is to have a standing rule to live by, common to every one of that society, and made by the legislative power erected in it. A liberty to follow my own will in all things where that rule prescribes not, not to be subject to the inconstant, uncertain, unknown, arbitrary will of another man..."<sup>43</sup>*

The 1959 Delhi Conference of the International Commission of Jurists, in relation to the relationship between the rule of law and the legislature, concluded: *"under the Rule of Law, the legislature carries out the function of creating and maintaining conditions that would uphold the dignity of man."*<sup>44</sup>

From the above, it may be understood that it is generally and rightly so, the role of the legislature to pass laws that ensure the liberty of the individual or rather the protection of human rights.<sup>45</sup> The rule of law must begin with the passage of laws and one can safely say that it is emphatically the province of the legislative department to make law. But the question that comes to mind here is whether the legislature in the state in which it is, as discussed above, in many African Presidential-Parliamentary systems of government can live up or has in fact been able to live up to its challenges under this head. The

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<sup>43</sup> John Locke; *Second Treatise on Government* Ch. 4 ss. 21

<sup>44</sup> Ante 23

<sup>45</sup> This also seems to have been the position of the Conference of 1959.

fact that party politics have safely crept into this arm of government raises important concerns for its (the legislature) effectiveness in the execution of the task of law making. Primarily and in the main, the fact that party discipline and collective responsibility exist to ensure that members of parliament vote in a certain way as required by the party through its head who in case of the ruling party is also the President of a country may mean that parliament can easily pass laws with certain cases in mind owing to its sweeping control of the legislative house. In Zambia, parliament amended the Constitution in 1996 before the elections in such a manner as to bar one of the prospective candidates from running in the presidential election.<sup>46</sup> But the most notable of parliaments failure to live up to its tasks with regard to the rule of law can be seen in the manner in which the government amended the Public Order Act<sup>47</sup> pursuant to the ruling of the court in the case of **Christine Mulundika & Seven Others v. The People**<sup>48</sup>. The court had ruled that Sections 5 (4) of the Public Order Act was unconstitutional as it infringed on the constitutionally guaranteed rights of the citizens. The effect of this was that the said sections were invalid by reason of inconsistency with the supreme law of the land – the constitution. This being the case, parliament amended the Act expediently but still systematically curbing the rights as created under the constitution. Clearly, the target of such expedient, unprofessional and malicious amendment was the opposition and non-governmental organization, which at the time were actively organizing demonstrations and public rallies owing to

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<sup>46</sup> In 1996 Zambia amended the Constitution maliciously with a view to barring Dr. Kaunda from standing for presidency. See LRF News, No. 28 2001: **Zambia Should Amend Constitution - African Charter On Human Rights**

<sup>47</sup> Chapter 113 of the Laws of Zambia

<sup>48</sup> SCZ Judgment No. 25 of 1995

the government's failure to address issues of political and economic concern to the citizenry.

The above behaviour of the legislative branch is met by contrast. In October 2002 local media organizations and opposition Members of Parliament pushed for amendments to existing media legislation in order to increase media freedom. However, the amendments were blocked by Parliament in November. The government's version of the three amended bills - the Zambia National Broadcasting Corporation bill, the Freedom of Information bill and the Independent Broadcasting Bill were presented and passed in parliament.<sup>49</sup> This again goes to show that the role of the legislature is greatly eschewed by the party-oriented executive branch of government.

More recently in Zimbabwe, another presidential-parliamentary system of government characterized by ruling party and executive dominance of the legislature, appalling legislation has been passed. Recently, the Access to Information Bill was amended to arrest journalists for up to two years.<sup>50</sup> Undoubtedly, such an amendment would not have been possible if the opposition was not maligned in the legislature.

Such haste actions by an organ of high importance in any democratic order are uncalled for especially that it (parliament) was called to deal with an issue that borders on the fundamental freedoms of individuals. The passage of a

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<sup>49</sup> Zamnet News; 2nd November 2002: **Parliament Throws Out Media Bills**

<sup>50</sup> BBC News; **Zimbabwe Crisis Continues**, ([www.bbcnews.co.uk](http://www.bbcnews.co.uk)) 12<sup>th</sup> November 2004

law in order that it may deal with a particular class of people perceived as enemies of the ruling party cannot by far pose as an uphold of the rule of law.

From the above, one can safely conclude that the mandate bestowed upon the legislature with regard to the rule of law is overtaken by the realities obtaining on the ground.

The above situation may be contrasted with a country that has a presidential-parliamentary system but without any such dominance by the ruling party-oriented executive in the legislature. Botswana provides an exception that confounds such generalizations. Professor Stedman explains: "[Botswana] is...a country akin to Switzerland, but whose very exceptionality prompts analysts to see it as a hopeful model for other societies."<sup>51</sup> Why this is so will be a subject of discussion of another chapter, which will draw conclusions and offer recommendations.

## 2.5 Conclusion

The uncontested concept of democracy avers a complex yet cardinal process of institution building, development of a liberal political culture and traditions, an uninhibited growth of free speech, an unfettered development of the press, and respect for not only the rule, but the due process of law. In all, there must be a law and an institution or institutions must exist for that purpose. Nwabueze writes, "it is also concerned with certain conditions of things, conditions such as a virile civil society, a democratic society, a free society, a

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<sup>51</sup> Steadman; *The Political Economy and Democracy*, (1993) p.1

just society, equal treatment of all citizens by the state, an ordered, stable society, a society infused with the spirit of liberty, democracy, justice and equality." For these values to be maintained, it has been seen in the above discussion, the law making institution must be free of any other power working upon it in a refractory manner that fetters its mandate in so far as it relates to people. The institution must reflect the will of the people and not in the main any form of classed representation should be entertained. The existence of divisive forces merely requires that the right precautions and measures be taken to neutralize such separatist forces, and not that the multi-party system be abolished by dominance of a single party. In other words, the existence of political parties defending different interests in the context of law and national unity in these institutions must ensure that it does nothing to create disorder, anarchy, and so on. On the other hand, the single party, emanating from the primacy of Heads of State unable to resist the myriad temptations afforded by political power must not abolish all the hard-won freedoms after prolonged and painful political and union struggles through enactment of sterile law. In instance of continued dominance as discussed, a lapse into dictatorship becomes a very real possibility. Leaders coming to power in such circumstances are naturally unpopular and their regime anti-democratic. They then set up the single party, attempting to assert themselves by filling the people with fear. Human rights and the rule of law are impeded. Government in such a case is as good as dead.

## Chapter Three

### 3.0 GOVERNMENT AND HUMAN RIGHTS VIOLATIONS IN ZAMBIA AND ZIMBABWE

*“Those who won our independence [from Britain] believed that the final end of the state was to make men free to develop their faculties; and that in its government the deliberate forces would prevail over the arbitrary. They valued Liberty both as an end and as a means. They believed liberty to be the secret of happiness, and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth.... recognizing the occasional tyrannies of the governing majorities, they amended the constitution so that free speech and assembly should be guaranteed.”*  
*(Mr. Justice Brandies, Whitney v. California, 1927)*

#### 3.1 Introduction

It has already been seen elsewhere that the role of the government relates by far to the protection of human rights and the upholding of the rule of law as prime concerns in the domain of human welfare. It has also been seen how political party dominance has jeopardized the role of the legislature in the governance of a country. This chapter discusses the various human rights violations that have taken place as a result of the dominance of the party-oriented executive branch of government in most presidential-parliamentary systems of government. The chapter focuses mainly on how the strong ties between the ruling party and the executive branch of government have compromised the upholding of the rule of law and human rights.

#### 3.2 The Party-Oriented Executive and Human Rights

The role of the executive branch of government does not end with policy administration but also presupposes a duty to uphold the protection of human rights as guaranteed by the law. The executive must ensure that “it provides clear leadership and political will to maintain clean government; its own

actions are lawful, transparent and fully accountable; the independence of the courts is respected and their judgments complied with; and, the watchdog agencies are given the resources and the mandate to discharge their functions without fear or favour.”<sup>52</sup>

Thomas Jefferson summarised this by saying: “*when a man assumes a public trust, he should consider himself public property.*”<sup>53</sup> Thus, it is submitted that if a man were public property, then the discharge of his functions must not be to the detriment of the public whose trust he assumed. Consequently, the executive branch of government cannot, being servants, trample the human rights of the people. At the root of the idea of human rights are the values people wish to have respected by governments. Failure to respect these values has led people and nations to rebel against repressive regimes. It is not enough just to have law. People should be able to feel that the law is there to provide and promote these fundamental interests.<sup>54</sup> That is only possible if the executive enforces the law in protection of these rights. It will be seen shortly, that the opposite has been true in the party-oriented executive branches of government taking example from Zambia and Zimbabwe.

### **3.3 Political Trends in Human Rights protection in Zambia**

A democratic state presupposes the observance of fundamental rights and freedoms. In effect, the concept of popular democracy is premised on the principle that the power is vested on the people and that it is in the exercise of

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<sup>52</sup> Transparency International (2000: *The Source Book: The Role of the Executive, Chapter 7*, (www.i-acci.org))

<sup>53</sup> In a Remark to Baron Von Humboldt, See *Ibid*

<sup>54</sup> Edited version of speech by Zimbabwe's former Chief Justice, Anthony Gubbay (delivered June 20, 2001) source: (www.sundaytimes.co.za)

that power that they elect their representatives to hold office.<sup>55</sup> Further, the people must have legal and institutional capacities to enjoy basic rights corollary to the democratic state.<sup>56</sup>

Part III of the Constitution of Zambia<sup>57</sup> guarantees these inherent freedoms presupposed by the democratic order. Zambia is also a party to various international and regional human rights instruments. However, it is submitted that the guarantee of these freedoms in a country where the government is essentially dominated by party politics especially the ruling party dominating the legislative and executive branches of government, is weighed towards the ruling party supporters in the main at the expense of other peoples rights.

### **3.3.1 Freedom of Assembly and Association**

Intimidation of opposition parties has been the in thing. Two weeks after the close of the consultative group meeting in 1997, the opposition United National Independence Party (UNIP) found its Lusaka headquarters besieged by police and filled with tear gas. Some passers-by were caught up in the police attack and at least one market stallholder was badly beaten. Twenty-three UNIP supporters who left the building were arrested, some of whom were badly beaten at the Force Headquarters of the police in Lusaka. UNIP Central Committee member Rabbison Chongo and eleven others were reportedly seriously injured, among them, two women spent five days in hospital, one with a broken leg, and the other with an injured knee. One

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<sup>55</sup> Afronet; Zambia Human Rights Report 2001, P. 8

<sup>56</sup> Ibid

<sup>57</sup> Chapter 1 of the Laws of Zambia

detainee was reportedly tortured with electric shocks.<sup>58</sup> These are serious impediments on the right to assemble and associate freely as guaranteed by the Constitution.<sup>59</sup>

October 28, 1997 saw another event that dealt a blow to the right to assemble and associate. A number of insurgent Zambia Army soldiers staged an unsuccessful coup.<sup>60</sup> The following day, President Chiluba declared a state of emergency<sup>61</sup> and a crackdown began on suspected accomplices in the coup attempt. A number of opposition politicians were targeted, including Zambia Democratic Congress (ZDC) leader Dean Mung'omba and on December 25, ex-president and UNIP leader Kenneth Kaunda.<sup>62</sup> In the months that followed the coup attempt, constitutional guarantees of many basic human rights were suspended in accordance with the provisions relating to the President power to declare a state of emergency.<sup>63</sup>

The police used the Public Order Act to arbitrarily deny opposition parties and non-governmental organizations permission to hold public demonstrations.<sup>64</sup> Under Zambia's Public Order Act, any group of citizens wishing to hold a public demonstration must notify the police seven days before the demonstration. However, the police abused the law and arbitrarily determined when a gathering could or could not take place. Breaches of the law's provisions on lawful assembly carry a maximum sentence of seven years

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<sup>58</sup> Human Rights Watch: **No Model for Democracy: Continuing Human Rights Violations**, Vol. 10, No. 2 (A) 1 May 1998

<sup>59</sup> Article 20 of the Chapter 1 of the Laws of Zambia

<sup>60</sup> Zamnet News; **Coup Scare: Commandos Rescue Nation**, ([www.zamnet.zm](http://www.zamnet.zm)) 29<sup>th</sup> October 1997

<sup>61</sup> This was done by Issue of Statutory Instrument No. 121 of 1997

<sup>62</sup> The Post; **KK Arrested**, 26<sup>th</sup> December 1997

<sup>63</sup> Supra Note 7

<sup>64</sup> Ibid

imprisonment. On May 7, 2000, then Inspector-General Sailus Ngangula said the police would continue to arrest people holding processions without permits since disregarding the Public Order Act could "create anarchy" in Zambia. This obviously was directly in confrontation with the courts ruling in the **Mulundika Case**<sup>65</sup>, which cited the dicta of Mr. Justice Brandeis of the United States Supreme Court in **Whitney v. California**<sup>66</sup> to the effect that freedom to speak as you think cannot be fettered by any other law and that without free speech and assembly discussion would be futile. The Police services' disrespect of freedom of assembly was apparent in its (Police) conduct in dealing with the demonstration by resident doctors, which later led to a case before the High Court.<sup>67</sup> There again, the ruling in **Mulundika** was stressed.

While Opposition parties, NGOs and other civic interest groups have regularly been denied permission to assemble or had their meetings cancelled on public security grounds, the ruling Movement for Multiparty Democracy (MMD), in contrast, continued to hold meetings, rallies, and pro-government demonstrations without permits. The case involving post newspaper columnist Roy Clark provides vivid insight. After Mr. Clark's article entitled "Mfuwe" raised mixed emotions amongst literate Zambians, MMD Cadres in Lusaka mobilised and marched through the central business district all the way to the Ministry of Home Affairs, which is situated a stone throw away from the Police Service headquarters, demanding audience with the Minister of Home Affairs pertaining to Mr. Clark's deportation.<sup>68</sup> Not only did the police escort them

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<sup>65</sup> SCZ Judgment No. 25 of 1995

<sup>66</sup> 274 US 357, 47 S.Ct. 641, 71 L.Ed 1095 (1927)

<sup>67</sup> See **Resident Doctor's Association and 51 others v. The Attorney General - (2001) Unreported**

<sup>68</sup> The Post Newspaper, 5<sup>th</sup> January 2004; **Clark Given 24 Hour Ultimatum**

(cadres) through their procession but also the Minister met with them<sup>69</sup> notwithstanding the fact that such could not have been allowed under any circumstances. From experience, many such processions have been quashed by police for lack of notice or permit in cases involving other interest groups other than MMD Cadres. For example, University of Zambia (UNZA) Students marching to the bursaries committee to meet the Minister over their meal allowances were stopped halfway by police and later packed into police cars and taken back to the main campus after being beaten.

Also, when the Clark deportation case came up in court, MMD Cadres as well Clark's supporters assembled at the court buildings to give support to the parties of interest. However, the MMD Cadres started throwing stones and beating up Mr. Clark's supporters and police watched like boxing fans the only intervention being to attempt to disperse Clark's supporters.<sup>70</sup> Here, one would ordinarily think that it is the duty of the police to protect the weaker party from having their rights violated by intimidation and fear of injury to the person.

### **3.3.2 Freedom of Expression**

Impediments on freedom of expression are also rampant. Amnesty International reports that the police and ruling Movement for Multi-party Democracy supporters continued to harass people perceived to be critical of the government, including independent journalists. One such case is storming of post newspaper offices by supposed Evelyn Hone College and University of Zambia students who went to demand for the post to stop running the column

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<sup>69</sup> Ibid

<sup>70</sup> The Post Newspaper, 19<sup>th</sup> January 2004 ([www.post.co.zm](http://www.post.co.zm))

titled "the spectator."<sup>71</sup> Later, the student unions at these learning institutions disowned the demonstrating students explaining that they (demonstrating students) were sponsored by MMD Lusaka province youth leader Mr. Jeff Kaande.<sup>72</sup>

Six journalists from the privately owned *Post* newspaper were detained in March 1999 for publishing a story headlined "Angola Worries Zambia Army." The story criticized Zambia's military capability and preparedness in the face of a possible military attack from Angola. All the reporters, including editor-in-chief Fred M'membe were later charged with "espionage." Two of the journalists, Lubasi Katundu and Amos Malupenga, were on leave at the time of arrest while Rueben Phiri and Mukalya Nampito were out of the country. Their case was taken before the High Court on April 16, 1999 and on November 1, 1999, twelve other *Post* journalists appeared before the High Court in Lusaka on a charge of espionage. All twelve pleaded not guilty to the charge and were at liberty on bail. On August 18, the state dropped charges against all the journalists except editor-in-chief Fred Mmembe.<sup>73</sup> As though these impediments of freedom of expression were not enough, on January 24, 2000, following pressure from the Ministry of Information, the privately-owned Radio Phoenix announced it was discontinuing a live phone-in program, "Let the People Talk: The Doctor's Strike." The program was sponsored by human rights NGO AFRONET to provide a forum for striking resident doctors to air their grievances. Following AFRONET's public complaints about this incident,

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<sup>71</sup> ZNBC News; *UNZA Students Demonstrate at Post*, Source: (www.znbc.co.zm)

<sup>72</sup> The Post Newspaper, 8<sup>th</sup> April 2004; *UNZASU Disowns Anti-Clark Protests*, Source: (www.post.co.zm)

<sup>73</sup> Supra Note 7

the program was restarted a few days later, but it was pre-recorded, edited, and the phone-in was discontinued.<sup>74</sup>

The editor of the *Monitor* newspaper, Arthur Simuchoba, and journalist Chali Nondo were charged with contempt of court in September 2003 following an article, which alleged that President Mwanawasa had increased the salaries of Supreme Court judges "to soften the judiciary ahead of the Presidential petition hearing." The Supreme Court dismissed the application in November.<sup>75</sup>

Following orders by President Mwanawasa, United Party for National Development (UPND) MP Vitalis Mooya was arrested in October 2003 on charges of making false statements aimed at causing public alarm, for publicly warning that people in southern Zambia were dying of hunger as a result of food shortages. The Director of Public Prosecutions ordered his release the same month and all charges against him were dropped.<sup>76</sup>

Lack of respect for freedom of expression is again evident in the Majid Ticklay case. On January 4, 2000, after fifty-four-years residence in Zambia, sixty-two-year-old Asian and British national, Majid Ticklay, was deported with one hour's notice to Britain after his letter to the *Post* appealing to Zambians of Asian origin to play a more active role in politics was published. The Minister of Home Affairs, Peter Machungwa, announced in a press statement that Ticklay had been deported for "sowing messages designed to promote ethnic divisions, hatred, racial discrimination, and anarchy among the people of the

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<sup>74</sup> Ibid

<sup>75</sup> Ibid

<sup>76</sup> Human Rights Watch: *No Model for Democracy: Continuing Human Rights Violations*, Vol. 10, No. 2 (A) 1 May 1998

county."<sup>77</sup> He was deported under the Immigration and Deportation Act, which gives the minister discretionary powers to deport persons whose presence is deemed "inimical to the public interest."<sup>78</sup> Such unreasonable exercises of discretion by the executive can never be in good taste with the discourse of human rights and good governance.

Hundreds of demonstrators were arrested in the context of the controversy over a third term bid for former President Chiluba. Police frequently demanded that protest organizers obtain a police permit, although law no longer required this.<sup>79</sup> In **Resident Doctors Association and 51 others v. The Attorney General**<sup>80</sup> it was held that such police actions were unconstitutional and "in bad faith". Nevertheless, police continued to use tear gas, beatings and arrests to break up opposition rallies that did not have a permit, calling them unlawful. Police continued to break up peaceful public events and even threatened to arrest anyone honking their car horn on Fridays, seen at the time as an expression of opposition to a third term for President Chiluba.<sup>81</sup>

In the meantime, those who supported the third term bid had supposedly a better right to speak. MMD party cadres led by disgruntled matero woman-cadre Esther Nakawala and Lusaka province youth wing leader known as "Mubobo"<sup>82</sup> were able to effectively organize any procession or indeed air any views without the police saying anything. This can be evidenced by these cadres' behaviour at the High Court premises in a case involving 21 members

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<sup>77</sup> Ibid

<sup>78</sup> Ibid

<sup>79</sup> Ibid; That was the ruling in the **Mulundika case**

<sup>80</sup> Supra note 16

<sup>81</sup> Supra Note 22

<sup>82</sup> The cadre was commonly known by his nickname which means a snake hence the difficulty in obtaining his real name

of parliament (MP's) opposed to the third term bid.<sup>83</sup> They (the cadres) went onto the court grounds without police intervention and intimidated the MP's swearing at them.<sup>84</sup> Nakawala was pictured within close range of Honorable Newton Nguni (One of the MP's) and the media picked her swearing vulgarities at the MP.<sup>85</sup> Opposition party cadres would not have done all this without the police turning on their dramatic yet barbaric character.

### **3.4 Party Aligned Human Rights Violations in Zimbabwe: Case Summaries**

Having shown in the preceding paragraphs by way of example, the specific violations of rights in relation to party favoritism or dominance of the executive branch, the paper here asserts brief cases of similar violation in the Zimbabwean setting with the aim of drawing the same generalizations as regards ruling party dominance of government.

Zimbabwe attained independence on 18 April 1980. On that day the constitution of Zimbabwe came into force, with a declaration of rights largely derived from the Universal Declaration of Human Rights and the European Convention.<sup>86</sup> However, living up to these standards has proved to be a problem in the recent past as the country seeks to dispel the 24 year rule of His Excellency, the President, Mr. Robert Mugabe. Many Human rights violations are being perpetrated by the Zimbabwe government, which is also

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<sup>83</sup> Zamnet news; *Nguni Roughed Up* ([www.zamnet.zm](http://www.zamnet.zm)) August, 2001

<sup>84</sup> Ibid

<sup>85</sup> Ibid; See Also, *I can bare you Children - Nakawala Offers Nguni* in *The Post, August 2001*

<sup>86</sup> Edited version of speech by Zimbabwe's former Chief Justice, Anthony Gubbay (delivered June 20, 2001) ([www.sundaytimes.co.za](http://www.sundaytimes.co.za)) Wednesday, 10 Nov 2004

tolerating the same violations, by the ruling Zimbabwe African National Union Patriotic Front (ZANU-PF) party headed by the republican President Mr. Mugabe.<sup>87</sup>

In the interim, there has been a thorough intimidation campaign of the opposition by the ruling ZANU-PF. In one disheartening case, police arrested 64 Movement for Democratic Change (MDC) members after they (MDC members) were attacked by ZANU-PF supporters while putting up campaign posters in the Lupane bye-election.<sup>88</sup> Ordinarily, it would be expected that police should arrest the defaulting party. What is further disheartening about the Lupane incident is that the bye-election itself was necessitated by the death of MDC MP David Mpala who died following a dastardly attack by ruling party loyalists.<sup>89</sup> In such cases, freedom of assembly and association are no longer guaranteed.

Freedom of expression has not gone without suffering. In 2002 the government issued a public notice advising non-governmental organizations (NGOs) to register with the government in accordance with Section 6 of the Private Voluntary Organizations (PVO) Act.<sup>90</sup> The notice warned that those NGOs, which continued to operate without registering, risked prosecution. There were also indications that new legislation would be introduced which would further curtail the activities of NGOs, such as increased restrictions, or a total prohibition, on the receipt of foreign funding by local NGOs, along with

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<sup>87</sup> Ibid

<sup>88</sup> [www.newzimbabwe.com](http://www.newzimbabwe.com); 64 MDC Supporters Held in Lupane, Thu, 13 May 2004

<sup>89</sup> Ibid

<sup>90</sup> Amnesty International; Zimbabwe Country Report 2002

harsher penalties for breaches of the PVO Act.<sup>91</sup> These and other recent government attempts to enforce the PVO Act were part of an overall campaign to further restrict freedoms of association and expression and prevent human rights organizations from investigating and publicizing human rights abuses perpetrated by the ZANU-PF Zimbabwe governing regime.

Further impediments on freedom of expression relate to two independent newspapers recently shut down in Zimbabwe on flimsy grounds.<sup>92</sup> This was after ZANU-PF supporters demonstrated and threatened the two papers with arson and other attacks.<sup>93</sup> That is in the same tune as the closure of Radio Phoenix in Zambia on similarly unfounded grounds. In addition to that, the Zimbabwe parliament recently amended media laws to introduce a jail sentence of up to two years for reporting without a licence to do so.<sup>94</sup> Essentially, licenses are given to pro-government papers as opposed to papers viewed as critical of the government.

Yet another example of executive oriented human rights violations in Zimbabwe is police action in the case involving Dr Frances Lovemore, the Medical Director of Amani Trust, a human rights NGO, who was arrested in August 2002, following allegations that the Trust was guilty under the Public Order and Security Act for "publishing or communicating false statements prejudicial to the state". The arrest stemmed from press reports, which referred to Amani Trust's work with victims of torture and politically motivated rape. The offices of Amani Trust were raided and searched by police. Dr

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<sup>91</sup> Ibid

<sup>92</sup> Ibid

<sup>93</sup> Ibid

<sup>94</sup> Amendment to the Information Act passed on Wednesday 10<sup>th</sup> November 2004

Lovemore was released the day after her arrest. In November, the government accused Amani Trust of threatening peace and security and warned that arrests would be made in connection with the organization's failure to abide by the PVO Act. Shortly after, Amani Trust closed its offices and by the end of the year had not resumed its work.

These and many other human rights violations at the hands of the Zimbabwe government as well as ZANU-PF must have a way of minimising them or in fact outwitting them. Another chapter will deal with that.

### **3.5 The Executive and the Rule of Law: Cases in Zambia and Zimbabwe**

The essence of the ideal of the rule of law is that people ought to be governed by law. This general ideal has at least two main components. First, it requires that governments, namely, *de facto* political authorities, should rule, that is, guide their subjects' conduct, by law. Second, it requires that the law by which governments purport to rule should be such that it can actually guide human conduct.<sup>95</sup>

The executive branch of government is at the core of every country's national integrity system.<sup>96</sup> Such a system must essentially have high regard for the

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<sup>95</sup> J. Raz, *The Authority of Law*, 212-214. Some commentators assume that the rule of law also requires the subjects to obey the law. In one sense, this is clearly true; unless the law is by and large obeyed, it cannot function as a means of social control. But of course, it should not be assumed that the rule of law entails a general *prima facie* obligation to obey the law. The question of whether there is such a general obligation to obey the law is clearly a moral one.

<sup>96</sup> The Source Book: The Role of the executive in Good governance ([www.i-acci.org](http://www.i-acci.org))

rule of law. The Executive is expected to provide the requisite degree of principled, ethical leadership, and control of its many functions especially the police function. While discharging its considerable responsibilities, the Executive must ensure that it provides clear leadership and political will to maintain clean government; its own actions are lawful, transparent and fully accountable; the independence of the courts is respected and their judgments complied with; and, the watchdog agencies are given the resources and the mandate to discharge their functions without fear or favour. These are cardinal means to maintaining the rule of law.<sup>97</sup>

Contrary to the above, the executive branch of government has time and again disregarded the rule of law by trampling these benchmarks. In the first instance, it has been submitted that there is need for the executive branch of government to provide clear leadership and political will to maintain clean government. Yet, on many occasions, party politics have overshadowed the role that the executive is expected to play in this regard. For example in Zambia, recently appointed Vice-President Lupando Mwape issued a statement that one can safely say does not exhibit any political will in so far as the rule of law applies. The Vice-President issued an instruction to police in his constituency to arrest any representative of any non-governmental organisation (NGO) going to his constituency without his permission.<sup>98</sup> In Zimbabwe, in response to a question by the BBC over governments in action at the violence meted out by ZANU-PF (the ruling party) cadres while grabbing land from white settlers, President Robert Mugabe was quoted as saying:

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<sup>97</sup> Ibid

<sup>98</sup> The Post Newspaper Editorial Comment 27<sup>th</sup> October 2004

*"The action by the war veterans was their own initiative. It took us by surprise. Pleasantly, I might add."<sup>99</sup>*

Stanislaus Mudenge, Zimbabwe Minister of Foreign Affairs was once quoted warning civil servants:

*"You are going to lose your jobs if you support opposition political parties in the presidential election. As civil servants, you have to be loyal to the government of the day. You can even be killed for supporting the opposition and no one would guarantee your safety."<sup>100</sup>*

Yet another member of the executive, Minister of Education, Sports and Culture Aeneas Chigwedere, echoed Mudenge's sentiments by simply saying:

*"We cannot continue to pay our enemies. People have to know which side of their bread is buttered."<sup>101</sup>*

The issue of such statements is a clear sign of a lack of political will in the maintenance of the rule of law. By condoning unlawful acts or instructing law enforcement agencies to act *ultra vires* the law, the executive undermines the rule of law to a very disheartening extent. One would think that, and rightly so, it is the role of the government to protect citizens from fellow citizens who undermine their human rights. Statements such as the above statements only go to show that the government abuses the mandate giving to it by the citizenry.

For the law to be able to guide human conduct, it must maintain considerable congruence between the rules promulgated and their actual application to specific cases. In other words, the law cannot guide human conduct if actual deviations from it are not treated as such, namely, as deviations from the rule.

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<sup>99</sup> Joshua Chigwedere; *Zimbabwe's Manmade Crisis* (www.google.com)

<sup>100</sup> Ibid

<sup>101</sup> Ibid

This is a very complex requirement, which entails a whole range of principles and practices. Generally speaking, it requires that the agencies dealing with the enforcement and application of law to specific cases actually apply those rules promulgated by the law.<sup>102</sup> The police here provide examples. In early 2004, Post Newspaper columnist Roy Clark, also known as the spectator was given 24 Hours within which to leave the country.<sup>103</sup> Prior to Home Affairs Minister Ronny Shikapwasha's announcement to that effect, ruling MMD cadres marched through town to the Minister's office, which is just next to the police service headquarters.<sup>104</sup> The cadres had not complied with the requirements of Section 5 of Public Order Act as amended in 1996 including the requirement to inform the police of any such procession 7 days before it was held.<sup>105</sup> Yet the police were at the scene escorting the cadres to the minister's office. Ordinarily, the police would not let that happen.<sup>106</sup> This is a clear case in which the law is enforced selectively and a clear departure from the rule of law. Had it been an opposition party demonstrating, the police would have quashed the procession rather unceremoniously.

It has been submitted elsewhere that the executive in the upholding of the rule of law must be able to respect independence of the judiciary and also adhere to the rulings of the courts.<sup>107</sup> In 2003, Zambian Republican President Levy Mwanawasa, SC, indicated that he was to appoint opposition members of

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<sup>102</sup> Andrei Marmor; *The Rule of Law and its Limits* (2003) p. 9

<sup>103</sup> Zamnet news; (www.zamnet.zm) Roy Clarke "The Spectator" Given 24 hours to leave Zambia

<sup>104</sup> The Post;

<sup>105</sup> See section 5(4), 5(5) and 5(6) of the Public Order Act

<sup>106</sup> Recently, pupils from Kabulonga High School were arrested while trying to stage a demonstration against their Head teacher for reason that the demonstration would be unlawful. These and many cases in which the police have not allowed such processions speak for themselves. See also The *Resident Doctor's case (2001)*

<sup>107</sup> See *Supra Note 1*

parliament as cabinet and deputy ministers. Seeing that doing so would undermine the strength of the opposition in parliament, opposition leaders led by UPND<sup>108</sup> vice-president, Honourable Edith Nawakwi obtained an injunction in the High Court restraining the President from going ahead with his planned appointment. In complete defiance of the court order, President Mwanawasa went ahead with his appointment at a press conference where he in fact took a swipe at the Judiciary strongly warning the judges of their conduct with regards to cases involving the government.<sup>109</sup> Ironically, the judge who issued the order soon apologised to the president saying that he had been ill and that affected him so that he could not know what he was doing.<sup>110</sup> The whole scenario represented the “circus” caused by a departure from the rule of law.

Zimbabwe is going through a phase in which the government simply ignores court orders to release detainees or to pay damages to victims (considered to be political foes) of human rights violations.<sup>111</sup> In January 1999 the army's military police arrested, detained, interrogated, and tortured two journalists for an article they published in a daily newspaper about an alleged coup plot by a few officers. The journalists were held for over a week before being placed in the custody of the police. Neither the President, nor a minister nor the Commissioner of Police issued any statement that the action of the military authority violated the law, the perception being, therefore, that the military authority may operate beyond the reach of the law; and this more especially when the President announced publicly that the journalists had forfeited their right to legal protection by having acted in such a blatantly dishonest manner.

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<sup>108</sup> United Party For National Development

<sup>109</sup> Press Conference at State House (Live on ZNBC Television, 2003)

<sup>110</sup> Judge Nyagulu was quoted in the apology by ZNBC Radio News

<sup>111</sup> See *Supra* Note 3

The Supreme Court granted an order directing the Commissioner of Police to institute a comprehensive investigation of the offences alleged to have been committed with a view to the prosecution of all persons against whom there was a reasonable suspicion of complicity. To date, nothing appears to have been done to bring the offenders to justice.<sup>112</sup> This is a clear departure from the rule of law.

During February 2000 the unlawful countrywide occupation of white owned agricultural land by war veterans and land-hungry ZANU-PF followers resulted in an application being brought before the High Court by the Commercial Farmers Union. The order sought was against the chairman of the War Veterans Association and the Commissioner of Police. It was granted by consent on 17 March 2000. It declared that the occupation of farms was unlawful and the Commissioner of Police was directed to instruct his officers and members to enforce the law. It was not, however, obeyed. The President criticised it as nonsensical.<sup>113</sup>

The attitude of disclaiming the judgments of its own courts and disregarding the constitution, on which its legitimacy is based, undoubtedly undermines a government's moral authority, if not legitimacy. It is a breach of human rights standards and a violation of the rule of law.

A further manner in which the Zimbabwean judiciary is being undermined is by the unreasonable use of the Presidential Powers (Temporary Measures) Act,

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<sup>112</sup> *Supra* Note 3

<sup>113</sup> *Ibid*

designed to give the President powers to deal with a situation requiring urgency in the interest of defence, public health, public order and the economic interest of the country. Yet this Act has been grossly abused in the interest of the ruling party.<sup>114</sup> On 6 October 2000 the President issued a Clemency Order, No. 1 of 2000. It granted an amnesty to those who kidnapped and tortured people and burnt their houses and other possessions as a way of politically intimidating them during the period 1 January to 31 July 2000 (that is, in connection with the 12 and 13 February constitutional referendum and the 24 and 25 June elections).<sup>115</sup> The amnesty has meant that those arrested and facing trial for such serious offences have had to be released and no new investigations and prosecutions can now take place into these crimes. In the main, these crimes were committed by supporters of the ruling party against supporters, or supposed supporters, of opposition parties.<sup>116</sup> Thus the effect of the amnesty is to create the impression that political violence will be condoned and those responsible for it will go unpunished. This is a clear violation of the rule of law at the hands of the party-oriented executive branch of government. In August 2003, Chipinge district magistrate Walter Chikwanha was dragged from his courtroom by people believed to be "war veterans" and assaulted. The attack was reportedly in response to his dismissal of an application by the state to remand in custody five MDC officials accused of burning two government tractors, on the grounds that the state did not have sufficient evidence.<sup>117</sup>

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<sup>114</sup> Ibid

<sup>115</sup> Ibid

<sup>116</sup> Ibid

<sup>117</sup> Amnesty International. Zimbabwe Country Report, 2003

### 3.6 Conclusion

It is a fundamentally inescapable equation, like any other well-established mathematical equation, the fundamental liberty, that which determines all other liberties is assuredly and indisputably political liberty. The most elementary democratic liberty requires freedom of opinion, freedom of expression, freedom of assembly and freedom of the press. In a democratic society, the citizens are entitled to assemble peacefully and to protest against the policies implemented by their government, or against the actions of other groups, by holding demonstrations or marches, signing petitions, boycotting products, striking, or engaging in any other forms of direct action that are within the law.<sup>118</sup> To ban a demonstration or a peaceful protest on grounds of maintaining order, to shelter behind this conventional and fallacious argument, is to go down the road of repression. By the same token, to allow violent contestation to go unchecked is to open the way to anarchy. In a system of democratic liberty, there is a balance to be struck between these two requirements. To reveal to the public the truth behind the government's false statements and to require holders of public office to account for their actions - this duty of vigilance is incumbent on the citizen to prevent a return by stealth to the age of the single party. In that regard, it is undoubtedly the role of the executive branch of government, to preserve these values. This task, should not be dispensed with by reason of party politics, the results of doing so being as grave as discussed under this chapter.

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<sup>118</sup> A.W. Chanda; *Zambia's Fledgling Democracy* in *Zambia Law Journal*, Vol 25-28, 1993-1996

## Chapter Four

### 4.0 CONCLUSIONS AND PROPOSALS FOR REFORM

***We face neither east nor west; we face forward*** – Nkwame

Nkhurumah

#### 4.1 Conclusions

New hopes for democracy, human rights and economic prosperity characterized the advent of pluralism in the recent past throughout African States. What is revealed after this study is that the institutional changes are not in tandem with the wind of political change sweeping across the continent. In the early stages of this exposition, the author made mention of the 'common good' to be the very essence of government. All through the preceding parts, it is clear that the common good is in law the sole justification for the authority claimed by any government worthy of the name. The purpose *vis-à-vis*, this common good is what substantiates the political authority, and sanctions its value. *A contrario*, the seeking after or pursuit of personal interests opposed to those of the common good gives no government the authority to deprive the people of the most elementary freedoms, which are vital to their development. It no longer has legitimacy, its credibility is lost and citizens have a right to challenge it. Basically, the difficulty with the multiparty system is that the power usurpers in Africa and elsewhere, even when elected democratically, fail to respect human rights. Respect for human and citizenship rights is so important a value that it is felt as a burden by those who have not made the necessary preparation intellectually, morally and civically. It demands a marked spirit of tolerance, understanding and constant

resistance to the primary instincts not seen in most African leaders, civilian or military. As we have already observed: faced with the numerous opportunities offered by power, faced with the spinelessness and cupidity of the elite and the decision makers, faced with the ignorance, apathy and fearful resignation of the impoverished masses, heads of state with no democratic background, but dauntless and greedy, lack the qualities, or the moral, intellectual and humanist skills, to reject the many temptations to violate these rights day by day, with each arbitrary action, these rights which are the very foundation of democracy and underlie each act of national life. To give therefore, control of the legislative branch to these power usurpers in the form of executive heads is itself a stump on the human rights of the poor African masses.

At all events, any comparison between the period of democratic pluralism prior to independence and the period of the anti-democratic single party system post independence, tips the balance strongly towards the former system: the single party without a shadow of doubt, is inferior to the multiparty system. This only goes to show the unchallenged need for a system of government to outwit the incubation or possibility of single party dominance. The well-known doctrine of 'separation of powers' between legislative, executive and judiciary is vital for any achievement in that tune, but as Dr Chongwe argues, almost all of the African Commonwealth Countries have an incomplete separation between the executive and legislative because, apart from the President, members of the executive are also members of the legislature. Constitutionalism will be inherently flawed without an overriding respect for its

purposes, including respects for the rights of the people.<sup>119</sup> Because of corruption, nepotism and the high stakes involved in transferring or maintaining power, the political process is too often devoid of any of the basic agreement on the nature of politics, which is vital for democratic continuity. If then, as Nkwame Nkhumah once said, we neither look east nor west but we look forward, which way forward?

## 4.2 Recommendations

In View of the above, the following reforms are recommended in the hope that they would help aid the human rights situation in Presidential-Parliamentary System of Government.

- **Constitutional Changes** are needed to redefine the powers of appointment that the president is vested with. That is in regard to his power to appoint holders of other offices such as judges. This will enhance the rule of law and reduce intimidation of the judiciary at the hands of the party-oriented executive branch if such power is taken away.
- **Appointment of Ministers** must not be made from amongst members of parliament so that the president may not extend his control over the legislature by appointing too many Ministers knowing that they (Ministers) are bound by collective responsibility hence will not counter any legislation he (president) supports. This way, it will be easier to hold the executive accountable for violations of guaranteed rights.

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<sup>119</sup> Dr. Rodger Chongwe; Democracies in Africa, (1999) p.1

- **Members of Parliament** must continue as such even after being expelled from the party so that they can be encouraged to vote objectively on important matters in the house and not necessarily toe party lines. This will defeat the disheartening effect of the concept of party discipline. This will inevitably delineate the party from the government.
- **Alternatively**, the legislative assembly should be split into two houses, one, the lower house, comprising political icons from which the executive could draw Ministers and another, the upper house, comprising people proportionally representing various interest groups voted in by those groups. That will ensure that the decisions and legislation proposed by one house are in tandem with the requirements of good governance, which include the upholding of the rule of law and more efficient guarantee of human rights.
- **The Electoral System** should be changed to that of proportional representation in the legislature. This means an electoral system designed to produce legislative bodies in which the number of seats held by any group or party is proportional to the number of votes cast for members of that group during the most recent election. The purpose of proportional representation is to reduce the power of a dominant political party and to provide minority groups with a degree of representation that has been denied them previously. This is vital in order to stop the creation of a *de facto* one party state.
- **The Constitution** should provide for the Human Rights Commission and grant to it full prosecutory powers so that even the executive

branch through its department such as the police are not able to perpetrate human rights violations.

With these changes, the advantages of a presidential-parliamentary systems will be fully utilized and will effectively close-up its gaps that lead to human rights violations and the a failure to uphold the rule of law at the hands of the tyrannical, undedicated and power hungry leaders and their followers.

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