

THE UNIVERSITY OF ZAMBIA

SCHOOL OF LAW

I RECOMMEND* THAT THE OBLIGATORY ESSAY WRITTEN UNDER MY SUPERVISION.

BY


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ENTITLED

ZAMBIA'S CONSTITUTIONAL PROVISIONS ON THE DOCTRINE OF SEPARATION OF POWERS : A STUDY OF THE EXTENT OF ITS PRACTICE

BE ACCEPTED FOR EXAMINATION.

I HAVE PERSONALLY CHECKED IT CAREFULLY AND I AM SATISFIED THAT IT FULFILLS THE REQUIREMENTS RELATING TO THE FORMAT AS LAID DOWN IN THE REGULATIONS COVERING OBLIGATORY ESSAYS.

SIGNED: .....
N. MUKELABAI

DATE: 16th Sept '95.....

(Supervisor)

DEDICATION

I dedicate this piece of work to all my relatives who have been instrumental in my education, most especially the following people; my father, Mr. Albert Walubita Lisulo, my mother, Mrs. Chrisencia Mooya Lisulo, my aunts Ms. V. Milimo and family, Ms. A.B Milimo, Mr. and Mrs. Wakunuma and family, Mr. and Mrs, Luhanga and family my brother Miyanza and my sisters. I am highly indebted to all these people for their love, care, encouragement, help and support they have unreservedly and unconditionally rendered to me throughout my life. I will live to remember you all for the rest of my life. It would not have been possible for me to be where I am today had it not been for your love, care, encouragement, help and support. I love you all. May the Almighty God bless you all.

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INTRODUCTION

The aim of this essay is basically to investigate the extent to which the doctrine of separation of powers has been provided for and put in practice in the Zambian Constitution of 1991.

By the doctrine of separation of powers is meant the division of governmental functions into three main organs, namely, the Executive, Legislature and the Judiciary. It also means that these three governmental organs are manned by separate personnel and perform separate functions in the day to day running of the government. Dicey defines the doctrine of separation of powers as the "preventing of the government, Legislature and the Courts from encroaching upon one another's province."(1) The doctrine of separation of powers is primarily aimed, then at restricting the institutionalised power of the state within legal limits.

The Zambian Republican Constitution of 1991 divides the organs of government into the Executive,(2) Legislature,(3) and the Judiciary,(4). However, the fact that the Republican Constitution clearly divides the organs of government into three main organs is in itself not enough. It is important to analyse the extent to which the doctrine of separation of powers has been put into actual practice. As Friedman points out, "the Vitality and importance of the doctrine of separation of powers lies not on any rigid separation of functions but in a working hypothesis, that is, in the basic differentiation of the three functions of law making, administration and adjudication"(5). A Careful analysis of the Zambian Constitution of 1991 reveals that the constitution provides for a strong presidency that actually has a very powerful role to play in all the three organs of government, namely in the Executive, Legislature and Judiciary. By virtue of Article 33(2) which provided that "the Executive power of the Republic of Zambia shall Vest in the President", it is important to undertake this study to find out how the influence of the

Executive on the other organs of government has undermined the doctrine of separation of powers, Rule of Law, accountability and democratic governance and the effect this has on the personal liberties of the citizens. This is because the Executive has a hand in the other two organs of government, for instance, the Vice President and Cabinet Ministers who are members of the Executive are also members of the legislature, and the Vice-President is head of government business in the National Assembly. As regards the Executive's influence on the Judiciary, all appointments to high judicial office are done by the President.

In democratic countries, the doctrine of separation of powers has been the subject of analysis and debate for well over hundred years now, and one may wonder as to why a constitution should observe the doctrine of separation of powers, or rather why should a government be divided into three main organs, which would be manned by separate personnel. The following are the reasons why the doctrine of separation of powers is necessary.

- (i) Separation of powers is necessary to avoid interference among the three organs.
- (ii) The doctrine of separation of powers removes the interference, confusion and suspicion that exists in the management of state affairs by the three organs.
- (iii) Separation of powers guards against the dominance

of one organ over the others.

- (iv) Separation of powers ensures that power is not vested in one body, or indeed one person.

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The doctrine of separation of powers guarantees personal liberties and democratic rights. The doctrine expresses the important and obvious truth that a concentration of power carries dangers with it, and in so far as it reminds us of this and leads us to arrange our affairs accordingly, it is of value. The concentration of power in one organ of government or the control of one organ of government by another, is what the doctrine of separation of powers is totally against, because the concentration of power in one person or organ of government would lead the rulers to rule in a dictatorial manner, thus subjecting the ordinary citizens at the mercy of the rulers. As Montesquieu remarked:

"When the Legislative and Executive Powers are United in the same person, or in the same body of Magistrates, there can be no liberty...Again, there is no liberty. If the judicial power be not separated from the Legislature and the Executive. Where it was joined with the Legislature, the life and liberty of the subjects would be exposed to arbitrary control; for the Judge would then be the legislator. Where it was joined to the Executive however, the judge might behave with violence and oppression. There would be an end to everything, were the same man, or the same body, whether of the nobles or of the people, to exercise those three powers that of enacting Laws, that of executing the public resolutions, and of trying the causes of individuals."(6)

In 1690, the Englishman John Locke wrote in his second Treatise of Civil Government:

"It may be too great a temptation to humane frailty, to opt to grasp at power, for the same persons who have the power of making laws, to have also in their hands the power to execute them, whereby they may exempt themselves from obedience to the laws they make, and suit the law,

both in its making and execution, to their own private advantage."(7)

The above quotations emphasises that, within a system of government based upon Law, the judicial function should be exercised by a body separate from the Legislature and Executive. This does not mean that the Legislature and Executive ought to have no influence or control over the acts of each other, but only that either should exercise the whole power of the other.

Supporters of the doctrine of separation of powers claim that liberty can be secured only by dividing political authority into its three constituent functions, and by assigning these functions to different bodies or individuals who will exercise their powers separately and without collusion. A legal historian has remarked:

"This threefold division of Labour, between a Legislator and an administrative official, and an independent judge is a necessary condition for the rule of Law in modern government itself."(8)

Therefore, the doctrine of separation of powers has been adopted not to promote efficiency but to preclude the exercise of arbitrary power. The purpose is not to avoid friction, but by means of the inevitable friction incident to the distribution of the inevitable friction incident to the distribution of governmental powers among the three organs to serve the people from autocracy.

However, a complete separation of powers, in the sense of a distribution of the three functions of government among the

three independent sets of organs with no overlapping or co-ordination, would bring the government to a standstill. What the doctrine must be taken to advocate is the prevention of tyranny by the conferment of too much power on any one person or body, and the check of one power by another. There is an echo of this in Blackstone's commentaries:

"In all tyrannical governments, the right of making and of enforcing the Laws is vested in one and the same man, or the same body of men, and wheresoever these two powers are United together there can be no liberty."(9)

Therefore, the aim of this essay as already indicated above, is to investigate the extent to which the doctrine of separation of powers has been provided for and put into actual practice in the Zambian Constitution of 1991, and to offer suggestions on how the future Republican Constitution should enhance the doctrine of separation of powers in order to enhance the rule of Law, accountability and democratic governance.

End Notes:

1. A.W. Dicey, Introduction to the Study of the Law of the Constitution, (Language Book Society and Macmillan, London, 1959), p.337.
2. Article 33 (1)
3. Article 62
4. Article 91 (1)
5. W.G. Friedman, Law in a changing Society, Longman, London, 1964, p.383.
6. De L'Esprit des Lois, Book XI, Chapter 6, quoted at p.51 of Constitutional and Administrative Law by E.C.S Wade and A.W. Bradley (London Group Ltd, London, 1985).

7. Chapter XII, para 143, quoted at p.50 of Constitutional and Administrative Law by E.C.S Wade and A.W. Bradley.
8. E.G. Henderson, Foundations of English Administrative Law (1960), p.50 of constitutional and Administrative Law by E.C.S Wade and A.W. Bradley.
9. O. Hood Phillips and Paul Jackson, O'Hood Phillips' Constitutional and Administrative Law, 6th Edition, (Sweet and Maxwell, London, 1978), p.14.

CHAPTER 1

DEFINITION AND HISTORICAL BACKGROUND TO THE SEPARATION OF POWERS

The doctrine of separation of powers is a system whereby the government is divided into three major organs, namely, the Executive, the Legislature and the Judiciary, and these three organs have separate functions to perform in the day to day running of the government machinery. It also means that there is separate personnel as well in the three organs of government.

Separation of powers therefore entails that each organ of the state, namely the Executive the Legislature and the Judiciary will perform its functions without undue interference from the the other organs. Each organ should be left to do what is assigned to it under the constitution. If any organ is not performing well it ought to be reminded and its performance monitored by way of accountability. This is not inteference but a system of checks and balances in the interest of good government.

The function of the Executive is the general and detailed carrying on of government according to Law, including the framing of policy and the choice of the manner in which the law may be made to render that policy possible. In recent times, and because of the industrialisation of most civilised nations, the scope of thie Executive function has extremely become wide such that it has now involved the provision and administration or regulation of a vast system of social

services such as public health, housing, assistance for the sick and unemployed, welfare of industrial workers, education, transport as well as the supervision of defence, order and justice, and the finance required thereof, which were the original tasks of organised government.(1) In Zambia Executive function is vested in the Republic President by virtue of Article 33(2) of the constitution and is exercised by him either directly or through officers subordinate to him.

The Legislative function is the making of new law, and the alteration or repeal of existing law. In Zambia, this function is carried on by Parliament which consists of the President and the National Assembly. This is provided for under Article 62 of the Constitution.

The Judicial function consists in the interpretation of the Law and its application by rule of discretion to the facts of particular cases, and this involves the ascertainment of facts in dispute according to the law of evidence. The organs which have been set up to exercise this judicial function in Zambia are called Courts of Law which consists of the Local Courts, the Subordinate Courts, the High Courts and the Supreme Court. This is provided for under Article 91(1) of the Constitution.

The idea that a government should have three separate organs has occupied the minds of lawyers and Jurists for a very long time now. Actually, the earliest person to talk

about the doctrine of separation of powers or that government should be divided into the main organs was a greek philosopher called Aristotle. In his book called 'Politics' he made the first attempt to classify the organs of government. He said:

"All States have three elements:

1. That which deliberates about Public Affairs;
2. That which is concerned with the Magistrates and;
3. That which has Judicial Powers."(2)

He considered the deliberate element as supreme and he defined it as having authority in matters of war, peace and alliances, the passing of laws, and the audit of public accounts.

The second element is the system of Magistrates or distribution of offices and this covers the setting up public offices, their authority and the manner of appointment. Here Aristotle was thinking of those who have the power and authority of deciding policy and issuing orders, especially in relation to revenue and defence.

Under the third element which is the Judicial part he discusses the staffing and jurisdiction of the law courts.(3)

After Aristotle, another very important person to consider about the doctrine of separation of powers was the British writer John Locke. In his book called the Second Treatise of Civil Government which he wrote in 1690 he argued that:

"It may be too great a temptation to humane frailty, opt to grasp at power, for the same persons who have the power of making laws, to have also in their hands the power to execute them, whereby they may exempt themselves from obedience to the laws they make, and suit the law, both in its making and execution to their own private advantage."(4)

He therefore devised a three fold classification of governmental powers. He said that the fundamental and primary function of government is legislation, that is to say, the formulation of the rules according to which man's natural rights are to be judged. By man's natural rights he meant life, liberty and property. He meant the Executive power as the enforcement of law by penalties and he regarded this as secondary but indispensable. The third function of government, says Locke:

"Contains the power of war and peace, Leagues and alliances, and transactions with all persons and communities throughout the commonwealth, and may be called Federative if anyone pleases. So the thing be understood. I am indifferance as to the name."(5)

However, the doctrine of separation of powers as we understand it today is principally due to a French writer and jurist Charles Louis de Montesquieu, whose declaration of the doctrine was based on the study of the writings of John Locke. Montesquieu in his book *De L'Esprit des Lois*, which he wrote in the middle of the 18th Century, argued that every government has three sorts of power:

- (i) Executive powers in matters pertaining to the law of nations;
- (ii) The Legislative power
- (iii) The power of judging.

As can be seen from the above it is from this that we get the

first settlement of the modern classification of the separation of powers to which we are now accustomed Viz:

- (i) Executive
- (ii) Legislative and
- (iii) Judicial.

He went on to say that in order to ensure the liberty of the subjects the three organs of government must be in the separate hands for "there would be an end of everything were the same man or body to exercise those three powers that of enacting laws, that of executing the resolutions and of trying the causes of individuals."(6)

Montesquieu is regarded in the Legal profession as the father of the doctrine of separation of powers as we know and understand it today. He propounded the doctrine on the basis of his study of the century British Constitution as he understood it. His main concern was the preservation of political liberty. He said that "political liberty is to be found only where there is no abuse of power. But constant experience shows us that every man invested with power is liable to abuse it, and to carry his authority as far as it will go.... To prevent this abuse, it is necessary from the nature of things that one power should be a check on another When the legislative and Executive powers are united in the same person, or in the same body of Magistrates, there can be no liberty..... Again, there is no liberty if the judiciary power is not separated from the legislature and Executive. If it was joined with the legislative, the life

and liberty of the subjects would be exposed to arbitrary control, for the Judge would then be the legislator. If it was joined with the Executive however, the Judge might behave with violence and oppression. There would be an end to everything, were the same man or the same body, whether of the nobles or of the people to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals."(7)

According to Montesquieu, the doctrine of separation of powers was simply a division of government into three sorts of power, the legislative power which enacts, amends and abrogates laws, the executive power in respect to things dependent on the law of nations, for example, making peace, war, sending or receiving ambassadors, and establishing public security, and the Judiciary in regard to matters that depend on Civil law, which punishes Criminals, and determines disputes between individuals. He therefore called both the first and second, the Executive power of the state, and the third power as the Judicial power.

It must be emphasised that the doctrine of liberty which was at its highest peak in the 18th Century was the main factor that motivated Montesquieu to formulate the doctrine of separation of powers. Liberty, according to him, consisted in what was not prohibited by law enacted by a government which realises the separation of powers:

"Where the law is made by a legislative body,
administered by a separate Executive and applied

against citizens only by an independent Judiciary".(8)

Montesquieu then cited England as the one country that has realised this ideal of political liberty. He argued that the Englishman's liberty was dependant on the English constitution which contained the separation of powers. In his support of this proposition Montesquieu further argued that power can only be checked by power and ideologies and beliefs. For instance Executive power can only be checked by either the legislative power or the Judiciary or both. He argued that this was necessary because constant experience has shown that every man invested with power is apt to abuse it and to carry his authority as far as it will go. To prevent this abuse therefore, it is necessary from the nature of things that power should be a check on power. Where the legislative and Executive powers are United in the same person or body of persons there can be no liberty, that person or body of persons may enact tyrannical laws and execute them in a tyrannical manner. If the judicial power is joined with the legislature, the life and liberty of the subjects would be exposed to arbitrary control for the Judge would then be the legislator, were it joined to the Executive power, the Judge might behave with violence and oppression.

The above statement emphasises that within a system of government based upon law, the Judicial function should be exercised by a body separate from the legislature and Executive. Montesquieu did not, it may be surmised, mean that Legislature and Executive ought not to have no influence or

control over the acts of each other, but only that neither should exercise the whole power of the other.(9)

Montesquieu cited Turkey as the country where the three powers were mixed in the sultan's person and because of this he argued that there the subjects "groan under the most dreadful oppression." He also cited Italy where he declared the powers were United and the government was obliged to have recourse to the most violent methods in order to gain support. Montesquieu argued that, in order to prevent all this, there was a need to devise a moderate government in which liberty can prevail, it is the reconciliation of might and right.

From what we have said so far, the doctrine of separation of powers may mean at least three different things:

- (a) that the same persons should not form part of more than one of the three organs of government, for example, that Ministers should not sit in parliament;
- (b) that one organ of government should not control or interfere with the work of another, for example, that the Judiciary should be independent of the Executive;
- (c) that one organ of government should not exercise the functions of another, for example, that Ministers should not have legislative powers.(10)

The point therefore which emerges from this chapter is that the doctrine of separation of powers came about in order to preserve individual liberties from arbitrary power with the increase of power in the hands of the rulers.

Endnotes

1. O. Hood Phillips and Paul Jackson, O. Hood Phillips' Constitutional and Administrative Law, 6th Edition (Sweet and Maxwell, London, 1985) p.10
2. Aristotle, Politics iv, 14, as quoted by O. Hood Phillips and Paul Jackson in Constitutional and Administrative Law, p.13
3. Ibid.
4. E.C.S. Wade and A.W. Bradley, Constitutional and Administrative Law, 10th Edition (Longman Group Ltd. London, 1985), p.50.
5. John Locke, Second Treatise of Civil Government (1690) as quoted by O. Hood Phillips in Constitutional and Administrative Law, p.14
6. David Foulkes, Introduction to Administrative Law, Third Edition (Butterworths, London, 1972) p.2
7. Ibid, p.44
8. De L'Esprit Des Lois, Chapter XI, pp.3-6.
9. I. Jennings, The Law and the Constitution, 5th Edition, 1959, p.12, quoted from Constitutional and Administrative Law by E.S.C Wade and A.W Bradley at p.51
10. E.C.S Wade and A.W. Bradley, Constitutional and Administrative Law, p. 53.

CHAPTER 2

This chapter shall examine how the doctrine of separation of powers has been provided for and implemented in the American constitution and the British system of government.

(a) THE DOCTRINE OF SEPARATION OF POWERS AS PRACTICED IN THE UNITED STATES OF AMERICA

In the United States Constitution of 1787 the separation of Powers was clearly expressed, and the United States Constitution goes farther than any other in applying the doctrine. The framers of the constitution intended that a balance of power should be attained by vesting each primary constitutional function in a distinct organ. Possibly they were imitating the form of British Constitution but by that time in Britain Executive power was passing from the Crown to the Cabinet.

The United States Constitution expressly vests the Federal Legislature in Congress:

"All legislative powers here in granted shall be vested in a congress of the United States, which shall consist of a senate and a House of Representatives". (1)

At the same time the constitution Vests the Federal Exexutive powers in the President of the United States:

"The Executive power shall be Vested in the President of the United States of America."(2)

The Judicial Power of the United States of America is vested in the Supreme Court and such other federal courts as might be established by congress:

"The Judicial power of the United States of America shall be vested in one supreme court, and in such inferior courts as the congress may, from time to time ordain and establish."(3)

The following then is the structure of the government in the United States:

(i) Executive

In the United States, the Executive power as we have seen is expressly vested in the President of the United States of America. The President of the United States of America is helped in the discharge of the Executive functions of the Federal Republic by a cabinet, which consist of the heads of the chief departments, each being personally responsible to the President alone for his own department but not to congress. The cabinet is composed of men and women who are appointed by the President from outside congress.(4) The president holds office for a fixed term of four years (5) and is separately elected; he may therefore be of a different party from that which has a majority in either or both Houses of Congress. His powers, like those of congress, are declared by the constitution.

(ii) Legislature

As already seen, the legislative power of the United States of America is vested in Congress which consists of a senate and a House of Representatives. Neither the President nor members of his Cabinet can sit or vote in congress, they have no direct power of initiating Bills or securing their passage through congress. However, some writers have argued

that there is nothing in the constitution which can stop members of the cabinet from having seats on the floors of congress. The president may recommend legislation in his message to congress, but he cannot compel it to pay heed to his recommendations. While he has power to veto legislation passed by congress, this veto may be overridden by a two-thirds vote in each House of Congress.

The other contact between the Executive and the Legislature is seen in the negotiation of treaties. Treaties may be negotiated by the President, but must be approved by a two-thirds majority of the senate. The president has power to nominate to certain key offices, including members of the Cabinet and Judges of the Supreme Court, but the senate must confirm these appointments and may refuse to do so. The President himself is not directly responsible to congress for his conduct of affairs, in normal circumstances he is irremovable from office, but the constitution does authorise the President to be removed from office by the process of impeachment at the hands of the senate," for treason, bribery, or other high crimes and misdemeanours."(7) The Prospect of such impeachment was the immediate cause of President Richard Nixon's resignation from office in 1974 following his complicity in the Watergate Affair.

(iii) Judiciary

The Judicial power of the United States of America is vested in one supreme court, and in such inferior courts as

the congress may from time to time ordain and establish. Once appointed by the President and confirmed by Congress, the Judges of the Supreme Court are independent both of Congress and the President, although they too may be removed from office by impeachment. The Supreme Court has assumed the power, following the historic decision of Chief Justice Marshall in Marbury V Madison,⁽⁸⁾ of declaring both the acts of the Legislature and the acts of the President to be unconstitutional.

However, even in the United States Constitution, there is not a complete separation of powers between the Executive, Legislature and Judicial functions, if by this is meant that each power can be exercised in complete isolation from the others. Indeed, having established the threefold allocation of functions as a basis, the constitution proceeds to construct an elaborate system of checks and balances designed to enable control and influence to be exercised by each branch upon the others. The three branches of government are therefore interrelated, they act as checks on each other.

(b) THE DOCTRINE OF SEPARATION OF POWERS AS PRACTISED IN THE BRITISH SYSTEM OF GOVERNMENT

The situation as regards the separation of powers is very different in Britain. It is important to note that in Britain, there is no single document from which is derived the authority of the main organs of government, such as the Crown, the Cabinet, Parliament and the Courts of Law. No single document lays down the relationship of the primary organs of

government one with another, or with the people. What Britain has is a complex and comprehensive system of government founded partly on Acts of Parliament and judicial decisions, partly upon political practice, and partly upon detailed procedures established by the various organs of government for carrying out their own tasks, for example the law and custom of parliament. In short, we can say that the British Constitution is unwritten since it is not embodied, wholly or mainly, in any enactment or formally related series of enactments. Hence in the absence of a written constitution to serve as the foundation of the legal system, the vacuum is filled by the legal doctrine of the Legislative supremacy of Parliament.

The Queen in Britain is the Head of state, and government is carried on in her name, political responsibility for the acts of the government is borne by ministers of the crown, who are answerable to and dependent for their offices upon the electorate and Parliament. After the settlement of 1688, it had to be established that the King could govern only through ministers who had the confidence of Parliament. Eventually Executive powers came to be exercised by the Prime Minister and the Cabinet.

The following is the structure of the government in Britain and the possible operation of the doctrine of separation of powers.

The three meanings of separation of powers mentioned above will first be applied to the relationship between the Executive and Legislature.

(a) Executive and Legislature

The main question to be answered here is whether the same persons or bodies form part of both the Legislature and Executive.

The form of the Constitution shows the Queen as the head of the Executive and also an integral part of the Legislature. Most important is the convention that ministers should be members of one or the other House of Parliament. Their presence in Parliament helps to make a reality of their responsibility to parliament. This is a contradiction of the doctrine of separation of powers which declares that no member of one organ of government should sit in another organ. Moreover, except for these ministers, the vast majority of persons who hold positions within the Executive are disqualified from membership of the Commons, namely all members of the Civil Service, the armed forces, the Police and the holders of many public offices.(9) The House of Commons Disqualification Act 1975 and the rules which forbid Civil Servants and the Police from taking part in political activities are evidence of a strict separation of membership which is maintained between Executive and Legislature. Only Ministers exercise a dual role as key figures in both

institutions.

The second question to be answered is, Does the Legislature control the Executive or the Executive control the Legislature? This question goes to the heart of parliamentary government in Britain and no simple or brief answer can be adequate. In one sense, the commons ultimately controls the Executive, since the commons can oust a government which has lost the ability to command a majority on an issue of confidence. But so long as the cabinet can retain the confidence of the commons, it generally exercises a decisive voice in securing the passage of Legislation.

The close relationship between the Executive and Legislature is not confined to legislation. It is also a function of the Legislature to call the government to account for its administrative work. Control over administration is necessarily indirect, as neither House can take over the task of governing. But a variety of procedures exist, for example, specialised committee and parliamentary questions, by which parliament informs itself about the activities of the Executive. As means of control these procedures vary in effectiveness, but they make possible a measure of democratic scrutiny.

The third question is: Do the Legislature and the Executive exercise each other's functions? The most substantial area in which the executive might appear to

exercise functions belonging to the Legislature is in respect of delegated legislation. In Britain there is no formal limitations on the power of parliament to delegate legislative powers to the government. Provided that whenever possible the main principles of legislation are laid down in an Act of Parliament, there is advantage in ministers having power to implement those principles by detailed regulation. The mass of detail involved in modern administration and the extension of the functions of the state to the political, social and economic sphere has rendered it essential for parliament to delegate the Ministers the powers to make statutory instruments. The only problem here is that it is often not easy to decide what is a matter of principle for parliament and what is a detail which should be left to Ministerial discretion. The process of legislation by departmental regulation saves time, can deal with any local variations and is more flexible than legislation by Act of Parliament. It can also be used when a Minister requires a wide discretion, to give him freedom to experiment in the Administrative field without seeking new powers from parliament. However, there is some danger in here and that is that, unless this type of legislation is subject to effective parliamentary scrutiny, there is a real threat to liberty from undue expansion of the powers of the Executive. Whatever is said concerning the relationship between the legislature and the Executive, it is always vital to remember the line between legislation and Administrative is not always easily drawn.

(b) Executive and Judiciary

There must now be examined the relationship between the Judiciary and the other two organs of government. Again, three questions may be asked:

The first question is: Do the same persons form part of Judiciary and the Executive?

The courts in Britain are the Queen's courts, but judicial functions are exercised by her judges. The Judicial Committee of the Privy Council is in form an exercise organ, but in fact it is an independent court of law. The Lord Chancellor who is a member of the Cabinet, is also head of the judiciary and is entitled to preside over the Lords, which is the final court of appeal from the Courts of the United Kingdom. Infact, he rarely sits to hear appeals today and avoids hearing appeals in which a government department is involved as a party.(10) The law officers of the Crown, in particular the Attorney General in England, have duties of enforcing the Criminal law, which are sometimes described as 'quasi-judicial', it must be emphasised that the law officers are members of the executive, and not the judges.

The second question is, 'Does the Executive control the Judiciary or the Judiciary control the Executive?' Although judges are appointed by the Executive, judicial independence of the executive is secured by law, by constitutional custom and by professional and public opinion. Since the Act of

settlement 1700, judges of the superior English Courts have held office during good behaviour and not at the pleasure of the Executive. One essential function of the judiciary is to protect the Citizens against unlawful act of government agencies and officials. It is the duty of the Courts if proper application is made to them by a Citizen adversely affected to check administrative authorities from exceeding their powers and to direct the performance of duties owed by officials to private Citizens. Only an independent judiciary can impartially perform these tasks of administrative law.

The third question to answer is, 'Do the Executive and Judiciary exercise each other's functions'?

The value of an independent judiciary would be reduced if essential judicial functions, for example the conduct of Civil or Criminal trials, were removed from the courts and entrusted to administrative authorities. But many disputes which arise out of the administration of public services today are not suitable for decision by ordinary litigation. Many administrative tribunals are now entrusted with the task of resolving disputes between two citizens or between a Citizen and a government department.(11) It is accepted that tribunals form part of the machinery of justice and should carry out their work independently of the department concerned. Tribunals therefore exercise judicial functions, even if they do so by procedures less formal than those used in the courts. There are nonetheless many matters which are

entrusted not to tribunals but to government departments and ministers for decision. Procedures like the public inquiry have been established to maintain standards of fairness and openness but do not provide for a decision independent of the department concerned. It is because a decision is required in which full account may be taken of departmental policy rather than a decision based on a judicial application of existing rules, that these matters remain subject to departmental or ministerial decision.(12)

It is not possible to draw a sharp distinction between decisions which should be entrusted to courts and tribunals on the one hand, and decisions which should be entrusted to administrative authorities on the other. When a new statutory scheme is introduced, a wide choice may be exercised between the different procedures available for deciding disputes likely to arise under the scheme. The separation of powers affords little direct guidance as to how particular categories of disputes should be settled, except to remind us that decisions which are to be made independently of political influence should be entrusted to courts or tribunals, and that decisions for which ministers are to be responsible to parliament should be entrusted to government departments.

(c) Judiciary and Legislature

Finally, we look at the relationship between the judiciary and the legislature.

The first question is: 'Do the same persons exercise Legislative and judicial functions? All full-time judicial appointments disqualify for membership of the Commons. This is in line with the House of Commons Disqualification Act of 1975. However, in the House of Lords, the Lord Chancellor presides over the House sitting in its Legislative Capacity; he is also entitled to preside over the Appellate Committee which discharges the judicial work of the House. The Lords of Appeal in ordinary who sit as judges in the Appellate Committee occasionally take part in the Legislative business of the House; but they do not sit as members of a political party and observe restraint in the topics they debate. Nevertheless, this is clearly an infringement of the doctrine of separation of powers. This is because although the House of Lords sitting as a court is in substance a court of law with only a formal connection with the House of Lords sitting as a chamber of the legislature, it is an infringement of the rule in the separation of powers which declare that there should be no inter-change of personnel between the three organs and that no single organ should perform the other organ duty.

The second question is to consider whether there is any control by the Legislature over the Judiciary or by the Judiciary over the Legislature.

By statutes judges of the superior courts may be removed by the Crown on an address from both Houses of Parliament,

such an address would however, never be accepted if it interfered with the independence of the judiciary. The rules of debate in the Commons protect judges from certain forms of criticism. Apart from the Lay Magistracy in England, inferior judges have statutory protection against arbitrary dismissal by the Executive. Under the Tribunals and Inquiries Act 1971, the members of tribunals are protected against removal from office by the appointing government department.

While the Courts may examine the acts of the executive to ensure that they conform with the law, the doctrine of Legislative Supremacy denies the Courts the power to review the Validity of Legislation. The judges are under a duty to apply and interpret the laws enacted by Parliament. The effect of their decisions may be altered by Parliament both prospectively and also, if necessary, retrospectively. In one sense, therefore, the courts are constitutionally subordinate to Parliament, but the Courts are bound only by Acts of Parliament and not by resolutions of each House, which may have no legal force.

The third question is: 'Do the Legislature and Judiciary exercise each other's functions'? It is vital to remember that each House of Parliament has power to enforce its own privileges and to punish those who offend against them. This power might in some circumstances lead to a direct conflict with the Courts. In prescribing rules of courts, the judges of the House of Lords as members of the Statutory Committee

for this purpose exercise a Legislature function, but it is limited to procedural details for the administration of justice. These instances involve no real departure from the separation of powers. However, there have been few occasions when Parliament in Britain has encroached on the sphere of the Courts. Ministers for instance have put up interpretation of Ministerial responsibility to Parliament as a justification for the withdrawal from the Courts of issues involving civil liberties. Needs of security also during the second World War made it necessary to give ministers powers over individual liberties, and in particular to detain on suspicion, which could not be questioned in Courts. The grant of such power was, however, from time to time defended on the ground that it was the duty of parliament to safeguard liberties and that an individual aggrieved by a ministerial decision should rely upon his member of parliament to put forward his grievance, and Ministers also declared that being responsible to Parliament they should be judged by Parliament and not by the Courts of Law.

In conclusion, because of the absence of a written constitution, there is no formal separation of powers in Britain. No act of Parliament may be held unconstitutional on the ground that it seeks to confer powers in breach of the doctrine. While the functions of the Legislature and executive are closely inter-related, and ministers are members of both, the two institutions of Parliament and government are distinct from each other. The formal process of legislation

is different from the day to day conduct of government just as the legal effect of an Act of Parliament differs from that of an Executive decision. Practical necessity demands a large measure of delegation by Parliament to the Executive of power to legislate. The independence of the judiciary is maintained, but many disputes which arise out of the process of government are entrusted not to the courts but to administrative tribunals; these tribunals are expected to observe the essentials of fair judicial procedure.

A point which has been made very clear from this chapter is that in the United States Constitution a more adherence to the doctrine of separation of powers is observed, while there is not, and never has been a strict separation of powers in the English Constitution in the sense that Legislature, Executive and Judicial powers are assigned respectively to different organs, nor have checks and balances between them been devised as a result of theoretical analysis.

End Notes

1. Article 1, Section 1 of the United States Constitution
2. Article 2, Section 2 of the United States Constitution
3. Article 3, Section 3 of the United States Constitution
4. E.C.S. Wade and A.W. Bradley, Constitutional and Administrative Law, Tenth Edition (Longman, London, 1985)p.51
5. Article 2, Section 1 of the United States Constitution
6. E.S Corwin, "The Constitution and What it Means Today" p. 105.
7. Article 2, Section 4 of the United States Constitution
8. [1803] 1 cranch 137
9. E.C.S. Wade and A.W. Bradley, Constitutional and Administrative Law, p.54.
10. Ibid, p.55
11. Ibid, p.56
12. I bid.

CHAPTER 3

Having looked at the application of the doctrine of the separation of powers in the United States of America and in Britain, the focus of attention now shifts to Zambia. The main focus in this chapter will be on the 1991 Zambian Constitution but the main emphasis will be on the separation of powers as provided for in the 1991 Constitution.

Zambia became an independent state on the 24th October, 1964 after the dissolution of what was then known as the Federation of the Rhodesias and Nyasaland.

The Legal framework for the modern governance of Zambia stems from the African Order in Council of 1889 that empowered the Commissioner and Counsel - General to make what were known as the Queen's Regulations for "Peace, order and good Government and for the security of the observance of any Treaty for the time being in force relating to any place to which the said orders apply." (1) At this time various parts of what is known as Zambia today were being governed separately by the British South Africa Company until 11th August, 1911 when, by the Northern Rhodesia order in Council the governance of Northern Rhodesia was exercised directly from whitehall in Britain. In 1953, Southern Rhodesia (Zimbabwe), Northern Rhodesia (Zambia) and Nyasaland (Malawi) were United into the Federation of Rhodesia and Nyasaland with one central Administration whose headquarters were in

Salisbury (Harare) in Southern Rhodesia (Zimbabwe). The federation of the Rhodesias and Nyasaland was dissolved in 1963 to pave way for the independence of the states which were considered ready to govern themselves then. Zambia and Malawi attained their independence the following year in 1964. Zimbabwe was the last to attain independence in 1980.

A constitution was drawn in London to usher in Zambia's independence. In 1965 this independence constitution was revised to fit into the framework of Independence Zambia. In the early 1970s one-party system of government began to emerge in Africa following on the models of Communist Eastern Europe. Zambia, following on the trails of Kwame Nkrumah's Ghana and President Julius Nyerere's Tanzania was not slow to jump on the bandwagon. In 1973 a One Party-State Constitution was imposed on the people of Zambia. This constitution was amended from time to time to fit into the dectatorial designs of the ruling oligarchy. Zambians became mere spectators as the one man style dictatorship manipulated the country unchecked. To some people both local and foreign for want of knowledge about what was going on, Zambia was viewed as a democracy. Meaningless, slogans like "Humanism" were created into the Zambia body politic to hoodwick the populace and the international community while exploitation and rape of the resources was rampant with repressive laws in place, enforced by a marxist/communist manned security network.

However, with the collapse of the Soviet Union and its Communist Satellite States in Eastern Europe, a number of Zambians began to question the presence of a one-party state dictatorship in their country. The view was held that the United Strength of a democratic nation can only be achieved if its people earnestly and seriously believing in the emancipation from the bondage of a dictatorship had the feeling from their own hearts and brains that the entrenched dictatorship must be removed and replaced by a government that would open up vistas of justice and freedom and secure to the people their rights founded on the Rule of Law.

Therefore, due to agitation from all over the country for Zambia to revert to a multi-party system of government, former President Kenneth Kaunda announced that he would call a national referendum on Zambia's political system to let the citizenry decide on the question of going multi-party or retaining the existing one-party system.(2) The then Deputy Chief Justice Mathew Ngulube was appointed to head the Referendum Commission which was mandated to work out the mechanics of the nation-wide poll to decide whether or not Zambia should revert to multi-party politics. The Commission comprises four members, and the Referendum date was announced as 17th October, 1990.(3) The government then introduced a motion to be used during the voting in the forthcoming referendum. Statutory Instrument number 94 of 1990 signed by former President kaunda says people would on October 17, 1990

multi-party system? The date for the Referendum was also gazetted.

However, on 24th September 1990, in an address to the 25th National Council of the United National Independence Party (UNIP) held at Lusaka's Mulungushi International Conference Centre, former President Kaunda informed the nation that the party and its Government had decided that the Country should revert to a multi-party political system and that the National Referendum which was to have been held to determine whether or not Zambia should revert to multi-party democracy had been cancelled. The former President further stated that the decision had been made because in the months leading to the Referendum he had detected a sense of restlessness in the nation which endangered the stability of the Country were the referendum to take place. He said that the Central Committee of UNIP had decided to cancel the referendum to forestall an imminent split in the nation.(4) The decision to hold the National Referendum had earlier been arrived at after widespread agitation in the country calling for a return to a plural political system. The former President also disclosed that the Republican Constitution would be amended to allow for the re-introduction of multi-party politics without holding a referendum. The former President also announced that a Commission of Inquiry would be appointed to recommend the constitution for the Third Republic. Subsequently, on 8th October, 1990 former President Kaunda appointed the Constitution Commission of Inquiry. The Commission, which was

appointed under the the inquiries Act (5) was gazetted under statutory Instrument number 135 of 1990 dated 8th October, 1990. A 22-man Constitutional Commission was appointed comprising Lawyers, trade unionists, church leaders and other prominent citizens to map out Zambia's new road to political pluralism. The Commission was headed by former Solicitor General Professor Patrick Mvunga.

The most important terms of reference of the Constitution Commission of Inquiry among other things, was to submit a draft Constitution for the Third Republic. The Commission gathered the views of the people through public hearings and written submissions. The commission commenced public hearings on 18th October, 1990 and completed the hearing on 18th January, 1991. The Commission then submitted its report to former President Kaunda on 25th April, 1991. The Commission thus came up with the 1991 constitution which is the main focus of our attention.

The Zambian constitution of 1991 observes the separation of powers. The constitution clearly separates the organs of government into three: the Executive, the Legislature and the Judiciary. We shall now look at these organs of government one by one.

(i) The Executive

The Zambian Constitution vests the Executive powers in the Republican President. Article 33 (2) provides for the Executive. It states that:

"The Executive Power of the Republic of Zambia shall vest in the President and, subject to other provisions of this constitution, shall be exercised by him either directly or through officers subordinate to him."

The President holds office for a period of five years. This is provided for by Article 35(1) which states that "subject to clauses (2) and (4) every President shall hold office for a period of five years." Further, Article 35(2) states that "no person who holds or has held office as President for two terms of five years each, shall be eligible for reelection to that office."

The President is assisted in the discharge of the executive functions of the Republic by a Cabinet. Article 49(1) of the Constitution provides that "there shall be a cabinet which shall consist of the President, the Vice President and the Ministers, other than Ministers responsible for the administration of Provinces." Article 50, provides for the functions of Cabinet which is that "the cabinet shall formulate the policy of the Government and shall be responsible for advising the President with respect to such other matters as may be referred to it by the President."

The Ministers who are members of the cabinet and also help the President in the discharge of his executive functions are appointed by the President from among the members of the national Assembly. This is provided for under Article 46(1) and (2) of the constitution.

The President of the Republic of Zambia can be removed from office on grounds of incapacity to discharge the

functions of his office due to any infirmity of body or mind, (6) and can be impeached by Parliament for violating the constitution.(7)

(ii) Legislature

The Zambia Constitution provides for the legislature and vests the legislative power in Parliament. Article 62 provides for the Legislature. It provides that:

"The Legislative power of the Republic of Zambia shall vest in Parliament which shall consist of the President and the National Assembly."

The Legislative power of Parliament is exercised by bills passed by the National Assembly and assented to by the President. Article 78(1) of the Constitution provided that "subject to the provisions of this constitution, the Legislative power of Parliament shall be exercised by bills passed by the National Assembly and assented to by the President." Article 80(1) provides that "Nothing in Article 62 shall prevent parliament from conferring on any person or authority power to make statutory instruments." Article 82(1) provided that "the President may, at any time, attend and address the National Assembly," and Article 82(2) states that "the President may send messages to the National Assembly and any such message shall be read, at the first convenient sitting of the Assembly after it is received, by the Vice-President or by a Minister designed by the President."

(iii) The Judiciary

Article 91(1) of the Constitution provides for the Judicature. It provided that:

"The Judicature of the Republic shall consist of:

- (a) The Supreme Court of Zambia
- (b) The High Court of Zambia
- (c) Such other courts as may be prescribed by an Act of parliament."

Article 91(2) of the constitution provided that "the judges mentioned in Article 91(1) shall be independent, impartial and subject only to this constitution and the Law."

Article 91(3) further states that "The Judicature shall be autonomous and shall be administered in accordance with the provisions of an Act of Parliament." Article 93(1) and (2)

provides that the chief Justice and the judges of the Supreme Court shall, subject to ratification by the National Assembly, be appointed by the President. Article 95(1) provides that

"The puisne judges shall, subject to ratification by the National Assembly, be appointed by the President on the advice of the Judicial Service Commission." Article 97(1) provides

that "subject to clause (2), a person shall not be qualified for appointment as a judge of the Supreme Court or a puisne judge unless:

- (a) he holds or has held high judicial office; or
- (b) he holds one of the specific qualifications and has held one or other of those qualifications for a total period of not less than seven years." Article 98(1) provides that "subject

to the provisions of this article, a person holding the office of a judge of the Supreme Court or the office of a judge of the High Court shall vacate that office on attaining the age of sixty five years." A Judge of the Supreme Court or of the High Court may only be removed from office only for inability to perform the functions of office, whether arising from infirmity of body or mind or misbehaviour, and cannot be so removed except in accordance with this Constitution. This is provided for under Article 98(2).

Therefore, it is clear from this chapter that the 1991 Zambian Constitution clearly provides for and separates the governmental functions into ~~three~~, viz, the Executive, the Legislature and the Judiciary. This is in conformity with the doctrine of separation of powers which demands that the organs of government should be separated.

End Notes

1. Quoted from the Introduction in the Mvunga Constitutional Commission Report of October, 1990.
2. Times of Zambia of 28th April, 1990.
3. Times of Zambia of 8th June, 1990.
4. Times of Zambia of 25th September, 1990.
5. Volume 4 Chapter 181 of the Laws of Zambia.
6. Article 36(1) of the 1991 Republican Constitution.
7. Article 37(1) of the 1991 Republican Constitution.

CHAPTER 4

THE APPLICATION OF THE DOCTRINE OF SEPARATION OF POWERS IN THE ZAMBIAN CONSTITUTION OF 1991

In Zambia, the Republican Constitution of 1991 observes the separation of powers but not in the classical form as propounded by Montesquieu. The Constitution separates the organs of government into:

- (i) The Executive
- (ii) The Legislature
- (iii) The Judiciary

The following will be the order of the discussion, first the discussion will be centered on the powers of the Executive and the Legislature, secondly the discussion will be on the relationship of the Executive and the Judiciary and lastly there will be a discussion on the relationship of the Judiciary and the Legislature.

(a) Executive and Legislature

There is provided in the Republican Constitution of Zambia of 1991 a combination of a strong Presidential Executive with a Unicameral Legislature. The Republican President is the Chief Executive. In the classic separation of powers, the President would have been confined to none other than the Executive, but this is not the case. In spite of the fact that the President is the Chief Executive, he is also part of the Legislative process. This is provided for in Article 62 which declares:

"The Legislative power of the Republic of Zambia shall vest in Parliament which shall consist of the President and the National Assembly."

However, the President is not a member of the National Assembly as provided in Article 65(2) which states that "No person who holds, or is a validly nominated candidate in an election for, the office of the President shall be qualified for election* as a member of the national Assembly." This can be seen is a clear contradiction of the rule in the doctrine of separation of powers which requires that each organ of government must operate without interchanging of functions.

Another classic example of the contradiction of the doctrine of separation of powers is the overlapping of personnel between the Executive and the Legislature. Although the President is not a member of the National Assembly, his Ministers and the Vice President are members of the National Assembly. The Contradiction comes in when it is realised that it is these Ministers and the Vice-President who are also members of the Executive. This is provided for in Article 45(2) that:

"The Vice-President shall be appointed by the President from among the members of the National Assembly."

Also Article 46(2) declares that:

"Appointment to the office of Minister shall be made from among members of the National Assembly."

However, these Ministers and Deputy Ministers can also be appointed from Nominated Members as seen in Article 68(1) which declares that:

"The President may, at any time after a general election to the National Assembly and before the National Assembly is next dissolved, appoint such number of persons as he thinks fit to be nominated members of the national Assembly, so, however, that there are not more than eight such members at any one time."

These Ministers are heads of government Ministries, also

the Vice-President is not only head of government but also the Leader of the House.

The next question following from this is whether the Executive Controls the Legislature or Vice-Versa. In principle, under the constitution, it is usually contended that the Zambian Parliament is not supreme in the sense that it dances to the whims of the Executive.(1) However, in practical the Zambian Parliament is supreme in the sense that it has power to make or unmake the laws of this country although with restrictions. But since the general and Parliamentary elections of October 1991, the Zambian Parliament has been divided into two main political parties, M.M.D and U.N.I.P. It is the majority party, M.M.D which exercise real control over Parliament mainly because M.M.D has more than 120 members. However, this coupled with party discipline inherent in the development of political parties in the twentieth century can actually lead one to submit that it is infact the Executive which controls Parliament. All the motions that are supposed to be debated in the House are presented by the Vice-President and Cabinet Ministers. A good illustration of how the Executive contols the Legislature in Zambia occurred in March 1993 after the state of Emergency was re-introduced by President Frederick Chiluba. MMD members of parliament were called for a caucus meeting at State House where President Chiluba urged them to support the motion for the re-introduction of the state of emergency. It is said that some members of parliament were heckled when they tried

to question the decision to re-introduce the state of emergency.(2) This only goes to show how the Executive Controls the Legislature and it clearly illustrates that members of the House are not free to speak and vote on any issue in the Assembly freely but have to take into consideration their party's stance on a particular issue before the House.

However, this coupled with the fact that the National Assembly is dominated by one party, the M.M.D, it may be argued that at least in principle, party discipline has been relaxed. In practice this is not likely to happen for two reasons.

- (i) Party discipline will still exist in the form of patronage. Most members of the National Assembly will still depend on the Executive for promotion.
- (ii) It is the Cabinet Ministers who possess usually all the information there is necessary for criticising of bills in the National Assembly.

The Constitution of Zambia vests as we saw in Article 62 the Legislature power of the Republic of Zambia into Parliament which "shall consist of the President and the National Assembly." This means that a resolution of the National Assembly alone has no legal force. This is supported by the fact that the President has a constitutional power either to assent or withhold his assent to bills passed by the National Assembly. It is provided in Article 78(1) that:

"Subject to the provisions of this Constitution, the Legislative power of Parliament shall be

exercised by bills passed by the National Assembly and assented to by the President."

Article 78(3) goes on to provide that "where a bill is presented to the President for assent he shall either assent or withhold his assent."

Articles 78(1) and (3) reveals the hopelessness of the legislature in the face of the President. The business of the National Assembly can be guided to a halt if the President so wishes, this is because a bill to which he doesn't give his assent will be thrown back to the Assembly and the latter can do nothing but amend the bill to enable it to be assented to by the almighty President. However, the National Assembly can put the pressure on the President if he doesn't assent to the bill. This is done by the Assembly voting on the returned bill and if supported by two-thirds of the members then the same bill shall be presented to the President who then must either assent to the bill or dissolve Parliament. Even with this situation it is the President in the final analysis who holds the whip hand over the National Assembly.

Although Article 62 provides that "the Legislative power of the Republic of Zambia shall vest in Parliament which shall consist of the President and the National Assembly" it is disqualified by Article 80(1) which authorises Parliament to confer Legislative powers on any person or authority to make Statutory instruments. Article 80(1) declares:

"Nothing in Article 62 shall prevent Parliament from conferring on any person or authority power to make statutory instruments."

This is contradiction of the doctrine of separation of powers. This is because according to the doctrine all legislative powers are supposed to be exercised by the Legislature alone. It may be argued that statutory instruments do not have the same effects as Act of Parliament, and therefore Article 80(1) does not erode the powers of the Legislature. This argument was rejected in the case of Jasbhai Umedbhai Patel V.A.G.(3) It was held in this case that a statement carrying a force of law was law. This was after rejecting counsel for the applicant's argument that a statutory instrument was merely a statement carrying a force of law and not a law itself.

By conferring powers on persons or authorities to make statutory instruments, parliament is in actual fact giving away some of its powers, in this regard the Executive through the government departments exercise the powers of the Legislature. Usually one finds that persons or authorities given such powers tend to abuse them for the simple reason that there are not enough checks to see that the powers so delegated are not abused to the disadvantage of the citizens.

However, there is in the national Assembly a sessional committee on Delegated Legislation. It consists of backbench members of parliament appointed by the speaker at the Commencement of each session. This committee scrutinises delegated legislation and reports to the national Assembly through the speaker on whether the power to make regulations,

rules, subrules and by-laws delegated by Parliament are being properly exercised by any person or authority within such delegation. In exercising its power of scrutinising delegated legislation, this committee ensures, that delegated legislation complies with the following principles:

- (a) That delegated legislation is intra-Vires the Constitution.
- (b) That delegated legislation does not impinge upon the personal rights and liberties of Citizens.
- (c) That the rights and liberties of Citizens do not depend on administrative decisions.
- (d) That delegated legislation is only concerned with details but not the substance of legislation which is a preserve of Parliament as the Ultimate author of all laws.
- (e) That delegated legislation is not contrary to government declared policy.

If the Committee is of opinion that the provisions delegating powers should be annulled wholly or in part, the Committee shall so report to the National Assembly. This is a commendable effort and a step in the right direction in trying to control and check the abuse of delegated legislation by the Executive.

On the foregoing discussion, it is submitted that as between the Executive and the Legislature, there is no separation of powers in the 1991 Constitution.

(b) Executive and Judiciary

The second area of discussion is concerned with the relationship between the Executive and the Judiciary. The Judiciary comprises:

(i) The Supreme Court,(4) which is also indicated in the Constitution as the final Court of appeal for the Republic;

(ii) The High Court, (5) then there are lower courts which comprise of the subordinate courts(6) and the local courts.(7) It should be noted that the doctrine of Separation of powers with the exception of the appointments made by the President of the Chief Justice, Deputy Chief Justice, judges of both the Supreme and High Courts, apply to the High Court and Supreme Court but not to the Lower courts because the latter usually combine administrative and judicial work.

As regard to the first aspect of the doctrine of separation which require that no same persons should form part of more than one organ, it is submitted that there is a strict adherence of the doctrine as far as the Supreme Court and High Courts are concerned. This is because only persons with high judicial qualifications can adjudicate in these courts and usually these persons do not serve in any other organs of the government. This of course do not apply to the lower courts which combine administrative and judicial work as was noted earlier. As regards qualifications for appointments as Supreme Court and High court judges, Article 97(1) provides:

"A person shall not be qualified for appointment as a judge of the Supreme Court or a puisie judge unless:

- (a) he holds or has held high judicial office; or
- (b) he holds one of the specified qualifications for a total period of not less than seven years."

A question however, arises as to the independence of the Judiciary. In principle it is contended that in the Zambian Constitution, like constitutions of other commonwealth countries, insulate the judiciary from political interference. Article 91(2) of the constitution states that "the judges of the courts shall be independent, impartial and subject only to this constitution and the law." Article 91(3) further provides that "the Judicature shall be autonomous." The constitution again provides for security of tenure for judges of the supreme court and High courts and this is provided for under Article 98(1) which declares that:

"Subject to the provisions of this Article, a person holding the office of judge of the Supreme Court or the office of a judge of the High Court shall vacate that office on attaining the age of sixty-five years."

Article 98(1) therefore provides for security of tenure of the judges of the Supreme Court and High Courts in the sense that once appointed by the President and ratified by the National Assembly, a judge of the Supreme Court or High court cannot be removed from office, he can only be removed from office for inability to perform the functions of his office, whether arising from infirmity of body or mind for misbehaviour. This is provided for in Article 98(2) which declares:

"A judge of the Supreme Court or the High Court may be removed from office only for inability to perform the functions of his office, whether arising from infirmity of body or mind or misbehaviour, and shall not be so removed except in accordance with the

provisions of this Article."

The procedure that should be followed when the question of removing a judge of the Supreme Court or High court comes up is provided for under Article 98(3)(4) and (5) of the constitution. This security of tenure extends to the fact that an office of a judge of either the Supreme Court or the High Court shall not be abolished while there is a substantive holder. Article 92(3) in particular states:

"The office of the Chief Justice, Deputy Chief Justice or of a Supreme Court judge shall not be abolished while there is a substantive holder thereof."

Article 93(3) also declares:

"The office of a Puisne judge shall not be abolished while there is a substantive holder thereof."

However, we tend to think that the independence of the Judiciary means just independence from the the Legislature and the Executive. But it means much more than that. It means independence from political influence, whether exerted by the political organs of government or by the public or brought in by judges themselves through their involvement in politics. Judicial involvement in politics (that is, organised politics) takes two main forms:

(i) Decisions biased in favour of a Ruling Party; Bias by the judiciary in their decisions is always very difficult to prove. It is almost always a matter of impression. Never obviously displayed, it is inclined to be masked under fine, seemingly learned arguments and rationalisations. Although bias should not be highly imputed to a judge, the circumstances may leave a distinct impression that a judge in

a case has been anything but unbiased. For example, the stand taken by the Zambian Supreme Court in the case of A.G.V Akashambatwa Mbikusita Lewanika and others(8) has been criticised as indicating bias for the government. Briefly the facts of the case were that, the Respondents were members of the Movement for Multi-Party Democracy (M.M.D). On 31st October, 1991 they stood for elections on the tickets of M.M.D. They won the elections and took their seats in the National Assembly. On 12th August, 1993 there was a press conference at Pamodzi Hotel at which all the Respondents, except one, attended and announced their resignation from the M.M.D. On the 13th of August, 1993 the National Secretary for the M.M.D wrote to the speaker of the National Assembly informing him that the Respondents were no longer members of the party. On 27th August, 1993, in consequence of that official notification by the National Secretary for the M.M.D, the speaker wrote to the Respondents that in terms of Article 71(2)(c) of the constitution of the Republic of Zambia they ceased to be members of parliament with effect from 13th August, 1993 a date when the National Secretary gave the notification to the speaker. The Respondents then petitioned the Attorney-General contending that although they had resigned from the party on whose tickets they won the elections, they were still members of parliament, and asked the court to declare the speaker's decision that their seats were vacant, null and void. Article 71(2)(C) of the constitution declares that:

(2) "A member of the National Assembly shall vacate his seat in the Assembly:-

(c) In the case of an elected member of parliament, he becomes a member of a political party other than the party of which he was an authorised candidate when he was elected to the National Assembly, or having been an independent candidate, he joins a political party."

The court held that the Respondents had ceased to be members of parliament when they resigned from the MMD. The court based its holding on the fact that the purpose of the National Assembly in enacting Article 71(2)(C) of the constitution was to ensure that members of parliament did not move from one party to another or leave parties to become independent while retaining their seats in parliament.

(b) Judicial members of political parties: In a two-or multi-party system nothing is more calculated to undermine the image of a judge as an impartial arbiter than his membership of a political party. Such as open identification with the interests of one of the groups engaged in the struggle for power suggests that the judge can easily become an interested party in a case pending before him. The principle of political self-abnegation by judges is thus vital to a healthy administration of justice.

The independence of the judiciary in Zambia is however not absolute as the judiciary has in fact been a department of the Ministry of Legal Affairs all along. It's officers' emolument and conditions of service, at least for the High Courts and Supreme Court judges, are decided by the Legislature. It's budget is voted and funded through the Legal Affairs Ministry.

However, much of the Executive's formal influence on the judiciary is limited to appointments by the President in his discretion. Article 93(1) declares:

"The Chief Justice shall be appointed by the President subject to ratification by the National Assembly."

Article 93(2) also declares:

"The Judges of the Supreme Court shall, subject to ratification by the National Assembly, be appointed by the President."

The President also appoints the judges of the High Court as seen in Article 95(1) which states that:

"The puisne judges shall, subject to ratification by the National Assembly, be appointed by the President on the advice of the Judicial Service Commission."

The other control by the Executive over the Judiciary is exercised by the President when he uses his powers to dismiss the judges by revoking their appointments. This is in accordance with Article 96(1) which declares that:

"Any person appointed under Article 93 to act as judge of the Supreme court shall continue to act for the period of his appointment or, if no such period is specified, until his appointment is revoked by the President."

Also Article 96(2) provides that:

"Any person appointed under Article 95 to hold office as a commissioner of the High Court shall continue to hold office for the period of his appointment or until his appointment is revoked by the President acting on the advice of the Judicial Service Commission."

Another formal interference by the Executive on the Judiciary and a clear contradiction of the doctrine of separation of powers is the Executive Prerogative of mercy. This is the only authority under the constitution for the annulment of a specific judgement but it operates only against

convictions and/or sentences in criminal cases. By it the President may pardon a person convicted of an offence, postpone execution of a sentence either for an indefinite or a specified period, substitute a less severe form of punishment, or remit the whole or any part of punishment or of any penalty or forfeit otherwise due to the government on account of such an offence. (9) If a pardon is free, that is not subject to conditions, its effect is to annul both the guilt and, if there has already been a conviction, any sentence imposed following upon that. Though unquestionably a limitation upon the judicial power executive clemency is not except when used for power. The State ought to have power to pardon those offending against it, and in granting pardon or reprieve the President merely acts on behalf of the state of which he is head. Moreover, the President rarely invokes the prerogative of mercy.

As for the exercising of each other's functions, this does not appear on a grand scale because there is no provision in the constitution for administrative tribunals.

As for the few exceptions mentioned earlier on, it is submitted that there is to some extent a strict adherence to the doctrine of separation of powers between the Executive and the Judiciary.

(c) Legislature and Judiciary

Lastly the discussion will be between the relationship of

the Legislature and the Judiciary. There is a strict adherence to the doctrine of separation of powers with regard to the first aspect of the doctrine. The two organs are not staffed by the same person or body of persons.

With regard to the second aspect of the doctrine however, there is what may be called an inevitable field of interaction between the two organs. The Zambian Parliament like the British one possess Legislature Supremacy over decisions of the Courts which it deems to be contrary to public policy. This was seen in the Case of A.G.V Thixton (10). The decision in this case was altered by the passing of the Immigration and Deportation (Amendment) Act of 1967.

As with regard to the function aspect of the doctrine it can be contended that there is no violation of it. This is based on the authority of the cases like the case of Ex-Parte Nalumino Mundia, (11) This case raised the Constitutional issue of the extent of the High Court's jurisdiction in relation to the affairs of the National Assembly. Counsel for the applicant argued that the courts had powers to exercise jurisdictional control over the National Assembly and that they are not prevented by Parliamentary privileges. The judiciary made it clear in this case that it did not have power to interfere with the exclusive jurisdiction of the National Assembly in the conduct of its own internal proceedings, and that the duty of the Judiciary was not to make law but to adjudicate. Indeed judges do not formulate

certain laws but these are procedural and do not involve real departure from the doctrine of separation of powers.

Another issue of interest worth mentioning is the fact that Parliament can sometimes impose itself as a court to adjudicate certain issues concerned with the internal affairs of the House. This was made clear in the case referred to above. The case came about because of the disciplinary procedure taken against Mr. Nalumino Mundia who was a member of the Assembly. The other case which can throw light on this issue is the case of The People V Speaker of the National Assembly, Ex-Parte Nkumbula, (12). An order of mandamus was directed at the Speaker and it was held that the speaker was not protected by Parliamentary privileges from performing a statutory function, outside the proceedings of the National Assembly, imposed on him by the constitution.

Apart from all these issues it can be submitted that as between the Legislature and the Judiciary, there is no substantial violation of the doctrine of separation of powers.

From the above illustration, it can be seen that the Zambian constitution of 1991 does observe the doctrine of the separation of powers but not as propounded by Montesquieu. There is a high incidence of overlapping of personnel between the three organs of government. The functions of the three organs of government are not clearly demarcated, as a result a member of one organ (executive) can also play a major role

in another organ (Legislature). However, there is a clear demarcation between the relationship of the Legislature and the Judiciary.

The non observation of the doctrine of the separation of powers as propounded by Montesquieu is justified from the fact that the machinery of government has become so intricate that the major organs of government need some interchange of duties to compliment each other. The Parliamentary bills, for example, need to be drafted by members of the Executive, by people who are seasoned professionals in their particular fields. The interchange of duties, it is usually argued, is inevitable if a modern government is to work smoothly.

In conclusion, one would submit that when the organs of government are considered in the constitution of 1991, it can be clearly seen that the Executive arm of government has a powerful control in the other organs of government. It can even be said further that even in the Executive itself, it is the President who holds the whip hand as shown in Article 33(2) which states that "the Executive power of the Republic of Zambia shall Vest in the President and, subject to the other provisions of this constitution, shall be exercised by him either directly or through officers subordinate to him." All this boils down to the fact that the Zambian Constitution of 1991, since being enacted on 24th August, 1991, has consciously or unconsciously been creating an omnipotent President, whose powers can send a cold chill in one's spine

In short the whole argument amounts to this that the
Zambian Constitution of 1991 has created a potential dictator
who is armed to the teeth, and the most important question one
can ask is what effect this has on the liberties of the
individuals. One would delare that the future of individual
liberties in this country is very dark. This is because these
liberties will always be at the mercy of one man who has
tremendous powers. If the future is going to be bright these
enormous power given to one man must be placed in other organs
of government in the Zambian Constitution which will provide
the necessary checks and balances.

End Notes

1. Refer to Article 81(a) and (b) which restricts the National Assembly to what it can do and also Article 88 which controls the life of the National Assembly.
2. The Weekly Post (Special Edition) of March 19, 1993
3. [1968] S.J.Z 1
4. Article 92(1)
5. Article 94(1)
6. Chapter 45 of the Laws of Zambia.
7. Chapter 54 of the Laws of Zambia.
8. Supreme Court of Zambia, judgement number 2 of 1994.
9. Article 59 of the 1991 Constitution
10. [1967] S.J.Z 21
11. [971] H.P 326
12. [1970] H.P. 4

CHAPTER 5

This chapter will concern itself with suggestions on how the future Republic constitution of Zambia should strive to observe the doctrine of separation of powers.

Before proceeding, it is fundamental to say something about the nature of a constitution in general.

A constitution is the fundamental law of the land. A constitution is a mode of organising a state and its government. All organs of a state derive their powers from the constitution. It is, in other words a body of fundamental principles according to which a state is structured. Any action by any organ of the state that does not comply with the constitution is invalid. The constitution in this sense distributes powers to all the organs of the state. It also ensures the fundamental liberties of the citizenry. Thus the source of power is the people. It must be the people's power as government is a modern organisation on how people must be democratically governed. In this modern organisation the people are the masters.

The doctrine of separation of powers is necessary for the following reasons:

Separation of powers is very much necessary to avoid interference among the three organs. The doctrine of separation of powers removes the interference, confusion and suspicion that exists in the management of state affairs by the three organs.

Separation of powers ensures that power is not vested

in one body, or indeed one person.

Hence the doctrine is the linchpin of democracy that ensures checks and balances, and beats bureaucracy and dictatorship.

When looking at the application of the doctrine of separation of powers in the Zambian Constitution of 1991, it is important to note that a rigid separation of powers has not been possible, instead it has been found that the three organs of government must be co-ordinated. As Wade and Phillips have remarked:

"the value of the doctrine lies in the emphasis placed upon the checks and balances of the three organs which is essential in preventing an abuse of the enormous power which are in the hands of the rulers."

The main reason why a complete separation of power is not possible is because the machinery of today's government has become so intricate that the major organs of government need some interchange of duties to compliment each other. Nevertheless, this does not mean that the doctrine is of no use at all. It is of great use and relevancy in that it emphasises the prevention of tyranny by the conferment of too much powers in one person or body.

Suggestions

It has been observed in the last two chapters that the Zambian constitution of 1991 clearly divides the organs of government into the Executive, Legislature and Judiciary. The constitution observes the separation of powers but not in a classical sense as propounded by Montesquieu. Our aim

therefore here is to come up with suggestions on how the future Republic constitution should enhance the doctrine of separation of powers. The doctrine will proceed as follows: first it will be centred on the Executive, then on the Legislature and lastly on the Judiciary.

(i) Executive

It is proposed that the Executive power of the Republic should continue being vested in the Republican President who should be the Head of State and of Government. An Executive Presidency ensures a stable strong government. The current provision under Article 35 of the 1991 constitution, that "every President shall hold office for a period of five years" and that "no person who holds or has held office as President for two terms of five years each shall be eligible for re-election to that office," should also be provided in the future constitution of the country. The reason for recommending this is due to the following reasons:

(i) Beyond these two terms a President becomes abessed with power and would influence the change of the constitution.

(ii) A two-five year term is appropriate so as to allow other citizens a change to reach that high national position.

A further recommendation that we would like to make is with regard to the appointment of ministers to help the President in the discharge of his executive function. Article 46(2) of 1991 constitution declares that "Appointment to the office of Minister shall be made from among members of the

National Assembly." We propose that ministers should continue being appointed by the President, but only those persons who are not members of the National Assembly should be appointed as ministers. Further Parliament should ratify such appointments by the President. The following are the reasons why it is proposed that ministers should be appointed from outside Parliament.

Appointment of persons from outside Parliament would allow the President a wide spectrum of choice which would include technocrats most of whom invariably shun politics although they have the calibre for government administration.

Such an appointment would avoid a situation of dual allegiance on the part of the Minister towards his constituency and the Ministry, leading to instances where Ministers favour their constituencies in the distribution of resources.

The Ministry and his constituency are bound to be adversely affected by a Minister who always attends Parliament and thus has no time for his Ministry and constituency.

Furthermore, appointing ministers from outside Parliament will avoid the embarrassing situation of divulging confidential government information by a minister who has lost his portfolio and becomes an ordinary member of parliament.

A cabinet which is part of the Executive cannot at the

same time be part of the Legislature because doing so would undermine the doctrine of separation of powers.

The cabinet should be individually and collectively responsible, accountable and answerable to Parliament as this is the basis of Parliament democracy. A cabinet minister should resign his portfolio if a vote of no confidence has been passed against him by the National Assembly.

(ii) Legislature

Parliament should be the highest legislature body in the land. It should enjoy complete freedom from the Executive and, as the people's representative organ, it should have the freedom to legislative organ, it should have the freedom to legislate for the good of the Republic without any interference from any other organs of government. It is suggested further that Parliament should establish committees corresponding to the various ministries to monitor the performance of the ministries and cabinet ministers should be answerable individually and collectively to Parliament through these committees. In order to accomplish this, it is suggested that the committees should be given enhanced powers so that they have more investigative authority to discharge their functions. In addition, it is suggested that the status of chairmen of Parliamentary committees should be higher than that of Cabinet Ministers. Parliament should have the following powers:

- (i) to impeach the President for ~~gross~~ ^{gross} misconduct,

commission of a Criminal offence or violation of the constitution;

- (ii) to remove the President, Cabinet Ministers or any other*official holding constitutional office such as the Chief Justice, Supreme Court and High Court Judges by a vote of no confidence for incompetence;
- (iii) to approve the national budget and make adjustments;
- (iv) to scrutinise public expenditure as well as Defence, constitutional and special expenditure;
- (v) to ratify the declaration of a state of emergency and approve its extention;
- (vi) to ratify the country's foreign policy and international treaties to be entered on behalf of the country.
- (vii) Parliament should ratify all appointments to constitutional offices whose independence is guaranteed by the constitution.
- (viii) Parliament should have power to dissolve itself.

The Vice-President and Cabinet Ministers should sit in Parliament and the Vice-President should be head of government business in the House.

(iii) Judiciary

The Judicial power of the Republic should continue being vested in the Judiciary. The independence of the Judiciary should be maintained as well as its autonomy. In order to ensure that there is total separation of powers among the three main organs of the state, namely the Executive,

Legislature and Judiciary, this latter organ should be truly autonomous. The present constitutional safeguards and guarantees of judicial independence were adequate, but these safeguards and guarantees would be more meaningful and stronger if the Judiciary was made autonomous.

The Judiciary should be de-linked from the Ministry of Legal Affairs in order to ensure true autonomy and separation of powers. The Chief Justice, Deputy Chief Justice, Supreme and High Court judges should be appointed by the Judicial Service Commission but such appointments should be subjected to ratification by Parliament. The Judicial Service Commission should be an independent body which should be constituted and answerable to Parliament. The appointment of the Chief Justice, Deputy Chief Justice, Supreme and High Court Judges by the Judicial Service Commission would serve to enhance the independence of the judiciary in that the Chief-Justice and the judges would not owe allegiance to any individual, but only to the state and the Republican constitution. Further, it would in a real sense, ensure the separation of powers among the government organs. The office of a judge should not be abolished while there is a substantive office holder, and judges should only be removed by Parliament passing a vote of no confidence in those found wanting, for inability to perform the functions of his or her office; or for misbehaviour or incompetence; but the procedure as outlined in Article 98 of the 1991 constitution should be followed when the question of removal of a judge is in issue.

It is hoped that the above suggestions will help to enhance the doctrine of separation of powers in Zambia, in order to protect the Citizenry against the abuse of their freedoms and rights by the Executive specially. The role of each organ should be clearly defined in order to ensure that the doctrine of true checks and balances is not only established but is seen to work.

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