

**THE SOVEREIGNTY AND SUPREMACY OF PARLIAMENT: A
COMPARATIVE STUDY OF THE BRITISH AND ZAMBIAN
SYSTEMS**

BY

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**THE UNIVERSITY OF ZAMBIA
SCHOOL OF LAW**

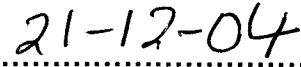
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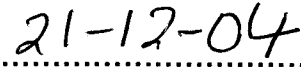
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One cannot do this work without the help of friends who may suffer hardship enroute. I would therefore like to thank the following:-

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To all of you, I say thank you and may the Almighty God continue blessing you.

ABSTRACT

The objective of this study is to compare and contrast the theoretical and practical aspects of the British and Zambian Parliamentary Systems with a view to highlighting:

- (i) the similarities and differences between the two systems; and
- (ii) the extent to which the Zambian Parliamentary System has often been confused with the British System in application.

In this respect, the study is set out by giving a theoretical point of view of both the British and Zambian Parliamentary Systems in chapter two and then goes to discuss the Zambian system from the practical point of view, highlighting the similarities and differences between the two systems in chapter three.

The subject matter of the essay is on the sovereignty and supremacy of parliament, a comparative study of the British and Zambian Parliamentary Systems. This comparison was made possible through personal interviews and evaluation of both parliamentary and judicial records.

Recommendations were made possible after making comparisons between findings and theoretical notes.

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CHAPTER ONE

THE SOVEREIGNTY AND SUPREMACY OF PARLIAMENT; A COMPARATIVE STUDY OF THE BRITISH AND ZAMBIAN SYSTEMS

1.0 INTRODUCTION

In this chapter the Researcher will provide: Statement of the problem; Objectives of the study; methodology and limitations of the study. The statement of problem will demonstrate to the reader the importance of the study and why it had to be undertaken.

2.0 STATEMENT OF THE PROBLEM

Irving Stevens in his book, ¹ under the subject *The Sovereignty of Parliament* states that the work of government can be broadly divided into three types of functions, namely legislative, executive and judicial. Since these functions are essentially different in nature, the case for assigning them to different persons or bodies arises, since not only could each body specialize in its own function (giving rise to greater efficiency in government) but the risk of concentrating too much power in any one body's hands could also be avoided.

¹ Constitutional & Administrative Law, page 39

Such a system, whereby each type of function is assigned to a completely separate body (or organ) of government, amounts to a separation of powers. For the reasons stated above, this has proved attractive to many commentators and especially to the French jurist, Montesquieu (1689-1755), who advocated the separation of powers as a means of avoiding dictatorship.²

The Zambian Parliamentary System has in certain instances been confused in application by the three arms of government, namely, Parliament, Judiciary and the Executive with the British System. In the United Kingdom it is known that among the three organs of government, Parliament is held to be supreme. To this effect, the Acts of Parliament are supreme and any other laws inconsistent with them are null and void.

In Zambia, the situation is however different since here, it is the Constitution, which is the supreme law of the land. Article 1(3) of the Zambian Constitution states that ' This constitution is the supreme law of Zambia and if any other law is inconsistent with this constitution that law shall, to the extent of the inconsistency, be void.' Subsection (4) further states that 'this constitution shall bind all persons in the Republic of Zambia and all Legislative, Executive and Judicial organs of the State at all levels.'

² The spirit of the Laws (1748).

The failure, therefore, to distinguish the differences between the two systems has to a large extent resulted in practical problems in Zambia with regard to the relationship and separation of powers between the organs of government. Furthermore, it has been difficult in certain instances by the citizens to appreciate justice and fair play in the Zambian judicial system.

3.0 RESEARCH QUESTION

What is the importance of establishing the differences between the British and Zambian Parliamentary Systems?

4.0 HYPOTHESES

Differentiating the Zambian Parliamentary System from the British System would help to:

- (a) Improve the quality of judgments by the courts;
- (b) Minimize interferences between the organs of government;
- (c) Enhance social justice and fair play in the nation; and
- (d) Uphold the rule of law

5.0 OBJECTIVES OF THE STUDY

The objective of this study is to compare and contrast the theoretical and practical aspects of the British and Zambian Parliamentary Systems with a view to highlighting:

- (i) the similarities and differences between the two systems; and

- (ii) the extent to which the Zambian Parliamentary System has often been confused with the British System in application.

In this respect, the study gives both a theoretical and practical point of view of the two systems then goes to discuss in detail the similarities and differences between the two systems.

6.0 METHODOLOGY

The methodology adopted in the study was the evaluation of certain records on disciplinary matters handled by the Disciplinary Sub Committee of Parliament and personal interviews with selected Members of Parliament, Judges, law Lecturers and Government officials in Zambia. Materials consulted in the study included: textbooks, law journals, Case Law and other legal publications.

The reasons why these methods were chosen are: -

- (i) Researcher did not have enough time and so personal interviews became the most effective that could give information required without delay. A total number of about fifty (50) people were interviewed.³

³ Refer to appendix 1

- (ii) The method selected was important or unique in that, the type of study undertaken required personal discussions to establish there and then whether people did understand the similarities and differences of the two systems.

7.0 LIMITATIONS

The Researcher encountered problems in the initial stages when gathering information. The people he arranged with to be interviewed could not readily give him information on the matter. Others requested for introductory letters to be convinced that Researcher undertook such a study. During the actual interviews, some people were not just interested to be interviewed and others like the Members of Parliament could not easily be found despite fixing appointments with them as parliament was on recess.

Accessing parliamentary records was also difficult as Researcher was required to go through a lot of officials responsible for the records. This was also the same when accessing case records and Law Reports at the High Court Registry. The Judges were also difficult to see owing to their busy schedule.

CHAPTER TWO

LITERATURE REVIEW

8.0 INTRODUCTION

In this chapter Researcher provides detailed information on both the British and Zambian Parliamentary Systems as understood by various writers and scholars of Constitutional and Administrative Law. The purpose of the chapter is to equip the reader with in-depth understanding of the two systems in terms of their similarities and differences.

9.0 THE BRITISH PARLIAMENTARY SYSTEM

Irving Stevens in his book, Constitutional & Administrative Law, page 45 states that Parliamentary sovereignty refers to Parliament's capacity to make whatever laws it wishes, by means of legislation. It is also sometimes referred to as Parliament's legislative supremacy, thus emphasizing the fact that legislation is the highest (supreme) source of law, including constitutional law, in the UK.

As Hood Phillips puts it in his book,⁴ that the sovereignty of Parliament is the one fundamental law of the British Constitution. In other words, whilst any other law (legal principle) can be amended or dispensed with, the sovereignty of Parliament is indispensable since, without it, there would be no legal basis for the Constitution itself.

All that a court of law can do with an Act of Parliament is to apply it. Willies J said in the case of *Lee vs Bude*⁵ that 'I would observe, as to these Acts of Parliament, that they are the law of this land and we do not sit here as a court of appeal from parliament. It was once said, in Hobart, that if an Act of parliament were to create a man judge in his own case, the court might disregard it. That dictum, however, stands as a warning, rather than an authority to be followed. We sit here as servants of the Queen and the Legislature. Are we to act as regents over what is done by parliament with the consent of the Queen, lords and commons? I deny that any such authority exists. If an Act of Parliament has been obtained improperly, it is for the legislature to correct it by repealing it: But, so long as it exists as law, the courts are bound to obey it. The proceedings here are judicial, not autocratic, which they would be if we could make laws instead of administering them.

4 Constitutional and Administrative Law

5 *Lee vs Bude and Torrington Junction Railway Company* (1871) LR 6 CP P.582

In *R vs Hampden* ⁶ it was stated that to be said that the Crown has certain inseparable prerogatives was a denial of the unlimited competence of parliament to alter the law, and the reversal of those decisions removed the only serious obstacle to its effectiveness; but the reversal was in every case done by statute, and parliament can but claim sovereignty, whereas what we are looking for is an admission by the courts.

For the rule, however, that parliament is sovereign it has always been difficult to find judicial authority apart from obiter dicta. Counsel having hardly ever ventured a direct attack on it, the enunciation of the doctrine appears only rarely as part of the ratio decidendi in a case (and then such cases are rarely to be found in the more definitive series of reports).

In *Mortensen vs Peters*, ⁷ it was stated by Lord Dunedin that in this court we have nothing to do with the question of whether the Legislature has or has not done what foreign powers may consider a usurpation in a question with them. Neither are we a tribunal sitting to decide whether an Act of the Legislature is ultra vires as in contravention of generally acknowledged principles of International Law. For us an Act of Parliament, duly passed by Lords and Commons and assented to by the King, is supreme, and we are bound to give effect to its terms.

6 (1637) 3 ST TR 825

7 (1906), 8 F. (Just. Cas.) p.100

9.1 Separation of powers

On the separation of powers, Irving Stevens states,⁸ that along with the lack of a written constitution, it is the absence of any real separation of powers, which distinguishes the British Constitution from most others and from the American Constitution in particular. He goes further to list some of the major attributes of the separation of powers in the UK as follows:

- a) Members of one organ of government are often also members of one or more others. For example,
 - (i) Legally and constitutionally, the queen is head of all three organs of government: as the Queen in Parliament (legislature), whose assent to a bill is necessary for it to become law; as head of the state (executive); and as fount of justice (judicially). In practice, however, the monarch exercises very little constitutional power personally.
 - (ii) The prime minister and other ministers of the crown (executive) in the UK must be members of one or other of the houses of Parliament (legislature).

⁸ Constitutional and Administrative Law, pages 18, 19 and 20

- (iii) Amongst the government ministers (executive) are the law officers of the crown, the Attorney General and the Solicitor General. These officials have important judicial functions. The Lord Chancellor is head of the judiciary, as well as being a government minister and member of the House of Lords. Furthermore, the most senior judges in the UK, the Lord of Appeal in ordinary (Law Lords), are also members of the House of Lords, and participate in its legislative functions.
- b) Some of the functions of one organ are to some extent also exercised by another. For example, as regards legislation, parliament is considered as the legislature. However, it should be remembered that Parliament includes government ministers (executive) and the Law Lords (judiciary), who are therefore involved in legislation. Secondly, certain legislative powers are frequently delegated to ministers, local authorities and other executive bodies, who are thereby empowered to make laws. Furthermore, although not exactly legislation, judicial law making occurs in the form of judicial precedents.

The most that can be said for the UK, therefore, is that the three organs of government can be identified, and that the three main types of government functions can be broadly identified with these organs. The amount of overlap between the three, however, is such that no clear separation of powers can be said to exist in Britain, unlike the USA.

9.2 Sponsorship of bills

H R W Wade in his book, Administrative Law,⁹ states that a bill in the UK is sponsored by the person or body introducing it. It is the responsibility of that person or body to draft and publish the bill. This can be costly, and is another reason why private members bills are less likely to become law than government bills. The government has public funds at its disposal, as well as a team of professional draftsmen, known as parliamentary counsels to the treasury. However, if the government is sympathetic to a private member's bill, it might make resources available to the member: if such a private member's bill seems endangered by lack of time, the government may even allocate some of the time allocated to debate on government bills (government time) to it, thus adopting the bill so as to ensure its success.

9.3 Royal assent

Wade states,⁹ that all Acts of Parliament have a particular manner and form, i.e. they must be authorized. To become an Act, a bill must have received the royal assent. It will normally also have been passed by both Houses of Parliament and will therefore contain the words, 'Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal and Commons in the present Parliament assembled.

8 fourth edition page 695.

9 Administrative law fourth edition page 696.

9.4 Parliamentary democracy

Irving Stevens's states, ¹⁰ that one of the chief features of the British Constitution is that it are based on a parliamentary democracy. This can be taken to mean a kind of qualified democracy, in which the government of the day itself is not elected, nor accountable directly to the people. Instead, the government is accountable to Parliament, and members of the government must also be members of parliament. Furthermore, members of one of the two Houses of Parliament are, by law, elected at least every five years. Accordingly, the government is, in the UK, indirectly accountable to the people, by virtue of the important conventions of ministerial responsibility.

9.5 Legislative process

Wade, ¹¹ states that like any other items on the parliamentary agenda, a bill is subject to debate, and to that extent the normal procedures apply. However, the passage of a bill through parliament is the subject of certain particular procedures, not applicable to other matters. The main features or stages in the legislative process are; (a) introduction of the bill; (b) readings; (c) committee and report stages; and (d) the royal assent.

10 Constitutional and Administrative Law, page 22

11 Administrative Law, page 697

In general, the above apply in both Houses. If a bill is introduced in the Commons, then, having passed all of the above stages in that House, it is presented to the Lords to undergo similar stages there. It is quite possible for a bill (but not one involving financial measures) to be introduced in the Lords, in which case it is presented to the Commons having been passed by the Lords. In either case, both Houses must have had an opportunity to debate the bill before it is presented for the royal assent.

10.0 THE ZAMBIAN PARLIAMENTARY SYSTEM

Zambia, like most other African countries, is an artificial creation of imperial powers. After decades of colonial rule, it faces at least four major pressing problems,¹ First, forge the bonds of unity and nationhood, and foster wider loyalties beyond parochial, tribal or regional confines. Second, convert a subsistence economy into a modern cash economy without causing social upheaval or economic chaos. Third, industrialise and introduce a sophisticated system of agriculture. Fourth, erase poverty², disease and illiteracy, raise

¹ S.K. Asante, "National Building and Fundamental Rights," Cornell IJL 2 (1969), 84, quoted in Alex Amankwah "Constitutions and Bills of Rights in the Third World Nations: Issues of Form and Content", The Comparative and International Journal of Southern Africa, 21 (1988), 207.

² See Government of the Republic of Zambia and the United Nations Systems in Zambia, *Prospects for Sustainable Human Development in Zambia*, (Lusaka, 1996), p. 7-8. It is estimated that about 70% of the Zambian population is poor and out that that 59% constitutes the "core poor", in that they cannot satisfy their nutritional requirements unaided. Zambia is now classified as one of the world's least-developed and worst-indebted developing countries. The manifestation of poverty in Zambia has grown to the extent that it is described as a social crisis. Child and maternal mortality has increased to the level where it is expected that by the year 2000 one in every four children will die before the age of five. The level of child malnutrition is one of the highest in Africa. In 1992 one in every two Zambian children was malnourished and 40% of the children under five were stunted and there has been no improvement in this area. The sharp drop in living conditions over the last decade could signal renewed acceleration in fertility in the years ahead. The improvement in living conditions experienced in the 1960s and 1970s had by the 1990s significantly declined. By the mid-1990s nearly all rural houses still had only earth or sand floors. More than half of the households has an average of 3 to 7 persons per sleeping room. Only 3% of rural households and 40% of urban households have electricity. Most urban residents have access to piped water,

the standard of living of the people, and in short create a modern state with all its trappings.

According to Zambia's constitutional order the branch of government with responsibility to address these challenges is the executive. Administration is commonly associated with the executive branch of government. It is the branch of government charged with executing the laws and policies to address these challenges. Government's efforts in addressing these formidable tasks will inevitably entail government interfering with society, the economy and generally with people's lives. It is therefore imperative to set the ground rules and mechanisms to govern the executive branch of government in its efforts in addressing these problems.

A parliamentary system of government by its very nature is designed to keep the administration in check. The Zambian Constitution embraces the concept of separation of powers. The legislative powers of Zambia are vested in Parliament that is the National Assembly acting together with the President. The executive power is vested in the President, whereas judicial authority is vested in the Supreme Court, High Court, Industrial Relations Court³, Magistrates Courts, Local Courts and any other court that may be created by Parliament. The endorsement of the concept of separation of powers is an expression of the need to control power.

but much of this is no longer safe. Less than half of the urban residents have access to adequate sanitation: uncollected garbage is heaping uncollected in the streets. On the other hand less than half of the rural residents have access to safe drinking water supply that are in working order. Living conditions are worse among the country's poorest, worst off and those living in the most remote areas – with most people living in overcrowded, unhygienic conditions. This has in turn contributed to the emergence of frequent serious epidemics of cholera and dysentery over the past years.

³ Although the Industrial Relations Court has been in existence since 1973, it has always been an administrative tribunal until in 1996, when it became part of the judicature. The reason for this change has never been properly articulated.

The Constitution creates the position of the President of the Republic of Zambia who is the Head of State and Government, and the Commander-in-Chief of the Defence Force.⁴ Article 44 of the Constitution stipulates the functions of the President. The President must perform with dignity and leadership all acts necessary or expedient for, or reasonably incidental to the discharge of the executive functions of the Government. The Constitution does not define the Executive functions.

The Constitution vests the executive power of the Republic of Zambia in the President. The Constitution does not define executive power and what activities fall within that scope. Neither does it provide any guidance on the functions of the executive branch of government.

Although it is not possible to provide a precise definition of executive power it has been taken to mean the remainder of the power after the legislative and judicial powers are taken out.⁵ Executive power includes the power to formulate policy and implement it. It includes the initiation of legislation, the maintenance of law and order, the protection and enhancement of economic and social welfare of the people, the direction of foreign policy, and generally the carrying on of the general administration of State.⁶

Article 44(2), in particular, provides that the President has power to do certain specific things, such as to dissolve the National Assembly; accredit, receive and recognise ambassadors; grant pardon; negotiate and sign international agreements; establish and dissolve government ministries. The list is merely illustrative of the things the President

⁴ See Article 33 of the Constitution.

⁵ For an extensive discussion of this issue see Nwabueze, O. B. *Presidentialism in Commonwealth Africa*. London: C. Hurst & Company, 1974.

⁶ See V.N Shukla's Constitution of India (Luncnow: Eastern Book Company, 19980) p. 481-2. See also Ram Jawaya Kapoor v. State of Punjab, AIR 1955 SC 549; 1955 2 SCR 225; Jayantilal Amaritlal Shodham v. F.N. Rama], AIR 1964 SC 648; (1964) 2 SCR 294. extensively discussed by Nwabueze

has the power to do. Given the language of the Constitution, the President has the power to do things, which may not be specifically provided for by either the Constitution or an Act of Parliament, provided the acts in issue are not in conflict with the Constitution or any other law in force.

This partly explains why it is not possible to successfully challenge certain decisions or actions by the President, questionable and morally unacceptable though they may be. The decision by the President to sell Government and Council houses ahead of the elections of 1996, under the guise of empowering the people to own property, was clearly intended to give him and his party political advantage over other parties. There is no legislation or constitutional provision, which prohibits the President from making such a decision. The creation of the "Presidential Slush Fund" which he disburses as he pleases is another example.

The executive power vested in the President can be exercised either directly by the President himself or through officers subordinate to him,⁷ among them the Vice-President and Ministers. The President appoints the Vice-President and the Ministers. The Vice-President can exercise the power specifically conferred on him by the Constitution and any other piece of legislation. He may also exercise such power as may be conferred on him by the President.

The Constitution confers power upon the President to appoint Ministers, Deputy Ministers and Provincial Deputy Ministers. The Ministers are responsible, while under the direction of the President, for such business of Government including the administration of any Ministry or Department of Government as the President may entrust to them. The Deputy Ministers assist Ministers in discharging the business of government. In the absence of the

⁷ See Article 33(2).

Minister the Deputy cannot act in the position of the Minister. The practice has been to appoint another Cabinet Minister to act in the absence of the substantive Minister.

The Minister being a delegate of the President cannot delegate his authority to the Deputy Minister. A Deputy Minister can act on behalf of the Minister only if the President has expressly conferred that authority on him. Notwithstanding the presence of the Minister, the President can authorise a Deputy Minister to exercise the power of the Minister. The Vice-President, the Ministers, Deputy ministers and Provincial Deputy Ministers exercise only such power or discharge such functions as are given to them by the President. In essence they are all delegates of the President. The ultimate executive authority is vested in the President.

The President, Vice-President and the Ministers make up the Cabinet. The functions of the Cabinet are to formulate government policies and advise the President on matters of policy and on any other matter that may be referred to it by the President. It is however difficult to perceive a situation where the President can be advised by Cabinet as he is himself part of Cabinet.

Parliament's influence on those with responsibility to run the administration is two-fold. For one to be eligible for appointment as Vice-President, Minister, Deputy Minister, Provincial Deputy Minister he/she must be a Member of Parliament. Secondly, Article 51 provides that Cabinet and Deputy Ministers (who are not members of Cabinet) are collectively accountable to the National Assembly.⁸

There is an assumption that Members of Parliament represent the interests of the members of their constituencies. Ideally, a Member of Parliament must explain to the

⁸ See also section 6 of the Parliamentary and Ministerial Code of Conduct Act.

constituents various decisions and policies of government. The people must present their grievances to their Member of Parliament. The Member of Parliament must follow up on the complaints on behalf of his constituents with the relevant government departments or ministries. Where necessary the matter can be brought up in the National Assembly, and the Minister responsible may be required to respond to the issues raised by the Member on behalf of his constituents.

The Minister concerned may make a public statement or commitment binding on the administration to address the problems raised by the Member of Parliament. This arrangement provides a check on the administration in its implementation of various policies. Members of Parliament are supposed to protect their constituents from administrative decisions, which may impact on them negatively and cause the administration to make those that will benefit them.

This is true where the party, which controls the administrative branch of government does not command an overwhelming majority in Parliament. The party controlling the executive branch of government will be forced to compromise or cooperate with the dominant party in Parliament to have some of its policies given the force of law.

In addition the National Assembly has powers to set up various select committees whose role is to scrutinize various aspects of government policies. Any such committee has power, to order any person to appear before it and give evidence, produce any paper, book record or document in his/ her possession or control.

For instance, a Committee of Parliament exists which scrutinizes appointments to constitutional offices. Article 56 of the Constitution provides for the position of Director of Public Prosecutions (DPP) with power to institute and undertake criminal proceedings against any person before any court, except a court-martial, for any offence committed.

The power vested in the Director of Public Prosecutions is vested in him alone to the exclusion of any other person or authority. The Constitution expressly provides that the DPP in exercising the power vested in him shall not be subject to the control or direction of any person or authority.

The office of the DPP enjoys further protection under the Constitution. The DPP, like a Judge of the High Court and Supreme Court, can vacate his office only upon attaining the age of sixty. He can be removed from office only on account of incompetence or inability to perform the functions of his office. The inability to perform may arise due to infirmity in body or mind. The DPP may also be removed from the office on account of misbehaviour. Once allegations against the DPP have been received, they have to be investigated. The President will appoint a three-man tribunal headed by a Chairman and two other persons holding or who have held high judicial office.

In essence the DPP enjoys a protected tenure. The elaborate constitutional protections are available because of the importance of his office and the nature of the power he has to exercise. Apart from the President who enjoys immunity from criminal prosecutions,⁹ the DPP is expected to institute criminal proceedings against any person within the Republic who is suspected of having committed an offence. This includes ministers and even members of the President's own family.

It follows that for the office of the DPP to function as expected by the framers of the Constitution only men/women of good and high moral standing should assume the office. For one to occupy the office of the DPP he/she must be beyond reproach and incorruptible.

⁹ See Article 43(2) of the Constitution.

It is in realisation of this fact that the drafters of the Constitution provided that appointment of any person to the office of the DPP be done by the President, since the DPP falls within the executive branch of government. However the National Assembly must ratify the appointment.

This arrangement is designed to ensure that the right person capable of discharging the functions of the office of the DPP is appointed. The committee of Parliament on constitutional appointments is expected to investigate any person appointed by the President to the office. If the candidate is found wanting the Committee is supposed to report to the National Assembly recommending the rejection of the candidate and the National Assembly will accordingly reject the President's choice of the DPP.¹⁰

The mechanism is designed to ensure that the President does not appoint a person can control to the office of DPP. A properly functioning parliamentary system in Zambia is an ideal yet to be realised. There is no rapport between the people and their Members of Parliament. The understanding of the nature of the relationship between the Member of Parliament and the constituents is still lacking. Members of Parliament are elected more on the strength of the party on whose ticket they stand, and not on account of individual abilities or standing in the eyes of the electorates. The party and not the people determine who should be a Member of Parliament. Allegiance to the party counts more than commitment to the voters.¹¹ The ideals reflected in these constitutional provisions have

¹⁰ Although this mechanism has been in force since 1991, the case of Mrs Sokoni is the only one on record of a person appointed by the President to the office of the DPP or any other Constitutional office being rejected by the National Assembly.

¹¹ This is clearly illustrated in the Chingola Constituency. In 1991 two candidates stood for election: Enock Kavindele stood as a candidate for the United National Independence, (UNIP) whereas Ludwig Sondashi stood as a candidate for the Movement for Multi-Party Democracy (MMD). Ludwig Sondashi won the election. Three years later the same candidates stood in the same constituency. The only difference this time was that Kavindele stood on MMD ticket whereas

never been realised. Both the Committee and the Assembly have tended to endorse candidates who have the President's approval.¹² The rejection of a nominee is considered an affront to the President as the nominating authority.

Some of the Members of Parliament do not feel obliged to visit their constituents or maintain contact. They often have no idea of the problems facing people in their constituencies. This is worse in constituencies where the Member of Parliament is not resident¹³ in the constituency or has a ministerial position, which will require him to take residence in Lusaka. Whether the Member of Parliament discharges his obligations to the constituents it matters less; he will retain his position as a Member of Parliament for the same constituency provided he stands as a candidate for a popular party and has the full backing of the party.

The parliamentary arrangement in Zambia does not check administrative actions. Party concerns, as opposed to the concerns of the people, are the factors which determine the conduct of the Members of Parliament.

During the sittings of the Mwanakatwe Constitution Commission representations were made that the new Constitution should confer power upon people within a constituency to remove their Member of Parliament from the National Assembly, where he is unable to discharge the functions of his office as the people's representative. The demand was

Sondashi stood as a National Party candidate (NP), a break-away party from the MMD. Kavindele won the election.

¹²For instance in the appointment of Mr. Kalima as Director of Public Prosecution (DPP) the Law Association did not support his nomination. That notwithstanding, the President appointed him and his appointment was ratified by the National Assembly. A few months later Mr. Kalima was suspended and a Committee appointed to investigate various allegations of impropriety made against him for possible removal from the office. It is ironic that a person who had met the President's and the Select Committee's approval would be found wanting a few months later.

¹³ The election rules in Zambia do not require residence in a constituency as a pre-condition to standing in any constituency.

widespread and in response the Commission under Article 134 of the Draft Constitution conferred upon members of a constituency the right to remove their representative from the membership of the National Assembly. A member was to be recalled if he had failed to undertake a reasonable number of visits to his constituency, failed to attend to constituency matters and for misconduct.

The misconduct envisaged under Article 134(4) (c) was not defined. Members were expected to file a petition with the Constitutional Court, which was to be created under the proposed Constitution, supported by not less than one-third of the registered constituents. The petition was to state the grounds and particulars upon which the application was founded.

The Government did not accept the recommendation. The Draft Constitution was rejected and Article 134 was not one of the Articles adopted and embodied in the Constitution (Amendment) Act of 1996. That this issue was considered by the Constitution Commission and provision made in the proposed Constitution was recognition of the enormity of the problem.

Historically parliamentary arrangement in Zambia has never been an effective non-judicial mechanism for checking administrative actions. The presidential parliamentary political system, its supporting constitutional framework and underlying ideas are alien to Zambia. The Independence Constitution prescribed a presidential multi-party system of parliamentary government. The sound articulation of the system required a ruling party or coalition of parties and an opposition party or coalition of parties. The Western parliamentary system adapted for Zambia included the presidential aspect and was based on the idea of politics understood in terms of a *zero sum game*.

In the American presidential system and other Western parliamentary systems where the system is in place its operation does not provoke total hostility between the rival parties or coalition parties. Political parties perceive competition for political power as a mixed interest game, in which the competing parties have, not only ideologically antagonistic interests, but also significant interests in common to maintain competition for power. The winning party may take all the offices associated with the victory but it does not set out to destroy the future opportunities of the defeated party of ever coming to power. This has worked well in Western liberal societies, because there exist shared values and willingness between parties to both the rules of the game and the maintenance of the political order.¹⁴

In the post-independence Zambia politics took a different dimension from what the drafters of the Constitution envisaged. Historically it was unrealistic to expect the system of government to operate as it did in the Western presidential or parliamentary system of government. Party politics were unknown among Africans until 1959 when the African National Congress (ANC) accepted to take part in the elections after the constitutional changes, which enfranchised a number of Africans.

The purpose of a political party is to mobilise the people and resources to gain access to the regular executive and legislative machinery of the State. The attainment of that goal, before 1959 was seen as the negation of colonial rule. The very idea of colonial rule was based on absolute supremacy of the Crown. Political parties were never recognised until it became obvious that the territory was moving towards internal self-rule. There was, therefore, no time for the new African leadership to perceive and accept politics as a game

¹⁴Ollawa, *Participatory Democracy in Zambia*, pp. 235-6.

in which, though the parties may have different ideological ideas, there must still be common interests and common desire to respect and maintain the political order. For Zambia and most other countries Ollawa observes:

Not surprising interaction between parties tended to degenerate into a negative mode of competition. Since politics as conducted by one party is felt by the other as to be *normless*, there hardly existed any shared common standards of the rule of the game which could permit inter-party collaboration or compromise in the process of political interaction. This being the situation, a party or a coalition of parties on coming to power never hesitated to employ its 'organizational weapons' ... to exploit all sources of power that were latent or manifest in every aspect of political and economic life of the country to deal with its opponents or members of the opposing party.¹⁵

Lewis has condemned this manipulation of power in the *zero-sum* game in Africa: "Translated from a class to a plural society this view of politics is not just irrelevant; it is totally immoral, inconsistent with the primary meaning of democracy, and destructive of any prospect of building a nation in which different peoples might live together in harmony".¹⁶

The chances of sustaining a multi-party political arrangement was further undermined by the fact that in Zambia's traditional societies the word opposition was unknown, but it has come to mean an enemy who had to be destroyed. The position is further complicated by the diversity in cultures and political arrangements. Apart from notable nations such as

¹⁵Ibid., pp. 236-7.

¹⁶Arthur W. Lewis "Beyond African Dictatorship: The Crisis of the One-party State". *Encounter*, 25 (1965), 9, quoted from Ibid. p. 237-8.

those of the Lozi, Bemba and Ngoni very few traditional societies had comprehensive governmental institutional arrangements. All traditional societies were made part of one state and the impact of their advances in government did not go beyond the boundaries of their own nations.

This can be contrasted with the position in Botswana, which has emerged as a shining example of democracy in Sub-Saharan Africa. Mbao observes that the success is mainly because many Batswana believe that pre-colonial Tswana political tradition, relative to the *Kgotla*, was democratic and thus provides an historical basis for the liberal democracy. Customs and laws limited the powers of traditional authorities. Notwithstanding the fact that there is multi-party democracy in the country, members of political parties still rally behind the chiefs and divest themselves of Party affiliations when they are at *Kgotla* meetings and still perceive the *Kgotla* as an effective institution for resolving issues that extend beyond political barriers. Batswana still rally behind the chiefs than behind their Members of Parliament. The use of the *Kgotla* and the chiefs in the evolution of the democratic process is an acknowledgment of the possible co-existence of the Westminster style of parliamentary democracy with the traditional government in one type of national government.¹⁷ The other, equally important factors, include Botswana's relative economic prosperity and cultural homogeneity,¹⁸ which are both lacking in Zambia.

The successful operation of the political arrangement was limited from the very beginning. The elections of January 1964, saw UNIP win fifty-six of the sixty-five seats and the ANC with only nine. The weak position of ANC meant that there was no rivalry between parties. This instead shifted within the ruling Party. It must be noted that both leaders of ANC and

¹⁷M.L.M. Mbao "Constitutional Government and Human Rights in Botswana" *Lesotho Law Journal*, 6 (1990), 204-5.

¹⁸*Ibid.*, p. 205.

UNIP lacked interest in promoting and sustaining the political system and this partly explains the inter-party violence experienced in the first few years of independence.

Almost all UNIP Government policies were viewed in terms of how the areas supporting the ANC would be affected or how one region would enjoy material benefits and political advantages from the control of government machinery by the leaders of certain ethnic groups within the ruling group. The statement by Mungoni Liso (ANC Member of Parliament), in his contribution to the debate on the repeal of the referendum clause, is instructive. Whereas the Government's reason for the amendment was to make the constitution flexible to change and do away with the costly mechanism of the referendum, Liso argued: "I have been informed... that this amendment or this Bill has been prompted by the fact that the Barotse Province enjoys a certain amount of special status. In that there is a Barotse Agreement and there are some highly placed politicians who would not tolerate a tribe other than their own having any agreement that does not exist in their own home area."¹⁹ The Barotse Agreement could have been abrogated without repealing the referendum clause. Whichever way the issue is perceived it shows how far removed the system of government was from the reality.

Similarly, when the UNIP Government decided in 1966 to ban the export of labour to South Africa most of the political leaders from Barotseland Province, where the majority of the migrant labourers came from, viewed the decision in terms of its negative economic impact on the region. Consequently, when the Lozi based United Party (UP) was formed it capitalised on the decision to ban migrant workers and other grievances of the people of Barotseland to build its base in the area.²⁰

¹⁹*Parliamentary Debates* col. 2177 (16 April, 1969).

²⁰Ollawa, *Participatory Democracy in Zambia*, pp. 238-9.

Inter-party rivalry was instead replaced with intra-party competition for power. The *political groups, which competed for the control of the party and government policies, were generally ethnic or regional groups which, designated a regionally or ethnically structured group within UNIP which sought to dominate the strategic positions in the authoritative decision-making structures of the political system with a view to, at the minimum, influence government distributive outputs to its advantage or that of its region/province.* Like inter-party competition, the two basic sources of social tension associated with party-sectionalism are those deriving from socio-economic developmental disparities among regions and those reinforced by communal group affiliations, which are usually based on ethnic or linguistic interactional variables.²¹

In addition to providing the individual nationalist leaders with the quickest avenue for upward mobility and personal advancement the nationalisation of politics, which accompanied the transfer of power to indigenous Zambians, also presented for the masses a source of miraculous material benefits. And because of the clear absence of shared values among the politicians, even those within the same party, the national leadership was isolated on the basis of ideological motivations and aspirations.²²

Internal political rivalry reached its zenith during the elections to the UNIP's Central Committee in 1967. The alliance between some ethnic groups ensured that members of some ethnic groups got seats on the Committee and others were excluded largely on tribal lines.²³ At the end of the elections Kaunda decried:

²¹Ibid.

²²Ibid. p. 239.

²³For a detailed discussion of these events see Ibid.: Carolyn Baylies and Morris Szeftel, "The Fall and Rise of Multi-Party Politics in Zambia", *Review of African Political Economy*, 54 (1992), 75-91: Idem, *The*

We have canvassed so strongly and indeed, viciously, along tribal, racial and provincial lines, that one wonders whether we really have national or tribal and provincial leadership. I must admit publicly that I have never experienced in the life of this young nation, such a spate of hate, based entirely on tribe, province, race, colour and religion, which is the negation of all that we stand for in this party and Government. I do not think that we can blame the common man for this. The fault is ours fellow leaders - we, the people here assembled.²⁴

The resignation of Kapwepwe from UNIP and the formation of his own political party, United Progressive Party (UPP), was part of the continued convulsions within UNIP. Although UPP was immediately proscribed on 4 February 1972, it was clear to remaining members of the Party that the multi-party system of government, as operated in Zambia, was encouraging ethnic differences and posed a danger to national integration.²⁵ Remedial measures were needed and the introduction of one-party rule was found to be the solution. According to Baylies and Szeftel the single party system can be seen as an attempt to contain structural political conflicts within the context of chronic underdevelopment. In an economy such as Zambia's, it is always unlikely that factional demands could ever be satisfied. The attempt to do so badly distorted an already unevenly developed mono-economy. The creation of a huge state sector fell victim to the effort to control resources and rewards - and the parastatal corporations quickly became engulfed by political patronage.²⁶

Dynamic of Zambia's One-Party State ed. Cherry Gertzel (Manchester: Manchester University Press, 1984), generally, and Gupta, *Government and Politics in Africa*, pp. 127-51.

²⁴Mulungushi Conference 1967 - *Proceedings of the Annual General Conference of the United National Independence Party* held at Mulungushi 14-20 August (Lusaka: Government Printer), p. 52.

²⁵Ollawa, *Participatory Democracy in Zambia*, p. 249.

²⁶Baylies and Szeftel, "The Fall and Rise of Multi-Party Politics in Zambia", *Review of African Political Economy*, p. 80.

It is evident that after eight years of a multi-party parliamentary system soon after independence and eighteen years of one-party rule nothing has been learnt. The events of the past nine years have revealed some inherent weaknesses in the 1991 Constitution. It cannot stand its celebrated task as a bulwark of defense against authoritarianism, since the party, which controls the executive branch of government also, controls the National Assembly. The only restraint available is the morality of those wielding power. The same powers, institutions and practices, which led to the collapse of the Independence Constitution, are still in place and at the disposal of the new political leadership. Should they decide to use them nothing can deter them.

The electoral system embodied in the Constitution of 1991, is the same as that of 1964. This constitutional arrangement coupled with the people's discontent with the UNIP Government and the general economic decline enabled the MMD to get a landslide victory. UNIP was reduced to a regional party,²⁷ just like the ANC was in 1964.

There are parallels with the developments soon after independence. The MMD secured 125 seats in the 150 seats National Assembly in the election of 1991. This was a repeat of the 1964 elections, in which UNIP obtained fifty-five of the sixty-five seats. The elections of 1991 merely created a shift from a *de jure* one party system to a *de facto* one party state. To all practical purposes there was no opposition party, and no inter-party competition for political power.

As was the case between 1964 and 1972, the rivalry over power has shifted within the MMD. This is evident from the resignation of some members of MMD to form the Caucus

²⁷See generally, National Democratic Institute for International Affairs and Carter Center of Emory University, *The October 31, 1991 National Elections in Zambia*.

for National Unity (CNU)²⁸ and the formation of the National Party (NP).²⁹ The dismissal of Dean Mung'omba and Derrick Chitala from the MMD ahead of the elections of 1996, and the subsequent formation of Zambia Democratic Congress (ZADECO) was the clearest indication of the death of intra-party competition for power itself. They were the last of the founder members of the MMD who had illusions about the party's commitment to the ideals of democracy and hoped that they would compete for the presidency of the party and ultimately that of the Republic without undermining the party and endangering their own membership. Most of the members of the party with presidential ambitions have been purged from the party and the President has succeeded in surrounding himself with loyal followers. The majority is compromised and has no life or existence independent from the party and government.

Membership of the MMD has become the basis for wealth. People, who just before 1991, were walking, not only were they driving after 1991, they were being driven in every new make of vehicle on the market. The cost of the luxury was unjustifiable and still is given the enormity of the country's economic problems. Connection with government or with someone with links to government is the basis of business. Merit is no longer an issue.

The privatisation of the huge parastatal sector, a legacy of the UNIP government, can at best be described as an act of looting sanctioned by the Government. A good number of the companies were sold to people in government or people with close connections with

²⁸Patrick Katyoka formed the CNU as a reaction to the MMD Government's failure to address what was promised during the campaign. The CNU has since been dissolved and Mr Katyoka is now back as a member of MMD.

²⁹See *Weekly Post* (13-19, August, 1993), pp. 10-11. The National Party was formed following the resignation of about ten Members of Parliament from the MMD. Some of the reasons given for their resignations were corruption and drug dealing among Government officials, failure to promote a democratic culture and poor management of the economy.

Government officials. The majority of them lacked business acumen and could not keep companies afloat. They instead sold off the assets and closed the companies.

Most of the Members of Parliament were beneficiaries or still hoped to benefit from the policies of government. They were in one way or another indebted to the executive branch government. They are compromised hence cannot play their collective role of checking the possible excesses of the executive. The distinction between the legislature and the executive disappeared. The Members of Parliament collectively traded the authority vested in them by the Constitution in return for personal and collective favours from the executive.³⁰

There are other reasons to account for this situation. The very premise of the changes of 1991 was flawed. The MMD, a coalition of various individuals, had as its agenda the removal the UNIP government from power. The majority of them were part of the UNIP government, but by 1991 they had fallen out of favour. They did not have any programme of action as to what was to follow after the removal of UNIP from power. Although the movement is premised on democracy and all other ideals, there is no national consensus on how these ideals are to be realised. Furthermore, the majority of them cut their political teeth under the tutelage of UNIP and Kenneth Kaunda. They have no idea of politics other than Kaunda's and UNIP's brand.

In the election of 1996, the MMD sought to wipe out all the opposition parties and effectively undermine the parliamentary system of government. Just ahead of the elections the government contracted an Israeli Company to carry out the registration of

³⁰ An example of this was the practice of giving vehicles to Members of Parliament at the beginning of every five-year term. Any such scheme requires the approval of the executive branch of government.

voters exercise.³¹ The voters' registers were rejected by all the opposition parties on the premise that they favoured the MMD. Since the election of 1991, there was consensus within the MMD party that the 1991 Constitution was a compromise Constitution and that soon after the elections steps were to be undertaken to prepare a popular constitution, which would stand the test of time.

After a great deal of hesitation, the President finally appointed a Constitution Commission with mandate to formulate a new Constitution for the country and in part determine, how this Constitution was to come into force.³² Most of the recommendations of the Commission were rejected. The Draft Constitution was rejected. The idea of introducing a new Constitution was also rejected. The MMD with its majority in the National Assembly proceeded to introduce a new Constitution, by purporting to amend the Constitution of 1991.³³ The Constitution, which emerged, was clearly designed to favour the MMD and disadvantage other parties, especially UNIP, which presented a real challenge to its continued hold on power.³⁴

³¹ Section 14 of the Electoral Act, Chapter 13 of the Laws of Zambia, provides that the registration and the conduct of election was to be under the direction and supervision of the Electoral Commission. The opposition parties who contended that this was a sure way of rigging the elections rejected the NIKUV Contract. They contended that Section 14 of the Electoral Act had been violated in that the registration of voters' exercise had been given to NIKUV and Israeli company as an independent contractor. Even though there was no evidence of rigging the elections through NIKUV's involvement, for purposes of legitimising the electoral process government should attend to the concerns of the opposition parties and arrive at a registration exercise acceptable to all the parties.

³² Three modes of adoption of the Constitution were suggested in the terms of reference: through the National Assembly then in force, Constituent Assembly and Referendum. The conclusion of the Commission was that adoption of the Constitution through the National Assembly was the least favoured mode of adoption of the Constitution based on the representation from the people. This was because the National Assembly was dominated by the MMD, which controlled over 125 of the 150 seats in the Assembly. The Commission produced a Draft Constitution and recommended that it be presented to a Constituent Assembly for further consideration and should finally be submitted to referendum for the people's approval.

³³ In reality the amendments to the Constitution resulted in a new Constitution. The entire Constitution of 1991 was repealed and reenacted apart from Part Three, the Bill of Rights, whose alteration requires a referendum.

³⁴ The President of UNIP Kenneth Kaunda, the man who had led Zambia's struggle for independence, the first and only black Prime Minister of Zambia, the first President of the Republic, the man who had been President of Zambia for 27 years became ineligible to stand for election as President due to a new Constitutional provision, which required a presidential candidate to be "a true Zambian". In addition to a candidate being a Zambian, the candidate's mother and father must be Zambians either by birth of descent. See Article 34 of the Constitution. This provision was clearly aimed at

All the opposition parties were united in their opposition to the NIKUV electoral registers and the amendment to the Constitution and threatened to boycott the elections unless these grievances were made. The MMD never budged, notwithstanding the demands made both within and outside the country. The MMD did not see the need to alter its position for the sake of strengthening and legitimising the democratic process. UNIP responded by advising its followers to boycott the registration of voters' exercise. When it was clear that the MMD government would not change its stand on the electoral registers and the Constitution, UNIP boycotted the elections.

The combined effect of these measures was that the opposition parties were not represented in the National Assembly. The MMD got over 130 seats. Although this was celebrated as a victory for the MMD, in reality it marked the death of parliamentary system in Zambia and the negation of the democratic gains of 1991.

The consequence of these developments is that the legislative branch of government has always been an appendage of the executive branch of government and not as an independent institution with power to check on the possible excesses of the administration.

For the Parliamentary arrangement to be an effective means of controlling the administration and its officers some radical changes are needed. First education is needed for both the Members of Parliament and the people. The Members of Parliament need to

barring Kenneth Kaunda. It is a notorious fact that both his parents were from Malawi. Article 35 was another provision of the Constitution designed for Kenneth Kaunda. Under the 1991 Constitution one could hold the office of President for two five-year terms. But the counting of this limitation was to start with the Constitution of 1991. Under Article 35, the starting point was removed. Any person who has held the office of President two five terms at any time since the post of President was introduced was not eligible to stand for election as President.

understand their role, and the people need to know what to ask and expect from them. At party level the existence of an opposition or opposition parties has to be accepted as necessary for the survival of the system of government itself.

CHAPTER THREE

FINDINGS

11.0 INTRODUCTION

In this chapter Researcher uses judgments in selected cases in Zambia to highlight the extent to which the Zambian Parliamentary System has been confused with the British system by the Zambian Judiciary, Legislature and the Executive in arriving at certain decisions.

Researcher would have cited many of such cases as they are plenty but for the sake of this study and limited space Researcher had, only three cases will be cited to demonstrate the problem. These cases are:

- a) *Zambia National Holdings and United National Independence Party v The Attorney General (1994) SCZ Judgment No. 3 ;*
- b) *Christine Mulundika and Seven others Vs The people (1995-1997) ZR P.20 and;*
- c) *Fred M'membe and Bright Mwape Vs The Attorney General (1996) HCZ Judgment No.25*

12.0 *Zambia National Holdings and United National Independence Party v the Attorney*

*General*³⁵

This case is unique to the study in that it demonstrated a lack of understanding by the Judiciary of the major difference between the Zambian Parliamentary System and that of the United Kingdoms (UK). Researcher found the case very helpful as it clearly brought out salient issues highlighting the thinking of the bench.

The case arose out of the decision by the President to compulsorily acquire the "New UNIP Party Headquarters." The Appellant lodged a petition challenging the President's decision. Shortly after lodging the Petition the Appellant applied for an injunction to restrain the Government, its servants or agents from taking possession or occupation of, or entering upon the appellant's property until after the trial of the case. The High Court ruled that it was precluded from awarding the injunction by section 16 of the State Proceedings Act. This case illustrates how blurred the distinction between constitutional and administrative law is.

On appeal, however, the Supreme Court reversed the holding of the High Court. The Supreme Court observed:

As a general rule, no cause is beyond the competence and authority of the High Court; no restriction applies as to type of cause and matters as would apply to the lesser courts. However, the High Court is not exempt from adjudicating in

³⁵ SCZ Judgment NO. 3 of 1994.

*accordance with the law including complying with procedural requirements as well as substantive limitations such as those one finds in mandatory sentences or other specification of available penalties or, in civil matters, the types or choices of relief or remedy available to litigants under various laws or causes of action.*³⁶

The Supreme Court's position was that Section 16 of the State Proceedings Act was constitutional. (This was also the finding of the High Court).

13.0 CHRISTINE MULUNDIKA AND SEVEN (7) OTHERS VS THE PEOPLE (1995-1997) ZR P.20

In this case, the appellants challenged in the Supreme Court the constitutionality of Section 5 (4) of the Public Order Act (Cap. 113 of the Laws of Zambia) which provided that:

" Any person who wishes to convene an assembly, public meeting or to form a procession in any public place shall first make an application in that behalf to the regulating officer of the area concerned and if such officer is satisfied that such assembly, public meeting or procession is unlikely to cause or lead to a breach of the peace, he shall issue a permit in writing authorizing such assembly, public meeting or procession and specifying the name of the person to whom it is issued and such conditions attaching to the holding of such assembly, public meeting or procession as the regulating officer may deem necessary to impose for the preservation of public peace and order."

³⁶Ibid.p.18.

The legal challenge in the case related to both the requirement of the permit for prosecution based on the absence of such permit. The challenge was grounded on the fundamental freedoms of expression, assembly and association guaranteed by Articles 20 and 21 of the Constitution of the Republic of Zambia.

In this respect the Supreme observed as follows:

"The broad question arising in this appeal is whether in this day and age, four years to go to the 20th Century it is justifiable in a democracy that the citizens of this country can only assemble and speak in public with prior permission. If such permission is not guaranteed and whether the law under attack is contrary to the guaranteed freedom of assembly and speech! The Supreme Court held that the requirement of prior permission was an obvious hindrance to the important freedoms under the constitution since the right to organize and participate in a public gathering is inherent in the freedom to express and receive ideas and information without interference. Thus, section 5 of the Public Order Act was held to contravene Articles 20 and 21 of the Constitution. Consequently, it was held to be void and invalid for unconstitutionality.

14.0 FRED MEMBE AND BRIGHT MWAPE VS THE ATTORNEY GENERAL (1996) HCZ
NO. 25

Facts of the case are that Supreme Court of Zambia in early January, 1996 rendered a judgment in which they nullified some sections of the Public Order act, Cap 150:01, laws, which required political parties and other organisations to obtain permission from the police before they could hold any meetings or processions. Soon after the judgment

delivered the Honourable Vice-President and other Government Ministers raised protestation in Parliament against the judgment.

On 29th January, 1996 the two Applicants and a columnist Mrs Lucy Banda Sichone wrote in the post Newspaper articles opposing the Government attack on the Supreme Court judgment. On 30th January 1996 the Vice President raised a point of Order and complained to the Speaker about the said articles in the Post Newspaper, which he alleged, were a breach of the privileges and immunities of the House. Following that point of order by the Hon. Vice President the Hon. Speaker made a Ruling in the House on 20th February, 1996 in which he found a 'prima facie' case of contempt of the House against the three writers.

He decided that some of the terms and phrases used in all the three articles were injurious to and contemptuous of the dignity and standing of the House. He then referred the matter to the Standing Orders Committee of the House for further consideration. The Standing Orders Committee met on Thursday, 22nd February, 1996 and considered the case against the three writers and came up with a resolution that the three writers were guilty of gross contempt of the House and that they also committed a breach of privileges of the House. The Committee described the three articles as highly inflammatory, contemptuous, libelous and aimed at brining the House into odium and ridicule

The Committee then meted out the punishment of committing the three to custody for an indefinite period from Friday 23rd February 1996 until they contributed or until the House resolved to discharge them. Each of them was also ordered to pay a K1, 000 fines. The three writers were then summoned by the Speaker to appear at the Bar to be informed (not to be tired) of the decision of the House. They failed to go to Parliament on that day, as they were not at their offices where the summonses were directed. Their Counsel, tried

to enter Parliament Building to explain to the Speaker why his clients had been u
comply with the summons, but he was turned away. The two Applicants and Mrs
did not go to Parliament the whole week from Monday 26th February, 1996 to F
March, 1996

On Monday, the 4th day of March, 1996 the two Applicants voluntarily went to Pa
to find out why they had been summoned. They were apprehended and put in cu
the authority of the decision of the Standing Orders Committee and the S
warrants of committal issued on 23rd February, 1996.

The two Applicants filed a Notice of Motion for a writ of Habeas Corpus ad subj
They also asked the court to consider the legality of their detention in custodi
order their release if their detentions were found to lack legal basis or propriety.

It was held that:

1. The Court possesses power on jurisdiction over major Parliamentary actions,
those that affect persons from outside Parliament. And that the purported ou
Courts, jurisdiction by section 34 of Cap 17 only refers to certain minor Parl
actions.
2. That our Parliament is not a court in any sense at all
3. That our Parliament is the Supreme legislative Organ in the land, with power
make, amend or repeal or re-make any laws. In the enjoyment of that power,
subject to the Court's interference as provided for in Article 1 (2) of the constitut
4. That although it is not a Court our Parliament has power to punish for conten
power is inherent in the nature of its status to present its dignity and honour. In

this power includes the common law power to imprison, and not only to reprimand as other lawyers think.

5. That the use of abusive language in a statement, speech or writing can amount to contempt of Parliament.

6. That in dealing with cases of contempt, Parliament must follow the standard procedure of reading the charge to the accused asking him why he should not be found guilty of contempt and so forth. Conviction and passing of sentence in absentia is an aberration of this natural justice procedure of any kind in absentia and merely driven to prison to serve the sentence. The person charged with the contempt has to appear before the Bar. Failure by him to appear at the required time and date is no reason for dispensing with this legal procedure and rule of natural justice.

7. The two Applicants to be released from Prison forth worth.

CHAPTER FOUR

DISCUSSION

15.0 INTRODUCTION

In this chapter Researcher discusses the subject matter of the study; 'The Sovereignty and supremacy of parliament, a comparative study of the British and Zambian systems'. In discussing the subject, Researcher would use the cited cases to demonstrate how a branch of the Zambian Government confused or attempted to confuse the Zambian Parliamentary System with the British System.

16.0 Zambia National Holdings and United National Independence Party v the Attorney General³⁷

This case is unique to the study in that it demonstrated a lack of understanding of the Judiciary of the major differences between the Zambian Parliamentary System and the United Kingdom. Researcher found the case very helpful in his discussion of the subject matter of the study as it clearly brought out salient issues highlighting the role of the bench.

The decision of the Supreme Court is sound, but cannot be supported on the reasons expressed by the Court. It is helpful to proceed on the premise that Article 94 specifically to the kind of matters which may be presented before the High Court.

³⁷ SCZ Judgment NO. 3 of 1994.

case be it civil criminal or otherwise can be presented before the High Court, except those reserved for the Industrial Relations Court.

The meaning of unlimited and original jurisdiction does not relate to remedies, which may be granted by the High Court. Article 94 does not relate to remedies, so that it would be perfectly legal for an Act of Parliament to limit the remedies that the High Court can issue. It is on this premise that legislation which limits the remedies or the sentencing powers in criminal cases, which may be given by the High Court, are constitutional. Section 16 of the State Proceedings Act does not violate Article 94 of the Constitution, because it limits the remedies, which may be ordered by the Court, but does not limit the case, which may be entertained.

Section 34 of the National Assembly (Powers and Privileges) Act is an interesting provision. Unlike the section 16 of the State Proceedings Act, which specifically deals with the issue of relief which may be ordered by the Court against the State, section 34 deals with the jurisdiction of the Court. It provides that neither the Assembly, the Speaker, nor any officer is subject to the jurisdiction of any court in respect of the exercise of any power conferred or vested by or under the Constitution, the Standing Orders and under the National Assembly (Powers and Privileges) Act. Apart from some incremental changes introduced in 1976, this has been the language of section 34 since the enactment of the legislation in 1956, as Legislative Council (Powers and Privileges) Ordinance No. 34 of 1956.

The said provision does not and cannot be taken to mean that courts in Zambia cannot inquire into the exercise of the power of the Speaker, the Assembly or an officer of the Assembly conferred by the Constitution, the Standing Orders or the Act itself. Section 34

does not oust the jurisdiction. The Court has a role, and a major role for that the to play in the exercise of the power vested in that Assembly.

The question which may be posed is: Who has the power to determine whether the exercised by the Assembly, the Speaker or officers of the Assembly are indeed ve the Assembly, the Speaker or the officers under the National Assembly (po Privileges) Act, the Constitution or the Standing Orders? It would no doubt be ab contend that the Assembly itself has the power to determine the question. This undermine the basis of the system of government which is founded on the rule of opposed to the rule of men. The dangers inherent in contending otherwise, is t Assembly or the Speaker may purport to assume powers which he may not have. duty of the court to interpret the relevant provisions of the Act, Constitution and S Orders and make the necessary findings.

In the case of *Dr Ludwick Sondashi vs The Attorney General and Speaker of the Assembly (1998) /HP/111*, the applicant was suspended from the National Asser account of a statement he made to the press stating that coups can someti positive. He applied for an order of certiorari to quash the decision to suspend him alternative, an order that the decision was null and void as it was made in bad faith contravention of Articles 20, 64, 65 and 71 of the Republican Constitution as re Sections 19 and 28 of the National Assembly Powers and Privileges Act.

The issues which had to be determined were:

- (a) Whether the applicant's freedom of expression guaranteed by Article 20 Constitution was contravened;

(b) Whether if the answer to (a) was in the affirmative, the court had jurisdiction to grant the applicant the relief he was seeking.

It was held that the High Court had jurisdiction to entertain the application as it had a Constitutional duty to enforce the bill of rights by virtue of Article 28 of the Constitution. The court noted that although Article 87 of the Constitution provides that the law and custom of Parliament of England shall apply to the National Assembly, such customs and law must not be inconsistent to the Zambian Constitution. The court pointed out that an Act other than the Constitution cannot diminish any of the rights guaranteed by the Constitution. Therefore no Act can oust or curtail the jurisdiction of the High Court contained in Article 28 of the Constitution.

If the National Assembly was desirous of taking away from the High Court jurisdiction in actions affecting the National Assembly, including actions arising from Articles 11-26, it should provide for this in the Constitution itself. The distinction between the internal and external business of the house is irrelevant in Zambia. Therefore the court held that the applicant's freedom of expression guaranteed by Article 20 of the Constitution had been violated. If the action taken by the house against him was allowed to stand, it would have a negative effect of curtailing his expression. There can be no freedom of expression where there is some section to follow.

The Constitution is founded on the principle of separation of powers. According to Article 62 of the Constitution the function of the National Assembly and all its officers acting together with the President is to legislate. The responsibility of interpreting the law vests in the judicature, which according to Article 91 of the Constitution consists of the Supreme Court of Zambia, the High Court for Zambia and any other court that may be prescribed under an Act of Parliament.

Section 34 does not limit the jurisdiction of the Court to review exercise of the power of the Assembly, Speaker or officers. The Court has the jurisdiction to hear any complaint or issue raised against the Assembly, the Speaker or against the officers of the National Assembly and it is for the Court to determine whether the subject matter complained of which is the subject of the application before the Court falls within the competence or jurisdiction of the Assembly, Speaker or the officer of the Assembly. If the Court holds that the subject matter which is the cause of the complaint is within the competence of the Assembly, the Speaker or the officer of the National Assembly, the court will uphold the action taken. But if it is found that the Assembly or the Speaker has exercised power which he does not have under the Act, the Constitution or the Standing Orders, the court will say so and make such directions or orders as may be deemed fit to correct the position.

Not even in the United Kingdom, where there is no written constitution in the traditional sense, is there a complete ouster of judicial review into the activities of Parliament. In the case of *British Railways Board v. Pickin (1973-74)*³⁸ Lord Denning observed "It is the function of the court to see that the procedure of parliament itself is not abused, and that no undue advantage is not taken of it. In doing so the court is not trespassing on the jurisdiction of Parliament itself. It is acting in aid of parliament and, I might add, in the name of Justice."

In *The People vs Chairman of the Standing Orders Committee of the National Assembly (Experte Mundia) (1971)* the applicant who was a Member of Parliament was suspended from the house for three months for gross contempt of parliament. The case

³⁸[1974] WLR 208.

determined by the Standing Orders Committee which has power under order 137 to consider any matter which the Speaker may refer it.

The applicant applied for an order of certiorari in that the Standing Orders Committee had disregarded certain procedural rules in the manner that the case was handled. The court said that the application raised important constitutional issues of the extent of the High Court's jurisdiction in relation to the affairs of parliament and that "*this is a problem which has led to considerable conflict in England in reconciling the law of privilege of the House of parliament with the general law*".

The court then referred to *Erskine May's parliamentary practice* "the situation marked out by the courts is to insist on their right in principle to decide all questions of privilege arising in mitigation for counts with certain and large exceptions in favour of parliamentary jurisdiction. Two of these which are supported by great weight of authority are the exclusive jurisdiction of each house over its own internal proceedings and the right of either house to commit and punish for contempt".

The court then cited *Stockdale vs Hansard (1839) 9 Ad. & E.1.* in which all the four Judges held that over its internal proceedings, the jurisdiction of the House of Commons was exclusive. In the result, the High Court dismissed the applicant's application for certiorari.

It is also worth noting that the Constitution in Zambia is the supreme law of the land. Article 1 (2) of the Constitution of 1991 provides: "*This Constitution is the Supreme law of Zambia and if any other law is inconsistent with this Constitution, that other law shall, to the extent of the inconsistency, be void.*"

It follows that if it is contended that the Section 34 of the National Assembly (Powers and Privileges) Act bars the court from inquiring into the exercise of powers conferred on the National Assembly, the Speaker or the officers of the Assembly, then section 34 is ultra vires Article 94 of the Constitution as it is detracting from the jurisdiction conferred by the Constitution. The provision does not limit the powers of judicial review on the part of the Court. The Court still has to examine whether what has been done is *intra-vires* the Constitution, the National Assembly (Powers and Privileges) Act and the Standing Orders. The scope of judicial review by the High Court is unlimited in Zambia, except for powers expressly reserved for the Industrial Relations Court. It follows that the High Court can hear a complaint against any one in Zambia, and adjudicates on it as provided for in the Constitution.

Without the position observed by the court, it would follow that if it is contended that Section 34 of the National Assembly (Powers & Privileges) Act bars the court from inquiring into the exercise of powers conferred on the Assembly, the Speaker or the officers of the Assembly, then section 34 is ultra vires Article 94 of the Constitution as it is detracting from the jurisdiction conferred by the Constitution. The provision does not limit the powers of judicial review on the part of the Court. The Court still has to examine whether what has been done is *intra-vires* the Constitution, the National Assembly (Powers and Privileges) Act and the Standing Orders.

It must be noted that the Supreme Court relied quite heavily in determining the "jurisdiction" of the High Court on cases decided in the England. The Supreme Court did not note the unique constitutional position of England. The jurisdiction of the High Court in England is prescribed by Acts of Parliament. The court cannot therefore exercise a jurisdiction greater than that prescribed in the Acts of Parliament.

The position in Zambia is different. It is the Constitution which has prescribed that the High Court shall have unlimited and original jurisdiction to hear and determine any civil or criminal proceedings under any law and such jurisdiction and powers as may be conferred on it by the Constitution or any other law. The only limitation on the jurisdiction which applies to the High Court is on matters which have been specifically reserved to the Industrial Relations Court under the Industrial and Labour Relations Act Cap 269 of the Laws of Zambia.

For instance the Industrial Relations Court can hear and determine a complaint by a person alleging that his employment has been terminated or has suffered penalties or disadvantages in employment on account of his tribe, sex, marital status, religion, political opinion or affiliation or status. The Industrial Relations Court may order reinstatement or damages or both if the allegations have been established. But the High Court cannot entertain such applications or complaints. This is so because such matters have been exclusively reserved to the Industrial Relations Court by the Constitution and the Industrial and Labour Relations Act provides that such complaints shall be heard and determined by the Industrial Relations Court.³⁹

This limitation is imposed by the Constitution itself and not by an Act of Parliament. It is the Constitution, which also recognises the provisions of the Industrial Relations Court Act on jurisdiction. The language of the Constitution also envisages that the Constitution or an Act of Parliament may confer jurisdiction on the High Court on other matters, but it is difficult to see what these matters may be, since the Article 94 already confers unlimited and original jurisdiction on the High Court, except for matters reserved to the Industrial Relations Court.

³⁹ See Section 108 of the Industrial and Labour Relations Act.

In the case of *Wynter Kabimba v Lusaka City Council and The Attorney General* the Supreme Court was able to stay the Government's decision made by the Minister of Home Affairs of the Government transferring the applicant to another district. The Court distinguished between an injunction and an order for stay of the decision being challenged.

17.0 CHRISTINE MULUNDIKA AND SEVEN (7) OTHERS VS THE PEOPLE (1995-1996)
P.20

This case clearly demonstrated the misunderstanding between the Zambian parliamentary system and that of the British from which we inherited most of our laws as a colony. The actions of the Executive Organ of Government in Zambia continued to hold that an Act of Parliament, though inconsistent with the Republican Constitution was valid and enforced accordingly as will be shown in our discussion of the case.

In response to the annulment of section 5 (4) by the Supreme Court, Parliament passed Act Number 1 of 1996 which was assented to on 3rd March, 1996. The section was subsequently replaced by Act Number 36 of 1996. Section 5 (4) to date provides as follows:

"Every person who intends to assemble or convene a public meeting or demonstration shall give police at least seven days notice of that person's intention to assemble or convene such a meeting, procession or demonstration. Section 5 (5) of the Public Order Act provides that the notice shall be in the prescribed form and shall contain an undertaking by the persons intending to assemble or convene a public meeting, procession

demonstration that order and peace shall be maintained through the observation of the following conditions;

- (c) that they have been informed by the police that the site for the meeting has not already been granted to another convener for the holding of a public meeting, procession or demonstration,
- (d) that the route and width of the route is suitable for holding of a procession in accordance with the width and route specifications for such purpose as specified by the Minister by statutory order,
- (e) The Marshals of a number sufficient to monitor the public meeting or procession or demonstration are available and shall co-operate with the police to ensure peace and order,
- (f) That the commencement, duration and destination of the public meeting, procession or demonstration shall be notified to the police,
- (g) That the public meeting, procession or demonstration shall not create a risk or public safety, a breach of the peace or disaffection amongst inhabitants of that neighbourhood and,
- (h) That the convenors of the meeting, procession or demonstration have been assured by the police that at the time the proposed activity shall be held, it will be possible for it to be adequately policed.

Section 5 (6) of the Act provides that where it is not possible for the police to adequately police any particular public meeting, procession, or demonstration the regulating officer of the area shall at least five days before the date of the public meeting, procession or demonstration communicate in writing the reasons for the inability of the police to police

the public meeting, procession or demonstration and shall propose an alternative date and time for the holding of such public meeting, procession or demonstration.

Section 5 (7) provides that where the police notify the convenors of a public meeting, procession or demonstration that it is not possible for the police to adequately police the proposed public meeting, procession or demonstration, such public meeting, procession or demonstration shall not be held

Section 5 (8) provides that if the convenors of the public meeting, procession or demonstration are unsatisfied with the reasons given by the regulating officer under subsection (6) they may immediately appeal to the Minister who shall decide and inform the convenors in writing of his decision on the matter within a period of 5 days.

Section 6 of the Act criminalizes the holding of an unlawful assembly and provides a penalty of a fine on conviction

The Amendment Act still has unacceptable features, which make it difficult for people to enjoy freedom of assembly and expression unhindered. It is arguable, for instance, that the requirement of 7 days advance notice in every situation is a prior restraint on the exercise of the fundamental rights to expression and assembly. What it means is that people cannot participate in a public meeting, procession or demonstration unless they first notify the police. There is no reasonable justification for requiring 7 days advance notice in every case.

On numerous occasions in Zambia, police have stopped people from holding rallies, processions and demonstrations on the spurious grounds that they do not have adequate manpower. Yet, if the rally goes ahead, the police are able to mobilize hundreds of officers to disperse the rally at very short notice.

The case that comes to mind on this issue is that of *Resident Doctors Association of Zambia and 51 others vs the Attorney General 1997/ HP/0817 (unreported)*. The facts of the case were that on 20th April, 2000, the petitioners gave written notification to the Senior Assistant Commissioner of Police and the regulating officer, that the petitioners intended to hold a peaceful procession on 27th April, 2000, to register public awareness to the poor health care in the public hospitals and the poor conditions of service for Doctors.

In response to the notification, the Senior Assistant Commissioner rejected the notification on the ground that the procession will lead to a breach of public peace. The Commanding Officer testified that suspected Movement for Multi Party Democracy (MMD) youths from Kulima tower and markets would attack the petitioners and cause damage to property and loot shops. It was further testified by the Commanding Officer that these youths were instigated by somebody in the government to attack the petitioners because of the wrangle between the petitioners and the government.

The trial court established that the procession which the petitioners conducted was a peaceful one. The petitioners were not attacked. In fact, the petitioners almost came to the end of their procession without any attacks or interruption from any member of the public. The only interruption came from the police themselves

In the judgment which was handed down on 19th April, 2001 Justice P observed at page 18 that:

"The combined operation Subsection (4) (5) and (6) of the Public Order Act 1986 does not require any person wishing to hold a public meeting or procession or demonstration to not require to obtain a permit from the police for such an event and the police have no power to issue a permit to any person before that person has held a public meeting, procession or demonstration and that the police have no power whatsoever to refuse any person from holding a public meeting, procession or demonstration at all. For those who administer the Public Order Act, 1986, they have erased the word permit from their minds and substitute it with notification. All that the police can demand from a person wanting to hold a public meeting, procession or demonstration is a notification of at least seven days. If such notification and the undertaking as to the public meeting, procession or demonstration being peaceful have been given, the police must police the public meeting, procession or demonstration at the time and on the date proposed by the conveners of the public meeting, procession or demonstration, if the police adequately police the public meeting, procession or demonstration on the date proposed by the conveners, the regulating officer is under no obligation to propose an alternative time and date at which the public meeting, procession or demonstration should take place and police must police the public meeting, procession or demonstration on the alternative date unless of course a serious breach of peace happens which makes it impossible for the police to police the public meeting, procession or demonstration. For example, if there is a riot in town which the police is fighting to prevent, the police cannot give threatened breach of peace as a reason

notification..... The power to decide whether the meeting, procession or demonstration will cause a breach of peace is no longer with the regulating officer as it was in the repealed law”.

Justice Peter Chitengi went on to observe on page 20 that:

“The police have no power to reincarnate repealed laws and make themselves an albatross around the necks of the Zambian people in the enjoyment of their fundamental rights and freedoms which are not only guaranteed by the constitution but are also their birth right. The courts which are charged by the constitution with the responsibility of protecting the people’s fundamental rights and freedoms will not allow a situation where the people’s fundamental rights and freedoms slip through their fingers like quick sand”.

The court ultimately held that:

- (i) the regulating officer or the police have no power to refuse notification on the basis that a public meeting, demonstration or procession will cause a breach of peace;
- (ii) the regulating officer or the police have no power to cancel a public meeting, demonstration or procession on account of the inability of the police to police the event without proposing in writing an alternative date and time five days before the taking of the event;
- (iv) The police action and conduct violated the petitioner’s freedoms of expression and assembly and association guaranteed in Article 20 and 21 of the constitution;
- (v) The police action and conduct was in breach of the Public Order Act.

The Amendment Act does not provide adequate safeguards against arbitrary action nor does it provide effective controls against abuse by those in authority, when the law. The provision for an appeal to the Minister is not an effective safeguard as we all know, Ministers are rarely impartial and are, in fact, highly partisan. It is unlikely that the minister will overrule the police, especially where the appeal is by perceived opponents or critics of the government. As a matter of fact, in practice has been no recorded instance where the Minister has ever upheld an appeal.

The provision of further appeal to the High Court is nothing new as the court always had the power of judicial review of administrative decisions. There is nothing in the Act, which requires the court to hear and determine the appeal within a short time. It is well known that civil cases take a long time to resolve in the court. Litigation in the High Court is an expensive affair. How many citizens have the time and patience to wait until final resolution of the matter in court?

Another major flaw in the Amendment Act is that it lacks flexibility. Seven days must be given in every instance. Yet there may be many instances where people need to meet or demonstrate before the expiry of 7 days. Needless to say, demonstrations, processions and public meetings are often convened in response to an event. It may often be necessary to respond quickly to an event or occurrence. Since the Amendment Act was passed in 1996, it has been used principally to stifle dissent. The Public Order Act has been enforced discriminatorily according to the nature of the opinions held by particular individuals. Advocacy NGOs, opposition political parties and other critics of the government have been prevented from holding public demonstrations and processions on numerous occasions.

It is obvious that, although the Constitution recognizes the need for restrictions on fundamental rights, it requires that the restrictions must meet certain criteria. Thus, the restrictions- (i) Must be prescribed by law; (ii) Must be in one of the specified interests; and (iii) Must be shown to be reasonably justified in a democratic society.

In order for a restriction to be prescribed by law, certain requirements must be met. In *Pumbun and another v Attorney General and the Tanzanian Court of Appeal* stated ".a law which seeks to limit or derogate from the basic right of the individual on grounds of public interest will be observed by Article 30(2) of the constitution only if it satisfies two essential requirements. First, such a law must be lawful in the sense that it is not arbitrary. It should make adequate safeguards against arbitrary decisions, and provide effective controls against abuse by those in authority when using the law. Secondly, the limitation imposed by such law must not be more than is reasonably necessary to achieve the legitimate object.

This is what is known as the principle of proportionality. The principle requires that such law must not be drafted too widely so as to let everyone including even the untargeted members of society. If the law, which infringes a basic right, does not meet both requirements, such law is not saved by article 30 (2) of the constitution; it is null and void. And any law that seeks to limit fundamental rights of the individual must be construed strictly to make sure that it conforms with these requirements, otherwise the guaranteed rights under the constitution may easily be rendered meaningless by the use of the derogative or claw back clauses of that very same constitution" (1993) 2LRC 317.

The Public Order Act is in general and Section 5 in particular is not achieving the intended result, because as the Supreme Court observed in the Mulundika case that:

"Unfortunately experience teaches and it is sadly not hypothetical that in this country, the requirement for a permit to gather and speak has been used since 1953 to muzzle, critics and opponents as well as alleged troublemakers. It has also been used to deny permission on grounds that had nothing to do with securing public order and safety. For example, there was much litigation in the courts during the recent transition to plural politics engendered by denial of permits on spurious grounds".

Freedom of expression is guaranteed by the constitution. In the decided case of *Saunders v Post Newspapers limited and printipak Zambia limited (1992)/HP/1395 AND 1804 (1993/HP/821 (Un reported)* Chief Justice Mathew Ngulube sitting in the High Court observed that the constitutional protection of reputation and free speech or press should be balanced. The Chief Justice went to observe that:

"..... the trick is to balance the competing rights and freedoms.. The solution lies in the application of the existing law a more imaginative and innovative way in order to meet the requirements of an open and democratic new Zambia....."

The Supreme Court of India in the case of *Rangarajan vs Jagjivan Ram and Others (AIR 1979 SC 1013)* expressed the point aptly as follows:

" In a democracy it is not necessary that everyone should sing the same song Democracy is a government by the people via open discussion..... The public discussion with people's participation is a basic feature of democracy.... Democracy can neither work nor prosper unless people go out to share their views. The truth is not that public discussion on issues relating to administration has positive value.

In deciding the case of Mulundika the court made reference also to the under listed cases:

(a) *The State vs The Ivory Trumpet Publishing Company Limited and others (1984)*

5NCLA P. 736

(b) *Re: Munhumeso and others (1994) ILRC 282*

3.0 FRED M'MEMBE AND BRIGHT MWAPE VS THE ATTORNEY GENERAL (1996) HCZ

JUDGMENT NO.25

Researcher found this case to be very interesting in that he was able to see and assess the extent to which the Legislative arm of government could go in disregarding the separation of powers of the three organs of government. The conduct of parliament was a total failure of its role as outlined in the Zambian Constitution thus its inclusion in the study.

Readers will be able to understand and appreciate Researcher's concerns with regard to the differences between the Zambian and British parliamentary systems. Unless therefore one understood the differences, it would be very difficult to have a transparent system that would respect and uphold the concept of rule of law, social justice and fair play. Parliament acted as though it was the supreme organ in the nation and yet it is the

Republican Constitution. The action was therefore a clear misconception of the System.

In Researcher's view the reasoning of the Judge in arriving at his judgment did not address our parliament's position in sending people to prison. Counsel for the accused came out clearly on the issue when he stated that provisions of section 25 of the National Assembly Act, Cap 17 of the laws of Zambia, the prosecution for the charge of contempt under that section takes place in the ordinary Courts of the land, away from Parliament and is conducted by the Director of Public prosecutions, as is provided for in section 27 of the same Act. Going by these provisions, the role of parliament in our situation is to legislate and not to sentence people to prison. If this role was to be done by parliament, should then courts exist if one was to ask? The other question one would ask has to do with the source of the powers parliament used. Where did it get such power?

Counsel added that if our Parliament had power to send any person to prison for contempt that power would have been specifically provided for in chapter 17 of the laws of Zambia in the Standing Orders or in the Constitution. These documents have not given parliament such powers! The Judge should have come out clearly on this issue than to depend on Common Law.

The reasoning with regard to the Court possessing power on jurisdiction over Parliament's actions, especially those that affect persons from outside Parliament, and the purported ouster of the Courts, jurisdiction by section 34 of Cap 17 was flawed. Parliament is not supreme in our context and therefore checks and balances should be observed at all times. If courts had no such powers then parliament could do anything.

Counsel argued that the Zambian Parliament had no power to commit any person to prison not even its own member of Parliament, because neither the National Assembly (powers & privileges) Act, Cap. 17 nor the constitution gives it any such powers. The issuing of the arrest order, and the Committal Warrant were all illegal, Counsel argued. He rejected an interpretation that section 28 of Cap 17 gives our Parliament power of Committal. He said that the House of Commons exercised that power because the Courts in Britain have, by practice or tradition, extended that power to them. No such practice and convention has taken place in Zambia.

Such a position obtains in Britain because that Country does not have a written constitution. In a country with a written constitution, power of Parliament to commit for contempt has to be specifically provided for.

On the provisions of section 25 of the National Assembly Act, Cap 17 of the laws of Zambia, he said that prosecution for the charge of contempt under that section takes place in the ordinary Courts of the land, away from Parliament and is conducted by the Director of Public prosecutions, as is provided for in section 27 of the same Act. He added that if our Parliament had power to send any person to prison for contempt that power would have been specifically provided for in chapter 17 of the laws, in the Standing Orders or in the Constitution. Even if our Parliament had rules of procedure in dealing with contempt cases or other matters, those borrowed rules would be below our constitutional provisions.

Before making his decision, the Judge had to answer the following questions:

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Before making his decision, the Judge had to answer the following questions:

1. Whether, though not a Court the National Assembly can commit a person to prison so under what law?

2. Whether a proper procedure was followed in sending the two Applicants to prison?

3. Whether in this case before Court the two articles by the two Applicants contained words or terms that were scandalous, contemptuous and meant to ridicule the House and bring it into odium

The Judge stated that the Zambian Parliament is not a Court of record. The British House of Commons is also not a Court of record on its own, yet it has power to commit for contempt (See chapter 8 of Erskine May). It has been argued that the British Courts have only recognised the power of the House of Commons to commit for contempt on traditional grounds, otherwise it is not supposed to have that power, as it is not a Court of record.

Counsel for the accused cited the case from the Maltese House of Representatives (already cited), which is not a Court of record. This Court exercised the power of committal and probably still does so. The legislative Assembly of the State of Uttar Pradesh is also not a Court of record, and yet it committed Keshav Singh to prison. The Judge further said that if he had time to look at the usage and practice of more other Commonwealth law parliaments, like Australia and Canada, he strongly believed that he would have found the same practice, namely that those Parliaments do exercise the power of committal.

He felt that the reason why Commonwealth Parliaments exercise the power of committal is simply that it is the only way they can deter those who deliberately plan to insult its members and officials, or lower its dignity through odious utterances or writings.

Zambian Parliament is a Commonwealth, which emulates a lot of its practice from Britain and other commonwealth countries.

On the basis of this argument he found that our Parliament even in the absence of express constitutional or other statutory provisions has the power to commit to prison any person whom it finds guilty of contempt of it, or of breach of any of its privileges. As already said there are no express provisions to that effect in our constitution and in the National Assembly (Powers and Privileges) Act, Cap. 17. *"But I have noted from the readings, which I have just done that Parliamentary law, which Counsel correctly called by the Latin name of 'Ief Parliament', is largely a law, which has been built up of practical experiences, rather than express statutory provisions".*

"The warrants of Arrest, the committed warrants and the whole procedure following in incarcerating the two applicants were proper. The requirement of 'a resolution' stated in section 28 (3) Cap. 17 was satisfied by the support the House gave to the Speaker's Ruling against the two Applicants".

CHAPTER FIVE

CONCLUSION

19.0 SUMMARY

As could be seen from the discussion of the subject matter in chapter four, one can conclude that if the two systems are not properly distinguished, serious problems will arise in the dispensation of justice and fair play in the nation. There will be no Rule of Law as the jurisdiction of the court would be ousted. As could be seen from the cited literature in the study, the Zambian Parliamentary System has greatly been confused with the British Parliamentary System by the Judiciary, Legislature and the Executive in many instances. Other scholars have deliberately attempted to cite occurrences under the British System to justify their

In the United Kingdoms, among the three organs of Government: the Executive, the Judiciary and Parliament, Parliament is held to be supreme. This means that the Executive and Parliament are supreme and any other laws inconsistent with the Acts are null and void. The House of Commons also exercised the power to commit persons to prison before the 17th century. Courts in Britain have, by practice or tradition, extended that power to themselves. This position obtains in Britain because that Country does not have a written constitution. In a country with a written constitution, the power of Parliament to commit for contempt must be specifically provided for.

3.0 RECOMMENDATIONS

From the view point of the literature review of both the Zambian and British parliamentary systems and the discussions of the subject matter in Chapter three of the study, Researcher had the following recommendations to make:

- (i) Independence needs to be created between the Executive and the Legislature. Some of the petitioners before the Mwanakatwe Constitutional Commission called for the appointment of Ministers from outside Parliament as opposed to from the National assembly, which has been the practice since the position of Minister was introduced.⁴⁰ Article 107(2) of the proposed constitution made provision for the appointment of Ministers from outside the National Assembly. The proposal was meant to strengthen the position of the National Assembly by making it independent, separate and distinct from the Executive, so that it could effectively play its role and check on administrative actions. This proposal was never introduced in the Constitution (Amendment) Act of 1996. It died with the draft Constitution.
- (ii) The Select Committee system can be greatly improved by uplifting the qualifications for election to the National Assembly. Right now any body qualifies going by Article 64 of the Constitution. This Article says that subject to Article 65, a person shall be qualified to be elected as a member of the National Assembly if: (a) he is a citizen of Zambia; (b) he has attained the age of 21 years and (c) he is literate and conversant with the official language of Zambia.

We have not gone further over what kind of literacy we are talking about in Article. Consequently, the operation of parliament is being affected since everybody in the nation qualifies to be a Member of Parliament. It does not really matter what qualifications an individual has. Now with this kind of scenario, do you expect members of parliament to understand the similarities and differences between our system and that of the British to which we have heavily borrowed? The answer of course no! It's high time that we appreciated this factor if we are interested in the affairs of our country.

Running a country is a complex issue and should not be left to just any body. We are even failing to understand a simple Act in the name of Public Orders Act. The court did a fantastic job to interpret the Act but still, we are failing to implement it.

- (iii) Officials of the three arms of government should from time to time be inducted into the operations of our parliamentary system and how it relates with the Executive System. As at now things are being taken for granted that people serving in the various organs of government know the differences and similarities between the two systems. If the cases cited in the discussion of the study are anything to go by, then this recommendation should be looked at as a matter of urgency.

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APPENDIX 1

LIST OF PEOPLE INTERVIEWED

NO	NAME			
1.	Hon Lucas Phiri	MP Chipangali		
2.	Hon. Fidelis Chisala	MP Kankoyo		
3.	Hon. Emanuel Musonda	MP Lupososhi		
4.	Hon. Benny TataMashimba	MP Solwezi Central		
5.	Hon. John Chibanga	MP Chama North		
6.	Hon. Inonge Wina	MP Nalolo		
7.	Hon. Hunter Kangwa	MP Solwezi East		
8.	Hon. Shemena	MP Solwezi West		
9.	Hon. Gladys Sialumba	MP Mapetizha		
10.	Hon. Ompie N. Libentho	MP Namwala		
11.	Hon. Enock Kacindele	MP Kabompo West		
12.	Hon. Edith Nawakwi	MP Munali		
13.	Hon. Henery Mtonga	MP Kayama		
14.	Hon. Andrew Haakaloba	MP Mogoye		
15.	Hon. Joseph Kasongo	MP Bangweulu		
16.	Hon. Cameron Pwele	MP Roan		
17.	Hon. Catterine Namugala	MP Isoka East		
	MINISTERS			
1.	Hon Brian Chituwo	Minister of Health		
2.	Hon. Geoffrey Samukonga	Deputy Minister Commence		
3.	Hon. Patrick Kalifungwa	Minister Tourism		

4.	Late Hon. Patrick Kafumukache	Minister of Labour		
5.	Hon. Ludwick Sondashi	Minister Works & Supply		
6.	Hon. Judith Kapwimpanga	Minister Lands		
7.	Hon. Silvia Masebo	Minister Local government		
8.	Hon. Mundia Sikatana	Minister of Agriculture		
9.	Hon. Gladys Nyirongo	Minister youth and Sport		
10.	Hon. Marina Nsingo	Minister of Community Services		
11.	Hon. Namundila Mukyokela	Deputy Minister Defence		
12.	Hon. Bett Mushala	Deputy Minister N. Western P.		
13.	Hon. Ronnie Shikapwasha	Minister Home Affairs		
14.	Hon. Norman Chibamba	Deputy Minister Local Government		
	Others			
1.	Mrs Lucy Muyoyeta	Chairperson NGOCC		
2.	Mrs Petronella Chisanga	Deputy Chairperson NGOCC		
3.	Mrs Chibesa Kankasa	Former MCC		
4.	Judge Charles Kajimanga	Judge		