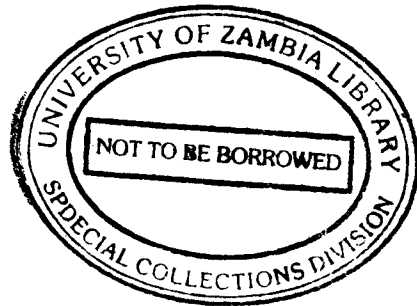


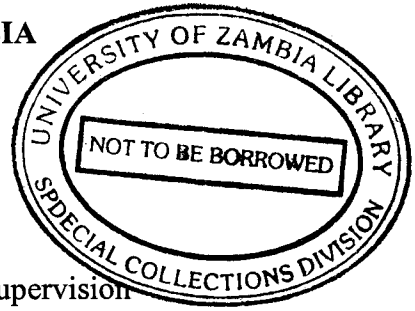
**THE DANGERS OF AN ELECTED MONARCH: THE ZAMBIAN
PRESIDENCY, ITS SCOPE AND LIMIT**



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Entitled

THE DANGERS OF AN ELECTED MONARCH: THE ZAMBIAN PRESIDENCY;
ITS SCOPE AND LIMIT

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ABSTRACT

The problem of Presidential power in Zambia is one that has occupied the minds of many scholars. From Professors of Law, those of politics, politicians to the ordinary Zambian citizen. Forty-one years after independence, the problem of excessive Presidential power has not yet been resolved. Four constitutional changes have occurred all changing and strengthening certain institutions. However, it is old that one institution or organ has remained untouched, the executive and the powers that flow from this organ.

This, however, is not surprising because all such constitutional reforms have been tailored to suit the leader in power. The constitution vests enormous power in the President, most of these to be exercised solely by him. This essay attempts to discuss Presidential power in Zambia, to try and define its scope, nature and limits. It will be observed that the extent of Presidential power goes beyond provision of the constitutions alone. The political system of the country that fuses into the legal regime also contributes to the excessive powers. The connection between the party and those elected to the National Assembly and the President's dominant influence over party affairs increases his influence in Parliament. Thus, over time this President elected by the People may well turn out to be a tyrant, an elected monarch, who may use his enormous power to violate basic constitutional and democratic principles. He may further use such power to his advantage and suppress his political opponents, at times, to the extent of violating basic rights and freedoms.

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powers are in the hands of the individual. The origins of executive power and a single executive cannot be exactly traced to one source, but numerous, from John Locke to Montesquieu, Blackstone and before that to the times of absolute monarch rule. However, speculative writers have sometimes traced the origins of government to a monarch in the forest who gathered in his person all power. At length weary of his responsibilities, the hypothetical potentate delegated some of these powers and responsibilities to his followers who eventually constituted the “courts.” He shared the alters with a more numerous body of his subjects who in due time organized themselves into what is now the “legislature.” The undefined residuum, called “executive power,” he kept for himself.²

This illustration, though odd, clearly illustrates the controversy surrounding the exact extent of executive power. Professor Allan Glendhill wrote that, executive power is what remains of the functions of government after the legislature and judicial powers have been taken away.³ He further wrote that executive power is not limited to execution of the laws, but also extends to actions by governments so long as law does not forbid them. He asserted that government action need not wait upon express legislation to empower such action to be carried out. Professor Alan Glendhill further stated that this connection between the formulation of policy and the preliminary steps necessary to implement it by legislation come into the purview of executive power. However, this view, though plausible, presents its own fears about the nature of executive power. The statement that executive power is what remains after legislative and judicial powers have been taken

² Ibid, pg.3

³ Alan Gendhill, Pakistan: The Development of the Laws and Constitution, 2nd Ed. (1967) p.42.

away and are not forbidden by law, seems to suggest that the President can take any action or do anything so long as it is not to do with legislating or adjudicating and the law does not forbid such action. Thus, the President can one day wake up and make a decision or take any action that is clearly against public opinion or the principles democracy, so long as it is not legislative or judicial and is not forbidden by law. According to Professor Glendhill's assertions this action by the President may be valid and within his executive authority, or, president may expend public resources to further his own political interests and may get away with it because the law does not forbid him from doing, so. It is therefore submitted that this cannot be taken as conclusive interpretation of the nature of executive power.

Another view taken is that, executive power confers an inherent authority to exercise any function, which is inherently executive in nature. It presupposes, therefore, that the function in fact partakes of the nature of execution. This would exclude functions that are not inherently of that nature, such as, the formulation of policy and administration of law.⁴ This again does not do much to explain executive power. It brings back the critical question always asked, what then is the nature of executive power. If Nwabueze suggests that executive power is the exercise of functions inherently executive in nature, he ought, therefore, to go further with this idea, and give us a precise definition of its nature and scope. Secondly, the presupposition that executive power is executory in nature, entails execution of existing laws. This means executive power is a specific grant of power, that which is expressly laid down in the constitution and the laws. Thus, what becomes of these actions taken by the president where no express law exists? What law is he then

⁴ Nwabueze. B.O. Presidentialism in Commonwealth Africa. (1994) C. Hurst and Company, London.

executing, are these not regarded as executive powers as they are neither legislative nor judicial in nature? Further, a strict adherence to the notion that executive power is executory in nature begs the question; does his participation in parliament take the nature of execution? For if his power is only executory in nature, is he then carrying out executive power when he assents to bills passed by the legislature to become law? It is well known that the whole process of law making encompasses the assenting to bills. It is, therefore, the present author's view that strict adherence to defining executive power as executory in nature does not adequately define the nature of boundaries of executive power.

This difficulty of according executive power with precise delineation was also strongly echoed by Daniel Webster, Secretary of State under President Taylor of the United States of America, particularly with regard to the American constitution.⁵ He said:

“The most defective part of the constitution beyond all questions, is that which relates to the executive Department. It is impossible to read that instrument, without being struck with the loose and unguarded terms in which the powers and duties of the President are pointed out. So far as the legislature is concerned, the limitations of the constitution, are, perhaps, as precise and strict as they could safely have been made; but in regard to the executive, the convention appears to have studiously selected such loose and general expressions as would enable the President by implication and construction earlier to neglect his duties or to enlarge his powers (we heard it gravely asserted in congress that whatever power is neither legislative or judicial, is of course executive, and, as such, belongs to the President under the constitution). How far a majority of that body would have sustained a doctrine so monstrous, and so utterly at war with the whole genius of our government, it is impossible to say, but this, at least we know, that if no rebuke from those who supported the particular act of executive power, of which it is urged. Be this as it may, it is a reproach to the constitution that the executive trust is so ill-defined, as to leave any plausible pretense even to the insane zeal of party devotion, for attributing to the President the powers of a despot; powers which are wholly unknown in any limited monarchy in the world.”

⁵ Taff, William H. Our Chief Magistrate and his Powers (1986) Columbia University Press, New York,, pg145

This statement by the secretary of state illustrates the great difficulty of a precise definition of executive power and its nature. Though this was a criticism of the American constitution with regard to the executive branch, a look at similar legal systems of single executive present the same difficulty, what is the nature of executive power then, what are its limits and scope? However, this uncertainty of the nature and extent of executive power was supported by one political analyst⁶, that:

“The grants of Executive power are necessarily in general terms in order not to embarrass the Executive within the field of action plainly marked for him There have not been wanting, however, eminent men in high public office holding a different view and who have insisted upon the necessity for an undefined residuum of executive power in the public interest.”

He however, stated, that the jurisdiction of the President must be justified and vindicated by affirmative constitutional or statutory provisions, or it does not exist.⁷

Further, another matter that seems to complicate the attempt to clearly establish the nature of executive power and adds to the controversy of this phenomena are the opening words of the executive branch under the constitution:⁸ “The executive power of the Republic of Zambia shall be vested in the President, ...” Do these words comprise a grant of power or are they a mere designation of office? If the former, then how are we to

⁶ Taft W.H. Our Chief Magistrate and His Poers (1986) pg.139

⁷ Ibid

⁸ Article 34(2) of the constitution of Zambia (As amended by Ac of 1996)

explain the more specific clauses of grant in the ensuring articles of the same institution?

Nwabueze , in his book,⁹ said the following:

“The other school of thought holds that the clause vesting executive power in the President is a grant of power. This viewpoint has behind it the authority of the US Supreme Court... it held that the vesting of executive power in the President was essentially a grant of power to execute the laws. This view is clearly to be preferred as according more with a common sense interpretation of the clause. What this means, therefore, is that once the legislature enacts a law authorizing, say, the establishment of post offices, then – whether or not the law expressly vests him with the power in that behalf – the president can, by right of the vesting of the executive power in him by the constitution, execute the law.”¹⁰

It is therefore submitted that by the wording of the above quotation, executive power it is suggested does not only comprise the various powers expressly granted but all other acts executive in nature. As long as these powers are not legislative or judicial in nature, even though not specifically granted by the Constitution, but by virtue of being executive in nature are powers of the President. However, the difficulty still remains of attaching a precise definition of what constitutes “executive in nature.” This seems to suggest that , executive power is the residuum of power when the legislative and judicial powers are taken away. But if this view be upheld what remains of the more specific grants of the power? it is this inconclusiveness of what is the exact nature of executive power that has presented numerous problems of clearly limiting the scope of presidential power.

1.3 Theories of Executive Power

A study of the nature of executive power cannot be understood without a look at theories that have been advanced to try and give a definition of the nature of executive. Thus, questions frequently asked are: does executive power embrace all functions that are neither legislative nor judicial? Can executive power be exercised independently of a law

⁹ Presidentialism in Commonwealth Africa (1974). C. Hurst and Company, London Pg. 14

¹⁰ Ibid, pg.14

– a provision of the constitution or statute or other law?”¹¹ Three theories have been expounded.

1.3(a) Residual Power Theory

This theory states that executive power is that which remains when all legislative and judicial powers are removed, power which by its nature is neither legislative nor judicial.¹² Professor Alan Glendhill put it simply as:

“Executive power, is what remains of the functions of government after the legislative and judicial functions of government have been taken away. It is not limited to execution of the laws and, provided it is not forbidden by law, action by government need not wait upon legislation expressly empowering to do it. The formulation of policy and preliminary steps necessary to implement it by legislation come within the executive power.”¹³

The professor’s definition and the theory give an assertion that the executive has inherent authority, independently of an enabling law, to execute any action necessary for the government of the nation, so long as this is not positively prohibited by law.¹⁴

This theory however, has its flaws. The proposition that executive power is what remains when all the legislative and judicial functions are removed is unsatisfactory. It still does not do much to explain what then constitutes executive power. As already stated from the onset, there is no possible definite or precise definition of executive power; yet neither does the constitution explain what it is. The aspect of simply limiting it to

¹¹ Opcit, pg.1

¹² Ibid pg.1

¹³ Alan Gledhill, Pakistan: The Development of its Laws and Constitution, 2nd ed (1967) p.42

¹⁴ Ibid.

execution has remained unsatisfactory for a long period of time. Further, to assert that executive power is that exercised independently of law is to set a very dangerous precedent in modern democratic society. What then is the status of those powers vested in the president by an Act of parliament?

This theory however, has merit in expounding on the meaning of executive power. It includes policy formulation and administration.¹⁵ These indeed have been accepted as the functions of the modern day executive branch and its responsibility to government. This is simply that neither the legislature nor judiciary is really well suited for such a task, their procedure and the limited time nor personnel cannot permit it.

1.3(b) The Inherent Power Theory

According to this theory, executive power confers an inherent authority to exercise any function, which is inherently executive in nature.¹⁶ It therefore presupposes that such function should partake the nature of execution and all other functions that are not inherently of that nature be excluded.¹⁷ Hamilton, a proponent of the American Constitution, greatly supported this theory. He said that:

“The general doctrine of our constitution then is, that the executive power of the nation is vested in the President, subject only to the exceptions and qualifications, which are expressed in the instrument.”¹⁸

¹⁵ Nwabueze B.O. Presidentialism in Commonwealth Africa, (1974) C. Hurst & Company, pg. 2

¹⁶ Ibid, pg.4

¹⁷ Ibid, pg.4

¹⁸ Works of Alexander Hamilton, J.C Hamilton ed. (New York 1857), 76, 80-81

Thus, this theory attributes to executive power the power to execute and do anything that is not prohibited by laws and is not legislative or judicial in nature. However, firstly, this theory as well does not explain what is inherently executive in nature. It also ignores those powers that the president performs together with parliament, are they too not described as executive functions under the constitution – Article 44. Secondly, it talks of execution, does not execution mean to carry into effect - something. Thus, it presupposes then that a law must exist to be executed; this then confines it to the specific grant theory rather than inherent theory. Thirdly, this theory ignores the restraints imposed by the concepts of democracy and constitutionalism in modern states and not just prohibited by law. Fourthly, this theory opens a dangerous avenue of abuse of fundamental rights and freedoms. It infers that as long as the law does not prohibit any action by the executive, it is lawful in respect of whether rights and freedoms may be infringed in the process.

However, this theory is plausible perhaps in the instance of executive action in foreign relations. This has the support of the US Supreme Court in the case of **United States V Curtis –Wright Export Corp**¹⁹

“The broad statement that the federal government can exercise no powers except those specifically enumerated in the constitution, and such implied powers – as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs.”

¹⁹ 229, U.S 304 (1936)

The Supreme Court in this case accepted the existence of inherent executive powers, but only in the conduct of foreign affairs as this was not a characteristic or provided for by the constitution but was passed on from the Crown in Britain.²⁰

1.3(c) The Specific Grant Theory

The third and last of these theories explaining executive power is the specific grant theory. This theory simply states that executive power is the power to execute laws, to carry out into effect the provisions of the law. It presupposes that a law exists that must be executed.²¹ However, this theory does not confine execution of the laws to legislative Acts only, but also the law of the constitution and the law of nations.²² This theory has among all the three received more creditability even from the courts as explaining the nature of executive power.

However, this proposition of execution of the law of the constitution is apt to give, and has in fact given, rise to much dispute regarding the nature and extent of acts that may be done in pursuance of it. This is because of the uncertainty as to what provisions of the constitutions amount for this purpose to a law capable of being executed. Further, the confining of executive power to execution of existing laws raises difficulties. Thus, what is the status of actions carried out by the president that are neither law of the constitution nor laws of nations. However, under the law of necessity this is accepted world wide. The President takes certain action in the absence of any law to refer to or execute. Does this then exclude such action as not being executive in nature. It is neither legislative nor

²⁰ Ibid.

²¹ Supra note 15, pg.10

²² Ibid.

judicial; the specific grant theory does not explain this. This action under necessity in the absence of specific law is however regarded as part of executive power. Further, this theory then excludes the notion that the vesting of executive power clause is not a grant of power at all. However, where a president acts and is required to act in the absence of express legislative grant isn't he empowered to act because the executive power is vested in him. Where the power is vested in a junior officer does it therefore mean the President cannot assume such power because it is not vested expressly in him but is executive in nature.

SUMMARY

It is, therefore, clear that a difficulty is encountered in the definition of the nature of executive power. These three theories, it must be acknowledged, are unsatisfactory if taken independently in trying to define exactly what executive and presidential power is. All embrace aspects of the office, which are recognized and accepted even by the courts of law. Therefore, it is submitted that only an understanding of all these theories can clearly give a more precise picture of what executive power ought to be.

CHAPTER TWO

THE ZAMBIAN PRESIDENCY: AN OVERVIEW

2.0 INTRODUCTION

In the previous chapter we began by looking at the nature of executive power and the problems encountered by many scholars in trying to find a precise definition of executive power. However, a conclusion was reached that there is no universal definition of the nature of executive power.

Therefore, under this chapter we zero in on the subject at hand, the powers of the Zambian president. Two aspects will be looked at, the first being the powers of the president under our constitutional system and secondly, his powers under the political system. These two concepts have in the past and still do influence the extent of presidential power. Of course, the starting point of every President's executive power is the constitution and the provisions there under; further, the kind of political system and how it operates greatly influences the extent of the president's power whether defined strictly in the executive nature or not.

2.1 Presidential Powers and the Constitutional System

Inevitably, when making a study on the President's power, the constitution and powers related to the executive are the starting point. It has been observed that constitutionally,

the powers of the African President are so tremendous that the office of the president has the appearance of a fourth government organ.²³ Nwabueze writes that:

“...the Presidency in Africa has tremendous powers. Its formal powers exceed those of its American prototype – not in nature, but in extent ...Its extent has to be judged in relation to the entire constitutional system in which the presidency operates, that is to say, in the context of the restraints, which the constitution impresses upon the power.”²⁴

Article 34(2) of the constitution opens with the words, “the executive power of the Republic of Zambia shall be vested in the President.” As we have already alluded to, this is a grant of power but already with the uncertain definition of executive power this provision provides difficulty as to the extent of presidential power. Further, under the constitution the president is the head of state and government and commander of the defense forces.²⁵ He has war powers, emergency powers, and treaty-making power, he has power to initiate laws, to appoint and terminate appointments of major public and constitutional offices without parliamentary scrutiny, to constitute and abolish offices, to appoint such number of persons as he considers necessary to be nominated members of the National Assembly; to assent to and promulgate law, to prorogue the National Assembly, and to dissolve it, he presides at cabinet meetings, confers honours and exercises the prerogative of mercy.²⁶

²³ Carlson Anyangwe, “The Zambian Constitution and the Principles of Constitutional Autochthony and supremacy.” *Zambia Law Journal* (1999) pg.18

²⁴ Nwabueze, *Presidentialism in commonwealth Africa* (1974) C. Hurst, London, pg. 104

²⁵ Article 33(1) of the Constitution of Zambia Cap 1 of the laws of Zambia.

²⁶ Articles, 29(1); 30(1); 44(2)(d); 44(3)(b); 54(5), 55(3); 68(1); 44(3)(a); 58(5) and (6); 49(2)(a); 44(2)(f) and 59

As already observed, the constitution vests enormous powers in the president as a person or single organ. This is as opposed to its American prototype, which either vests some of these powers in other organs such as Congress or distributes them between two organs as a form of restraint on their exercise by the president. Under Article II of the American constitution, appointment of Heads of government departments by the President is subject to ratification by congress. This, however, is not so for Ministers in Zambia.

This inclusion of wide presidential powers has been the characteristic of all constitutional reforms undertaken by previous governments. This integration was, however, it must be noted, done by those in government at that particular time. This characteristic dates back to the 1964 constitution through to the current 1996 constitution; the executive branch was and is vested with broad powers. It is no exaggeration to describe the power of the President under these constitutions as enormous. Therefore, a brief but detailed analysis is worth carrying out. Under the 1964 constitution appointment of Ministers was vested in the President as is the case under the current constitution,²⁷ Further, while the 1964 Constitution vested the power to create Ministries in Parliament, the current Constitution vests the power to create and abolish offices of the Republic in the President.²⁸ Thus, there is no security of tenure as there is no ratification by the National Assembly during appointment and removal of these ministers. Further, the President is not obliged to follow the advise of Cabinet.²⁹ Further, these ministers are appointed from among members of Parliament, giving the president influence in the National Assembly. The

²⁷ Article 46 of the Constitution of Zambia

²⁸ Article 44(i) of the 1964 Constitution and article 61(1) of the Constitution of Zambia 1991(as amended by the Act of 1996)

²⁹ Article 44(6) of the Constitution

appointment of Ministers from among Members of National Assembly by the President continues to be a provision found in the current constitution. This is despite recommendations of the past two constitutional Review Commissions to separate the position of minister from members of Parliament. The Mvunga and Mwanakatwe Commissions³⁰ recommended for a Cabinet outside parliament which the government rejected saying that being policy initiators, the ministers needed to support and defend their policies in parliament. This was a plausible argument but unnecessary. It is submitted that even without ministers being from among MPs their policies can be implemented and defended when they are called before parliamentary committees to brief these committees, as is the case under the American congressional committee system. Further, divorcing cabinet from parliament will enhance separation of powers because the executive influence will be detached from the legislature and further make parliament independent and an effective check and restraint on the exercise of executive power.³¹ The President further, appoints the vice-president who serves at the pleasure of the President and performs such functions as the President may delegate.³² Critics of executive power have argued that due to this provision the president controls succession to the presidency in the event of death, disability or removal.³³ The Chona Constitutional Review Commission tried to curtail this by dividing the executive power between the President and Prime Minister, where the latter would have power to appoint other ministers.³⁴ This was, however, rejected by government and though the office of Prime

³⁰ The Mvunga Constitutional Review Commission 1991 and Mwanakatwe Constitutional Review Commission 1996, recommendations on appointment of cabinet

³¹ "Minister outside Parliament." By Kabanda Simon. The Post Newspaper, Wednesday July 27, 2005

³² Article 45(4) of the constitution

³³ Ndulo M. and Kent E." The Constitution of Zambia", Vol.30, Zambia Law Journal, (1999) pg.7

³⁴ Ibid, p.72

Minister, was accepted the powers of the office were substantially reduced in favour of the preservation of the powers of the President.³⁵ Further, the president enjoys under the constitution wide discretionary powers of detention during a state of emergency³⁶ which has a great impact on fundamental rights and freedoms.³⁷

Another power vested in the executive is the power of the purse.³⁸ This is unlike the American system where the power of the purse is exclusively vested in Congress. To provide an effective restraint on the executive, which the framers of the American Constitution viewed as a single most powerful organ, they saw it fit to vest the money power in Congress. This has to a large extent prevented abuse of state resources. However, in Zambia, the Constitution states that no money will be expended from government reserves unless authorized by a warrant under the hand of the President. Parliament's participation in controlling such expenditure is however, limited. The National Assembly is not, however, exclusively left out; it is submitted, however, that this participation of parliament is rather highly circumscribed. It is limited firstly, to instances when the Minister at the beginning of each financial year prepares and lays before the National Assembly estimates of revenue and expenditure, which the National Assembly must approve and these Heads of estimates together with the amounts are included in these Appropriation Bill.³⁹ Secondly, to instances where at the end of each financial year the Minister of finance presents a report, which includes revenue, received

³⁵ Ibid, p.13

³⁶ Amnesty International Report: Zambia, Misrule of Law: Human Rights in a State of Emergency, 2nd March, 1998. p.16

³⁷ Ndulo and Kent. The Constitutions of Zambia (1999), Vol .30, Zambia Law Journal . p. 7

³⁸ 115 (2) of the Constitution of Zambia

³⁹ Article 117 of the Constitution

by government and expenditure within that financial year before the National Assembly.⁴⁰ Thus, when and where this money is channeled to and expended is outside the control of the National Assembly. Further, the President holds the power of the purse, he has the exclusive power to issue a warrant for moneys to be expended without parliamentary scrutiny.⁴¹ This is unlike in the United States where Congress holds the power of the purse. The power to negotiate, sign and make international agreements and treaties is under the Zambian Constitution exclusively vested in the President. The Mwanakatwe Constitution Review Commission had recommended that such power to negotiate, sign and make international agreements and treaties be done with the approval of the National Assembly. This, was however, rejected by government. This rejection is to some extent plausible, this is supported by the opinion of the U.S. Supreme Court in the case, **United States V Curtis – Wright Export Corporation**, 229US.304 (1936) where the court was of the view that in the field of negotiation of treaties the President was to have exclusive power as he was the sole organ of the federal government in the field of international affairs. He alone, rather than congress, had the better opportunity of knowing the conditions, which prevail in foreign countries, he has confidential sources of information and he has his agents in the form of diplomatic, consular and other officials. However, it did accept that when it came to making of such treaties participation of congress was necessary. In Zambia parliament only participates in this power in so far as making an international treaty already negotiated and signed by the executive is to have domestic effect.⁴³ Thus, how the country interacts with other foreign nations as regards trade, investment, economic integration and financial agreements (loans, aid) is the

⁴⁰ Article 118.

⁴¹ Article 115.

⁴³ Carlson Anyangwe Supra note 23. p.19

exclusive prerogative of the president and parliament has no influence at the international level.

Finally, but not least, the effectiveness of restraints in which executive power operates in the constitutional system determines its extent. It has been noted that the ineffectiveness of restraints on Presidential Power has contributed to enormous extent of Presidential powers in Africa.⁴⁴

The President under the constitution appoints the Chief Justice, Deputy Chief Justice and other judges of the Supreme Court subject to the ratification of the National Assembly.⁴⁵ Further, under Article 95(1) of the constitution the President appoints puisne judges with the advice of the Judicial Service Commission and subject to ratification by the National Assembly. Thus, the appointment authority exhibits some level of influence over the judiciary. Seldom does the judiciary want to come into conflict with the President more especially in the exercise of his powers under the constitution. The incident of judge Nyangulu's castigation is one such example of Presidential influence over judicial officers.⁴⁶

2.2 Presidential Power and The Political System

The non-complexity of a political system like the one existing in Zambia allows for the expansion of executive power. The president today is politically as well as

⁴⁴ Nwabueze, *supra* note 24 p.104

⁴⁵ Article 93(1) and (2)

⁴⁶ President Mwanawasa's Press Conference of February 8, 2003, *The Post Newspaper*, February 7, 2004, p.2

constitutionally, actually as well as symbolically, the sole representative of all the people.⁴⁷ This has, however, led to the presidency becoming a potentially very powerful figure against its political opponents.

Our political system dictates that the head of a political party that ascends to power in a general election, ultimately becomes the head of state and government. Essentially, the electorate votes for a political party that fields a candidate for the president as well as Members of Parliament. Our constitution does not however, expressly have provisions for such. But this, it is submitted, is of no legal consequence as this is considered axiomatic and is subsumed into our constitutional system and order of the country. The President, therefore, as head of the party and state wields enormous power and influence over candidates to be elected as Members of Parliament to the National Assembly during the selections of those that will stand on the party ticket. They thus, owe their allegiance to the head of the political party.

This expansion of presidential power as a result of the political system within which it operates was mostly seen in the era of the one-party state. The introduction of the one-party system of government greatly strengthened the executive president.⁴⁸ An example of this concentration of power was in the manner in which elections to parliament were organized and conducted. B.C. Chikulo writes,⁴⁹

“...There were two stages for election of members of the National Assembly. The first consisted of primaries in each of the constituencies

⁴⁷ Hirschfield S.R. *The Power of the Presidency: Concepts and controversy*, 3rd ed: Presidential Power and the Political system (1982) Aldine de Gruyter, NY. p.4

⁴⁸ Ndulo and Kent, *Supra* note 37, pg15

⁴⁹ B.C. Chikulo. Elections in a one-party participatory democracy, in Turok, *supra* note 60 201.

in which voting was by an electoral college of party officials. Officials elected by party members only. This primary election provided an opportunity for party officials to eliminate candidates they did not like. The next stage was the vetting of candidates by the Central Committee of UNIP. Its power was to eliminate a candidate considered 'inimical to the interests of the state.' This test was never defined and remained a subjective test in the mind of the executive branch. In practice the system was used to eliminate potential political rivals."

Since the President was the chairman of the central committee, and given the fact that in the one party system the executive office was personalized by the paternalistic, condescending charismatic President, the influence he yielded in the adoption/rejection of would be candidates was too powerful. Therefore, the President had an on over bearing influence on those that were selected to go to the National Assembly. An instance of such influence was witnessed during the periods of 1973-1990. The backbenches had become more critical of Minister's policies and replies to questions in the House. On many occasions, Government Bills, which were seen to be 'inimical' to the interests of the majority of the Zambians, were thrown out. For this reason, parliament was, over the years, seen by the government and the central committee of UNIP as a forum for the opposition party within the one-party system. Thus government consequently worked out an administrative mechanism, which eventually eroded participatory democracy in parliament. The Republican President appointed three quarters of the Members of parliament as District Governor's Cabinet Ministers and Members of the Central committee.⁵⁰ Thus, the executive increased and buttressed its influence in the house through the concept of collective responsibility and through means of patronage.

⁵⁰M. Chibesakunda, *The Parliament of Zambia*. National Assembly of Zambia, Lusaka, 2001 p. 46-47

The selection process of candidates to be elected to parliament even under the current system of multi-partism of today is in effect no different from that which existed under the one-party system. The President as head of the party and chief executive and appointer of MPs to Ministerial positions has great influence over the selection process of candidates for election to the National Assembly from his party. Thus, MPs feel they owe their allegiance to the President through means of party patronage in order that they secure their positions in government. They, thus, become the voice of the President in Parliament. This is coupled with the concept of collective responsibility. Thus, Ministers, though Members of Parliament cannot criticize or oppose government even if they wished to. The effect is to make parliament subservient to the will of the executive. Thus:

“It is not difficult to imagine a situation where, through appointments of ministers and other functionaries who are MPs the house becomes an extension of the executive...”⁵¹

It is therefore inevitable to note that, though there have been changes in our political system from the one-party system to that of multipartism the influence of the executive still remains a growing concern. The nature of our political system has allowed for greater influence of the executive more significantly on parliament. This is coupled with little or no restraint by the opposition. The ambiguous provisions in the Constitution that allow the President to appoint Ministers from among Members of Parliament overshadow the effectiveness of the opposition.⁵² Thus, even appointment of opposition MPs is

⁵¹ Chumpuka, B. Executive – Legislature relationship in one-party state. Obligatory Essay, school of law, 1988-89.

⁵² Article 46(2) of the constitution, see also Article by Simon Kabamba. Ministers outside Parliament. The Post Newspaper, Wednesday 27th July, 2005.

permitted by the Constitution. However, as regards the principle of multiparty democracy it is a gross violation. Thus, Presidents may take advantage of such lacunae in the Constitution to erode opposition within the National Assembly. Therefore, were the majority of MPs are Cabinet Ministers and Deputy Ministers they are tied by collective responsibility while ordinary MPs of the party are tied to the President by means of party patronage. Therefore, they owe their allegiance to the President and the party. This, therefore, increases the executive's influence within the National Assembly thereby rendering parliament an ineffective check of the executive.

Therefore, the Zambian Presidential-parliamentary political system is far from being the ideal structure of providing a check on the President. Members of parliament are elected more on the strength of the party of which the President is the nominating authority or has considerable influence. Thus, these members of Parliament see their responsibility as one to the President than the electorate. This is further coupled by the fact that our system of politics are unaccustomed to the concept where the opposition is seen as a competitor and effective check of the government.⁵³ Most African governments view the opposition as an enemy that must be extinguished, a threat to the effective running of government. Thus, the party in power seeks to destroy the opposition rather than accommodate it.

Further, Lord Hailsham's pronouncements on the influence of the executive on parliament adequately summarizes the influence of Presidential power in the Zambian Presidential-Parliamentary political system. He said.

⁵³ An excerpt from notes compiled by J.P. Sangwa, Lecturer, school of Law, Administrative Law

“The control of Parliament by the executive is such that an elective dictatorship exists. Parliament is essentially powerless, and merely confirms decisions made by the government (executive). Since this situation exists, and there are few constitutional restraints on the power of the government, thus an elective dictatorshipThe most widely supported measure of reducing executive dominance would be to reduce the power of the majority party by adopting the Proportional representation electoral system”⁵⁴

⁵⁴ ‘Elective Dictatorship’ – Wikipedia, the free encyclopedia. Adapted from An Academic paper written by Lord chancellor, Quintin Hogg, Baron, Hialsham of St. Marylebone in 1976.

CHAPTER THREE

PRESIDENTIAL POWER FROM THE PERIOD 1964-2001 AND BEYOND

3.0 INTRODUCTION

The last two chapters have focused on the general characteristics of Presidential/Executive Power. This chapter, focuses on the practical aspects of Presidential power, how presidents have abused the power either for their personal gain or against political opponents. However, due to the nature and undefined limits of executive power, difficulty is seen in declaring actions unconstitutional. However, other acts are obvious abuses of presidential power.

Thus, this chapter focuses on the dictatorial tendencies exhibited by past and current presidents. Therefore, this chapter will focus on Presidential power in the One party state, as well as under the Third Republic from the period 1991 to 2001 and finally Presidential power under the New Deal Administration.

3.1 Presidential Power Under The One-Party System: An Analysis

It must be stated from the outset that many accounts have been given of Presidential power during the one party system of government. This part of the chapter will dwell much on the practical aspects of the power and its relationship with the legislature.

After the fight for independence was won, on 24th October 1964, Northern Rhodesia became an independent state of Zambia and a Republic within the Commonwealth. The first Republic under African Government was born and Kenneth David Kaunda became

the first President.⁵⁵ The attainment of independence was an important turning point in the development of the Parliament of Zambia. Parliament became an independent institution, making up one of the three wings of government, namely, the executive, the judiciary and the legislature. The legislative power of the Republic was vested in the Parliament of Zambia, which consisted of the President and the National Assembly.⁵⁶ Zambia was a multi-party system of Democracy and this evidently was reflected in the composition of the National Assembly. At this time, political development in Zambia required some changes in the Zambian constitution and this affected the operations of the Parliament.⁵⁷ Due to the dominant position of the United National Independence Party (UNIP) during the 2nd session of the National Assembly most leaders were misled into thinking that the opposition African National Congress, a strong opposition to UNIP would die a natural death. President Kaunda and his colleagues thought they would bring about the one-party state by voluntary liquidation of the ANC.⁵⁸ Thus, the dictatorial tendencies and abuse of Presidential power were already beginning to manifest themselves. The need to wipe out the opposition was therefore priority. This view was explicitly put by the President in his speech to the General Conference,⁵⁹

“UNIP was in favour of a one-party state; that we do not believe in Legislating against the opposition, that by being honest to the cause of the Common man, we would, through effective party and Government organization paralyze and wipe out any opposition thereby bring about the birth of a one-party state; and we go further and declare that even when this comes about we would still not Legislate against the formation of opposition parties because we might be bottling the feelings of certain people no matter how few (UNIP, Party Annual General Conference, 1967:10-11).”

⁵⁵N.M. Chibesakunda, *The Parliament of Zambia* (2001), p30

⁵⁶Ibid.

⁵⁷Ibid, p.31

⁵⁸Ibid.

⁵⁹Ibid.

Despite the above pronouncements, in order to perpetrate themselves in power and prevent the democratic process from determining which party should govern Zambia, the UNIP leadership called for constitutional changes, through the 1969 referendum.⁶⁰ Under the referendum, the leadership argued that it was necessary to change sections of the Zambian Constitution in order to make parliament supreme. It was argued further that under the inherited Constitution of 1964, the governing party in Parliament had the power to make any laws it wished. This was by simply getting the votes of the majority of Members of Parliament in the National Assembly. The referendum also stated that the Constitution empowered the party in Government to make amendments to large sections of the Constitution itself simply by getting a majority vote in the National Assembly. It was further argued that to call for a referendum every time the Government wanted to effect Constitutional changes was expensive and a waste of public resources. These resources could be used to provide for clinics, schools, roads and other social services.⁶¹ However, the 1964 Constitution contained a provision that no governing party may make amendments to part 3 and 7 and sections 71, 72 and 73 of the Constitution without a referendum.

Thus, the "yes" vote referendum of 1969, was a referendum that ended all referendums. Pursuant to this, a Constitutional Review Commission was setup in 1972 under the Inquires Act to gather views of how best to establish a One-Party Participatory Democracy. This was then established in December, 1972.⁶² Significant changes to the

⁶⁰ Proceedings of the Annual General Conference of the United National Independence Party Mulunguhi Rock of Authority, 14-20 August, 1967

⁶¹ M. Chibesa Kunda. *The Parliament of Zambia* (2001). National Assembly, Lusaka. p 33

⁶² *ibid.*

⁶³ Article 4(1) and (2) of the 1973 Constitution of Zambia.

constitution involved the declaration of UNIP as the sole-political party in Zambia and, further made it unlawful for anyone to form or attempt to form any political party, or, to belong, assemble, associate with or express opinion in sympathy of such party.⁶³ The Bill of Rights contained in the 1964 Constitution was carried forward into the One-Party Constitution but with major modifications. The fundamental rights provisions remained much the same, though, the new provisions of article 4(1) and (2) greatly limited the enjoyment of these freedoms.⁶⁴

The introduction of the one-party system of government greatly strengthened the executive president. This concentration of power was most evident in the selection of candidates as members of Parliament. The president was head of state, party president and chairman of the central committee.⁶⁵ Thus, his influence in the selection of persons to parliament was great. The influence, and, interference, of the executive into the parliament was most evident. On numerous occasions President Kaunda castigated vocal MPs who spoke against government. One instance, President Kaunda warned that MPs who used their privilege to make wild or unsubstantiated allegations against parliament would be disciplined.⁶⁶ He said:

“I want truths and not half-truths spoken in Parliament. The disciplinary Committee at parliament would be authorized to discipline erring MPs If any of you, for any good reason, should think of a better way of doing things in terms of policies – parliament is not the place for changing Party policies.”⁶⁷

⁶⁴ PART III of the Constitution (Bill of Rights)

⁶⁵ Ndulo, M. and Kent, R.B *The constitution of Zambia*, Zambia Law Journal Vol. Pg.15

⁶⁶ *Times of Zambia*, Friday November 11, 1988 Pg.1

⁶⁷ *Ibid.*

The executive, which was in effect the party, and the President also outlined what the business of parliament would be which parliament was to follow:

“The party will not tolerate vocal MPs who criticize the leadership during the next five years ... candidates must follow strictly the party line when in Parliament or be disciplined. If you do not follow that line you cannot sit in Parliament. If you follow party directives you would be protected but if you deviated you would lose your democracy.”⁶⁸

Clearly, the executive was supreme over the institutions of government. Parliamentary democracy was therefore eroded and parliament greatly undermined. Executive interference was a clear violation of the doctrine of separation of powers and the principles of constitutionalism. The president and executive through its enormous powers thus eliminated parliament as an effective check of the executive. First, at national level, the introduction of the one-party state eliminated the formation and existence of the opposition in parliament.⁶⁹ Secondly, the threats on vocal MPs of disciplinary action against them and threats of not selecting them for coming elections, wiped out opposition within the one-party state itself. Thus, the executive could do as it wished with less limitation from the judiciary and an ineffective parliament.⁷⁰

The one-party system was perceived to be in the interest of unity and economic development, a way to achieve balance between popular participation and central control in the development process.⁷¹ However, subsequent experience in Zambia showed otherwise. The poor economic and political policies coupled with a rise in corruption

⁶⁸ Times of Zambia, Saturday, October 8, 1988, p. 1

⁶⁹ Article 4(i) of the 1973 constitution of Zambia

⁷⁰ Chibesakunda. Parliament of Zambia (2001) p.48

⁷¹ Ndulo and Kent. Constitution of Zambia, p. 11 and 15

had a great impact on the economy. There was an increase in the commodity price of essential goods, increased shortages of basic goods and steep decline in total foreign exchange reserves.⁷² This was coupled with restrictions of the selling of basic commodities to state owned shops which resulted in riots around the country due to increase in commodity prices such as bread those of and fuel.⁷³ This, as well as pressure from the church and civil society, caused President Kaunda to effect constitutional changes in 1990 that re-introduced multiparty politics in Zambia. It was under this new constitution that a new government was ushered into office with Fredrick Chiluba as President.⁷⁴

3.2 Presidential Power (1991-2001): An Analysis

On 2nd November 1991, the new President was sworn in at the Supreme Court Building in Lusaka and the dawn of the new multi-party democratic system in the Third Republic began in Zambia.⁷⁵ The new government promised to revive the sunken economy, to be a government of the people and respecter of Human Rights and the Rule of Law.⁷⁶ In fulfillment of this, it facilitated for the smooth passage of important laws such as the 1992 Privatization Act, the Securities and Exchange Act (1993), the Investment Act 1993, the Companies Act (1994), the Anti-corruption Commission Act and the Zambia Revenue Authority Act (1994).⁷⁷ This speeded up the transformation of the economy from a commandist one to a liberalized private sector led system.⁷⁸

⁷²Times of Zambia, Tuesday April 10, 1984 p.4

⁷³ Times of Zambia, Wednesday January 11, 1989

⁷⁴ Chibesakunda, Parliament of Zambia (2001) p.50

⁷⁵ Ibid, p.49

⁷⁶ Ibid, p. 50

⁷⁷ Ibid.

⁷⁸ Ibid.

However, dictatorial tendencies, the clear consequences of excessive executive power and its abuse, began to manifest themselves early in President Chiluba as head of state. The political rivalry and cordial working relationship between the MMD and UNIP gradually disintegrated.⁷⁹ The introduction of the state of Emergency during the Zero option saga in 1993, the evocation of the powers under the Emergency Powers Act in 1993 and Amendments to the Presidential clause in 1996 Constitution (Amendment) Act, were all seen as a clear abuse of Presidential/Executive power to suppress political opponents.⁸⁰ The changes to the presidential clause were a clear ban on Kenneth Kaunda from standing for President in the 1996 Presidential –Parliamentary elections.⁸¹

Further, in the run-up to the 1996 General elections, President Chiluba announced the sale of government houses. This was unsupported by any law though a government circular was passed to this effect. It may be argued that the President being vested with executive power, is under the constitution and theory of executive power authorized to do such acts which are executive in nature.⁸² The U.S. Supreme court supported this⁸³ that the clause vesting executive power is a grant of power to the President to execute the laws. Thus, once the legislature enacts a law creating say a post office or council then – whether or not the law expressly vests him with the power in that behalf – the president can by right of being vested with executive power by the constitution, perform their

⁷⁹ Ibid.

⁸⁰ Ibid.

⁸¹ Ibid.

⁸² Article 33(2) of the constitution of Zambia (1996)

⁸³ Myers V. US (1926) 272 US 52

functions.⁸⁴ Their functions are executive in nature and are thus merely units of the executive department. However, though this is true in this sense, it is submitted that such power must be exercised in good faith and for legitimate purposes and not abused for personal political gain. This however, was seen to be 'a cheap' political campaign strategy meant to solicit for votes for the MMD from the public. The sale for as cheap as K10,000 was a clear abuse of Presidential power and a great restraint on revenue generation for the operations of councils. However, the absence of judicial pronouncement on this matter has left much speculation.

A clear abuse of executive power was evidently seen in events that followed before and after the failed coup attempt of October 1997. The use of provisions of the Public Order Act by the executive to suppress political opponents was a characteristic feature of this period. In August 1997, police used live ammunition to disperse a rally called by the coalition of all opposition political parties in Kabwe. One of the live bullets shot and wounded Roger Chongwe and Dr, Kaunda....⁸⁶ No investigation was ever carried out. This heightened speculation over the matter. President Chiluba refused to apologize to his political colleagues but rather egged on the police;

"If you do not behave well, the police will do their job...do not agitate the police because if you do they will deal with you..."⁸⁷

It is clear that the Executive by invoking the provisions of the Public Order Act and the subsequent action of the police, which was clearly unjustified, was an abuse of executive power. Further, the fact that no investigations were ever carried out only showed that the government was out to suppress all political opponents by canvassing their action through

⁸⁴B.O. Nwabueze, *Presidentialism in Commonwealth Africa* (1974) Hurst & Co. Pg.14

⁸⁶ Zambia Human Rights Report (1997) AFRONET – April 1998, p. 22

⁸⁷ Zambia Human Rights Report (1997) AFRONET March 1999 p.6-7

allegations of violation of the provisions of the law by conveners of such political meetings. In addition, remarks by President Chiluba cannot be reconciled with the principles of a democratic state, of enjoyment of fundamental rights guaranteed by the Constitution.

The occurrence of the failed coup and subsequent declaration of a state of emergency witnessed a clear abuse of executive power and violation of basic fundamental rights. In the first days after the coup attempt, marches and rallies supporting the government were staged in a number of towns across the country.⁸⁹ A broad spectrum of the Zambian Society, including opposition political parties, condemned the coup attempt.⁹⁰ This included Religious groups, Law Association of Zambia, AFRONET and Women for change. A group of soldiers and politicians were arrested in the aftermath of the failed coup. A state of emergency was declared on 29th October 1997. Five months later on 17th March 1998, President Chiluba revoked it and on 24th March, Parliament ratified the revocation.⁹¹ While they condemned the coup, much of civil society quickly criticized the imposition of the state of emergency as unnecessary. National Party Vice-Chancellor Daniel Lisulo declared that the President did not need the state of emergency to handle the aftermath of the coup as it was not properly organized and was immature.⁹² In support of this the Zambia congress of Trade Unions stated that in the given circumstances, a state of emergency was necessary, so long as it was not abused.⁹³

⁸⁹ Amnesty International: Zambia Mis rule of Law: Human Rights in a state of Emergency, Ziharch, 1998, p.1

⁹⁰ Ibid

⁹¹ Zambia Human rights Report (1998) AFRONET – March 1999 p. 6-7

⁹² Amnesty International: Zambia, Mis-rule of Law, p.1

⁹³ Ibid.

Further, Zambian Human Rights activists began to raise concerns that the executive was using the state of emergency to suppress political activity.⁹⁴ A report by Amnesty International revealed that the coup attempt was used by the government to justify an unneeded state of emergency declaration, which was then used to suppress peaceful, non-violent political activity under the guise of investigating the failed coup plot.⁹⁵ In particular, police officers allegedly tortured at least six detainees to extract statements in an apparent attempt to implicate those perceived as political enemies.⁹⁶ In this vain, opposition leaders such as Dean Mungomba (ZDC) was arrested and tortured, and these events led to the High Court case of **Dean Mungomba V The Attorney General**,⁹⁷ where he challenged the declaration of the state of emergency. However, the discussion of this case is beyond the scope of this chapter. Others arrested included Kenneth Kaunda, Nakatindi Wina and Fredrick Mwanza (UNIP member).⁹⁸

Initially, the Government of Zambia had exonerated former President Kaunda of involvement in the Coup. However, after an interview of Kaunda by journalist Dickson Jere was published in the Post Newspaper in which he warned of something big a day before the coup, Kaunda was later arrested without charge on 25th December 1997.⁹⁹ This was highly condemned by the international community, who described the detention without trial of political opponents as contrary to the basic principles of a democratic state.¹⁰⁰ They called on the authorities to bring Kenneth Kaunda to trial immediately or

⁹⁴ Ibid p.2

⁹⁵ Ibid.

⁹⁶ Ibid.

⁹⁷ 1997/HP/26117 (unreported)

⁹⁸ Zambia Human Rights Report (1998) AFRONET – March 1999 p. 6-7

⁹⁹ Amnesty International: Zambia, Misrule of Law (1998) p.7

¹⁰⁰ Ibid, p.8

to release him.¹⁰¹ Thus, President Chiluba later ordered that Kaunda be put under house arrest under the Preservation of Public Security Act section 3.3(a) and Regulation 16(1) of the Preservation of Public Security Regulations.¹⁰² These regulations also banned Kaunda from political activity, access to the press and his lawyers, contrary to Article 26(1)(d) of the constitution.¹⁰³ Amnesty International later concluded that the state of emergency was used to arbitrarily detain critics of the government and shielded such detentions from judicial scrutiny.¹⁰⁴ The secret release without charge or trial of Priscilla Chimba and Fredrick Mwanza is an indication that there was no basis for their detention.¹⁰⁵

Another significant instance of Presidential abuse was President Chiluba's plan for a third term.¹⁰⁶ However, various civic groups, the church and Law Association of Zambia vowed to vigorously campaign against constitutional changes sought by President Chiluba.¹⁰⁷ The groups declared that President Chiluba would not be allowed to stand as the constitution was unambiguous in its limitations of the tenure of the presidency to two terms of five years each.¹⁰⁸ However, President Chiluba said the people must be allowed to debate the issue and he would only comment later on, the church and LAZ disagreed. They further stated that it was not only the sanctity of the constitution that was at stake or trial, but also Mr. Chiluba's own commitment to the ideas he so eloquently enunciated

¹⁰¹ Ibid.

¹⁰² Ibid.

¹⁰³ Ibid.

¹⁰⁴ Ibid p.9

¹⁰⁵ Ibid.

¹⁰⁶ Anthony Kunda. *Zambian churches and lawyers oppose Presidential plan for Third Term* (2001) ENL

p.1

¹⁰⁷ Ibid.

¹⁰⁸ Ibid.

over the years.¹⁰⁹ The President in his speech in 1991 promised to uphold and protect the Rule of law. However, due to mounting pressure from the church, civic groups, the people and LAZ and students forced the President to give in to pressure. Meanwhile this led to internal strife within the MMD with most leaders being expelled. However, come the 2001 elections, lawyer Levy Patrick Mwanawasa was hand picked as Chiluba's successor.

3.3 Presidential Power Today: An Analysis

The 2001 elections that were said to be characterized by election malpractice with a petition being lodged before the Supreme Court¹¹⁰ saw the ushering in of the New Deal government of Levy Mwanawasa. In order to silence critics that he was elected fraudulently and to instill confidence in the electorate and people of Zambia, President Mwanawasa promised to revive the erring economy within the first 100 days of his government in power and fight corruption.¹¹¹ The New Deal government promised to be a government of laws, and not of men.¹¹²

Early into his term in office and to honor his promise to fight corruption, the President announced the creation of the Task force on Corruption comprising of law enforcement agencies headed by Mark Chana.¹¹³ However, the creation of this body was highly criticized that it had no legal backing and would thus lead to abuse. It was feared that the

¹⁰⁹ Ibid.

¹¹⁰ Maidestone Mulenga (2003) Zambia in 2002 – Review of Politics in Zambia – Jan 7, 2002 position filed

¹¹¹ Ibid.

¹¹² Statement on the Forced leave of the DPP by Samuel Mulafufu (2004) The Zambian p. 1

¹¹³ Pambazuka News. Weekly forum for Social Justice in Africa; Moves Against Corruption

Task Force would be used to settle political scores instead.¹¹⁴ Former President Chiluba who is being investigated for National Plunder expressed his fears about the operations of the Task force. He stated that the Republican Constitution vested prosecution power in the office of the DPP or those that the office delegates to.¹¹⁵ He further said it was illegal to allow a body such as the Task Force on corruption to do both investigations and prosecutions without any blessing of the law.¹¹⁶ However, Task force spokesperson defended the body by stating that all prosecutors at the Task force operated under the Director of Public Prosecutions who perform the functions of the office of in accordance with provisions of the constitution.¹¹⁷ However, the Constitution as well as the composition of the Task force leaves much to be desired insofar as it is not constituted under any law. The head of the Task Force is an appointee of the President on contract. He co-ordinates and directs the activities of the Task Force which consists of law enforcement agencies established by law. It is therefore submitted that, the various legal bodies, the ACC, DEC and the Police are autonomous bodies including the office of the DPP capable of operating by themselves. Adequate funding is only necessary for these institutions to function effectively and efficiently. Thus, these bodies in themselves are capable of fighting corruption.¹¹⁹

However, the use of presidential/executive power to violate basic principles of the constitution was witnessed first when President Levy Mwanawasa appointed Member of

¹¹⁴ Ibid.

¹¹⁵ The Post Newspaper, Tuesday June 1, 2004, p.1

¹¹⁶ Ibid.

¹¹⁷ The Post, Tuesday June 1 2004, p. 3

¹¹⁹

Parliament of the opposition to Ministerial positions.¹²⁰ Nothing in the constitution precludes him from doing so. Article 46(2) of the constitution empowers the President to appoint Ministers from among members of the National Assembly. Thus, the theorists of the specific grant theory would consider this good law and execution of executive functions. However, it is submitted that it is not the intention of the constitution or those that drafted it to promote erosion of the opposition. One of the principles of democracy that flows from the doctrine of separation of powers is that parliament must be an effective check and restraint on the exercise of power. This can only be achieved if a strong and effective opposition exists within parliament. However, appointment of opposition members to cabinet greatly erodes this. The principle of patronage and doctrine of collective responsibility preclude such MPs from speaking against government.¹²¹ A further incident of abuse of Presidential power was the events that followed the February 8, 2003 press conference. Opposition leaders had filed for an injunction restraining President Mwanawasa from appointing opposition MPs to Ministerial positions.¹²² President Mwanawasa during the Press Conference gave a timely warning to the Chief Justice to advise his judges on the President's immunity from suit set out in Article 43(1) of the constitution.¹²³ Judge Nyangulu thereafter reversed the order (ex-parte) he had granted. Godfrey Miyanda in his appeal against the reversal said Nyangulu did not act independently. There was interference with the judicial system that judge Nyangulu felt threatened by the President's attack on the court during the press

¹²⁰ Press conference of February 8, 2003

¹²¹ Article 51 of the constitution (1996)

¹²² The Post, February y, 2004 p.3

¹²³ Ibid.

conference.¹²⁴ The judge was clearly influenced by extraneous and irrelevant factors and he acted under duress instead of judiciously and independently.¹²⁵ Further, Nyangulu's justifications to reversing the order were baseless. He stated that following a news item in the Media that General Miyanda had blocked the President's appointing of MPs had caused a storm within the executive and that he was recovering from a severe gout attack following a bout of Malaria, thus his state of mind was impaired.¹²⁶ This was a clear incident of the use of Presidential power to undermine and compromise the independence of the judiciary. This is a violation of the principles of separation of powers and the rule of law, which are cardinal elements of democracy.

The appointment of Nevers Mumba as vice President was another issue that raised questions as to the constitutionality of President Mwanawasa's exercise of executive power.¹²⁷ Many sectors of society criticized this move. FDD Vice President Nawakwi questioned how President Mwanawasa had gone against the Constitution, which he swore to defend by appointing Nevers Mumba.¹²⁸ Michael Sata, Patriotic Front President said in terms of Article 68(3) of the constitution of Zambia, Reverend Mumba did not qualify for appointment as nominated member since he was a candidate for election in the last proceeding elections.¹²⁹ However, President Mwanawasa defended his position that Dr. Mumba's appointment was constitutional and he had thoroughly considered the matter

¹²⁴ Ibid.

¹²⁵ Ibid.

¹²⁶ Ibid.

¹²⁷ The Post, May 29 Thursday, 2003, p.7-8

¹²⁸ Ibid

¹²⁹ The Post Newspaper, Thursday May 30, 2004,p.3

before appointing him.¹³⁰ However, absence of judicial pronouncement on the matter leaves much speculation as to the real meaning of Article 68(3) of the constitution.

Another matter of importance that questioned the exercise of Presidential power under the constitution was the DPP saga.¹³¹ Following allegations of misconduct, the DPP was allegedly sent on forced leave.¹³² Many sectors of society including the Law Association of Zambia condemned the move. FODEP strongly implored government to respect the rule of law when dealing with constitutional matters, that sending of the DPP on 45 days forced leave was unconstitutional.¹³³ The Law Association of Zambia voiced its concern over the government's apparent "lack of regard" to the "rule of law" in not constituting a tribunal.¹³⁴ Nonetheless, the Tribunal was constituted in accordance with Article 58(3) of the constitution. The Tribunal however, concluded that as a result of mistrust, suspicion and lack of confidence, which existed between the DPP and Task Force chairman and the Nchito Brothers- working relationship between them, had degenerated.¹³⁶ That the public had lost confidence in the DPP. It however, did not establish misbehaviour, which would warrant removal from office. It however, recommended retirement with full benefits.¹³⁷ The President endorsed this recommendation. But this is clearly outside the ambit of Article 58. The DPP can only be removed for misbehaviour or incapacity. If these are not proved he cannot be removed on other grounds or retired. The tribunal as a body constituted by law was the best forum to exonerate the DPP and help restore public

¹³⁰ Ibid.

¹³¹ The Post Newspaper, February 6, 2004, p.2

¹³² The Zambian, 17 January 2004

¹³³ Ibid.

¹³⁴ "Lawyers say rule of Law threatened by sacking of DPP" IRIN 2004

¹³⁶ Post Newspaper, Wednesday March, 31, 2004

¹³⁷ Ibid.

confidence in the office. The findings of the tribunal that no misbehaviour was present as a ground for removal should have recommended that the DPP be restored to his position. This would build confidence and independence in the institution and maintain the rule of law. The recommendations of the tribunal were clearly against Article 58. .

The deregistration of the southern Africa Center for the Constructive Resolution of Disputes (SACCORD) by the Home Affairs Minister and the President's support for such action was seen as another abuse of executive power.¹³⁸ The President defended the Minister's action that he enjoyed the power of de-registration of non-governmental organizations that were a threat to national security.¹³⁹ Further, the President stated that the Minister was not required by law to give reasons for his actions, he could do as he so wished.¹⁴⁰ However, the Citizens forum and other civic groups condemned the action. That although the Minister was empowered to deregister, he should not do so arbitrarily.¹⁴¹ Women for Change said the de-registration of SACCORD was a product of excessive abuse of powers of government Ministers.¹⁴²

The Constitutional demonstrations of December 21st 2004 by the opposition parties and civil society and the subsequent use of force by the Police against journalists was another incident of abuse of executive power.¹⁴³ This was yet another instance of use of the Public Order Act to suppress nonviolent demonstrations by the opposition. Police action

¹³⁸ The Post Newspaper, Number 19, 2004 p. 1 and 3

¹³⁹ Ibid.

¹⁴⁰ Ibid.

¹⁴¹ Ibid.

¹⁴² Ibid.

¹⁴³ Times of Zambia, December 20, 2004 p.1

and the harassment of journalists was condemned as unfair and wrong by Human Rights Organisations.¹⁴⁴ The excessive and extreme action of the police must be seen against the background of tactical approval from the executive.¹⁴⁵

SUMMARY

All through the period from 1972 to date it is evident how Presidential Power/executive power has been abused. This is against a background of the excessive powers that been used to either foster personal political goals, eliminate potential political opponents under the guise of development and security measures, such as the use of state of emergency provisions. The power has also been used time and again to capitalize on lacunae in the constitution, but against principles of democracy, rule of law and separation of powers and principles of judicial independence. This has been coupled by the lack of judicial pronouncements on certain executive actions, which have gone unchallenged. Further, to avoid antagonism between the executive and the judiciary, challenges on the exercise of Presidential power have on many occasions been pronounced in favour of the executive.

¹⁴⁴ Ibid.

¹⁴⁵ Zambia Human Rights Report (1997) Afronet p.57

CHAPTER 4

PRESIDENTIAL POWER: JUDICIAL VIEWS

4.0 INTRODUCTION

In previous chapters we have tried to define the scope and limit of Presidential power. However, it must be ultimately accepted that the last word on the scope and limit of Presidential power ostensibly belongs to the courts as ultimate interpreters of the constitution and the laws. Though the courts have power to review any action under any law,¹⁴⁶ the judiciary's role in defining and reviewing executive authority has been quite limited. The court's jurisdiction in reviewing executive authority is (either) ousted by express legislation that either confers such power in another body, the legislature for example. In other instances, it may be limited to instances of bad faith, malice or unreasonableness.¹⁴⁷ Thus, this chapter focuses on judicial pronouncements on executive authority. It is here where Presidential power is either seen as excessive or not. The chapter focuses on judicial pronouncements on the exercise of emergency powers; power to constitute the constitutional review commission and amendment of the constitution; appointment of cabinet ministers and judicial control on the power of eminent domain.

¹⁴⁶ Article 94(1) of the constitution of Zambia, Cap 1 of the laws of Zambia

¹⁴⁷ Zambia National Holdings Ltd. and United National Independence Party (UNIP) V The Attorney General (1993/94) ZR 115(S.C)

4.1 Judicial Views On Exercise of Emergency Powers: Dean Namulya Mungomba and Matter of Application for a Writ of Habeas Corpus – 1997/HP/2617

The applicant in this case was arrested and detained after being accused of being one of the master minds of the failed 1997 coup. He, therefore, brought an application for a writ of Habeas Corpus an subjucendum. On behalf of the applicant, counsel submitted that although the President had the power to declare a state of emergency, the court has to investigate whether there were circumstances justifying the declaration of a state of emergency by the President. According to him, there were no reasons or circumstances for the declaration of a state of emergency. He further submitted that the court had powers to inquire into the legitimacy of the declaration of the state of emergency. He argued that the court had power and authority to inquire into the basis of the president's belief that the state of emergency exists in Zambia. He submitted that whether a state of emergency exists is a matter of fact and could not be a matter of submission of one person. The applicant further contended that facts must exist which are substantial to warrant that a state of emergency exists or does not. The court, he contended was better and would be better placed to inquire whether such facts exist. It was the applicant's further contention that since the constitution did not define what a state of emergency is then, the court must make such definition. The applicant was of the view that facts which support that threats to the scarcity of notion exist must be proved and that no such proof was given by government. The applicant further challenged the regulations made by the President pursuant to section 3(1) of emergency powers act. He contended that they were null and void as the President had invoked regulations under The Preservation of Public Security regularities under the Public Security Act. Thus, he had made no regulations in

conformity with section 3(1) of the Emergency Powers Act which obliges him to make regulations and not adopt or borrow from other Act of Parliament.

However, the state argued that the **court** had no jurisdiction to inquire into the declaration of a state of emergency by the President because the president is not obliged to furnish reasons for making a declaration. He argued further that such inquiry by the court would be ultra vires its powers because the only pre-condition that the President must fulfill under the law is to meet and consult with cabinet before making the declaration. The state further responded that other remedies existed which the applicant could avail before the court to challenge state of public emergency as unjustifiable.

The court held that firstly, the constitution of Zambia does not define what a state of emergency is. However, it stated that the nearest indication of its definition was to be found in section 3(3) of the Preservation of Public Security Act CAP 112 of the laws of Zambia. The court then concluded reading the section that a state of emergency in Zambia is where the situation is so grave that it is necessary for the President by statutory instrument to make regulations to provide for the detention of persons and for requesting persons to do work and render services. It is a situation in which the security of the nation and safety are in danger. The court considered the events of October 28, 1997 as amounting to a state of emergency. It further held that the President is not obliged to furnish any reasons for making a declaration and such inquiry would be ultra vires the power of the court because the only condition that the president is required to fulfill is to meet and consult with cabinet before making the declaration. The court further held that

necessary for the President to issue fresh regulations when what he wanted already existed in other statutes. Thus, the issuing of Statutory Instrument No. 126 of 1997 by the President satisfied provisions of section 3(1) of The Emergency Powers Act, Cap 108 of the laws of Zambia. It therefore, dismissed the application.

Thus, it can be observed from the foregoing case that the only power the court has under a state of emergency is to grant a writ of Habeus Corpus. A detainee can challenge the legality of his detention by application to a court of law for a writ of Habeas Corpus Article 26(1) (c) of the constitution allows a detainee to have his detention under a state of emergency reviewed after a minimum of three months by an independent and impartial Tribunal presided over by a judge of the High Court. This is an important safeguard of human rights under a state of emergency. The courts, however, lack the power to review the circumstances under which a state of emergency is declared. The Mwanakatwe Constitution Review Commission had recommended that the courts should possess power to review the declaration. However, this was rejected by Government. This power is exclusively vested in the National Assembly.¹⁴⁸ Thus, while the courts can order a detainee produced, they lack the power to supervise effectively the detention of prisoners or to call into question the activities of the security services. Further, even were Habeas Corpus is granted, and the detainee is released, the state has been in the habit of bringing new charges against such person. Thus, they may issue a Presidential detention order, which be detention for an undefined period. They may further charge such a person with

¹⁴⁸ Article 30(5) of the constitution of Zambia

imprison treason, punishable by a death sentence, and is nonbailable offence.¹⁴⁹ Therefore, in such circumstances Habeas corpus applications become a mere academic exercise.¹⁵⁰ The applicant in the above case was charged with treason. Thus, the court cannot effectively supervise abuse of declaration of a state of emergency.

4.2 Judicial Views on the Constitutional Making Process: Nkumbula V. Attorney-General (1972) 212 204 (CA)

This case arose after President Kenneth Kaunda announced that Cabinet had resolved that the constitution of Zambia should provide for a One-Party Participatory Democracy. He then appointed a commission with the task of determining the form which the One-Party Democracy should take. The function of the commission would not be to consider whether or not there should be a One-Party Democracy. But rather, how the one-party state would be established in Zambia. The applicant thus went before the High Court to challenge this decision and the application. Before the High Court, the applicant argued that firstly the freedom to form and belong to a political party at it existed under the constitution would be incompatible with the one-party state. He further, alleged that his right of expression was hindered when the commission refused to hear his evidence against the formation of the One-Party state. And lastly, that the formation of the One-Party state would be contrary to the spirit of the Constitution.

¹⁴⁹ Dr. Kenneth Kaunda who was accused of plotting the 1997 coup challenged his presidential detention order during Habeas corpus Application he was later charged misprision of treason, which is unbailable and carries a death sentence.

¹⁵⁰ Amnesty International Report: Zambia, Misrule of Law: Human Rights in a state of emergency (1998) pg.18

The High Court judge held that indeed if the One-Party state was formed it would infringe upon the right to form political parties guaranteed under the constitution. But no such evidence existed before the court that any action will be taken to prevent formation of political parties. The court further held that no evidence existed that government had taken steps to hinder the petitioner's right of opinion against the One-Party state. That in fact he had expressed his sentiments on Television and at a rally in Lusaka. The fact that he could not put forward his view before a particular commission set up to deal with other matters was not restriction upon his freedom. Its evidence would be outside the commission's terms of reference. The court thus, held that while the constitution existed in its present form there was not evidence that the petitioner's rights are likely to be interfered with.

The court dismissed his application and he appealed to the court of Appeal.

The applicant argued firstly, that the appointment by the President of the commission of inquiry under section 2 of the Inquiries Act, cap 181 was ultra vires and null and void because the matter to be inquired into could not be for the public welfare within the meaning of those words as used in the said section. Secondly, that if a One-party state were introduced, the appellant's rights under section 23 (Freedom of Association) were likely to be infringed. The appellant contended that the setting up of commission was ultra vires because as a question of law the inquiry could not be 'for the public welfare.' That it cannot be for the public welfare to prepare to deprive a citizen of any of the fundamental rights protected by the constitution. He further argued that public 'welfare'

meant the welfare of the individuals comprising the public, and that to derogate from individual rights and freedom cannot be for the public welfare.

The court held that, firstly, the first ground was a mere academic exercise which the court did not encourage and thus of no practical value. This is because the commission was never asked to inquire into the desirability of otherwise of introducing the One-Party Democracy, it was asked to inquire into the mechanics of setting up such a state, thus the decision had already be taken and it was not clear of what consequence a declaration by the court that constitution of such commission was ultra vires would be. However, the court went on to hold that the constitution of the commission was in the subjective determination of the President. That such power cannot be challenged unless it can be shown that the person vested with the power acted in bad faith or from improper motives or on extraneous considerations or under a view of the facts or the law which could not reasonably be entertained. After considering the issue the court held that the President in setting up a commission to inquire into various matters specified in statutory instrument No. 46 of 1972 was acting within the powers contained in section 2 of the inquiries Act, Cap 187. The court further disagreed with the appellant's contention of the meaning of public welfare. It held that the ordinary meaning of 'the Public' is the community in general, as an aggregate, the people as a whole and the context in which it is used in the inquiries Act suggested a different meaning. There was nothing to support the submission that welfare of the individuals makes up the community.

On the second ground, the court dismissed the appellant's suggestion that in the area of individual rights and freedoms it would be a salutary warning to the government for the

courts to say that a proposed amendment is in conflict with existing rights. The court held that it was not its function to issue warning to government as to the legality of its proposed actions. The function of the court is to determine issues between parties. It was therefore absurd to suggest that the legislature intended the courts to be vested with the power to pronounce in advance that if government pursued expressed intention legislation on the lines of that expressed intention, would be ultra vires the constitution. This would entail the court preventing amendment. No executive or administrative action had been taken in relation to the appellant and it was not alleged that such action is threatened. The court thus dismissed the appeal.

However, it is submitted that the events that followed supported the appellant's fears. The establishment of the one-party participatory democracy led to the amendment of the constitution. The 1973 constitution under the one-party state violated the fundamental rights and freedoms of individuals. Article 4(1) and (2) of the constitution barred the formation of other political parties or association of such. Thus, the intention of the executive to declare a one-party was for the benefit the political leaders in power and not the public at large.¹⁵¹ This was an effective way of eliminating the opposition especially in parliament. An effective way of eliminating the opposition, thus a clear abuse of executive power.¹⁵²

4.3 Judicial View on Power of Appointment: Maxwell Mwamba and Stora Mbuji V. Attorney General, SCZ No. 10 of 1993

¹⁵¹ Chibesakunda, M.N. The Parliament of Zambia (2001). National Assembly of Zambia. Pg.32

¹⁵² Ibid, pg.34

In this case the plaintiff argued before the High Court that it was contrary to the requirements of Article 44(1) of the constitution¹⁵³ for the President to appoint persons as Ministers implicated in dealing with Mandrax. The plaintiff argued that it was contrary to the requirements to perform with dignity and leadership when the President appointed such Minister. The High Court however, held that the President had an exclusive and absolute discretion to appoint ministers from among members of parliament. That it was necessary that the President should exercise his functions independently within a wide latitude, subject to the constitution, and without interference from other organs of government, courts included. Thus, the appellants appealed to the Supreme Court.

The plaintiff before the Supreme Court argued that it was wrong to say that the President enjoyed unfettered discretion when Article 44(i) imposed a preëemptory obligation on him to perform with honour and dignity. They argued that it was not enough that the Ministers were from the National Assembly, but that the President should have had regard to the report to the report of the tribunal legally constituted and to the morals of society by looking for honesty and incorruptibility in persons to be ministers. The appellants called upon the court to guard the morals and moral welfare of the nation and to declare that the appointments were not an exercise of discretion with authority and honour designed to earn the respect and reputation necessary for government.

¹⁵³ Art 44(1) "As Head of State, the President shall perform with dignity and leadership all acts necessary or reasonably incidental to, the discharge of the executive functions of government ..."

The Supreme Court acknowledged that the appellants as citizens had legitimate interest in their national leaders' governance of the country. The Court further held that on the contrary because constitutional power, including that of the president was reviewable by the courts in proceedings challenging compliance and validity, the judge in the lower court carefully examined the applicable provisions and found that the President did not appoint persons who were disqualified under the constitution. The disqualifications alleged by the plaintiff were not those that were outlined in Article 65 of the constitution. The court further said, with a written constitution like ours, the courts are not prevented from reviewing the validity of an appointment made by a Head of state in the exercise of an executive discretion and where a person not qualified has been appointed, the appointment is liable to be struck down. It stated that the case at hand was one in which the disqualification alleged was not one of those spelt out in the law. Thus, the question was whether an appointment can be challenged on the ground that the person appointed is not a suitable person for holding that office. The court found and held that suitability of a candidate was for the electorate to judge and not for the courts to decide. It thus dismissed the appeal.

Thus, the limitation that this presents on the courts is clearly evident. Suitability is a matter beyond the court's jurisdiction in determining whether an appointment of a minister by the president is valid. This, therefore, leaves the President with wide latitude of who to appoint. As long as such person is validly elected under the laws as Member of Parliament, the President has the discretion to appoint him/her Minister despite any levels of incompetence. It must be noted that ministers are appointed by the President without

Parliamentary scrutiny.¹⁵⁴ Thus, the President can appoint any member of parliament he so wishes despite such member not possessing the necessary skills or qualifications to run a certain Ministerial department. The Mwanakatwe Constitutional Review Commission had recommended appointment of Ministers on the basis of ability, merit and experience and subject to ratification of the National Assembly. The Government rejected such a recommendation.¹⁵⁵

4.4 Judicial Views on the Exercise of the Power of Eminent Domain: William David Cerlisle Wise V. Attorney-General (1990-92) ZR124 (HC)

This case involves the exercise of Presidential/executive power on compulsory acquisition of land under the Lands Acquisition Act, Cap 296 of the Laws of Zambia. The plaintiff in this case inherited two farms belonging to his uncle upon his death. The plaintiff permitted the widow, after the death of her husband, to continue farming in the name of the company E.F. Harvey. The company, however, owned by another individual Barrett and his wife, refused to yield up possession and took the dispute to court. However, the High Court found in favour of the Plaintiff and so did the Supreme Court on appeal. Later on in January 1989, the Plaintiff was detained by immigration officers and later served with two notices under the Lands Acquisition Act of intention to acquire the two farms, thus, this application. The plaintiff argued that the defendant had not pleaded what national interest the farms were acquired for, nor given evidence such effect. The plaintiff contended that acquisition of the two farms was done mala fide (in

¹⁵⁴ Article 46(1) and (2) of the constitution of Zambia Cap. 1 of the laws of Zambia

¹⁵⁵ The Mwanakatwe Constitution Review Commission, 1996: Recommendations on Appointment of Ministers

bad faith). The defendants, however, disputed this and pleaded that the notices of intention to acquire property were legal, proper, in good faith and thus valid.

The court held that the Lands Acquisition Act Cap 296, empowers the President of the Republic of Zambia, whenever he is of the opinion that it is desirable or expedient in the interest of the Republic so to do to compulsorily acquire any property of any description. The Act did not stipulate the purposes for acquisition. This was a question for the courts to determine. That, absence of such definition did not per se give the state a blanket compulsory acquisition without a purpose. An implied purpose was to be given by the courts. What constituted public use largely depended upon the circumstances of each case. The court, thus, held that letting of private property not for public use but to a private occupant for purposes of raising money was an abuse of the power of eminent domain.

4.5 Zambia National Holdings Limited and United National Independence Party (UNIP) V The Attorney-General (1993/94) ZR 115 (Supreme Court)

The appellant brought a petition in the High Court to Challenge the decision of the respondent to acquire compulsorily under the Lands Acquisition Act the appellant's land being Sand Number 10934 Lusaka which is also known as the New UNIP Headquarters. The President resolved that it was desirable or expedient in the interests of the Republic to acquire this property whereupon the appropriate Minister gave notice to the appellants of the Government's intention in that behalf and the steps and formalities under the Act for such acquisition were commenced. The appellants wrote to the respondents suggesting a sum of money to be paid as compensation but as it turned out, and as the

parties especially informed the learned trial judge, they wished the question of compensation to be postponed until the court had disposed of the challenge to the legality and constitutionality of the compulsory acquisition.

The appellant alleged that the trial judge erred in law and in fact when he decided that the Lands Acquisition Act did not contravene the spirit and intention of Article 16(1) of the constitution.

The court on this point found that Article 16(1) provided that acquisition could be done under a law that provided for adequate compensation. Further section 12 of the Lands acquisition was amended to exclude from compensation any money used in the development of land which was donated by government. In fact the evidence showed that the bulk of the money, it not all, used to build the building in issue came from government grants during the One-party era. The court found that the Act was in conformity with Article 16(1) of the constitution as it provided for adequate compensation thus was not unconstitutional.

The appellant further alleged that the judge below was wrong to hold that the compulsory Acquisition was not done in bad faith. They alleged that the acquisition was based on an ulterior motive or intent to simply punish the appellants. They relied on a statement made by two senior members of the MMD who stated that the party when in government would retrieve all property acquired with public funds so as to benefit the people of Zambia as a whole. The trial judge below found that far from demonstrating bad faith the

MMD had instead demonstrated good faith. They did not indiscriminately plan to take away all the appellants property but only those acquired or build with state money. The court found that the appellant did not discharge the burden which was on them to demonstrate mala fides on the part of the President. The Lands Acquisition Act gives power to the President to resolve in his sole judgment when it is desirable or expedient in the interest of the Republic to acquire any particular land. However, this does not mean that the President's resolve can not be challenged in court as to its legality. Where arbitrariness and other vices are demonstrated such can be challenged. The exercise of statutory powers can be challenged in the courts if based on bad faith or some other such arbitrariness, capricious or ulterior ground not supportable within the enabling power.

The court was thus of the opinion that the acquisition was in the interest of the Republic to recover state funds used by the appellants thus valid.

The Court therefore, has power to review Presidential exercise of the Power of eminent domain if it is exercised mala fide or in bad faith and not for a public purpose.

4.6 SUMMARY

On occasion important questions of Presidential power have and will continue to come before the courts. Courts are viewed as the only ones that provide a formal exposition of the President's power. As has been noted from the cases cited, the courts are not precluded from reviewing presidential power. However, their power is either limited or their jurisdiction ousted especially in critical cases of exercise of Presidential power such as the declaration of a state of emergency and appointment of Ministers. The ousting of

the court's jurisdiction to review reasons for declaring a state of emergency has lead to arbitrary use of the power, torture of political detainees, with the court lacking the mandate to provide effective protective measures of supervision of the detainee's conditions while in detaintion. As regards appointment of ministers the court's power of review is only limited to instances outlined in Article 65(1) of the constitution. With regard to the power of Land acquisition, the court's power of review is more effective as a check on the exercise of Presidential power.

CHAPTER FIVE

RESTRAINTS ON PRESIDENTIAL POWER AND THEIR EFFECT

5.0 INTRODUCTION

When we began this research, we lamented the difficulty we encountered in defining the extent of executive power. A number of theories were outlined that could help define the extent of the power. These however, in themselves are not satisfactory. Thus, a more effective way of defining the extent of Presidential power is view it within the restraints within which the power operates. Thus, the extent of Presidential power has to be judged in relation to the entire constitutional system in which the presidency operates. This is to say, in the context of the restraints in which the constitution imposes upon the powers.¹⁶⁰

This chapter, therefore, looks at the restraints on the Zambian Presidential power and their effect, particularly, the legislature, judiciary and a more-but known restraint that of public opinion.

5.2 Legislative Control of Executive Power

The doctrine of separation of powers is a fundamental principle of democracy. The doctrine stresses that the same persons should not be seen to form part of more than one of the tree organs of the state.¹⁶¹ In addition, closely tied up with the doctrine of separation of powers is the doctrine of checks and balances.¹⁶² Parliamentary control of the executive is just a fulfillment of the system of checks and balances. The National Assembly, as one of the three organs of government, checks the executive in many ways.

¹⁶⁰B.O. Nwabueze, (1974) *Presidentialism in Commonwealth Africa*, Hurst & Co. Pg.104

¹⁶¹ Wade, *Constitutional Law* (1970), pg. 23

¹⁶² Patrick Mutale, *Parliamentary Control of the Executive Action through the Sessional Committees*. Obligatory Essay,(1985)

These mechanisms include: questions; motions for adjournment; point of order; private members motions; private bills; criticism in the course of ordinary debate and vote of no confidence and use of the committee system.¹⁶³

Cabinet Ministers and Deputy Ministers who are part of the executive are collectively accountable to the National Assembly.¹⁶⁴ Thus, one of the ways the National Assembly checks the executive is through questions to a particular Minister or Deputy Minister. This is an important part of the procedure for parliamentary control of the executive and is one of the few times in which the backbencher has a chance to make frequent interventions.¹⁶⁵ The purpose of questions is to give an opportunity to members of Parliament to solicit information from government on matters of public interest. They also press government to take action on any public affair that requires attention.¹⁶⁶ Another mode of checking the executive is through private members motions.¹⁶⁷ Once a private member's motion is tabled before parliament, the Permanent Secretary in the relevant ministry must prepare detailed notes for use by his/her Minister in clarifying issues expected to be raised by a mover of a motion.¹⁶⁸ Such information required must not be denied or misleading information must not be given, as this might damage the credibility and interests of the government.¹⁶⁹ However, the Zambian Constitution does not provide for a "vote of no confidence", which is a fundamental feature of the British

¹⁶³ Ibid, pg.3

¹⁶⁴ Article 51 of the constitution, Cap 1 of the Laws of Zambia

¹⁶⁵ Chibesakunda. "The Parliament of Zambia", National Assembly of Zambia; (2001) pg. 79

¹⁶⁶ Ibid.

¹⁶⁷ Ibid, pg.79

¹⁶⁸ Ibid.

¹⁶⁹ Ibid.

Parliamentary checks and balances system.¹⁷⁰ It will be noted, however, that the system of executive scrutiny outlined above relates to parliamentary scrutiny of the executive as a whole, i.e. actions of Ministers and Deputy Ministers. It does not relate to scrutiny of executive power solely exercised by the President under constitution or any other law.

One of the main characteristics of the executive in a presidential system is its independence from the legislature.¹⁷¹ The President is elected by direct universal adult suffrage.¹⁷² He is, therefore, elected by the people and this gives him an independent right to govern. He is not accountable to the National Assembly. Parliamentary check or scrutiny of Presidential power is, however, limited to those instances where the President has to exercise his power under the constitution subject to the ratification of the National Assembly or with the advice and consent.¹⁷³ It must be stated, however, that this does not make the exercise of such power the joint responsibility of the National Assembly and the President.¹⁷⁴ This still remains the act of the President and it also a voluntary act.¹⁷⁵ Thus, the National Assembly cannot substitute its action or preference for that of the President nor can it totally frustrate exercise of such power by the President. The President in relation to appointments can still nominate and appoint another person suitable. However, the Zambian committee system, which is to a large degree similar to

¹⁷⁰ Patrick Mutale, *supra* note at 162

¹⁷¹ Nwabueze, *supra* note 160 at 27

¹⁷² Article 34(1) of the constitution

¹⁷³ Articles 54, 55, 56, 93(1) 95(1), 121(1)

¹⁷⁴ B.O. Nwabueze, (1974) *Presidentialism in Commonwealth Africa*, Hurst & Co. pg.30

¹⁷⁵

Britain, is quite ineffective. One of the reasons for this is the way they are intended to function.¹⁷⁶

They merely make recommendations that are not binding.¹⁷⁷ Further, their activities were not held in public.¹⁷⁸ It must be stated however, that due to these inadequacies, reforms to the committee system were undertaken in 1999. The committees were reformed in such a way as to government more accountable through the allocations of departmental committees to each ministry. Further, public participation was included, through public inquires and media reports on their deliberations and recommendations. However, there has not been much sensitization on the committees' activities, hence the public are not well informed of their activities. Thus even in the scrutiny of presidential appointments that are subject to ratification by the National Assembly, such scrutiny is a more academic exercise. This is coupled by the fact that the majority of members of parliament are either members of the ruling party or Presidential appointees who will seldom go against the President's choice. This is unlike the American committee systems, which are autonomous and investigative in character and operations.¹⁷⁹ They exercise considerable power and their influence is so immense that their reports and recommendations can bind the executive in the same way the law operates.¹⁸⁰ Another check of Presidential power by the National Assembly is the power of impeachment. This is for any violation of the constitution as gross misconduct.¹⁸¹ However, two-thirds of the National Assembly must vote in favour of such action before a tribunal can be

¹⁷⁶ Patrick Mutale, "Parliamentary control of the executive action through the sessional committee."

Obligatory Essay()

¹⁷⁷ Ibid.

¹⁷⁸ Chibesakunda, Parliament of Zambia (2001) pg.116

¹⁷⁹ Patrick Mutale (supra note 176) pg. 15 and 16

¹⁸⁰ Ibid.

¹⁸¹ Art 37(1) of the Constitution

appointed. But, as stressed earlier were the reasons given for impeachment are not clear and with parliament dominated by the ruling party such power is rarely exercised. One occasion in which this power was to be exercised to impeach President Levy Mwanawasa was ineffective, as it never even passed the 2/3-majority stage.¹⁸²

5.2 Judicial Control of Presidential Power

Judicial control of executive action is seen as a more effective restraint on the exercise of Presidential power. This restraint can be more effective only by an independent and impartial judiciary. The Zambian constitution guarantees independence of the judiciary. Article 91(2) of the constitution provides that the judges of the courts mentioned in clause (1) shall be independent, impartial and subject only to the constitution and the law. Further, the constitution provides the judicature shall be autonomous and shall be administered in accordance with the provisions of the Act of parliament.¹⁸³

Furthermore, the court's unlimited jurisdiction clause¹⁸⁴ provides that the court can review any action brought before it civic or criminal, including Presidential actions.¹⁸⁵ However, one major draw back to the exercise of this power by the courts is the ousting of its jurisdiction from reviewing critical aspects of Presidential power such as the validity of the declaration of a state of emergency.¹⁸⁶ This it is submitted is a critical power that the court should have been allowed to review as it borders on enjoyment of basic fundamental rights of individuals guaranteed by the constitution.

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¹⁸³ Article 91(3) of the constitution

¹⁸⁴ Art 94(1) of the constitution

¹⁸⁵ Maxwell Mwamba and Stora Mbuzi, V. The Attorney General, SCZ of 1993

¹⁸⁶ Dean Mungomba V. The Attorney General 1997/HP/2617 (unreported)

Further, the court's jurisdiction in reviewing Presidential power is limited. The functions of the President under the constitution and the laws are for the most part discretionary. They are given to him to be exercised in his own judgment and discretion.¹⁸⁷ It is only in instances where the discretion is exercised in bad faith that the court can intervene.¹⁸⁸ Further, the courts cannot by injunction restrain the executive from putting forward to the legislature proposed legislation that such would be undesirable, harmful to society or even constitutional before it is actually passed or enacted by the legislature.¹⁸⁹

It must be stressed however, that constitutional provisions may not by themselves ensure the independence of the judiciary.¹⁹⁰ It must be the role of the Chief Justice, Justices of the Supreme Court and judges to ensure the independence of the judiciary. This role, however, requires someone who is eminently independent and who can put his mark on the image of the judiciary and the legal system.¹⁹¹ But so long as judges are appointed, paid, promoted, or removed from office by persons or institutions controlled directly or indirectly by the executive, the judiciary's independence may be more theoretical than real.¹⁹² The President subject to ratification by the National Assembly appoints the Chief Justice, Deputy Chief Justice and Justice of the Supreme Court.¹⁹³ The judges of the High Court are appointed by the President on the advice of the Judicial Service

¹⁸⁷ Nwabueze, *Presidentialism in Commonwealth Africa* pg.23,(1974)

¹⁸⁸ *Ibid.*

¹⁸⁹ *Nkumbula V. Attorney General* (1972) SCZ judgment

¹⁹⁰ "Towards an independent and effective judiciary in Africa," A paper presented by Hon. Justice A.M.

Akiwumi

¹⁹¹ *Ibid.*

¹⁹² *Ibid.*

¹⁹³ Article 95(1) of the Constitution of Zambia

Commission subject to ratification by the National Assembly.¹⁹⁴ The President subject to ratification by the National Assembly appoints those who sit on the Commission.¹⁹⁵ However, due to the President's dominant influence over the commission, it may well be a creature of the president.¹⁹⁶ This on many occasions has led to judges succumbing to executive threats or pressure¹⁹⁷ or intimidation by the executive, which has led to some judges resigning. For example, in 1969 the president Kenneth Kaunda questioned a decision of a High court judge reducing the sentence of two Portuguese soldiers who had been convicted by a subordinate court for illegal entry into Zambia. This led to the resignation of the Chief Justice, who led other judges in support of the judge so criticized.¹⁹⁸ Further, in the events after the murder case of **Kambarage Kaunda V the People**,¹⁹⁹ in which the Supreme court acquitted him citing flaws in the judge's judgment, the Supreme Court judgment was swiftly condemned by government and Chief Justice Silungwe was accused of being a close friend of former President Kaunda. The executive made it impossible for the Chief Justice to stay in office and he therefore resigned.²⁰⁰ Another incidence was after the case of **Christine Mulundika**.²⁰¹ Heinous attacks, which were unsubstantial, were made on Chief Justice Ngulube that he had raped a cleaner. Professor Alfred Chanda condemning such attacks stated that was meant to force the chief justice to resign from office.²⁰² Professor Muná Ndulo also stated that this was meant to intimidate the judiciary and its independence for deciding against

¹⁹⁴ Article 95(1) of the Constitution of Zambia

¹⁹⁵ Paper by Hon. Mr. Justice AM Akiwumi

¹⁹⁶ Ibid.

¹⁹⁷ Justice Nyangulu's apology to President Mwanawasa after the February 8, 2003 press conference

¹⁹⁸ Ndulo & Kent. The Constitution of Zambia. Zambia Law Journal Vol. 30 of 1998, p 9

¹⁹⁹ SCZ of 1992 (unreported)

²⁰⁰ The Post, March 27, 1992, editorial, pg.1

²⁰¹ SCZ judgement No. 25 of 1995

²⁰² A.W. Chanda, Zambia's fledging Democracy: Prospects for the future Zambia Law Journal. Vol 25-28 (1993-96), UNZA Lusaka. Pg.140

government.²⁰³ This is despite, the Republican constitution guaranteeing tenure of office of the judges.²⁰⁴

5.3 Public Opinion As a Restraint On Presidential

A rare but unique restraint on the exercise of Presidential power is that of public or popular opinions. The people elect the President by universal adult suffrage.²⁰⁵ He is, therefore, accountable to the nation as a whole. Much of what the President does or says is said to be in the interest of the public. Thus, much of his actions will depend upon popular approval of such actions. Thus, closely tied-up to this proposition is the right of people to freely express themselves and assemble freely to express this stems two fundamental freedoms of democratic society. These are the freedoms of expression and assembly.²⁰⁶ The value of these freedoms was well expressed by Justice Brandeis in the case, **Whitney V. California (1927), 274 US 357(71 Law ed)** in which he said:

“The right to free speech, the right to teach, and the right of Assembly are, of course, fundamental rights ... These may not be denied or abridged. But although the rights of free speech and assembly are fundamental, they are not in their nature absolute. Their exercise is subject to restriction, if the particular restriction proposed is required in order to protect the state from destruction or from serious injury, political, economic or moral. Those who won or independence believed that the final end of the state was to make men free to develop their faculties... They valued liberty both as an end and a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth. That without free speech and assembly discussion affords ordinary adequate protection against the dissemination of noxious doctrines, that the greatest menace to freedom is an inert people, that public discussion is a political duty ... they know that order cannot be secured merely through fear of punishment for its infraction, that it is hazardous to discourage

²⁰³ Ibid, pg. 141

²⁰⁴ Article 98(1) of the Constitution.

²⁰⁵ Article 34(1) of the Constitution.

²⁰⁶ Articles 20 and 21 of the Constitution .

thought, hope an imagination, that fear breeds repression, that repression breeds hate, that hate menaces stable government...”

Thus, freedom of speech is the foundation for every democracy. Criticism of government is not possible without freedom of speech.²⁰⁷ In addition, freedom of assembly is a fundamental aspect of democracy; public discussion of the running of the administrative adds positive value.²⁰⁸ Although freedom of expression and assembly are guaranteed in the Zambian constitution, they are limited by several statutes. Usually in terms of such amorphous principles as national defense or security, public safety, public order or morality of health.²⁰⁹ These grounds are so broad and vague that virtually any decision can be justified.²¹⁰ It is under these limitations that government has suppressed critics and those voicing out their concerns of executive actions. On many occasions the executive has vigorously applied the provisions of the infamous Public Order Act to suppress freedom of expression and Assembly. For example, hundreds of demonstrators were arrested in the context of the continuing controversy over a third term bid for former President Chiluba.²¹¹ Police frequently demanded that protest organizers obtain a police permit, although this was no longer required by law,²¹² Further, there appears to be a long-standing policy by the executive to misuse criminal charges against journalists with the aim of harassing and intimidating the independence press into docility.²¹³ The executive against non-violent opponents and critics of the government uses certain types

²⁰⁷ State V. Ivory Trampet Publishing Co. Ltd. (1984) 5NCLR 736

²⁰⁸ Rangaraji V. Jagjivran Ram (1990) Supreme Court of India

²⁰⁹ Amnesty International Report (2002) Zambia, freedom of expression & Assembly, pg.1

²¹⁰ Ibid.

²¹¹ Ibid.

²¹² Ibid.

²¹³ Amnesty International Report 1996: Zambia, a Human Rights Review Based on the International Covenant & Civil and Political Rights, pg.1

of legal charges including sedition, contempt of court, subversion, defamation, possession of classified documents.

From the freedom of expression flows the freedom of information and the media. However, there have been concerns about the mounting number of criminal charges against journalists of the independence press in Zambia. These appear to confirm a pattern of intimidation by the government to silence critics from non-violently expressing critical opinions about government and its policies.¹²⁵ For example, in April 1994 Managing Director of the Post Newspaper Fred Mmembe and Managing Editor Bright Mwape charged with criminally defaming the President, in violation of section 69 of the Penal Code. They had published an article that quoted a former Minister describing the President as a cretin.²¹⁶ Further in December 1994, Mmembe and staff journalist Mulenga Chomba were charged with various offences, including treason, sedition, possessing of printing classified documents, and inciting the army to revolt. They had published an article quoting unnamed sources inside the Zambian Army describing dissatisfaction among soldiers that bordered on mutiny. This could be legitimately described as a matter of public interest to be discussed in a free and public manner.¹²⁷

Thus, use by government of the Public Order Act and other laws that impose criminal charges greatly undermine public opinion as an effective restraint of Presidential executive power.

¹²⁵ Ibid.

²¹⁶ Ibid (April, 1994) pg.2

¹²⁷ Ibid (Dec. 1994) pg.2

5.4 Summary

As observed, restraints on Presidential power are inadequate. However, legislative and judicial restraints are seen to be more effective when checking other executive officers. However, there has been less effective scrutiny of executive powers. Solely exercised by the President as Chief Executive under the constitution and the laws. The legislature and judiciary have either restrained themselves from totally frustrating the Presidents actions or do not have jurisdiction to check the power. Thus, the President has emerged as a all powerful organ above the other two, the legislature and Judiciary. Further, the restraint that public opinion is supposed to play is greatly undermined and interfered with by laws hat are clearly used to suppress freedoms and rights guaranteed by the constitution. Thus, the public is sometimes silenced from expressing their views and displeasure of executive action.

CHAPTER SIX

CONCLUSION, SUMMARY AND RECOMMENDATIONS

6.0 SUMMARY

Throughout this research I have attempted to show the scope and limits of Zambian Presidential power and how excessive the power is. That is a reality more than mere speculation.

Chapter one was an attempt to define what exactly constitutes executive power: its nature, scope and limits. The power, it was realized, is absent of any precise definition unlike the other powers of legislation and adjudication. Not even our constitution defines what executive power is. It merely states that the executive power of the Republic will vest in the President of Zambia. Further, it was observed, that the defining of the power as executory in nature was unsatisfactory and raised major questions as to other aspects of the power that do not necessarily take this form. In this chapter we also analyzed the various theories advanced to try and define executive power. The conclusion reached is that these theories cannot in themselves independently explain the nature of executive power. But, taken as a whole, they bring out a clearer picture of the executive power. The chapter further looked at some various aspects of the power that have raised questions as to whether indeed they are powers in themselves. One such instance is the opening of the executive clause, that executive power will be vested in the President. This, it was concluded, is indeed a grant of power.

Thus, under this chapter certain common features arose to help decide what executive power is. It is seen that firstly, executive power is vested in the president. Secondly, it is neither law making (legislative) or judicial in nature. Thirdly, it has no precise definition.

Chapter two discussed the Zambian Presidency in the context of our constitutional system and political system. Under the constitutional system, the various powers of the President under the constitution were discussed. His powers as Chief Executive, to appoint Ministers and other constitutional officials, his emergency powers, treaty powers, powers of removal, prorogue and dissolve parliament and many others were analyzed comparing them with the American system. It was observed that the powers of the Zambian President under the constitution are excessive. One reason for such a conclusion was that unlike the American system where certain powers are limited by joining congress to their exercise by the President, the Zambian President exercises such powers exclusively without the National Assembly.

Further, our political system also contributes to the widening of Presidential power. Through party patronage and lacunae in our constitution, the President is able to manipulate the political system to increase his influence in the National Assembly. Further, he is able to effectively wipe out opposition within parliament by appointing members of parliament from the opposition as ministers and deputy ministers who are then tied up by collective responsibility. His power is further increased as head of the party and his influence in deciding which candidates are to stand for election as members of parliament in his party.

Chapter three discussed the practical aspects of Presidential power. Various incidents are brought out in this chapter where presidential power has been abused, either to further personal political goals, intimidate and silence political opponents or to wipe out those opposed to the president and his government. Further, the power has been used at the expense of individual rights and freedoms, to punish political opponents. This chapter showed how the executive used emergency powers to intimidate the political opposition. Further, how Presidential power was used under the one-party state to erode parliamentary democracy within the house. How various Constitutional provisions were violated with little or no judicial pronouncement on the legality of such actions by the President. It was further observed under this chapter, how executive power was used to silence civic organizations and civil society that criticized government, through the power of deregistration. Finally, how the provisions of the Public Order Act were used to suppress non-violent and peaceful demonstrations.

Chapter four looked at judicial views on the exercise of Presidential power. Case law was discussed in which the exercise of Presidential power was adjudicated upon. This chapter further identified the shortcomings of the court in the effective exercise of Presidential power. The courts are limited in jurisdiction to reviewing aspects of the exercise of discretionary power. Secondly, their jurisdiction in certain cases is ousted by express legislation or the constitution. The power to review Presidential power is mostly seen in instances where it is exercised in bad faith. At times the court has declined to rule on

certain aspects of Presidential power citing absence of any legal provisions to back a petitioner's claim.

In chapter five, the various restraints on Presidential power were discussed and how effective they are. It was observed that they were either ineffective in terms of the nature in which they operate or due to executive influence are unable to effectively check the executive. Further, efforts to check such power are frustrated by the executive through intimidation of judicial officers through threats or pressure to resign. Restraints are made ineffective by various laws that are used by the executive to silence positive criticism against government. Irrelevant criminal charges and offences are slapped on the private media journalists who criticize government as either defamatory or sedition and espionage.

6.1 Conclusion

The conclusion to be drawn from this essay is that the powers of the Zambian President are excessive. Firstly, the constitution itself vests enormous powers in the president as chief executive to be exercised solely by him. Unlike its American prototype, where the power is the joint responsibility of the President and Congress, the Zambian President exercises such powers alone. Our Constitution is defective as to certain provisions. It is ambiguous thus leaving room for all types of interpretations of certain provision even so the disadvantage of the true meaning of the framers of the constitution. Further, the

restraints on President are either nonexistent or rendered ineffective. Constitutional restraints on the Presidency are not clearly defined and precise. This is partly due to rigid adoption of the doctrine of separation of powers.

Thus, the dangers of abuse that this presents are highly manifest. As the term of office of President is limited to two five-year terms he may become a tyrant worse than an inherent monarch. Since his term is limited he may use his power to perpetuate himself in power for another term. He may use his power against other political opponents to the extent of violating fundamental rights, violating basic principles of democracy and the rule of law, just to get his will done. He further has laws to his benefit that he may use to eliminate and suppress his opponents and silence sectors of civil society. He may therefore, emerge a dictator in a democratic society: an elected monarch who had the initial mandate of the people to govern and later turns against them to fulfill his own will even against their wishes.

Having identified this problem, discussed its features and outlined its dangers, the following recommendations are offered as solutions to the problem.

6.2 Recommendations

One of the basic tenets of the doctrine of separation is that the same persons should not be seen to form a part of more than one of the three organs of the state. Thus, the appointment of Ministers and their deputies from outside parliament is a fundamental

feature worth repeating. Past Constitutional Review Commissions²¹⁸ and the present²¹⁹ have made this recommendation. Thus, the appointment of Ministers and their deputies must be from outside parliament and subject to ratification of the National Assembly. Further, nomination and appointment of Ministers and their deputies must be based on merit, ability, qualification and experience. In addition to ensure independence of the Police and Defense forces, it is recommended that the Inspector-General of Police and Defense Service Chiefs must also be appointed subject to ratification of the National Assembly. This will ensure non-abuse of the police for political purposes. Further, the security of tenure of the latter officers must be guaranteed under the constitution. They may be removed for misconduct, incapability or gross abuse of office.

Hand in hand with the above is the need of reform of the parliamentary committee system. The committee system must be revised to conform to that of the United States. These committees must therefore be investigative in character and be autonomous. They must have power to summon ministers and other officers of the executive department. Their recommendations and reports must have the binding force similar to law. Further, their proceedings must be held in public and allow for public participation through questions. Thus, the appointment and nomination of executive officers by the President on merit and experience will be guaranteed through scrutiny by the National Assembly. Further, the question of ministers defending their policies in Parliament will be assured when they appear before a committee when summoned to explain an issue of concern.

²¹⁸ Mwanakatwe Constitutional Review Commission (1996) on Appointment of Ministers

²¹⁹ Mungomba Draft Constitution, Article 152(2)

It is also recommended that the procedure of removal of the Director of Public Prosecutions must be revised. The power to constitute a tribunal must not be left to the President. It must be given exclusively to the National Assembly.²²⁰ The President must only make recommendation to the National Assembly that removal of the DPP needs investigation. In addition, the question of removal of judges of the Supreme Court and High court, and the constitution of a tribunal must not be left to the President. To ensure independence of the judiciary, the question of removing the Chief Justice and his deputy must be left to the National Assembly. The President may make representations to the National Assembly, which will then constitute a tribunal. As for other judges, the Chief Justice may make representations to Parliament, which will then constitute a tribunal to investigate the removal of the judge. This may be an addition or substitution to recommendations in the Draft constitution of 2005.²²¹

It is further recommended that, as regards appointment of puisne judges, to ensure independence, the composition of the Judicial Services Commission must be spelt out within the constitution. Nomination and Appointment of these officers by the President must be subject to ratification of the National Assembly. Composition of the commission is critical. An example of the proposed composition could be: the Chief Justice, two puisne judges, a lawyer of immense practical experience and who qualifies to be judge of the High court and a Professor of law.

²²⁰ The Mungomba Draft Constitution 2005 under chapter 19 of the Report recommends removal by the National Assembly

²²¹ Mungomba Draft Constitution Report (2005)

A further recommendation is that to ensure autonomy of the judiciary, reforms must be made so as to enable the judiciary run by itself. As is the case with the Canadian judiciary, the Zambian Judiciary must be able to raise its own finances, salaries and other resources. Dependence on the executive must be done away with.

Recommendations as to powers of the President to declare a state of emergency and measures made pursuant to this are as follows: the courts power to review the validity of the declaration must be enlarged. The constitutional Review Commission draft constitution (2005) provides that a constitutional court should have the jurisdiction to decide the validity of the declaration or threatened state of emergency including reasonableness thereof, the validity of any extension and any enactment or measures taken in consequence of such declaration.²²² Further, the constitution must define what amounts to a state of emergency in a democratic society in conformity with international standards. The court must further be given power to impose measures to prevent torture of detainees within prison, and bringing erring officers before it to justify torture of such detainees. In addition, Article 26 of the constitution must be amended to exclude the holding of secret trials by a tribunal appointed under the provisions of the article to review a person's detention. These must be held in public. Repeal or reform of the regulations made under the emergency powers Act (Cap 108) and the Preservations of Public Act (Cap 112), which facilitate abuse of Human Rights, is required.

²²² Article 85(1) of the Mungomba Draft Constitution, (2005)

Finally, laws that make defamation of the President criminal must be revised as defamation is a civil and not criminal offence. Further, laws of sedition and espionage must be repealed so as to ensure independence of the media and journalists.

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