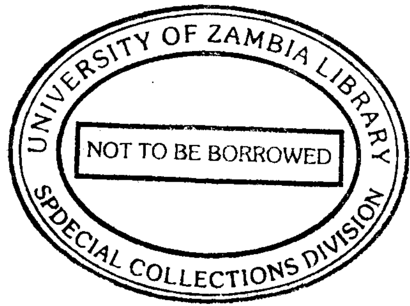




# THE DOCTRINE OF SEPARATION OF POWERS: A CRITICAL ANALYSIS OF WHETHER IT HAS ACHIEVED ITS GENERAL APPLICATION IN ZAMBIA AND TO WHAT EXTENT HAS IT BEEN APPLIED.

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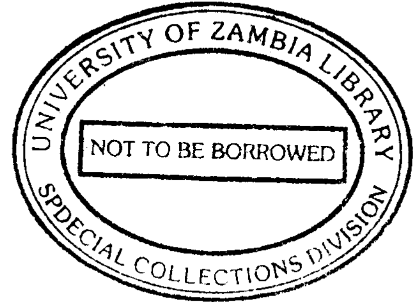
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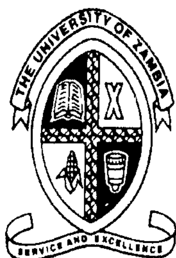
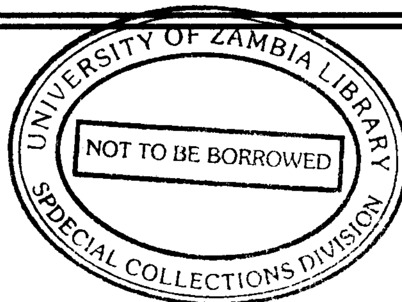
**GALAPA LYNNE**

**A Directed Research Paper Submitted to the University Of Zambia Law Faculty in partial fulfillment of the Requirements for the Award of the Degree of Bachelor of Laws (LLB)**

**UNZA** **JANUARY 2007**

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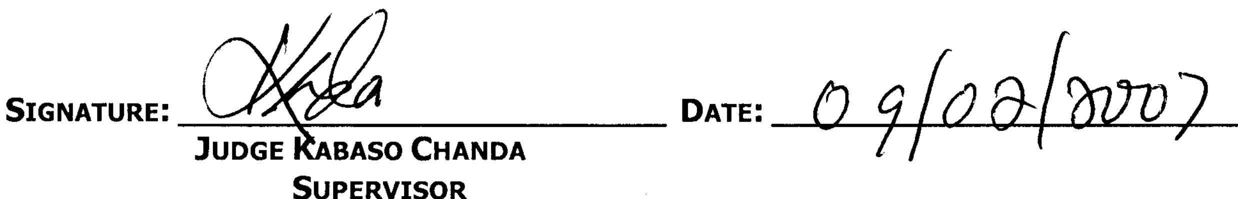

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**JUDGE KABASO CHANDA**
**SUPERVISOR**

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## Declaration

I **GALAPA LYNNE**, do declare that the contents of this Directed Research Paper are entirely based on my own findings and that I have not in any respect used any person's work without acknowledging the same to be so.

I therefore bear the absolute responsibility for the contents, defects and any omissions therein. I verily believe that this research has not been previously presented in the school of law for academic purposes.

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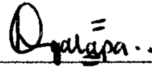
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**GALAPA LYNNE.**

# DEDICATION

This piece of work is dedicated to my lovely family (the Galapa family) for their tremendous support and for being there for me in good and difficult times especially in times when I needed them the most. Throughout my life, they have showed me love, kindness, compassion and showed me the true meaning of family. They have given me the strength to pull through any difficult situation. They are the reason I have reached so far, I am what I am now because of them, I owe it all to them. Thanks a lot, Dad, Mum, Ivy, Micah and Susan.

To Lawrence C. Chikonde, I say, of all the things I appreciate, you are one of them. You have taught me things and I have learnt a lot though still learning. I now have a different and better understanding of things I used to overlook in life. I am glad our paths crossed.

To my darling daughter Stacy Choolwe Chikonde, you are truly a blessing sent from above. You have brought so much joy into my life and for this I will always be grateful to the Almighty Father. I am very hopeful of you and I know you will make it in life and make me proud. I love you daughter.

## ACKNOWLEDGEMENTS

First and foremost, I would like to express my gratitude to the Almighty Father for bring my helper and source of strength. He has given me a good family, good friends, he has been with me in good and difficult times and above all, made it possible for me to finish my Directed Research paper and final year in good health.

Secondly, I wish to extend my gratitude to my supervisor Judge Kabaso Chanda by ably supervising this tedious work by making himself available for advice, consultation and fatherly guidance despite his busy work schedule. May the Good Lord bless him. Special thanks also go to the Late Professor Alfred Chanda for his inspiration and Judge Phillip Musonda for his assistance and guidance rendered to me during my research.

I am further indebted to my family for the financial and moral support they gave me, at all times that enabled me to complete my studies at the University of Zambia.

I also wish to further express my gratitude to all my lecturers in the School of Law, to all my friends; Jimmy James, Jorek, Mutonga, Christebell and my colleagues; Kabukabu, Gracillia, Shanique, Anthony, just to mention a few, for their inspiration, tremendous support and for believing in me.

Lastly but not the least, I wish to thank Ms Sylvia Tope for typing this work with commitment and a lot of patience.

## CHAPTER ONE

## 1.0 THE DOCRINE OF SEPARATION OF POWERS AND ITS REQUISITE CHECKS AND BALANCES.

### 1.1 INTRODUCTION

Government is universally accepted to be a necessity, since men cannot fully realize himself – his creativity, his dignity and his whole personality – except with an ordered society.[1] Yet the necessity for government creates its own problem of how to limit the arbitrariness inherent in government, and to ensure that these powers are to be used for the good of society.[2] It is this limiting of the arbitrariness of political power that is expressed in the concept of constitutionalism. Constitutionalism recognizes the necessity for government but insists upon a limitation being placed upon its powers by way of dividing the government powers into their three constituent functions, and under three arms. Thus constitutionalism connotes in essence a limitation of government powers through the doctrine of separation of powers.[3]

The doctrine of separation of powers is indispensable in Zambia's constitutional system and is one of the features of the Zambian Constitution since independence. It has been embraced in the constitutions of independent Zambia as the pillar to secure democracy. It is a core characteristic and pre-requisite of a democratic government though it is important to note that, the mere separation of powers of government cannot on its own secure democratic governance.

### 1.2 THE IMPLICATION OF THE DOCTRINE OF SEPARATION OF POWERS ACCORDING TO MONTESQUIEU

In modern times, the concept has been expanded and has come to mean a number of things to scholars and other interested parties. However, in its original context as formulated by Montesquieu, the concept meant: (1) that the same person should not form part of more than one of the three organs of government; (2) that one organ of state should not control or interfere with the exercise or functions of other organs; (3) that one organ of state should not exercise the functions of another organ of state. In considering each of these aspects of

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[1] Nwabueze, B. O. 1973 Constitutionalism in Emergent states. Page 1

[2] Ibid.

[3] Opicit.

separation of powers, it is important to make note of the fact that though the separation of powers is desirable and important, absolute separation of powers is not possible.

### 1.3 PHILOSOPHICAL BASIS OF THE DOCTRINE OF SEPARATION OF POWERS

The doctrine of separation of powers was formulated as an alternative to absolution. The doctrine advocates the independent exercise of the three constitutional government functions by different bodies of persons, without interference, control or domination by one o two.[4] Political thinkers such as John Locke and Baron De Montesquieu, who were concerned with securing the liberty of individuals from the tyrannical tendencies of those vested with state power, advocated for the separation of Government functions. Locke felt that the essence of political liberty is that a man shall not be "subjected to the inconsistent, uncertain, unknown, or arbitrary will of another man".[5] He recognized three powers of government. First, the legislative power, whose function is to make laws. Legislation to Locke involved the formulation of rules according to which man's natural rights are to be judged. According to him, natural rights meant the right to life, liberty and property. Secondly, the executive power to him meant the power to enforce laws by penalties. The third power, Locke said, is the power to interpret the laws. Concerning the separation of the Executive form the legislature, Locke made the following classical exposition:

> *"It may be too great a temptation to human frailty; apt to grasp at power for the same persons who have the powers of making laws, to have also in their hands the power to execute them, whereby they may exempt themselves from obedience to the laws they made, and suit the law, both in its making and execution to their own private advantage."*[6]

As a result, it was felt necessary to separate the legislative and executive power of the government.

The doctrine was further developed by Baron de Montesquieu who observed that the three powers of government, viz, executive, legislative and judicial powers, be kept separate. Montesquieu was concerned with the preservation of political liberty when he wrote that:

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[4] Justice Kayonde Eso, supra note 5
[5] John Locke, 1966. The Second Treaties of Government (J.W Gough ed) at page 15
[6] Ibid at 28

> *"political liberty is to found only in moderate governments: and even in these, it is not always found. It is there only when there is no abuse of power ... but constant experience shows that every man vested with power is apt to abuse it and to carry his authority as far as it will go. To prevent this abuse, it is necessary from the very nature of things that power should be a check to power."*[7]

According to Montesquieu, the legislative power "enacts temporary or perpetual laws and amends or abrogates those that have been already enacted", the executive power "makes peace and war, sends and receives embassies, establishes the public security and provides against invasions". While the judicial power "punishes criminals or determine the disputes that arise between individuals".[8]

He believed that when the legislative and the executive powers are united in the same person or in the same body of persons, there can be no liberty because apprehensions may arise since the executive and legislative may enact tyrannical laws and execute them in a tyrannical manner.[9] Further, he believed there can be no liberty if the judicial power were not separated from the legislature. In such a situation, the life and liberty of the subject would be exposed to arbitrary control of judges, who would also be legislators. Where the judiciary is joined to the Executive, the judges, he believed, would behave with violence and oppression.[10] Consequently, where the three powers of government are vested in one man or the same body whether of nobles or of men, there would be an end to everything.[11]

While Montesquieu cannot be credited with the invention of the doctrine of the separation of powers, his statement of it has settled the modern classification of the estates of government to what are accustomed to today, viz, the Executive, the Legislature, and the Judiciary. The doctrine in summary gives three different components as follows: First, no one arm of government should control or interfere with the exercises of function of another arm of government, for example the Executive should not be under the control of the other organs of government; Secondly, no one arm of government should exercise the function of another, for instance, Ministers should not exercise any legislative power; Thirdly, the same persons

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[7] Baron de Montesquieu, 1966, The Spirit of the Laws (Translated by Franz Newmann) at 150
[8] Ibid.
[9] Ibid at 151
[10] Ibid.
[11] Ibid.

should not form part of more than one of the three arms of government.[12] For instance, a judge should not be a member of the Executive by holding a ministerial position.

However, Montesquieu did not imply that the legislature, the Executive and the Judiciary should not in any way have influence or control over the actions of each other, but rather neither should exercise the whole functions of the other. As Professor Sagney notes:

> *"The concept of separation of powers arose from the need to ensure that government power was restrained by dividing that power, and at the same time, ensuring that its division was not carried to an extreme incompatible with effective government."*[13]

The interference which professor Sagney envisaged is to the extent that it is only for the purposes of enabling one of government to provide checks and balances to the other arm(s) of government. This type of interference and control is justified and commonly referred to as the concept of checks and balances.

## 1.4 THE CONCEPT OF CHECKS AND BALANCES

The concept of checks and balances allude to various inbuilt mechanisms in a system of government that prevents an over concentration of decisional authority in any person or branch of government.[14] This idea of checks and balances seeks to make the idea of separation of powers more effective by balancing the powers of one organ of government against those of another through a system of positive mutual checks exercised by the government organs upon one another. The most important function of the concept is to avoid dictatorship and tyranny of each one of the arms of government. It is necessary in a democracy in order to maintain law and order as well as to secure the liberties of the citizenry.

In modern times, Jurists and political scientists have been concerned with how to curtail the ever rising power of the Executive relative to the other two arms of government. The function of the Executive is the general and detailed carrying out of government according to law. This involves that formulation of policy and its implementation, as well as ensuring that

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[12] Supra note 4 at 52
[13] Itse Sagney. Separation of Powers and the Rule of Law, in supra note 10 at page 20
[14] Hawa Sisay, The Executive: Checks and alances at page 29

the laws are obeyed. With the advent of industrialization in modern nations, the scope of the Executive function has become very wide such that it now involves the provision and regulation of vast system of social services and the finances required thereof.[15] Practically, the government is run by the Executive, with the Legislative playing a legislative and examinative role, while the Judiciary plays the role of the protector of the citizenry from the excesses of the other organs of government and stands as a sentinel of the structure of the constitution. In a democracy the legislature and the Judiciary must always be disposed to check the Executive. However, for the legislature and the Judiciary to check the Executive, certain pre-requisite conditions in the manner they operate and the calibre of personnel found therein have to exist.

### 1.5 THE LEGISLATURE: CHECKS AND BALANCES

It has been noted that the concept of democracy refers to the participation of the citizenry in the political life of a nation. It is based on a consent given freely or through persuasion but not coercion.[16] This was echoed by Locke when he wrote:

> "*... men being ... by nature free, equal and independent no one can be put out of this state and subjected to the political power of another without his consent. The only war whereby anyone divests himself of his natural liberty and puts the bonds of civil society is by agreeing with other men to join and unite into a community for their comfortable, safe and peaceful living one amongst another, in a secure enjoyment of their properties and greater security ... when any number of men have so consented to make one community or government, they are thereby presently incorporated and make one body polity wherein the majority have a right to act and conclude the rest.*"[17]

Therefore it would be unrealistic in today's world to envisage a government in which there is direct participation of citizenry in the formulation of policy and in the everyday running of the nation. Modern democracy is not based on participation but on representation. The citizens are given a choice between rival political parties and individuals, from whom the choose their representatives.[18] Therefore, for democracy to function, the Executive has to be accountable to the people's representatives, that is, the national Assembly.

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[15] O. Hood Philips and Paul Jackson, 1985, 6th ed, Constitutional and Administrative Law. page 10
[16] M. C. Musambachime, 1998, The Role of Political Parties in Electrical System in the Road to Democracy page 1
[17] Supra note 18 at 19.
[18] Supra note 34 at 4 .

Most democratic states have one or another form of National Assembly and Executive. The delineation of the functions of the two cannot be made in absolute terms as these functions vary from one country to another with regards to their history and constitution. However, two models which have been found world-wide spread are the Presidential system and the Parliamentary system of governments.[19]

The Presidential system was first applied in the United States Constitution of 1787 under the wide spread notion, and the influence of James Madison and Alexander Hamilton.[20] The silent features of this type of government are that Legislature and Executive are considerably more independent of each other as compared to the Parliamentary system. Neither the president, who is the head of the Executive branch, nor the Legislature is able to determine the election of the other. They are either directly or indirectly elected by popular vote for definite terms of office. Moreover, one may not be a member of both the legislative and the executive arms of government at the same time.[21] But even so, Madison and Hamilton also stressed that the separation should be only partial to allow each branch to exercise checks and balances on the other arms of government.[22]

The parliamentary system on the other hand embodies three characteristics: first, the members of the executive, often referred to as the government, may hold office only as long as they possess the support or confidence of a majority of members of the elected Legislature; second, if the government loses the confidence of the legislative Assembly it must either resign or dissolve the Assembly to determine whether it or the Assembly represents the electorate; and third, if the government fails to win a majority in the Assembly after a dissolution, it has no choice but to resign and allow the formation of a new government that has the confidence of the Assembly's majority.[23] This type of government is often said to reject the separation of powers in favour of a "fusion" or "concentration" of legislative and executive power.[24]

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[19] Williams B. Gwnyn 1986. The Separation of Power and modern forms of Democratic Government: Separation of Powers- Does it Still Work, page 72.
[20] Ibid
[21] Ibid at 75
[22] Ibid at 74
[23] Ibid at 75
[24] Ibid

In most but not all existing parliamentary systems, members of the executive are also elected voting members of the Legislature to which they are responsible. In most parliamentary systems Executive members form a relatively small majority of the total membership of the Legislative Assemblies. In Britain, for example, the law in 1980 limited the number of government ministers who might be members of the House of Commons to ninety-five or 15% of the total membership.[25] However, the Legislature and the Executive maintain separate existences, and each through withdrawal of confidence or dissolution respectively, is able to check the actions of the other.[26] There is thus the separation of the legislative and executive power in the Parliamentary system.

However, the question that arises is that of the duty of the elected representatives in the National Assemblies to their constituents. The relationship between the National Assembly and the Executive is clearly one focused on achieving one primary goal, democracy. The people's representatives are duty bound to ensure the accountability of the Executive to the National Assembly to avoid dictatorial rule by the ruling party and at the same time promote transparency in decision-making.[27] For the representatives to carry out their duty they require to be given the mandate by the sovereign people in genuine free and fair elections held at regular intervals on the basis of universal and equal suffrage.

However, with the appearance and domination of political parties on the political stage, the ideas of representative democracy have been eroded. Politics is today associated with political parties as the instruments of democratic systems.[28] A political party has been defined as:

> *"An organization formed by a group of people concerned with the expression of preferences and views regarding the contest, control, consolidation and the use of local, regional and state power to improve the social economic well-being of the people they represent"*[29].

The case for political parties as a basic element in the democratic apparatus is that they draw the electorate together into majorities so that people can be governed by their own consent,

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[25] Ibid at 76
[26] Supra note 4 at 37
[27] Ibid at 38
[28] G.A. Regulation, The role of Political Parties in Democracy system in the Road to Democracy, Supra note 34 at page 4.
[29] Supra note 34 at 4.

thereby allowing for existence of government by the will of the people and peaceful change of government.[30]

However the above case for political parties is only an ideal case. In practice, political parties are dominated by the interests of their members and not the general citizenry. Since democracy is defined as "government of the people, by the people, and for the people"[31] the emergence of political parties as a tool through which the people can express their myriad interest and opinions of the governed as well as the determination of which one or more of such opinions should find priority expression, has greatly diminished the idea of representative democracy.[32] Government for the people in reality has become rulers of the people. The sovereign is degraded to the position of the ruled.

Through the mechanism of the party discipline, the executive is not controlled by the Legislative Assembly because in most modern Assemblies there are no longer free representatives, but tied up delegates fettered by the promises made before election to which they are forced to adhere by pressure of Parliamentary whips.[33] Some writers are of the view that this is the only way in which Parliamentary government can work efficiently. Gwyn writes that:

> *"Parliamentary government could only function properly with a fair and reasonable party majority, predisposed to think the government right but not ready to find it to be so in the face of the facts and opposition to whatever might occur...The majority of the Legislature being well disposed to the government would not find against it."*[34]

With regard to the British situation, Gwyn notes.

> *"The House of Commons no longer controls the Executive: on the contrary, the Executive controls the House of Commons...In our modern practice, the cabinet is scarcely ever turned out of office whatever it does..*[35].

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[30] Supra note 47 at 16.
[31] Defined by Prosesor Lincon.
[32] G.C. Mulenga 1995. The Juristic and Constitutional Implications of Party Membership on the theory of practice of representative Government: The Zambian Experience, The University of Zambia Obligatory Essay, page 2.
[33] Ibid
[34] Supra note 35 at 15.
[35] Ibid at 81.

Modern Assemblies in the Parliamentary system are therefore scarcely legislative chambers but an automation of registering the cabinet's decrees and discussing the Legislative projects of Ministers. Moreover, in no case does a political party capture power on behalf of the people. A party gives priority and prominence to people not so much for their intellectual merit or moral integrity, but to those who can be of greatest help for it to capture power.[36] As a result most political parties serve the purpose of promoting the ambition of individuals either thirsting for power for the sake of power or material benefits.[37] The membership of even the largest party is only a small fraction of the people, thereby making the dangers of party dictatorship ever present.

Any majority party can establish a dictatorial regime. Lastly but not the least, political parties have no legal obligation to translate their manifestos into working reality. The only guarantee is their moral sense.[38]

The conclusion to be drawn is that checks by the Legislature on the Executive in reality are not assured as the current political regimes divert the primary royalties of the peoples' representatives to political parties, which are dominated by their leaders who in most cases head the Executive branch of the government.

## 1.6 THE JUDICIARY: CHECKS AND BALANCES

The concept of democracy and its attendant values of liberty, the rule of law and justice guarantee freedom based only on the awareness of ever intervention of law under the arm of the third organ of government which is the judiciary. Under the doctrine of the separation of powers, the judiciary is vested with the power to serve as the "honest broker" in a democracy and is entrusted with the task of deciding the scope of the fundamental rights as well as the permissible rights to which the law of the social control could go.[39]

[36] Supra note 35 at 15.
[37] Ibid
[38] Ibid at 14
[39] Justice Omar H. Alghali. The Judiciary-Checks and Balances, Supra note 10 at 38.

The doctrine of separation of powers has been applied ardently to secure judicial independence which is indispensable is meaningful adjudication in a democracy. Judicial independence has been said to mean;

1. that every judge is free to decide matters before him in accordance with his assessment of the facts and his understanding of law without any improper influences, inducements or pressures, direct or indirect from any quarter or for any reason.

2. the judiciary is independent of the Executive and the Legislature and has jurisdiction directly or by way of review over all issues of the judicial nature.[40] For example in Zambia Article 91 of the Republican Constitution acknowledges that the courts outlined therein shall exercise their power in an impartial way while enjoying independence from other interferences.[41]

In a country like Zambia where there is a written constitution and it is declared to the supreme law of the land, the judiciary like other two arms of government is a creature of the constitution. The constitution positions the judiciary as an impartial and independent body in a judicial system, which protects an individual from the excesses from other organs of government and which stands as a sentinel of the structure of the constitution. It is the principle of the Constitutional Supremacy, which presupposes judicial control of the constitutionality of the law and administrative acts under the practice of the judicial review.[42]

Judicial review is the power of the court to invalidate acts of Legislators and Executives, which in the court's view violate the constitution or vindicating them and so putting them beyond challenge in future. The practice of the courts of reviewing the Legislative and Executive enactments and actions was first pronounced and established as a rule of law by the Chief Justice Marshal of the United States Supreme Court in the landmark case of **Murbury v Madison**[43], and the practice has become a foremost feature of popular or representative government organized under a written constitution[44].

[40]Marjorie B.Musonda. The Politics of the Zambian Judiciary; A Case Study of the Transition to

[41]Article 91 of the Constitution, Cap 1 of the Laws of Zambia.

[42] Carlson Anyangwe 1997. The Zambian Constitution and the principal of Constitutional Autochthony and Supremacy.

[43] (1803) Cranch

[44] C.G Haines, The American Doctrine of Judicial Supremacy, Russsell Inc. New York.

In that case, the question was presented, stated the chief Justice, whether the Authority given to the Supreme court by the Judiciary Act of 1789, authorizing the Courts of the United States to issue writs of mandamus of Public Officers, was warranted by the constitution in its application to the original jurisdiction of the Supreme court or, in other words, whether an Act which according to the judgment of the members of the court, repugnant to the constitution could become a law of the land. The Supreme Court in an opinion delivered by the Chief Justice thought that if a Constitution is superior paramount law, then"...a Legislative Act contrary to the Constitution is not law".

On the duty of the Court, Chief Justice Mashal said;

> *"It is emphatically the province and duty of the judicial department to say what the law is. Those who apply a law to a particular case of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each law. If a law be in opposition to the constitution, if both the law and the constitution apply to a particular case so that the court must either decide that case, conformably to the law, disregarding the constitution, or conformably to the constitution disregarding the law the court must determine which of these conflicting rules govern the case. This is of the essence of judicial duty".*

The decision in **Murbury v Madison** firmly established the practice of judicial review and it has found favour in many jurisdictions in the world. The Judiciary therefore performs the function of checks and balances of the other two arms of government by ensuring that their activities conform to the law.

The judiciary today faces two main challenges; first, how to apply the ever changing principals of freedom, and second, how to countervail the executive which has continued to rise in authority and through innovations, including the use of Legislature, has tried to subjugate and undermine the judiciary.[45] It is a fact that the Judges who form the judiciary are people within the living stream of our national life, steering the law between the dangers of rigidity on one hand and formlessness on the other. The judiciary has therefore, an exigent task of securing and maintaining their impartiality and independence especially when they

[45]In April 1996, the governments included provisions in the Constitution of Zambia (Amendments) Bill which allowed the President to dismiss Judges for "gross misconduct" without going through a judicial tribunal. Only determined opposition from the Judges and Magistrates Association, the Law Association of Zambia., the Church Labour Movement, the Independent Press and Non-governmental Organisations forced the government to drop these provisions See A.W. Chanda, Zambia's fledging Democracy, Zambia Law Journal, Vol 25-28 1993, at 140.

are called upon to review "political cases that is, cases that arise out of controversial legislation or action initiated by the government or cases, which touch on important moral and social issues.[46]

To enhance democracy and the protection of human rights, in the resolution of such cases, Judges have to a great extent discard a "strict constructionist attitude in the interpretation of the Constitution and statutes and adopt instead an "activist" approach.[47] Judicial activism refers to the policy-making role, which courts have incidentally assumed in the performance of judicial duties. Justice Sanderson Silomba of the Supreme Court of Zambia has identified three features of the judicial activism. He has noted that:

1) In the resolution of political cases judges must all times be active and not passive in the manner they exercise sovereign adjudicatory power.
2) Judges must be women and men who possess strength of character and self-belief in applying the law without having to worry about consequences to their families.
3) At best, the judges should be activists with a strong inclination for creativity, innovation and dynamism in their law-making roles.[48]

It follows therefore that for the judiciary to effectively play its prominent role of limiting both Executive and Legislative power and protect the right and liberties of individuals; it is imperative that it can be active, courageous and creative.

Judges in some jurisdictions have exhibited possession of the three hallmarks for meaningful adjudication in a democratic society. In Zimbabwe, the Supreme Court of that country has made a great conscious effort towards the protection and active enforcement of fundamental human rights and freedoms and has endeavoured where possible to construe domestic legislation so that it conforms with developing international jurisprudence of human rights. Chief Justice Anthony R, Gubbay of Zimbabwe has written that: -

> *"Judges would address human rights issues with boldness, imagination and creativity. Their primary duty is to make the constitution grow and blossom in order to meet the just demands and aspirations of an ever-developing society. International human rights norms must be taken into account when interpreting the meaning and*

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[46] Justice Sanderson Silomba
[47] Ibid page 1.
[48] Ibid.

*content of the fundamental rights and protections emmerated in the national constitutions."* [49]

On judicial Review Justice Gubbay has noted that: -

> *"As the custodian of the Constitution of Zimbabwe, the Supreme Court has stood resolute in its determination to strike down an Act of Parliament, Presidential or Ministerial regulations or excessive use of power by the state which transgresses one of the constitutional provisions."* [50]

With this approach, the Supreme Court of Zimbabwe has made a number of landmark decisions in their defence of human rights and political liberty.[51] The Indian Judiciary has employed the tools of judicial activism to safeguard India's democracy. On a question whether, in a country where the constitution may be amended without difficult, and therefore the provisions of the bill of rights being at a risk of being diluted and eroded, it is possible for the Judiciary to protect the declaration of Rights against the passing of such amendments, the Supreme Court of India, in a unique decision gave an affirmation answer in the case of **Kasavananda Bharati v State of Karela.**[52] In that case, the court was concerned with the constitutional amendment that empowered the state of Karela to expropriate land. The Supreme Court rule that:

> *"Parliament's power to amend the constitution was indeed plenary but always subject to the implied limitations of the basic structure doctrine. The essential features of this structure may not be amended: if amended, these would be subjected to judicial review. These features include: federalism, democracy equality before the law, socialism and secularism".*

The judgment generated political consternation and there emerged a political consensus among all political parties that the judiciary had usurped the Constitutional powers of Parliament.[53] However, what the Supreme Court achieved was a unique assertion of judicial power under which could negative an amendment to the constitution duly passed by Parliament acting under the provisions of the Constitutions.

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[49] Anthony R. Gubbay, The protection and Enforcement of Fundamental Human Rights: The Zimbabwean Experience, Human Rights Quarterly, Johns Hopkins University Press, No. 2 of Vol. 19 May 1997 at 232-

[50] Ibid.

[51] In **Sate v Ncube** and **State v Juvenile** (1987) ZLR and (1989) ZLR respectively, the Supreme Court declared as unconstitutional regulations authoring the confiscation of property from a person deemed by the Minister of Home Affairs to be an enemy of the State, where there was no war or armed conflict in existence.

[52] AIR [1973] SC at 1461.

[53] Apendra Baxi, Judicial Activism: Usurpation or re-democration.

The wisdom of the Supreme Court decision can be appreciated in a later case of **Indira Ghandi v Ra Narain.**[54] In that case the appellant, the Prime Minister of India, appealed against an order declaring her election to Parliament void. Later, at the instigation of the Executive, Parliament enacted an amendment to the constitution purporting to put issues relating to her election beyond judicial review or any form of investigation by the apex court. The Supreme Court recalling its earlier decision in **Kasavananda Bharati v State of Karela,** invalidated the amendment because they were inconsistent with the "essential feature" or "essential pillars" of the Constitution. The Supreme Court reiterated that, the Constitution of India stands on certain fundamental principles which are its structural pillars, and if these pillars are damaged or demolished, the whole Constitutional edifice will crumble. The decision without doubt demonstrates how judiciaries can apply their adjudicatory power to the preservation and promotion of democracy.

As stated earlier, the United States is another jurisdiction where judicial power has been actively employed to protect human rights and liberty. One illustration is the United States Supreme Court's decision in the case of **Brown v Board of Education.**[55] The judicial leadership is effectuating desegregation, which began with the decision of that case in the early fifties, and still continues unfolding demonstration of how the adjudicatory power and process can be deployed to interrogate and disorient oppressive structures of dominance. As we discuss the notion of judicial activism it is worth keeping in mind and recognizing the obvious. "Adjudication, all said and done, is an aspect of governance.[56] In other words, courts have become policy-making institutions incidentally or in consequence of the performance of judicial duties and in some jurisdictions by deliberate design. As a result, courts everywhere at the end of the day are strategic domains of both responsive and ideological state apparatus[5757]. Thus the rule of law can co-exist and combine with the reign of terror.

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[54] AITR [1995] SC 2299.
[55] Discussed by Hon. Jude Robert 1 Carter, Right not to be separated by race, in the Supreme Court and Human Rights, Forum Series, Voice of America, 1978, (Marshal Bueke ed.).

[56] Supra note 37 at 191.
[57] Supra note 37 at191

Courts and justices wield the power of the state even as they are constituted by it. Citizens become justices when appointed by executive of the day. Within this frame, considerations of religion, castle, race, region, gender etc, play a distinctive role in converting citizens into justices, and in the exercise of the sovereign adjudicatory power of the state the judiciary and courts are naturally inclined not to be passive, they by definition need to be active. Just as the protection of democracy and human rights cannot be maintained by passivity of adjudication; nor are draconian detention laws nor a regime of immunity from corruption in high places. The judiciary may be active in the preservation of structures in dominance and they thus have to bring an unusual insensitivity to injustice as a mark of competence in adjudication.[58]

The, American Supreme Court offers a most illustrative example. For over two hundred years clauses of the constitution of the United States have been substantially the same. Nevertheless, the institution of slavery was sustained in the infamous **Dred Scott** decision. For about 100 years the Supreme Court sustained "apartheid" at all levels of the American social and political life, women did not have the contractual capacity or the ability to own property until 1848; women and African-Americans did not have the right to vote until the 20th century: sex and racial discrimination co-existed notwithstanding the equal protection clause in the constitution.[59]

Therefore, the labeling of the judiciary and adjudication is merely a fleeting categorizations, that is to say, only under certain setting justices in their self-images and/or by their fearsome critics get "tagged" as activists.[60] The classifications are accomplishments of changing political milieu. When adjudicatory power or process is deployed to interrogate or disorient structures of dominance, outries of judicial activism happen. Serving of dominant ideologies interests, values and visions is not considered activism, only the problematisation of all this is.[61] The judiciary therefore can be activism either for or against the cherished principles of democracy. The existence of a standing judiciary in any polity is not a guarantee that it would act as check on the Executive. It may just reinforce, or be indifferent to the excesses of the Executive.

[58] Ibid.
[59] Ibid.
[60] Ibid.
[61] Nambweze. B.O 1973. Constitutionalism in Errment States, page 13.

## 1.7 CONCLUSION

The separation of powers of the three organs of government is a core characteristic and pre-requisite of a democratic government. It should be there if political liberty is to be achieved because if the Legislative and Executive powers are united in the same persons or body of Magistrates, there could be no liberty in the same way that if the judiciary power was not separated from the Legislative and the Executive, the life and liberty of the subject could be exposed to arbitrary control for the Judge would then be the Legislature and where it joined to the Executive however, the Judge may behave with violence and oppression. However, though the separation of powers is a core characteristic and pre-requisite of democratic government, the mere separation of the powers of government cannot on its own secure democratic governance. It is cardinal that the three arms of government interact in such a way that they through the ideas of checks and balances, prevent each other from abuse of power. From what has been discussed the doctrine of the separation of powers does not seem to be attaining its general application in Zambia. It has been shown that the Executive has steadily risen in authority relative to the other two branches and the other, in such an environment, to effectively and meaningfully check, the Executive have to be manned by people with strength of character, and activist attitude and creative with a strong bias to upholding democratic values, and respect and protection of human rights. However, it is usually the case that such personnel are not found. As a result it is not strange to have representatives and Justices actively safeguarding undemocratic regimes and even clothing them with legitimacy. Therefore, the mere presence of a system of separation of powers in a constitution of a country is not a guarantee that democratic governance would prevail. Though the inference that the doctrine of separation of powers has not achieved its general application in Zambia is correct, that is not to say that it has completely not been applied because in some instances, generally speaking, it has been realized.[62]

[62]In that the Zambian constitution Chapter one of the Laws of Zambia presupposes separation of powers.

## CHAPTER TWO

## 2.0 THE DOCTRINE OF THE SEPARATION OF POWERS UNDER THE REPUBLICAN CONSTITUTION OF ZAMBIA

### 2.1 INTRODUCTION

Zambia has a combination of both the presidential and parliamentary system of government. A parliamentary system of government is by its very nature designed to keep the administration in check. The Zambian Constitution embraces the concept of separation of Powers. The Executive power is vested in the President.[63] The legislative powers of the Republic are vested in Parliament, that is, the National Assembly acting together with the President,[64] where as Judicial authority is vested in the Supreme Court, High Court, the Industrial Relations Court, Subordinate Courts, Local Courts, and such lower courts as may be prescribed by an Act of parliaments.[65]

### 2.2 THE EXECUTIVE

The Constitution of Zambia creates the office of the President of the Republic of Zambia and grants him the leadership of the state and the government, and he is also Commander-in-chief of the Defense Forces.[66] Article 33(2) of the Constitution vests the Executive power of the Republic of Zambia into the President, which powers are to be exercised by him either directly or through officers subordinate to him, such as the vice president, Cabinet and Deputy ministers who are appointed by the President himself from amongst members of the National Assembly.

Although the Constitution provides for and vests Executive power of the Republic in the president, it does not define Executive power and what activities fall within that scope. Though it is not possible to provide a precise definition of the Executive power, it has been taken to mean the remainder of the powers after the legislative and Judicial powers are taken out.[67] Executive power includes the power to formulate policy and implement it. It includes

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[63] Article 33(2)
[64] Article 62of the Constitution read together with Article 78(1) of the Constitution of Zambia
[65] Article 91(1)
[66] Article 33(1)
[67] Article 33(1)

the initiation of legislation, maintenance of law and order, the direction of foreign policy, the enhancement of economic and social welfare and the carrying of the general administration of the state.[68]

In the performance of his functions as head of state, Article 44(6) provides that the President shall, unless he otherwise desires, act in his own deliberate judgement and shall not be obliged to follow the advice tendered by any other person or authority.

## 2.3 THE LEGISLATURE

Article 62 of the Constitution of Zambia vests the legislative power of the Republic of Zambia into Parliament, which shall consist of the President and the National Assembly. According to Article 63(1), the National Assembly shall consist of one hundred and fifty elected members, not more than eight members nominated by the president, and the Speaker of the National Assembly.

Article 78(1) of the Constitution[69] provides that the legislative power of Parliament shall be exercised by bills passed by the National Assembly and assented to by the President. Where a bill is presented to the President for assent, the President has the power either to assent or withhold his assent.[70] Article 78(4) provides that, where the president withholds his assent to a bill, the president may return the bill to the National Assembly requesting the National Assembly to reconsider the bill accordingly. If the National Assembly passes the bill without or with amendments by a vote of not less than two-thirds of all the members of the National Assembly, the president has to assent to the bill within twenty one days of its presentation unless he sooner dissolves parliament.

Thus it is very difficult or even impossible for the legislature to pass a piece of legislation that is to the disadvantage of the Executive as no Bill can have the force of law without the assent of the president. This carefully stated in Article 78(6)[71] which provides that "where a Bill that has been duly passed is assented to in accordance with the provisions of this Constitution, it shall become law ...". Article 78[72] demonstrates the power of the President in

[68] Shukla, V.N Constitution of India. Luncnow: Eastern Boox Company
[69] Cap 1 of the Laws of Zambia.
[70] Article 78(3) of the Constitution.
[71] Ibid
[72] Opicit

the legislative process. Resolutions of the National Assembly alone have no legal force unless they are assented to by the President. The power to dissolve a non-conformist National Assembly given to the President in Article 78(4) consolidates the president's hold on the National Assembly.

The Executive's dominance in the legislative process is further consolidated by Article 81 of the Constitution which restricts the National Assembly, except upon the recommendation of the President, signified by the vice-president or a Minister, from proceeding upon any bill relating to taxation and general revenue of the Republic.

Apart from appointing Members of Parliament into cabinet and deputy ministers, whom he controls through the principle of collective responsibility, the president also has the power under Article 68(2) of the Constitution to appoint up to eight individuals to the National Assembly "to be called nominated Members of Parliament". The President's absolute control over such members is assured as their membership to the National Assembly is during the president's pleasure. As regards Back Benchers and opposition members of Parliament, the president can easily control them by promising to appoint them to Ministerial positions and other Executive positions if they toll along his line. This effectively makes all members of Parliament susceptible to the President's control.

The Executive therefore participates in and in fact, dominates the legislative process leaving a very thin line separating the legislature and the Executive.

**2.4 THE JUDICIARY**

The doctrine of separation of powers has in form found nearly unadulterated application in the relationship between the Judiciary and the other two arms of government. Article 91(1) of the Constitution vests the adjudicative power of the republic in:-

- the Supreme Court of Zambia
- the High Court of Zambia
- the Industrial Relations Court,
- the Subordinate Courts
- the Local courts and

such lower courts as may be prescribed by an Act of Parliament.

Article 91(2) goes further to provide that Judges, Members, Magistrates and Justices as the case may be, of the courts mentioned in Article 91(1) shall be independent, impartial and subject only to the Constitution and the Law and shall conduct themselves in accordance with a code of conduct promulgated by Parliament. Article 91(3) provides further that the Judicature shall be autonomous and shall be administered in accordance with the provisions of an Act of Parliament. Article 98 of the Constitution further strengthens the Independence of the Judiciary by providing for specific instances and procedure under which Judges can be removed from office, thereby providing security of tenure of office. Furthermore, the Constitution gives Judges immunity from Civil and Criminal liability which they may incur in the course of their duties.

However, these provisions attempting to establish and secure judicial independence are inadequate and in some cases undermined by other provisions of the same Constitution, One such provision is Article 59 of the Constitution which gives the President power to:

> *grant to any person convicted of any offence pardon, either free or subject to lawful conditions;*
>
> *grant to any person a respite, either indefinite or for a specified period of the execution of any punishment imposed on that person for any offence;*
>
> *substitute a less severe form of punishment for any punishment imposed on any person for any offence; and*
>
> *remit the whole or part of any punishment imposed on any person for any offence or any penalty or forfeiture or confiscation otherwise due to the government on account of any offence.*

It is submitted that the above Article empowers the Executive to encroach upon the province of the Judiciary, to the detriment of Individual liberties and the Rule of Law.

Furthermore, despite the fact that under the Constitution of Zambia, the President appoints the Chief Justices,[73] Deputy Chief Justice[74] and Supreme Court Judges[75] subject to ratification by the National Assembly, and Puisne Judges on the advice of the Judicial Service Commission and also subject to ratification by the National Assembly,[76] it is submitted that the President has too much power in the appointment process of members of

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[73] Article 93(1)
[74] Ibid
[75] Article 93(2)
[76] Article 95(1)

the Bench as he also has influence over the National Assembly through both party patronage and Collective Responsibility in the House. This leaves Judges and other members of the Bench amenable to the control and influence of the President.

As was stated by Justice Sakala in the case of **Miyanda v Mathew Chaila**,[77] absolute freedom and independence of the Judges is imperative and necessary for the better administration of justice. In that case, the plaintiff sued a High Court Judge because of his delay in disposing of a civil case in which the applicant was the plaintiff. His argument was that failure to deliver judgement within a reasonable time violated Article 20(9) of the 1973 Constitution of Zambia which required judges to hear cases within a reasonable time. Justice Sakala dismissed the petition on the ground that a Judge could not be sued for any thing he did or said while exercising his Judicial functions.

*Articles 91(2) and 91(3) which proclaim the independence and autonomy of the Judicature* qualify averment of independence. Article 91(2) requires Judges, Members, Magistrates and Justices, as the case may be, to be independent, impartial and subject only to the Constitution, and to conduct themselves in accordance with a code of conduct promulgated by Parliament. Article 91(3) provides for the Judicature to be administered in accordance with the provisions of an Act of Parliament.

Despite the averment of Judicial independence by the above Articles, the same provisions on the other hand make the Judiciary ever at the risk of being handed despotic laws through which it can administer and conduct itself by parliament. Moreover, the Judicature is not as entrenched in the Constitution like the bill of rights which requires a Referendum in order to amend or to abrogate its provisions. Therefore a Political Party with more than two thirds majority in the National Assembly can enact a law which will ensure that the Judicature conducts itself, and is administered in a manner which is in line with the dictates of the Executive or indeed the legislature.[78]

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[77] (1985) ZR 173

[78] Article 79(1) of the constitution confers on Parliament the power to alter the Constitution provided a bill for alternation is supported by votes of not less two-thirds of all members of the Assembly at both the second and third readings. Article 79(3) provides that the alteration of part 111 of the Constitution or Article 79 itself shall not be passed unless before the first reading of the bill in the National Assembly it has been put to a National Referendum with or without amendment by not less than fifty per cent of persons entitled to be registered as voters for the purposes of presidential and parliamentary elections. The judicature is in part VI of the

Every attempt must be made to maintain the independence of the Judges after appointment. Their salaries and allowances should be a direct charge on the General Revenue of the Republic and provided for directly in the Constitution itself, unlike in the current situation where it is prescribed by or under an Act of parliament.[79]

## 2.5 CONCLUSION

The Constitution of Zambia provides for and separates the governmental functions into three organs namely, the Executive, the Legislature and the Judiciary. There is, however, no rigid separation between the Executive and the Legislature, with the former exercising a dominant role in legislative process. This is due to the fact that members of the Executive form part of the Legislature, as well take part in the legislative process.[80] Further more the Legislature does not exercise meaningful checks on the Executive. The doctrine has found wider application so far as the Judiciary is concerned in the sense that, members of the Executive and the Legislature do not form part of the Judiciary.

However, the appointment to the Judiciary and the existence of the Judicature as a whole to a large extent lies within the domain of Parliament, with the President playing a predominant role. Further, Article 59 of the Constitution, which gives power to the President to, inter alia, grant a pardon to a convicted offender, commute offenders' sentences, otherwise collectively referred to as Prerogative of Mercy, empowers the Executive to encroach into the province of the Judiciary, to the detriment of the doctrine of Separation of Powers.

It is submitted that Zambia needs a system of government that is sufficiently able to discharge its responsibilities effectively while simultaneously adequately being limited through checks and balances in order to secure democracy and to protect people's liberties.

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Constitution and therefore can be amended by a two third majority or more on second and third readings of all members of the Assembly, without a Referendum.

[79] Article 119 of the Constitution of Zambia.

[80] Article 62 of the Constitution of Zambia vests the legislative power of the Republic in Parliament which consists of the President and the National Assembly. The Constitution vests the Executive power of the Republic in President. Further, the Vice-President, Cabinet and Deputy Ministers are also members of the National Assembly.

The next two chapters examine the extent to which the Legislature and the Judiciary have provided checks and balances to the Executive, as the dominant arm of government in the Third Republic.

## CHAPTER THREE

## 3.0 APPLICATION OF THE DOCTRINE OF SEPARATION OF POWERS BY THE NATIONAL ASSEMBLY

### 3.1 INTRODUCTION

In democratic dispensations, people's Representative Assemblies play a very important role of providing a platform through which the citizen or through their elected representatives, can speak out and take part in the day to day running of the country. It is also an institution that provides checks and balances on the exercise of the power by the Executive and Judiciary. This Chapter looks at the degree of freedom from the Executive that members of the National Assembly have enjoyed in Zambia drawing examples from the third Republic and also the extent to which the Executive as a dominant Arm of government, has been accountable to the National Assembly.

### 3.2 Third Republic

The Third-Republic is in essence the return to a multi-party system of politics. President Kaunda on 24th September, 1990, amid a genuine overwhelming demand by all sectors of the Zambian people, announced that the government had decided that the country should revert to a multi-party system.[81] Thus on 17th December, 1990, Article 4 of the Constitution of Zambia which provided for the existence of only one political party, UNIP, in Zambia was repealed.[82] Upon the legalization of multi-party politics, the MMD which was the main pressure group for the return to multi-party politics, transformed itself into a political party and Fredrick Chiluba was elected as its president.[83]

Expectations in the nation were that the National Assembly would be rejuvenated and play its democratic function of holding the other two arms of government accountable. The nation was hopeful that Members of Parliament would put aside their individual and partisan interests instead work for the betterment of the people, and enhancement of democracy. However, shortly after the first elections in the Third Republic, held in 1991, in which Fredrick Chiluba emerged winner, these hopes were quickly thwarted.

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[81] The Zambian Daily Mail 25th September, 1990

[82] Supra note 2 at 133.

[83] Ibid.

The people's euphoria for political change made them vote for the MMD in such a manner as to grant it more than two thirds majority in the National assembly.[84] The MMD could thus pass any Bill in the National Assembly without worrying about the opposition. The MMD, using its overwhelming majority in the National Assembly, could thus enact any law they wanted, even when the law in question was contrary to the democratic aspirations of the nation. For instance, the MMD dominated Parliament in 1996 made fundamental changes to the Constitution that impacted on the whole electoral process and to some extent the outcome of the 1996 general elections. Through the Constitution Amendment Bill Number 18 of 1996, the MMD dominated National Assembly proposed legislation that sought to disqualify persons whose parents were not Zambians by birth or descent from contesting for the position of Republican President.[85] Through the same Bill the National Assembly also proposed that those who have twice been elected as President shall not be eligible to seek re-election to that office.[86] The above provisions, most people argued, were designed to eliminate Dr. Kenneth Kaunda, then President of UNIP and former Republican President, from contesting the Presidential elections since he was considered to be the major challenger to the then incumbent President Chiluba. The Bill was quickly assented to by the President, and on 28th May 1996 it became law through The Constitution of Zambia Act number 18 of 1996.

UNIP and other Political Parties and interest groups challenged the legality of the amendments, particularly Articles 34(3)(b) and 35(2), arguing that the said Articles violated Article 23(3) which prohibits discrimination on the ground of place of origin, and the UN Charter on Civil and Political Rights, which guarantees, inter alia, for a person's right to actively take part in the governance of his country, respectively. After exhausting all administrative and legal means, UNIP decided not to take part in the elections. As a result the MMD consolidated its majority status in the National Assembly by capturing more seats in that election than it had in 1991.This resulted in Zambia being a defacto one party state as the number of seats held by opposition parties in the National Assembly was too small to make any impact in providing checks to the MMD. This resulted in the President (Executive) being able to control the National Assembly as MPs owed their loyalty to him as President of the

[84] Supra note 2 at 133, MMD won 125 out of 150 seats in the National Assembly.
[85] Article 34 (3) b.
[86] Article 35(2).

MMD party, through party patronage in the House, and for those who also held Ministerial positions, through the concept of Collective Responsibility.[87]

Thus the power of the Republican President in both the government and his own political party during the first 10 years of the Third Republic was similar to that of his predecessor in the second Republic. President Chiluba controlled the National Executive Committee (NEC) of the MMD by appointing most, if not all, of the NEC members to full-time jobs in the government as Cabinet Ministers, Deputy Ministers and other parastatal positions, thereby securing their personal loyalty to him alone. As for the government all top civil servants such as Permanent Secretaries and Directors were, and are still being, appointed by the President, thereby owing their loyalty to the President. This was also the case with the National Assembly, which the President controlled through the concept of Collective Responsibility and Party discipline for members of the Front Bench and Back Bench, respectively.

A good illustration of how the Executive controlled the National Assembly in the first 10 years of the Third Republic occurred in March 1993 when the President sought ratification by the National Assembly of his declaration of a State of Public Emergency. All MMD MPs were summoned for a caucus meeting at State House where the President requested them to support the motion for the imposition of a State of public emergency. MPs who tried to oppose the idea were said to have been intimidated by MMD whip in the House.[88] The motion succeeded in the house with the support of nearly all MMD MPs.[89]

The Executive's control of the National Assembly was not only confined to how the majority MMD Members of Parliament voted but was extended to how they debated in the House as well. This was clearly exhibited when Chipili MMD Member of Parliament - Ntondo Chindoloma was barred from entering Parliament Building, a government complex where the National Assembly is housed, because of his speech in the National Assembly in which he described President Chiluba's opening speech of the National Assembly, in January 1999, as "hollow" because it did not address the issues and concerns affecting his constituents. Mr. Chindoloma had to seek the protection of the High Court through an Injunction to restrain

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[87] Article 51 of the Constitution of Zambia.

[88]The Weekly Post (Special Edition of March, 19, 1993).
[89] Ibid.

MMD cadres from interfering with his right of entry into the Parliament Buildings.

The Executive control of the National Assembly did not end with the Chiluba regime, but rather it has continued even during President Mwanawasa's regime. The Executive has continued to employ the same old methods of Party discipline, Collective Responsibility and Party patronage to control the National Assembly. Regarding the use of the doctrine of Collective Responsibility, the Mwanawasa regime have gone a step further by appointing opposition MPs as Cabinet and Deputy Ministers[90] without consulting their various political parties, thereby bringing the opposition MPs under Executive control as they are bound by the doctrine of Collective Responsibility.

As regards Party patronage or loyalty in the National Assembly, the Constitution (Amendment) Act Number 18 of 1996 further consolidates the Executive's control over the National Assembly by implying in Article 71(2)(c) that the MPs loyalty in the National Assembly lies first and foremost to the political party on whose ticket the MP was elected. By implication, the MPs represent the interests of their Parties and not that of their constituents in the National Assembly. In fact, the above position of the law was affirmed earlier before the passage of Constitution (Amendment) Act Number 18 of 1996 by the Supreme Court, in the case of **Attorney General v Fabian Kasonde and others**[91] when the Supreme Court, driven by a desire to strengthen the ruling party by guarding against both the internal problems of instability and insurrection and the external problems of reaction and subversion, held that the wording of Article 71(2) (c) of the 1991 Constitution did not clearly carry out the legislative intent of prohibiting floor crossing generally and the Court saw it prudent to read into the Constitution the relevant words that went to fill up the lacuna spotted by the Court, by adding the words "vice versa" at the end of Article 71 (2) (c) of the 1991 Constitution. The Supreme Court's decision is reflected in the Constitution of Zambia (Amendment) Act of 1996 under Article 71(2)(c) which now reads:

> *"A member of the National Assembly shall vacate his seat in the Assembly in the case of an elected member if he becomes a member of a political party*

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[90] President Mwanawasa appointed Sylvia Masebo from the Zambia Republican Party, Dipak Patel and Mr. Chance Kabaghe from the Forum for Democracy and Development, Mr. Shempande from the United Party for National Development, inter alia into Cabinet and Deputy Minister positions.

[91] SCZ Judgment Number 2 of 1994.

*other than the party of which he was an authorized candidate when he was elected to the National Assembly or, if having been an independent candidate, he joins a political party or having been a member of a political party he becomes an independent".*

The decision of the Supreme Court has buttressed Executive control over the National Assembly in the current political environment. The practical implication of that decision is that a Representative of the people in the National Assembly, who has been given a mandate by his constituents to speak for them and protect their interests, is now expected to put the interests of his political party before those of his electorates, where the two conflict. If he resigns or is expelled for disagreeing with the policies of his party, then he loses his seat in the National Assembly. The question that has been asked is whether such an unceremonious termination of an MP's mandate has any place in a Representative Democracy[92] and the answer, it is submitted, is that it is an overture to increased party dictatorship.

### 3.3 CONCLUSION

The National Assembly has failed to provide effective Checks and Balances to the Executive as the Executive still electively exercises control on individual MPs and the National Assembly as a whole. The ideal role of the National Assembly as a body through which the citizens, through their representatives, can express their views and influence the governance of the country is non existent. The MPs once elected reflect and express the views of their political parties and in particular the dominant interests in those parties, which quite frequently are embodied in the leadership of those parties. Under the Zambian setup, the leadership of the ruling party, which in most cases has the majority in the National Assembly, runs the Executive branch of government. Therefore, Executive control of the National Assembly through Party patronage and loyalty in the National Assembly, Party discipline and Collective Responsibility in the House has resulted in the Zambian citizenry not having a say in the day to day governance of the country. This leaves the Judiciary as the other arm of government to provide checks and balances on the Executive, as well as safeguard people's fundamental rights and freedoms. The next chapter discusses how the Judiciary has performed in carrying out the above Constitutional functions in the Third Republic.

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[92] Ibid.

CHAPTER FOUR

# 4.0 APPLICATION OF THE DOCTRINE OF SEPARATION OF POWERS BY THE JUDICIARY

## 4.1 INTRODUCTION

In order to implement the doctrine of the separation of powers in Zambia, the power to interpret the law is vested in the third arm of government which is the Judicature, otherwise commonly referred to as the Judiciary. Article 91(1) of the Zambian Constitution,[93] provides that the Judicature of the Republic shall consist of the Supreme Court of Zambia, the High Court of Zambia, the Industrial Relations Court, the Subordinate Courts, the Local Courts and such lower courts as may be prescribed by an Act of Parliament. The Judiciary is a very important institution in a democratic dispensation as it is an institution that interprets the law enacted by the Legislature and it also protects people's fundamental freedoms and liberties by ensuring that there is rule of law and constitutionalism. It does this by striking down any Act of Parliament or provisions thereof, that are unconstitutional hence invalidating any Act by the Executive or the Legislature that is illegal, procedurally improper or unreasonable, it is an important arm of the state whose function is to provide checks and balances on the exercise of power by the Legislature and the Executive.

This chapter analyses the extent to which the Judiciary has implemented the doctrine of the separation of powers, and particularly the extent to which it has provided checks and balances to the executive as a dominant arm of government. To illustrate this, the focus will also be based on the third Republic.

## 4.2 THE THIRD REPUBLIC

With the coming to power of the MMD after gaining a landslide victory in the October 1991 Presidential and General Elections, the Judiciary for a while operated in a relatively independent environment. The Courts showed the enthusiasm to continue upholding fundamental rights and freedoms, which enthusiasm that had shown during the transition period. However, the one-party despotic mentality did not end with the mechanical change of

[93] Cap 1 of the Laws of Zambia

Zambia's political system and the ushering in of a new government. The practice of denying permits[94] to hold public meetings and demonstrations to opposition parties, and organisations and persons with divergent views to those of the government has continued in the Third republic. Whereas the ruling MMD has no problem obtaining police permits to hold meetings and processions, opposition parties and groups with divergent views to govern actions and policies are routinely denied such permits.[95]

The Judiciary rose to the occasion to stand stalwartly between the state and the citizens in an attempt to bring this practice to an end. An illustration of this was the case of **Christine Mulundika and Seven Others V The People,**[96] Where the Supreme Court struck down certain unconstitutional provisions of the Public Order Act.[97]This case was an appeal to the Supreme Court against the High Court decision to hold Section 5(4) of the Public Order Act constitutional. The applicants who were members of UNIP had been charged with addressing an illegal assembly because they had addressed a public meeting without a police permit. The applicants requested the High Court to make a declaration:-

> *that those provisions of the Public Order Act*[98] *requiring a person to apply for a police permit to hold a public meeting were null and void for being inconsistent with Articles 20 and 21 of the Constitution.*[99]
>
> *that those provisions of the Public Order Act*[100] *granting absolute power to the Regulating Officer to grant or refuse a police permit were null and void for being inconsistent with Articles 20 and 21 of the Constitution.*
>
> *that the provisions under the Public Order Act*[101]*exempting Ministers and Deputy Ministers from obtaining a police permit were null and void for being inconsistent with Article 23 of the Constitution.*[102]

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[94] Although the Law i.e. the Public Order Act-Cap 104 of the Laws of Zambia, requires persons and organisations intending to hold public meetings only to notify the Police at least seven days before such a meeting is held, in practice the Police administer this law in such a manner as to require such organisations and persons to obtain permits, as the Police sometimes refuse to grant the 'permits'.

[95] Supra Note 2 at 26.

[96] (1995-1997)ZR 20 (SC).

[97] Cap. 104 of the Laws of Zambia.

[98] Sec. 5(6)

[99] Article 20 – Freedom of Expression; Article 21 – Freedom of Assembly and Association, 1991 Constitution.

[100] Supra Note 153.

[101] Ibid Sect. 5(6).

[102] Article 23 – Protection from discrimination.

The High Court did not champion the just cause of individual liberty. It held that the contentious sections of the Public Order Act were reasonably justified in a democratic society and hence consistent with Articles 20 and 21 of the Constitution.

The applicants appealed to the Supreme Court and Ngulube, C.J. read the judgement of the majority, which upheld the appeal. His Lordship stated;

> *"The broader question arising in this appeal is whether in this day and age with our only four years to go to the end of the twentieth century, it is justifiable in a democracy that the citizens of this country can only assemble and speak in public with prior permission which is not guaranteed, and whether the law under attack is consistent with the guaranteed freedoms of assembly and speech."*

After consideration of the above question, the Supreme Court decided that Section 5(4) of the Public Order Act contravened Articles 20 and 21 of the Constitution and therefore null and void and invalid for unconstitutionality. Accordingly a prosecution based on Section 7(a) which depended on section 5(4) was itself declared unconstitutional and equally invalid.

The government reacted to the Supreme Court judgment with a crude display of executive power. On 27th February 1996 the MMD government presented to Parliament an amendment to the Public Order Act designed to reinstate government control over public assemblies. The Bill passed through Parliament in record speed, three readings being completed in one day. The chief justice was virulently attacked in the House and attempts were made to impugn his moral calibre and integrity by falsely accusing him of having raped a High Court cleaner, a non-existent Charity Chanda, after midnight at a Lusaka Hotel.[103]

The Chief Justice had to issue a press statement to put the allegations into context. He said:

> *"The false allegations of rape, serious as they may be, is nonetheless just another shameless lie by enemies of an independent Judiciary who have, since the Supreme Court judgment on the Public Order Act, and more recently my decision to appoint the tribunal under the Ministerial and Parliamentary Code of Conduct Act, launched a vicious and sustained campaign aided and abetted by papers like The Confidential to force me to resign my position as Chief Justice".*[104]

[103] Ibid at 32.
[104] The Post, May 2nd 1996.

Justice Silomba noted that:

> *"This attack like the one on Chief Justice Skinner and Judge Evans was after a decision had been made. With this kind of intimidation it remains to be seen whether the Supreme Court of Zambia will in future be inclined to decide in favour of the government in important cases."*[105]

The series of events following the judgment in the **Christine Mulundika case** inevitably had a negative effect on the independence of the judiciary. The independence of the judiciary, particularly the Supreme Court, after a series of events following the **Christine Mulundika** judgment was put to test in the same year in **Derrick Chitala v Attorney General.**[106] The case went to the Supreme Court as an appeal against the decision of the High Court refusing to grant leave to bring Judicial Review proceeding against the government's decision to use its legislative majority in Parliament to effect amendments to the 1991 Constitution. Government's decision was contrary to the Mwanakatwe Constitution Review Commission's (appointed by the President under section 2 of the Inquiries Act)[107] recommendation that the new Constitution of Zambia be adopted by a Constituent Assembly, then be submitted to a referendum before being enacted by Parliament.[108]

The Zambia Democratic Congress (ZDC) Party challenged the decision of the government in the High Court arguing that Parliament did not have the competence to alter the basic structure of the Constitution. They contended that Constitution (Amendment) Act No. 18 of 1996 was ultra vires Article 79 of the 1991 Constitution and therefore null and void. The High Court dismissed the application for Certiorari, on a conceived ground, and held that the alternation of the Constitution of Zambia depends on who commands the majority in Parliament, and on the population of eligible voters in the country. The court went on to say that the theory of preservation of the basic structure does not apply in Zambia.[109]

The applicants appealed to the Supreme Court, and the issue was whether the learned Judge below erred in law to refuse leave and, whether the Supreme Court should do so in particular circumstances of the case.

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[105] Ibid
[106] (1995-1997) ZR 91 (SC)
[107] Cap. 181 of the Laws of Zambia.
[108] Mwanakatwe Constitution Review Commission Report at 204.
[109] A. W. Chanda Supra Note 83 at 145.

The Constitution Review Commission under terms of reference number 9 was directed to, inter alia:

> *"recommend on whether the constitution should be adopted by the National Assembly or by a Constituent Assembly, by a Referendum or by any other method."*

On this point the Commission made the following recommendations:

> *"In evaluating the best method of adoption, the Commission addressed itself to the need of legitimacy and durability of the Constitution and the views of the people. In this latter regard, petitioners overwhelmingly agreed that adoption by the current Legislature was the least favoured because of the dangers of one-party dominance and a repetition of the past experiences in the formation of the Constitution. In agreeing with the overwhelming views of petitioners, and the rationale or reasons advanced, the Commission finds it unavoidable and compelling to recommend unanimously adoption by a Constituent Assembly and a National Referendum".*[110]

The reaction of the government as reflected in the white paper was to reject this recommendation citing "legal and practical limitations" in the recommendation. The government instead decided;

> *(a) to encourage public discussion of both the Commission Report and draft Constitution on order to arrive at the broadest possible consensus on the content of the proposed Constitution.*
> *(b) that with the exception of the provisions in the draft Constitution touching on Part III of the existing Constitution, all other parts of the draft on which a consensus will have been reached should be enacted by the existing Parliament.*
> *(c) the provision of the draft Constitution seeking to amend, modify re-enact or replace any provisions relating to Fundamental Human Rights will be enacted through a National Referendum.*[111]

After setting the background facts and legal issues in the case, the Supreme Court adopted Lord Diplock's statement in **Council of Civil Service Unions v Minister of the Civil Service**[112] as a correct formulation of the grounds upon administrative action is subject to judicial review. The Court held the three grounds to be illegality, irrationality and procedural impropriety.

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[110] Supra Note 64.
[111] Government White Paper 104 – 106.
[112] (1984) 3 ALL ER 935, (1984) 3 WLR 1174, 111.

Guided by the three grounds, the Court went on to explore whether the government was making a mistake or failing to grasp the opportunity to fashion a constitution that would not be considered 'tailor-made' for some immediate convenience. That, in the Court's opinion was a political question which the Court considered wholly improper to adjudicate upon. But on the legal question of illegality the Court considered the provisions of the Inquiries Act under Section 2(1), which provides that;

> *"The President may issue a Commission appointing one or more Commissioners to inquire into any matter in which an inquiry would, in the opinion of the President, be for the public welfare."*

From the wording of the statute, the Court was of the opinion that a commission could only lawfully be appointed to promote the public welfare. It stated that in this regard a decision arising from the report of a commission could be challenged quite legitimately if the decision frustrated the policy and objectives of the Act, since a decision which does not promote the objectives of the law would be said to frustrate the object of the Inquiries Act. However, the Court found that the government had addressed the concerns of the applicants and many other citizens by its decision to allow public discussion.

The decision of the Supreme Court amounted to a negation of its role of being the pillar of Constitutional Democracy. If the Supreme Court had the courage to withstand the treat of Executive tyranny it would have declared the government's decision unlawful as it clearly was. The chance to enact a Constitution that did not reflect one party's interests and which was legitimate and durable had been lost and, most treacherously, the government threw people's views to the wind. The Supreme Court allowed history to repeat itself.[113]

Thus the enactment of the Constitution by MMD dominated Parliament was clearly not for the public interest. Regarding the question of public interest, Doyle C.J, in **Nkumbula v The Attorney General**[114] had this to say;

> *"What is the public interests for the public benefit is a question of balance: the interests of the particular section of society or of the individual whose interests or rights are in issue, and if the interests of the society are regarded as sufficiently important to override individual interests then the action in question must be held to be in the public interest or for the public benefit."*

[113] The UNIP Government in 1973 used its majority in Parliament to impose a one-party state in Zambia disregarding the people's views.
[114] (1972) ZR 204 Court of Appeal.

In the **Chitala** case the interests of the applicants were in harmony with those of the society generally. It is difficult to notice how the interests of a cross-section of society could be overridden by that of a small clique of individuals in the Executive. The government's proposal to encourage public discussion to arrive at a consensus was vague as the mechanism of determining consensus was undefined. The Supreme Court's failure to stop the enactment of the Constitution (Amendment) Act of 1996 by the MMD dominated Parliament resulted in political discontentment in Zambia.

The case of **Akashambatwa and Four Others v F.T.J Chiluba**[115] ('The Presidential Petition') arose as a result of the amendments made to the 1991 Constitution particularly Article 34(3) which required one contesting the office of the Republican President to be, inter alia, a Zambian citizen with both his parents being Zambian citizens either by decent or birth. The presidential petition case challenged the President's parentage and the validity of the 1996 Presidential and General Elections. The petitioners sought declaratory relief as follows:-

(i) *that the provisions of Article 34(3)(b) in respect of the respondent had not been satisfied, and secondly that the respondent did not qualify to stand in the 1996 elections, and to be elected President of the Republic of Zambia and that his election was void;*

(ii) *that the respondent had falsely sworn as to the citizenship of his parents and was in contravention of Section 9 of the Electoral Act of 1991 as a amended by Act No. 23 of 1996;*

(iii) *that the Electoral Commission neglected its statutory duty to superintend the election process thereby allowing a fraudulent exercise favoured the respondent;*

(iv) *that the election process was not free and fair, and that the election was rigged, and therefore null and void.*

The Constitution (Amendment) Act Number 18 of 1996 included the controversial Presidential Parentage clause in Article 34(3), and conferred original jurisdiction in the Supreme Court under Article 41(2) to hear and determine matters relating to the election of the President. Article 34(3) provided as follows:-

*"A person shall be qualified to be a candidate for election as President if:-*
*he is a Zambian citizen*
*both his parents are Zambian by birth or decent*
*he has attained the age of thirty-five years*

[115] SCZ/8/EP/3/96-/4/96 (unreported)

*he is a member of, or is sponsored by, a political party*
*he is qualified to be elected as a member of the National Assembly*
*has been domiciled in Zambia for a period of at least twenty years.*

Thus by their Petition, the petitioners asked the Supreme Court to inquire into, and determine the Respondent's qualifications under section 34(3) of the Constitution in respect of the Respondent's citizenship and that of his parents. They also questioned the electoral process and its handling by the Electoral Commission. The Petitioners prayed for the remedy of Declaration and Certiorari, as they contended that the elections were rigged, and therefore not free and fair.

Regarding the Petitioner's first ground, that the respondent did not satisfy the requirements under Article 34(3)(b), the Supreme Court held that Zambian Citizenship and Nationality only commenced on 24th October 1964 and therefore:

> *"...The Constitutional provision regarding parents or anyone born prior to independence who are or were Zambian by birth or by decent can meaningfully only be contrived as a reference to those who became Zambians on that day."*[116]

The Court said both Mr. Chabala whom the Petitioners alleged was the Respondent's father, and Mr. Chiluba were British protected persons immediately preceding the independence of Zambia and as far as the Court was concerned, it did not matter where Mr. Chabala was born.[117] On the second ground, the Supreme Court astoundingly held that:-

> *"the various accounts as to the parentage [of the Respondent] were irreconcilable in the consequence of which an affirmative case has not been proved to the necessary degree of convincing charity."*

Commenting on the decision by the Supreme Court, Dr Rodger Chongwe noted that;

> *"In regard to the person nominated by Mr. Chiluba as his father, one Jacob Titus Chiluba Nkonde, supposedly of Lwenje Village in Luapula province, it would have assisted if evidence by anyone of the relatives of the man or Mr. Chiluba himself was given in Court. To the Supreme Court of Zambia it was not even important to seek through scientific means the truth of the allegation."*[118]

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[116] Ibid at 47.
[117] Ibid at 43.
[118] Dr Rodger Chongwe S.C. "The Presidential Petion Judgment" The Monitor Newspaper, November 20-December3, 1998, page 7.

To Dr Chongwe, there was sufficient proof adduced by the petitioners to nullify the Elections under the Electoral Act.[119]

Elections is one of the fundamental tenets of democracy. They are imperative in order to accord citizens the opportunity to exercise their Constitutional rights to elect their leaders. For this right to be effectively exercised, elections must be free and fair. The Electoral Commission of Zambia unfortunately has failed to build Citizens' confidence in the electoral system. In addition the Commission has exhibited lack of commitment to dealing with the problem of corrupt practices during elections as it has not taken any practical measures to deal with corrupt practices decisively.[120]

The challenge presented to the Supreme Court in the Petitioners' third and fourth grounds concerned the Electoral Commission of Zambia and its ability to conduct free and fair elections. The Petitioners contended in their Heads of Argument that the 1996 elections were marred with bribery and corruption, irregularities, flaws, with the Respondent as the perpetrator. The Court, in considering the Petitioners' ground, referred to Section 18(2) of the Electoral Act, Chapter 13 of the Laws of Zambia, which provides as follows:-

> *(2)The elction of a candidate as a member of the National Assembly shall be void on any of the following grounds which is proved to the satisfaction of the High Court upon the trial of an election petition, that is to say:-*
>
> *that by reason of any corrupt practice or illegal practice committed in connection with or by reason of other misconduct, the majority of voters in a constituency were or may have been prevented from electing the candidate in that constituency whom they preferred or,*
>
> *subject to the provision of Subsection (4), that there has been a non-compliance with the provisions of this Act relating to the conduct of elections and it appears to the High Court that the election was not conducted in accordance with the principles laid down in such provisions and that such non-compliance affected the results of the election;*
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> *that any corrupt practice or illegal practice was committed in connection with the election by or with the knowledge and consent or approval of the candidate or of his election agent or his polling agent;*

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[119] Ibid.
[120] Ibid at 57

*that the candidate was at the time of his election a person not qualified or a person disqualified for election*

Section 18(3) provides as follows;

*(3) Notwithsatnding the provisions of Subsection (2) where, upon the trial of an election petition the High Court finds that any corrupt practice or illegal practice has been committed by or with the knowledge and consent or approval of any agent of the candidate whose election is the subject of such election petition, and the High Court further finds that such candidate has proved that:-*

*no corrupt practice or illegal practice was committed by the candidate himself or by his election agent, or with the knowledge or consent or approval of such candidate or election agent; and*

*such candidate and his election agent took reasonable means to prevent the commission of corrupt practice or illegal practice at such election; and*

*in all other respects the election was free from any corrupt practice or illegal practice on the part of such candidate or his agent; then the High Court shall not, for any reason only of such corrupt practice or illegal practice declare that election of such candidate was void.*

*no election shall be declared void by reason of nay act or omission by an election officer in breach of his official duty in connection with an election if it appears to the High Court that the election was so conducted as to be substantially in accordance with the provisions of this Act and that such act or omission did not affect the result of that election.*

The Supreme Court was presented with evidence of video tapes at the Zambia National Broadcasting Corporation studios showing the President campaigning in various parts of the country indicating that there would be a sale of Local Government houses at discount prices and even handing over Certificates of Title. The Supreme Court however, held that there are no Electoral Regulations prohibiting that kind of behaviour.[121] The dishing out of municipal and government pool houses at ridiculously reduced prices was given prominence on both state-owned radio and television, and newspapers. It has been suggested that the intention of the President was clearly to buy votes or as the Supreme Court put it, "the exercise was clearly used to assist the campaign".[122] However, the Court found the conduct of the President unexceptionable but for the timing of the discounts in an election year.[123]

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[121] Supra Note 171 at 52.
[122] Ibid.
[123] Ibid.

Acts of bribery and corruption result in elections which are not free and fair. Thus to hold that the timing of the sale of the government pool houses was wrong and yet do nothing about it is nearly collusion on the part of the Supreme Court. Despite the Court accepting evidence that there was treating, the Court nevertheless held that since the Presidential Constituency is very large, covering as it does the whole country, it was unable to find that the instances of treating took place with the Respondent's knowledge, or indeed with the knowledge of the Respondent's election agents.[124] The decision was assailed on the ground that the respondents did not himself give evidence to rebut the evidence of treating against him. Neither was a witness called on his behalf to assist the Court.[125]

On direct bribery, the Supreme Court had this to say;

> *"...There was evidence from some of the petitioners who complained that various Ministers and the Respondent donated public funds to public causes which donations were widely reported in the media. The donations have taken place before, during and since. We have anxiously examined the Regulations in which various kinds of conduct or misconduct is prohibited or made an offence. We have tried to see where the allegations in the petition and in the evidence of various political leaders donating to community projects might fit in without success. The timing of such public philanthropic activity must have had influence on the affected voters yet the Regulations are silent on such matters and on any possibly improper donations when not directed at individual benefit."*[126]

The Court called this a lacuna in the law which must be corrected by the authorities concerned.[127] The Court conveniently passed the buck to someone else. Section 18 of the Electoral Act is very clear in subsection 2(a)[128] wherein it provides against corrupt practices and other illegal conduct. The section does not distinguish between bribing an individual and bribing a group of individuals. The Supreme Court seems to have either forgotten or ignored its earlier decision in the case of **Josephat Mlewa v Eric Wightman**[129] where it said that Section 18(2)(a) of the Electoral Act is designed to protect the electorate and the electoral system itself.

[124] Ibid at 53.
[125] Supra Note 174.
[126] Supra Note 171 at 55.
[127] Ibid
[128] The provisions of Sect. 18(2)(a) of the Electoral Act are laid out Supra
[129] SCZ Judgment No. 1 of 1996 (unreported).

In that case both the appellant and the respondent were candidates in the parliamentary and General Elections held on 31st October 1991, for the Mkaika Constituency. The appellant stood on the UNIP ticket and emerged winner of the election. The Respondent, who had stood on the MMD ticket, in an election petition in the High Court challenged the election of the appellant and asked the Court to order a nullification of his election and a further order that a fresh poll be held in accordance with the provisions of the Constitution. Both parties presented evidence that the election had been marred by corruption, bribery and incidents of illegal practices. The High Court found that there was evidence supporting the allegation that UNIP cadres had distributed materials and gifts to bribe voters. Even though the High Court found that the appellant was not personally involved, it held that the election was a nullity and ordered a fresh poll.

On appeal to the Supreme Court, the Court rejected the appellants contention that Section 18 (2)(a) of the Electoral Act was dependent upon Section 18 (2)(c)[130] of the same Act. Thus the court held that a violation of Section 18(2)(a) does not require personal knowledge of the wrong doing by a candidate and it said, the Section is designed to protect the electorate and the system itself by providing for the nullification of the election of a candidate whenever there is wrong doing which has adversely affected and probably affected the election. The Supreme Court thus upheld the decision of the High Court that section 18(2)(a) of the Electoral Act No. 2 of 1991 had been violated in the election.

If the intent of Parliament in Section 18(2)(a) of the Electoral Act was to protect the electorate and the electoral system as a whole by ensuring that each voter exercised his/her independent choice in the election of candidates and that the "playing field" was level to all parties, respectively, then it is difficult to understand how and why bribery of voters by an opposition party's members should be held to be in violation of Section 18(2)(a) while bribery of communities by the President ad his Ministers using private and public funds is not a violation of Section 18(2)(a).

It is submitted that bribery is an offence under the Electoral Act and does not cease to be bribery when offered to a community or community projects. If the regulations are silent, as

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[130] Section 18(2)(c ) of the Electoral Act requires the knowledge of the candidate or his election agent or polling agents of any corrupt practices o illegal practice to warrant nullification of the election of the candidate concerned.

the Supreme Court claimed, the Court should have as it did in **Kasonde v Attorney General,**[131] read words in the provision of the Act to cure the absurdity or unjust situation created. It is obvious that in the case in issue, the Supreme Court was actively preoccupied with finding for the Respondent, the President, and thus could not fill the lacuna, unlike in the **Kasonde case** where a perceived lacuna had to be filled in, and indeed it was filled in, in order to find in favour of the ruling party.

The Supreme Court found that the allegations made against the Electoral Commission had been proved according to the evidence submitted in court, the Electoral Commission allowed double voting, issuing Voters Certificates on the day of elections, as well as permitting unregistered people to vote. The Court was of the view that these factors did not influence the outcome of the elections, and therefore, could not be relied on to nullify the election result. However, it is submitted that the end product of all the said irregularities was clearly[132] an unfair and fraudulent election process and the results thereof. If the Supreme Court had been truly impartial, it could have nullified the election results and ordered for fresh elections. This would have put Zambia on a firm path to democracy. Today, the scourge of bribery and corruption in elections has not only continued but also increased. The ruling party, using public funds has capitalized on the people's poverty by carrying out public philanthropic activity in areas where there are by-elections.

The 'Presidential Petition case" demonstrates that Executive influence on the Judiciary exists. The Supreme Court went out of its way to find for the President even where the facts and the law were totally against him.

All in all, with regard to the above and also going by Montesquieu's first and second meaning of the doctrine of separation of powers, it can be seen that there has been no rigid application of the doctrine by the Judiciary and this can be seen from the fact that, the first meaning of the doctrine of the separation of powers according to Montesquieu requires that a person should not form part of more than one of the three organs of government but in Zambia, such instances are common for instance, the appointment of Justice Bobby Bwalya, a sitting Judge of the High Court as Chairman of the Electoral Commission and others like in

[131] Discussed Supra Chapter 3, citation see Note at 131.
[132]

the past to offices in the Executive branch of government. However, this is not seen as a problem because those appointed do not see anything wrong with such appointments, as they are a source of great reward. In fact, since such appointments are often very rewarding in monetary terms, it becomes a way of sending very subtle messages to other serving judges that if they conduct themselves favourably in the eyes of the Executive they would also be rewarded. The consequence is that judges except for the very brave often shudder to make any finding against the government except in case where a decision in favour of the government is impossible to sustain in the light of law, the evidence and above all public opinion. Furthermore, where not even with the most liberal interpretation of the law and facts, would support a decision in favour of the Government.

Furthermore, there has also been instances of violation of the doctrine of separation of powers in that the Judiciary at one point has exercised the functions of another organ of state as can be seen from the case of **Attorney General and Another v Lewanika and 4 Others**[133] in which the Judiciary arrogated to themselves undelegated powers and violated Articles of the Constitution which vests legislative power in the President and National Assembly. The Supreme Court of Zambia violated the doctrine by arrogating to itself power to legislate, which has not been delegated to it under the Constitution.

### 4.3 CONCLUSION

Not withstanding the constitutional safeguards granted to the Judiciary, the Judiciary has not displayed the boldness that is required of it under the doctrine of separation of powers. The Judiciary lacks the total independence from the Executive so as to be an impartial and neutral tribunal, ready to defend the fundamental rights and freedoms of the citizens against the might of an adamant Executive. It is submitted that as a result of the lack of total independence the Judiciary has actively found for the government in cases which challenges the legitimacy of the government. Therefore, the Judiciary cannot be relied upon to effectively provide checks and balances, to the government, especially in cases which challenge the legitimacy of the government.

As can be seen from the preceding chapters, the Doctrine of separation of powers has not been effectively applied in Zambia due to Executive dominance over the other two arms of

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government. The Executive has a role to play in the other arms of the state, thereby making it very difficult for the other arms of government to provide effective checks and balances on the Executive. The next chapter suggests measures which should be taken in order to strengthen the application of the Doctrine of separation of powers.

# CHAPTER FIVE

## 5.0 CONCLUSION AND RECOMMENDATIONS

### 5.1 CONCLUSION

Having analysed the extent to which the Doctrine of the Separation of powers has been applied in Zambia, it can be said that the implementation of the Doctrine as a means to ensure Constitutionalism, Rule of Law and Democratic governance has not been effectively applied.

This has been due to the vesting of so much power in the Executive Presidency which has had the effect of according opportunity to the president to exercise considerable influence and control over the Judiciary and the National Assembly. As a result of the influence and control by the Executive, the National Assembly and the Judiciary have been intimidated and improperly influenced by the Executive in their conduct of their duties to such an extent that they have failed to perform their democratic function of providing checks and balances on the exercise of power by the Executive.

The concentration of power in the Executive has also resulted in ineffective citizen participation in the governance of the country as their representative in the National Assembly are under the control of the Executive. Furthermore, the MPs owe their loyalty in the National Assembly to their respective parties, and not to their electorates, due to party patronage and discipline, to the further detriment of citizen participation in government.

For the Rule of Law and Democracy to flourish in Zambia, the National Assembly and the Judiciary have to be securely rejuvenated by diminishing the current powers of the Executive to a level where they are at par with those of the National Assembly and the Judiciary. Furthermore, citizens have to be pulled out from their docility so that they can actively superintend the exercise of their sovereign power in the state by affording them ready channels to use to influence and control those wielding state power. To achieve the above status, this dissertation proposes the following changes to be made to Zambia's legal system.

## 5.2 RECOMMENDATIONS

The following are therefore the recommendations;

### 5.2 (a) Speaker of the National Assembly

The office of the Speaker of the National Assembly should be an elective one, to be elected during the Parliamentary and General elections. The candidates for office of Speaker of the National Assembly should neither belong to nor be sponsored by any political party. The person elected to the office of Speaker of the National Assembly should hold office for a period of the life of the Assembly, that is to say, 5 years and should vacate office upon the assumption of office of another person elected as Speaker. A person contesting for the office of Speaker of the National Assembly should be eligible to be elected as MP and must have been an MP for at least two five year terms. It is hoped that electing a non-partisan and experienced person as Speaker of the National Assembly will create an impartial and effective office of Speaker of the National Assembly.

### 5.2 (b) Members of Parliament

With regard to Members of Parliament, the recommendation which was given by the Mwanakatwe Commission which resulted into rejection by government would be appropriate in this case to ensure Separation of Powers hence enhancing checks and balances. The Mwanakatwe Commission recommended that the President should appoint Ministers from outside Parliament, subject to ratification by the National Assembly. Such Ministers had to be qualified to be elected as MPs. This entails that MPs should not hold any position in any other arm of government apart from the position in the Legislature. Once a person is elected as an MP, he must continue to be so. An MP who wants to hold a position other than one in Legislature or an MP who is appointed to the office of minister has to vacate his/her seat on Assembly. This is aimed at strengthening the independence of the Legislature and by enhancing checks and balances.

Floor crossing should also be reduced in the House, this should entail therefore that an MP who joins another political party other than the one on whose ticket he was elected should lose his seat as MP and should not be eligible to re-contest in that seat, or any other seat in the National Assembly during the life of the Parliament. This will reduce floor crossing in the House, more especially MPs from opposition parties crossing over to the ruling party. This

will reduce ruling party's dominance in the House. Ruling party dominance results into having laws passed in favour of the ruling party at present.

Similarly, those MPs who are expelled from their political parties should loose their seats in the National Assembly and be ineligible to re-contest the seat, or any other seat in the House if they do not appeal against their expulsion to the constitutional Division of the High Court, which this dissertation proposes should be set up in the High Court to exclusively deal with constitutional and governance matters such as Election Petitions (excluding petitions involving the Presidency, which under Article 41 of the Constitution lies directly with the Supreme Court), qualifications, or disqualifications for persons to contest or continue as MP, etc, or if the MP in question looses such an appeal in the Courts of law, appeal against the decisions of the High Court should lie to the Supreme Court. However, if the MP successfully challenges the expulsion, then such an MP should decide, within 3 months from the date of the decision of the Court, whether to retain his/her seat on the Party ticket he or she was elected to the House, or continue being an MP as an independent. Thus Article 71(2)(c) of the Constitution should be amended so that the above scenario should be the only instance in which an MP who was elected on a party ticket can continue holding his seat, but as an independent MP. This will give MPs the freedom to debate and vote in the House according to their convictions and will of their electorates, instead of the current situation where they debate and vote according to the interests of their political parties, and quite often, that of the Ruling party and the Executive, as President Mwanawasa has shown that opposition MPs can be made to toil the line of the Ruling Party and its government in the National Assembly by appointing them into Executive positions such Cabinet and Deputy Ministers, thereby putting them under the President's control through Collective Responsibility to the National Assembly.[134]

**5.2 (c) Local Government Elections**

It is submitted that Local Government Elections be held every after 2½years, so that these elections are held together with the Presidential and General Parliamentary elections at the end of every Parliament, and half way the life of a Parliament, instead of the current situation where they are held every after three years, so that those elections which will be held during the mid of the tenure of the National Assembly should have a provision where people can

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[134] Article 51 of the Constitution of Zambia, CAP one of the Laws of Zambia.

express a vote of confidence, or no confidence in their area MP. Those MPs who receive votes of no confidence should loose their seats, and be replaced by the person who was second to the MP in the last Parliamentary Elections. If that person is not available to take up the post, then a by-election should be conducted in that constituency. The MP who has lost the seat should not be eligible to re-contest the seat. This will allow the electorates to monitor the performance of their MPs, thereby ensuring that MPS perform according to the people's expectations.

**5.2 (d) Reduction of Extensive Presidential Powers**

The Executive Powers conferred in the President under the current Constitution are too broad. There is thus a need to limit some of the Powers conferred in the Presidency by the express delegation of some of the powers, that have a bearing on the effective implementation of the Doctrine of Separation of Powers, to an imperial and professional Civil Service. These include the following:

**(i) Elimination of Presidential Involvement in the Appointment of Judges;**

Under Articles 93 and 95 of the Constitution, all appointments to the Office of Judge are done by the President on the advice of the Judicial Service Commission, subject to ratification by the National Assembly. It is submitted that this in itself creates a feeling of indebtedness on the part of the Judge to the appointing President as he views the person holding the Office of President, and not the institution of Presidency, as the appointing authority, thereby causing the Judge to be partial to the President in cases in which the President has a *Locus Standi*. This was evidenced by the ruling of the Presidential Petition case referred to above.

It is thus recommended that all appointments to the Office of Judge be made by a competent and independent Judicial Service Commission, comprising equal numbers of persons from the three arms of the state i.e. Executive, Legislature and Judiciary, Civil Society and other Professional bodies, who should thoroughly scrutinize the applicants before submitting the short listed candidates for ratification by the National Assembly.

It is submitted that by having an independent impartial and professional Judicial Service Commission to appoint Members of the bench instead of the President, the Judiciary will be highly independent and impartial, and will be able to perform its

democratic function of providing checks and balances to the Executive and Legislature.

**(ii) Elimination of Prerogative of Mercy Powers of the President**

Under Article 59 of the Constitution, the President has power to grant to any person convicted of a crime a Pardon, grant a respite of the execution of any punishment imposed on any person. It is submitted that this usurps the powers of the Judiciary in that the President (Executive) in exercising these powers encroaches into the sphere of the Judiciary, to the detriment of effective application of the Doctrine of Separation of Powers.

It is therefore submitted that the Prerogative of Mercy powers conferred upon the President under Article 59 of the Zambian Constitution be eliminated, and the powers be vested in the Judiciary who should exercise the powers through a system of Parole or any other suitable method.

**5.2 (e) Vice-President, Cabinet and Deputy Ministers to be appointed from outside Parliament.**

Under Article 45, 46 and 47 of the Constitution, the Vice-president, Cabinet and Deputy Ministers respectively are appointed from amongst Members of the National Assembly. This has negatively impacted the effective application of the Doctrine of Separation of Powers as the same persons who are Members of the Executive are also members of Legislature, thereby making it difficult for the two arms of government to provide active checks and balances on each other. It is recommended therefore that the Vice- President, Cabinet, and Deputy Ministers be appointed from outside the National Assembly. This will not only enhance the effective application of the Doctrine of Separation of Powers but also enable the President to appoint professionals into his Cabinet.

**5.2 (f) Office of the President.**

To further enhance separation of powers, the President should not be part of the legislature. The legislative power should be vested entirely in the National Assembly and not Parliament comprising of the President and National Assembly.

Therefore, having looked at the extent to which the doctrine of Separation of Powers has

been applied in Zambia, the above are the recommendations that need to be taken into account in order to achieve effective application of the doctrine.

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