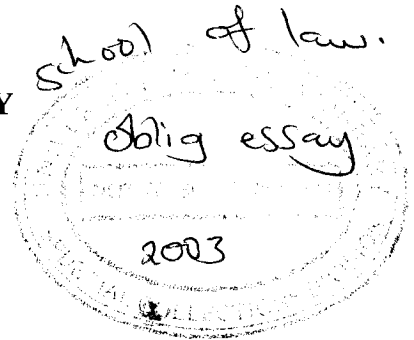


THE UNIVERSITY OF ZAMBIA

SCHOOL OF LAW

L 410 OBLIGATORY ESSAY



**THE INFLUENCE OF THE EXECUTIVE ARM OF GOVERNMENT OVER PARLIAMENT
IN THE THIRD REPUBLIC: ZAMBIAN EXPERIENCE**

BY

PAUL CHISHA

**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)**

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THE UNIVERSITY OF ZAMBIA

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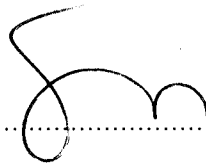
DECLARATION

I **CHISHA PAUL COMPUTER No. 99059614** 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 for academic purposes.

Date:.....

24/11/03

A handwritten signature in black ink, appearing to be 'Sm', written over a dotted line.

SIGNATURE

DEDICATION

To my two loving children, Chewe (boy 16) and Lunda (girl, 7) remember I and your mother have shown you the way to great future and we are very hopeful both of you, you will make it in life, our belief is in the Lord, hard work, love and honest.

Dad

ACKNOWLEDGMENT

"The LORD is my helper; I will not fear what can man do o me. "James 1:5,6)

Indeed the Lord has been very helpful to me throughout my life time, without him I could not have managed writing this dissertation. In this regard, I take this opportunity to express my sincere gratitude to the Lord for having been highly inspirational in this work.

Secondly, I wish to extend my thankfulness to my supervisor Simon Kulusika for accepting to supervise this tedious work by making himself available for advice, consultation and fatherly guidance. May the Lord bless him. Special thanks also goes to Dr. M. Munalula, the coordinator for her guidance.

I also wish to express my heartfelt gratitude to my lovely wife Joyce, my son Chewe and my daughter Lunda for their encouraging phone calls every evening.

I thank Mrs Moyo and Mrs Msoni for typing this dissertation with a lot of patience. I wish to extend my gratitude also to members of staff at the National Assembly for accessing me to their Library. Special thanks goes to Mrs Tembi Mtine (Library), Mr. Mumba, Mr. Hintobolo and Mr. Mukalebai (all of Research Department)

Lastly, but not the least, I wish to thank all friends and relatives for their moral, spiritual and material support rendered to me to see this dissertation a success.

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PREFACE

The Zambian Republican Constitution has provided for the mechanism that has allowed the executive arm of the government to interfere in the independence of the legislature. The executive has deliberately enacted the constitution that has made it encroach on the legislature making the legislature a rubber-stamp institution of the executive.

This essay discusses 'The Influence of the executive arm of government over Parliament in the 'Third Republic'.

The constitution of Zambia, though seem to be embracing the dictates of constitutionalism has in practice allowed parliament to operate on the basis of Westminster model making it difficult for Parliament to check the excess of the executive because the fusion of the two branches of government.

Without the interference of the executive in the legislative branch the encroachment mechanism, the Zambian legislature could have been as independent as the American Congress. To some extent the Zambian legislative though, not controlled by the executive is only constitutionally designed for manipulation by government in times of needy.

The factors that have weaken the independence of the legislative are the fusion between the legislative and executive branches of government, the extensive powers of the executive, party patronage, appointments of opposition members of Parliament in the government.

The solution to these factors is to re-organise the constitution and provide for the new constitution that will remove the fusion clause and provide for the separation and equal distribution of powers within the executive the legislature and the judiciary, the non-appointment of the opposition members of Parliament into government, defining the executive powers of the President in the constitution, non-appointment by the president of administrative staff of the National Assembly.

The essay is divided in five chapters:

Chapter one - Zambia's Constitutional order in the Third Public

Chapter two - The independence of the legislature

Chapter three - Factors inhibiting legislative independence

Chapter four - Five solutions

Chapter five - Conclusion and Recommendations

ABSTRACT

Ever since Zambia became independent from Britain in 1964, the Zambian legislature has never been separated from the executive branch of government. This encroachment of the executive on the legislature has negatively impacted on the independence of the legislature, thereby, weakening its legislative functions.

The dawning of the 'Third Republic' in 1991, which re-introduced multi-party politics after the twenty seven years of one-party rule, strongly indicated the application of constitutionalism where the executive was expected to be separated from the legislature. Disappointingly, the executive, for wanting to control Parliament introduced a constitutional democracy which gave extensive executive power to the president whilst retaining the encroachment clause that weakens the independence of the legislature.

Zambian Parliament is prema-facie independent but it is only the interference by the executive through the front bench that influences its independence. Therefore, to safeguard the independence of the Zambian legislature there is need to re-organise the constitution to provide for the reliable one which can stand the test of time, detach executive from the legislature, cease the presidential appointment of members of Parliament in the executive arm of government, cease, the presidential appointments of National Assembly administrative staff and the definition of the executive powers in the constitution as it is too wide to know the limits.

CHAPTER ONE

INTRODUCTION

1.0 ZAMBIA'S CONSTITUTIONAL ORDER IN THE THIRD REPUBLIC

1.1. Meaning of constitution

Government system of every state is organised around a constitution¹. A constitution is “the body of fundamental doctrines and rules of a nation from which stem the duties and powers of the government and the duties and rights of the people”² Zambia as a state has a peculiar kind of democratic system of governance. It is peculiar in the way that it’s constitution allows both principles of Parliamentary democracy and constitutional democracy to function simultaneously under the same constitution.

1.2 Parliamentary democracy

Parliamentary democracy is “a system of government by the whole people of country especially through representatives whom they elect. Such a system contrast favourably with a principle of government based on one man rule, absolutism or an oligarch. It is a system also in which government ministers are appointed from among parliamentarians, such appointees will retain their seats as Members of Parliament”³. In this type of a set up, the executive are accountable to Parliament because all authority in the state emanates from the sovereign people. It is observed that

¹ John G. Livingston and Robert G. Thompson, The Consent of the Governed, The Macmillan company, New York, 3rd ed. (1966) P. 138

² L.B Curzon, Dictionary of Law, Pitman Publishing London, 5th ed. (1998), P 78

³ Carlson Anyangwe, “Parliamentary and Constitutional Democracy,” *Zambia Law Journal*, Vol. 31,

this system “focuses on ‘government by the people’ rather than on any need to restrain government since it is a government by the sovereign people therefore cannot be limited.”⁴ The concept of parliamentary democracy historically is being associated with Zambia as a result of Zambia having been a British colony where parliamentary supremacy is observed. Parliamentary supremacy in this context means that an Act passed by Parliament will be enforced, and powers of any other bodies are derived, in the final analysis, from Parliament or will exist by the tolerance of Parliament.⁵ It is said that, “in the UK, Parliament is, therefore, not only sovereign but supreme by which is meant that there is no law to which it is subject as regards either the content of its power or the procedure for exercising it and it is this supremacy that really excludes the supremacy of the constitution”⁶.

1.3 Constitutional democracy

In reference to constitutional democracy, Professor Carlson Anyangwe, stated that: “In a constitutional democracy the written constitution enshrines the principles of democracy. It establishes defines and confines the various organs or institutions of state. In other words, the constitution establishes a constitutional democracy of separate powers, checks and balances. It establishes a framework of limited government.”⁷

From the given definitions of the two concepts of parliamentary democracy and constitutional democracy, I am of the view that from the constitutional arrangement, Zambia, to a certain extent apply and enjoy constitutional democracy because of the supremacy of the constitution is provided

⁴ Ibid P. 95

⁵ B. O Nwabueze, Constitutionalism in the Emergent States, C. Hurst and company, London, 1st ed (1973) P. 7

⁶ Ibid P 8

⁷ Ibid P

under Article 1(3) which states:

“This constitution is the supreme law of Zambia and if any
other law is inconsistent with this constitution that other
law shall to the extent of the consistency be avoid.”

It must be noted that though the constitution is said to be supreme, it is the people of Zambia who have an ultimate power over the constitution. In light of this Article 1(2) states:

“ All power resides in the people who shall exercise their
sovereignty through the democratic institutions of the state
in accordance with this constitution.”

When we take a look at Article 1(4) we find that the constitution binds all persons in the Republic of Zambia and all legislative, executive and judicial organs of the state at all levels. This means that the constitution, “establishes, defines and confines the various organs or institutions of state”⁸ To be precise, it establishes a constitutional democracy of separate powers, checks and balance as Professor Anyangwe's conclusion that, “it establishes a framework of limited government.”⁹ Limited government in this view connotes “the limiting of the arbitrariness of political power”¹⁰ because some governments tend to abuse power. Arbitrary rule is the “government that is conducted not according to pre-determined rules but according to the momentary whims and caprices of the rulers”¹¹

Zambia which was until 1991 a one – party system of government for twenty – seven years, has attempted to amend a constitution based on securing the goal of limited political power through constitutionalism. ¹² When the Movement for Multi Party Democracy Party (MMD) lead by Dr.

⁸ Ibid P. 97

⁹ Ibid P. 97

¹⁰ Ibid P 1

¹¹ Chanda Alfred, Dr., “Constitutionalism in Southern Africa.” Observer, Vol. 6 (2001), P. 1

¹² Muna Ndulo, “The Constitutions of Zambia,” Zambia Law Journal, Vol. 30, (1998), P. 16

Frederick Chiluba defeated Dr. Kenneth Kaunda of the United National Independence Party (UNIP) in the 1991 elections, MMD promised to change the constitution based on constitutionalism.¹³ The period came to be known as “The Third Republic” of which the First being the post – Independence era of the multi – partism running from 1964 to 1972 and the Second Republic was from 1972 to 1991.

I must admit here that though the MMD government has been in power for more than ten years now, it is still grappling with the problem of implementing the concept of constitutionalism up to now despite amending the constitution in 1996. The amendment of the current constitution in 1996 brought further misery as it was characterised by partisan influence from the ruling MMD government rejecting most of all the petitioner’s submission and inserted their own selfish clauses into the constitution.

One such example was the petitioner’s recommendation which was rejected was:

“Ministers should be appointed from outside the National Assembly,
from among citizens of Zambia on the basis of ability, merit, and
and experience, and such appointments should be subject to
ratification by the National Assembly.”¹⁴

This submission was unfortunately rejected by the executive who were campaigned against it so strongly in Parliament taking advantage party patronage amongst MMD Members of Parliament through party caucus. As the situation is right now the clause reads:

“ Appointment to the office of minister shall be made from amongst
members of the National assembly.”¹⁵

¹³ Ibid P 1

¹⁴ Article 11. 19(a) of The Report of the Constitution Review Commission, 16 June (1995) P. 7

¹⁵ Article 46 (2) of the 1991 Constitution as amended by the 1996 Constitution

This implied that the concept of separation of powers was disowned. The intransigence of the MMD government not to go by the petitioners submission indicated to me that the government was not willing to fully embrace constitutionalism because one of the elements of constitutionalism,¹⁶ is the principle of separation of powers. In fact, Professor Patrick Mvunga observed: "for constitutionalism to be achieved there is great need for political will and the participation of public opinion in the political and democratic process."¹⁷ And I agree with him when he further concluded that:

"The main impending factor in this evolution is the dominance of the state above other organs namely, the judiciary and the legislature."¹⁸

The scenario where the executive dominate the other organs of the state does not only undermines the principles constitutionalism but is also a danger to individual freedoms, as Dr. Alfred Chanda noted: "A government that has unlimited powers is a danger to individual freedoms as history has countless times demonstrated."¹⁹

It is true that there are countless times that the MMD government has had infringed on the freedoms of individuals. One such example is the infringement of freedom of movement in **FRED M'MEMBE AND BRIGHT MWAPE V THE ATTORNEY GENERAL**²⁰ where Parliament at the instigation of the executive withdrew the liberty of the two applicants, M'membe and Mwape by sentencing them to imprisonment for allegedly contempt of Parliament for publicly criticising a Parliamentary speech of the then Vice-President of Zambia Brigadier General Godfrey Miyanda's attack on the Supreme

¹⁶ Ibid P. 96

¹⁷ Ibid P. 2

¹⁸ Ibid P. 18

¹⁹ Ibid P. 1

²⁰ (1996) HCJ/X

Court's landmark decision which declared section 5(4) of the Public Order Act as unconstitutional.²¹

However, the court later released the two applicants on the ground that the Zambian parliament has no jurisdiction to imprison anyone for court contempt.

This case is a true reflection of one of the examples of how the executive can influence the decision in Parliament inducing it to act unparliamentary. One of the reasons for Parliament to behave in that way is lack of appreciation of the doctrine of separation of powers. In other words, the appointing of ministers from amongst serving Members of Parliament in a constitution democracy is in itself against the principles of constitutionalism. What does constitutionalism mean?

1.4 Meaning of Constitutionalism

According to Professor Anyangwe, constitutionalism simply means, "the idea of a written statement of binding principles and rules aimed at securing limited political power."

He went further to state that "such a goal appears eminently desirable because absolute power, uncircumscribed and unchecked, all too quickly becomes arbitrary and oppressive. Liberty demands that (written) limits be placed on the exercise of all political power."

He concluded by stating: "The range of and scope of public authority, the times and modes of election, the reserved rights of citizens and so on should be removed from public tempering. Public liberty, even in a democracy, depends on a government of laws not of individuals, on the security that

²¹ Christine Mulundika and 7 Others V The People (1995) SCJ No. 25

comes only from a set of rights and principles that are not subject to the whim of the powerful.²²

From this explanation, it is clearly understood that constitutionalism is the culture and habit of living with and being regulated by the constitution. In this regard, the constitution which forms the basis of constitutionalism is said to be the principal law, the embodiment of values, political power, distribution of power between organs of the state, provision of rights, obligations and privileges of citizens and willingness of the state to uphold and enforce the same.

Having said this, my focus is on the separation distribution of powers within the branches of government, with special interest on the legislature. Therefore, questions to be addressed are:

Is the *Zambian* legislature independent of executive?

Does it enjoy the powers designated to it by the constitution.

The next chapter, therefore, answers these questions.

²² Ibid P. 96

CHAPTER TWO

INDEPENDENCE OF THE LEGISLATURE

2.0 THE BASIS OF LEGISLATIVE INDEPENDENCE

2.1 Meaning of Legislative independence

An analysis of legislative independence or independence of the legislature must begin with some idea of its core meaning. The term legislature means “a body of people with power to make and change laws”²³. In Zambia the legislative power of the country vest in Parliament²⁴. The term Parliament is described as “an institution of consultative government, an assembly of representatives of a political nation or people, often the supreme law – making authority and a symbol of national sovereignty.”²⁵ From this point of definition of the terms, ‘parliament’ and ‘legislature’ you would agree with me that people generally use these terms interchangeably because they almost mean the same thing. Additionally, the term ‘independence means “not subject to control by other people or things.”²⁶

Therefore, it follows that the expression ‘independence of legislature would collectively mean “Parliament, in the conduct of its business in the ‘House’ as a law – making body is not subject to any control by other people or things whether it is organised under constitutional or parliamentary system of government.

²³ A.S Hornby, Oxford Advanced Learners Dictionary of Current English, Oxford, Oxford University Press 5 ed (1998) P 674.

²⁴ Article 62 of the Constitution of Zambia, (1996)

²⁵ Ngonga Mwelwa Chibesakunda, The Parliament of Zambia, Venus stationary, Lusaka, (2001), P.1

²⁶ Ibid 604

2.2 The Zambian situation

I am mindful of the fact that in practice, there is no Parliament in the world that would claim independence in such absolute terms because the freedom enjoyed by Members of Parliament is constrained by existing laws, practice and procedures, for instance, in Zambia, Article 86(1) of the 1991 Republican Constitution states:

“subject to the provisions of this constitution, the National Assembly may determine its own procedures.”

Further Article 87 of the constitution of the same constitution states that:

“The National Assembly of Zambia and its members shall have such privileges and immunities as may be described by an Act of Parliament”.

The privileges and immunities referred to in Article 87 of the constitution are embodied in the National Assembly (Powers and Privileges) Act section 3 of this Act which states that:

“There shall be freedom of speech and debate in the Assembly.
such freedom of speech and debate shall not be liable to
question in any court of law or place outside the Assembly.”

All that I want to show here is that whilst the members of the Zambian parliament enjoy the freedom of speech and debate in the House, their freedom is not absolute but it is subject to the control by internal practice and procedures in the House. Any language that is unparliamentary would immediately face sanctions from the speaker of the National Assembly, for example, Hon Lewanika was expelled by the Speaker for disassociating himself from a parliamentary decision that ordered the imprisonment of journalists Fred Mmembe Bright Mwape and columnist Lucy Sichone.²⁷ However, for those Members of Parliament with sense of decorum in the House enjoy the legally protected

²⁷ Akashambatwa Mbikushita Lewanika V AG (1996) HCJ/X (Unreported)

freedom of the House to the full capacity. And that is the independence of the legislature I am talking about where they are not subjected to any controls in view of their debates in the House. Even their electorate, inclusively, do not control their Members of Parliament by compelling them to present petitions on their behalf because Members of Parliament enjoy the discretion to present or not to present a petition before Parliament. In **CHAFFERS V GOUDSMID**,²⁸ a constituent presented a petition to area MP which he should have presented before Parliament. The MP did not present it and the constituent sued the MP for not presenting it. The court held that an action of mandamus to compel the MP to present a petition was not available because the MP as a reasonable person has the discretion to or not to present it before Parliament.

This judgement is a confirmation of the freedom accorded to Members of the Parliament to enable them to operate independently without subjecting themselves to the control of any force.

In Zambia, as I have pointed earlier, the powers of Parliament are enshrined under Articles 62, 78 and 80(1) of the Zambian Constitution and they read as follows:

Article 62: " The legislative power of the Republic shall rest in the Parliament of Zambia which shall consist of the President and a National assembly."

" Article 78(1) " Subject to the provisions of this constitution, the legislative power of Parliament shall be exercised by Bills passed by the National Assembly and assembly to by the President".

"Article 80(1): "Nothing in Article 62 shall prevent parliament from conferring on any person an authority, power to make statutory instruments."

²⁸ (1874)1QB 186

Though the constitution is said to be supreme over other organs of the state including, Parliament under the provision of Article 1(4), technically Article 79(1) gives power to Parliament to alter the constitution. This Article states”

“Subject to the provisions of this article, Parliament may
alter this constitution”

All these constitutional provisions reminds us of the powers of Parliament in its legislative role. However, to enable Parliament to independently discharge its legislative function, the constitution has under Article 87 empowered National assembly to enact a law to provide for privileges and immunities of the Members of Parliament. In light of this, the National Assembly Powers and Privileges Act, Cap 12 of the Laws of Zambia was enacted. In relation to this Act, Erskine May defined the term ‘privilege’ as:

“Parliamentary privileges the sum of the peculiar rights enjoyed by each
House collectively as a constituent part of the High Court of Parliament, and
by Members of each House individually, without which they could not discharge
their functions, and which exceed those possessed by other bodies or individuals.”²⁹

Mr. Chibesakunda, the former Clerk of the Zambian National Assembly, concurred with this statement and added that Parliamentary privileges and immunities refers to perculiar advantages which quarantees the effectiveness of Parliament and without which parliament would not function properly. And going by Chapter 12 of the laws of Zambia, one of the Parliamentary privileges enjoyed by Members of Parliament in Zambia is the freedom of speech. It enables members to debate freely on any subject in the House. This freedom is provided under section 3 of the National Assembly (powers and privileges) Act and it states:

²⁹ Erskine May, Parliamentary Practice, Butterworths, 21st ed. (1989), P. 69

“There shall be freedom of speech and debate in the Assembly. Such freedom of speech and debate shall not be liable to be questioned in any court of law or place outside the National Assembly.”

In view of this provision, the Zambian courts have also recognised the independence of legislature in its conduct of business. In **Re NALUMINO MUNDIA**,³⁰

Hughes, J. held that:

“ The High Court does not have power to interfere with the exercise of the jurisdiction of the National assembly in the conduct of its own proceedings.”

Additionally, Members of Parliament are protected from criminal and civil prosecution for any breach committed in the House as a result of debate or speech. In this regard, section 4 of the National Assembly (Powers and Privileges) Act states:

No civil or criminal proceedings may be instituted against any member for words spoken before or written in a report to the Assembly or Committee thereof or by reason of any matter or thing brought therein by petition, bill, resolution, motion or otherwise.

Considering all these freedoms, I have no doubt that the Zambian Parliament is indeed independent.

2.3 The House of Commons

In the United Kingdom, for example Parliament, or the House of Commons, as it is popularly known, is said not only is it sovereign but is also supreme, meaning that there is no law which it is subject to.³¹ The doctrine of the legislative supremacy of Parliament in the UK has been firmly established that it has scarcely been challenged in the courts.³² This principle has been illustrated in **R V**

³⁰ (1971) ZR 70

³¹ Ibid P. 107

³² Ibid P. 47

JORDAN³³ where the prisoner applied to court for an order of habeas corpus on the ground that the Race Relations Act was invalid as being a curtailment of free speech. The Division Court dismissing the application held that Parliament was supreme and there was no power in the courts to question the validity of an act of Parliament adding that the ground of the application was completely unarguable. This case shows that the House of Commons enjoys Parliamentary independence,

2.4 The Congress

Similarly, the United States of America's legislative body or commonly called the Congress, enjoys its legislative independence it derives from Article 1, Section 1 of the Constitution. Though it is recognised that the American constitution is supreme over all branches of government, Congress inclusively, Congress is not controlled by any branch of government in the process of performing its designated function of law-making because the American constitution believes in the concept of constitutionalism which embraces the principle of separation of powers. The doctrine of separation of powers calls for the distribution of powers among two or more mutually independent branches of government. The concept of constitutionalism requires organisational arrangements which enable each branch to exercise its designated powers without being obliged to submit to the dictates of the other. None of each branch of government is superior to the other. The doctrine of separation of powers is a political concept propounded by Montesquieu in his book "L' Esprit des Lois" that:

"Political liberty is to be found only where there is no abuse of power. But constant experience shows us that every man invested with power is liable to abuse it and to carry his authority as far as it will go. To prevent the nature of things that one power should be a check on another When legislative and executive powers are united in the same person or body there can be no liberty."

³³ (1967) Crim LR 483

This is the principle upon which the USA constitution based the separation of powers distributed among the three organs of the state. The principle is not expressly stated in the American constitution but it is, however, implied in the structure of the government. The first three Articles in the American constitution covering this principle states:

Article I section 1. "All legislative powers herein granted shall be vested in a congress of the United States, which shall consist of Senate and House of Representatives.

Article II Section 1: "The executive Power shall be vested in a President of the United States of America..."

Article III Section 1: " The judicial power of the United States; shall be vested in one supreme court and in such inferior courts as the congress may from time to time ordain and establish"

The basic principle underlying this system is clear that "the accumulation of all powers of the legislative, executive, and judiciary in the same hands must be prevented if tyranny has to be avoided. Therefore, Congress is not subject to any control with regard to the freedom it enjoys during the debates and speeches in the House.³⁵

I have to remind myself once again that in Zambia, Parliament is the creature of the constitution, too, and that all the legislative powers vest in Parliament. It is the constitution that establishes Parliament and directs the scope and manner of its law-making powers.³⁶ Though the concept of separation of

³⁵ Article 1 (6) of the 1991 constitution as amended by the 1996 Constitution

³⁶ Article 62 of the 1991 constitution as amended by the 1996 Constitution

powers is not applicable in Zambia due to the fact that there is a fusion between the executive and legislature, there is a recognition under Article 1(4) of the Zambian constitution that the constitution is above all organs of state, therefore, the executive is not above the legislature.

Basically, there is no branch of government which would claim superior to the other but that the three organs are all subject to the constitution which entails that Parliament in Zambia is, I would say, independent in its legislative function though by the constitutional set up it is weakened by the executive interference.

Having recognised the fact that the Zambian Parliament enjoys its legislative independence, to what extent has it enjoyed this freedom without the influence or interference from the powerful branch of the executive?

The next chapter answers this question.

CHAPTER THREE

FACTORS INHIBITING LEGISLATIVE INDEPENDENCE

3.0 THE FOUR INHIBITING FACTORS

Though the Zambian parliament, *prima facie*, seem to operate independently in its role of legislative process, it is however, inhibited by a number of factors which tend adversely affect its constitutional independence. The term 'inhibit' in this context mean 'to restrict or prevent a process or an action.'³⁷ Implying that the executive arm of government tend to restrict or prevent parliament from performing its function independently.

In the light of this, I have identified the following factors as some of the obvious obstacles that affect the Zambian parliament in the execution of its function independently;

- i . the fusion between the legislature and executive arms of government;
- ii. extensive executive power;
- iii. party-patronage and
- iv. appointments of opposition Members of Parliament to ministerial portfolios.

3.1 The fusion between the legislative and executive branches of government

As mentioned earlier, Article 46(2) of the Zambian constitution empowers the President to appoint ministers amongst Members of Parliament. Legally speaking, the President has constitutional powers in making these appointments, however, I feel that this does not augur well

³⁷ Ibid P. 612

with the doctrine of separation of powers because the appointees become bound to the doctrine of collective responsibility.

The concept 'collective responsibility' mean that "all members should fully support cabinet decision, whoever disagrees with the decision, must resign."³⁸ The appointee, in this sense, immediately assumes the status of a back bencher. The negative factor about such appointments is that the appointees are engaged in self restrictive process in terms of speech in the House by accepting ministerial positions at the expense of the electorate whom they are designated to serve. In this circumstance, the executive benefits by extending its influence in Parliament, hence, impairing the independence of the legislature. Basically the role of the legislature is to make law and that of the executive is to execute policies.³⁹ Ideally, it is difficult to serve both branches effectively without vested interest.

In the light of this explanation, Professor B.O.Nwabueze refering to the doctrine of separation of powers stated:

"The separation of functions between execution and legislation, requiring separate procedures, is thus of the utmost importance, for even if government is regarded as a single indivisible structure, the separation in procedure will necessarily operate as a limitation upon the incidence of arbitrariness."

He further continued;

"The implication of this proposition is that in countries where separation of powers between the legislature and the

³⁸ Martin A. Elizabeth, Dictionary of Law, Oxford, Oxford University Press, (2002), P. 62

³⁹ Gerster, F.G., "Federalism, Decentralization and Rights." In Henkin, L and Rosenthal A, ed., Constitutionalism and Rights, the Influence of the USA Constitution Abroad, New York, Columbia University Press (1990) P. 24

executive is applied there is a likelihood of arbitrary rule is likely to result in the violation of individual rights."⁴⁰

The Zambian constitutional arrangement allows the executive branch of government to encroach on the legislative branch and in so doing, the legislature is weakened in its functions reducing it to the level of rubber stamp, hence, abandoning its role of checking the excess of the executive:

When a situation of this nature occurs, it reminds me of Montesquieu's fears that:

"when legislature and executive powers are united in the same person or body... there can be no liberty."⁴¹

Whenever references as to liberties are made, any person who has read the Zambian constitution is reminded of the Bill of Rights under Part III of the Constitution. The Bill of Rights under the constitution of Zambia guarantees fundamental freedom and rights of the individual.⁴² However, the extent to which these liberties are protected, bearing in mind that, under the same constitution there is no separation of powers procedure between the legislature and the executive, leaves much to be desired. Experience has it that, in Zambia, the legislature has failed to protect violations of human rights executed by the executive by failing to check the powers of the executive. For instance, the executive having designed the 1996 constitution to suit its personal interest, inserted Article 46(2) to enable the executive to encroach on the legislature with the purpose of interfering with parliamentary process for the safe passages of Bills in the House. With such a powerful and domineering front bench, the executive, normally carry the day by securing a legal backing in Parliament. Usually this is done at the expense of disregarding the rights of the citizens.

⁴⁰ Ibid P. 15

⁴¹ Ibid P. 14

⁴² Articles 11 to 24 of the 1991 Constitution as amended by the 1966 Constitution

One such example is, the ratification of the 1993 State of Emergency by Parliament on the allegation by the executive that the opposition United Nation Independence Party (UNIP) was planning to overthrow the Chiluba led MMD government, was later discovered as a mere ploy of using Parliament to legalise the executive powers to invoke the State of Emergency under Article 30 of the Republican Constitution⁴³ which gave effect to the operation of Article 25 of the Constitution to suspend the enjoyment of fundamental rights and freedoms guaranteed under Part III of the Bill of Rights.

Following the ratification of the State of Emergency, at least twenty-seven UNIP members were detained for allegedly involving themselves in a subversive plan called "Zero option."

In the light of these detentions. The Weekly Post opinion observed that the detentions were unlawful in that, firstly, the President erroneously signed Article 31 which does not call for the suspension of the rights and freedoms enjoyed by citizens. Secondly, it was discovered that as a result the UNIP detainees were unlawfully detained for 4 days before the President was advised to reverse the situation and properly invoke Article 30 which allows for the suspension of the guaranteed rights, rights and freedoms. This was a total violation of rights to illegally detain people without proper verification of the law. Basically, Parliament could have checked all these but simply ratified the declaration since it was infiltrated by the executive. As a result people's rights were abused. The Weekly Post reported:

"The lonely voices of dissent in Parliament who opposed to ratification of UNIP members to detention have been squashed"⁴⁴

That's why going by the current State President Mr. Levy Mwanawasa's remarks that "MMD is

⁴³ The Weekly Post, March 11th – 18th, (1993), P. 1.

⁴⁴ Ibid P. 4

growing stronger,”⁴⁵ I have begun to feel that it’s the numbers that matters in Parliament other than having balanced debate for a meaningful legislation. Experience has shown that despite an outcry by the public to reduce the cabinet, the executive finds comfort in expanding ministerial positions. For instance, statistics after the 1996 Presidential and General Elections conducted under Dr. Chiluba’s MMD government indicated that the total number of both ministers and their deputies was sixty-seven (67), MMD Members of Parliament was 70 whilst independents 4, national Party (NP) 4, Agenda for Zambia (AZ) ⁴⁶ and United National Independence Party (UNIP) had none as they had boycotted the 1996 Presidential and General Elections on the ground that their party candidate Dr. Kaunda was constitutionally barred from contesting because of his Malawan origin.⁴⁷ These figures are out of the required constitutional total number of hundred and fifty elected Members of Parliament. Therefore, if put together, the number of the ruling (MMD) party Members of Parliament the figure came to 137 which was a reminiscence of one-party dominance in the House of the UNIP Government. Given this situation where 67 out of 150 members of Parliament are ministers and out of the remaining number of 83 back benchers 70 were from the ruling MMD party who, of course, are expected to pay loyalty to their party for having sponsored them to Parliament, this scenario is not reflective of an independent legislature because it is constituted of the same cabinet which initiate a policy as executive arm of government and at the same time be part of Parliament to enforce its safe passage in the House. For instance, the 1996 Republican constitutional amendment which is in use currently was given the expected overwhelming safe passage despite its controversial form. That’s why its effect is sadly felt today as a result lack of checks and balance by Parliament. Weakness of Parliament has led to a number of scandals. To be specific there are reported allegations of economic

⁴⁵ Times of Zambia, Monday, September 22nd (2003) P. 1

⁴⁶ Daily Parliamentary Debates of the Third session of the Eighth National Assembly, 24th August – 3rd September 1999.

⁴⁷ Article 34 (3) (b) of the 1991 Constitution as amended by the 1996 Constitution.

plunder by the Chiluba government, such as "Task Force charges Chiluba with theft K200 billion."⁴⁸

The 2001 Presidential and General elections saw the ruling MMD party capture 70 parliamentary seats and the total number of 80 seats went to the opposition parties. This composition of Parliament appeared to bring much cherished hope of a balanced House in preference to the all time ruling party dominance. Hence, it won a comment from Sakwiba Sikota the opposition UPND First Vice President who said that "Parliament will no longer be a rubber stamp."⁴⁹ This scenario excited a lot of Zambians because ever since the re-introduction of multi-party politics in the country, Parliament has had been dominated by the ruling party. Therefore, people believed that "with the majority of Members of Parliament in the opposition, the MMD will pay heavily to have whatever it is determined to pass in the House."⁵⁰ Unfortunately, things did not work according to the peoples' expectations because as time went by, statistics in the House slumped and this change was deliberately designed by the government through appointing of Members of Parliament into government and creating defections of opposition Members of Parliament to the ruling Party. As at 23rd July 2003, statistics at the National Assembly showed that there were 21 cabinet ministers and 41 Deputy ministers making the total number of 62 members of the executive branch of government in Parliament and out of these 6 were surprise appointments of opposition MPs into the executive branch, a phenomenon which is new to the pattern of the Zambian parliament.

These are Dipark Patel of the opposition Forum for Development and Democracy (FDD) as Minister of Commerce, Silvia Masebo of the Zambia Republican Party (ZRP) as Minister of Local Government and Housing. Others are Chance Kabaghe of FDD as Deputy minister for Agriculture, Geoffrey Samukonga of FDD as Deputy minister for Commerce, Chile Nguni of United National Independence

⁴⁸ The Post, Wednesday, August 6 (2003) P. 1

⁴⁹ The Post, Saturday, January 5th (2003) P4

⁵⁰ The Post, February 9, (2002) P. 4.

Party (UNIP) as Deputy minister for Labour and Neddy Nzowa of Heritage Party (HP) as Deputy minister for Tourism. In my own view, these appointments were not intended to extend an olive branch or to form a government of national unity as President Levy Mwanawasa puts it but to interfere with the independence of Parliament so that he can have a stronger and larger voice on the executive side and silencing the appointees through the doctrine of collective responsibility.

For instance, on a motion debating the funding of the personal emoluments of the District Administrators, opposition Members of Parliament failed to shoot down the motion and when the motion was subjected to a vote the ruling MMD won by 15 votes. As expected all the appointees from the opposition present in the House voted with the ruling MMD⁵¹ in satisfaction of the doctrine of collective responsibility. These ministers were Silvia Masebo, Depark Patel, Chile Nguni and Neddy Nzowa who voted contrary to their party views.

This position is what Valentine Hermans refers to as "Incompatibility of a ministerial office with membership of parliament,"⁵² of which he advised; "incompatibility as a rule forbids a Member of Parliament to carry on certain occupations or professions while holds office." He further stated that; "the objectives to this rule is to enforce the separation of powers and to prevent Members of Parliament from becoming dependent upon their public authorities or private interest and to prevent them from deriving advantage from their membership in carrying out their profession."

I strongly agree with Valentine Hermm's position on this rule because an effective Member of Parliament is, in my view, one who must devote his work to parliamentary work on only. Therefore, to establish a vibrant independent legislature there is need to have focused Members of Parliament whose interest is to serve the nation and not personal. I have observed that the executive arm of

⁵¹ Times of Zambia, Thursday, March 27th (2003), P. 1

⁵² Valentine Herman, Parliaments of the World Thomson Litho Ltd, East Kilbride, Scotland (1976) P. 174.

government has taken advantage of the law which provides for the appointment of minister among the sitting Members of Parliament knowing too well that ministerial portfolios are enviable because conditions of service that goes along with the office. These appointments, in the true sense, compromises the independence of Parliament. In Zambia its common to see 'principled' opposition Members of Parliament crossing over to the executive branch with impunity.

Contributing on the need to establish a strong and independent legislature, Hon. Kennedy Shepande the then opposition UPND Member of Parliament but currently Deputy minister of Works and Supply said in Parliament:

"... the Executive must be completely separated from the legislature by providing that ministers shall not be Members of Parliament. Sir, there is currently a lot of influence by the executive in the work of both the judiciary and legislature which must be curtailed."⁵³

The honourable Minister who was advocating for the separation of powers between the legislature and the executive a few months before surprisingly became a member of the executive branch of government on the ruling MMD ticket after crossing over from his UPND party and to retain his Nangoma seat in a by-election organised and vigorously campaigned for by the ruling MMD government after he was expelled from his original party UPND for no other reasons than accepting the ministerial appointment whilst serving as opposition Members of Parliament which was against his party policy.

This is one of the examples that is indicative of a manipulative hand of the executive branch of government over the independence of legislature. Sadly Hon. Shepande may no longer express

⁵³ Daily Parliamentary Debates, First Session of the Ninth National Assembly, Tuesday 26th February 2002

similar views whilst serving as a back bencher. As a result of the effect of the doctrine of collective responsibility, Hon. Shepande's his freedom of opinion, thought and speech in the House is somehow restricted.

3.2 Extensive executive powers

In reference to the Office of the President, Professor Nwabueze observed that "the most striking feature of presidency in Africa is its tremendous powers."⁵⁴ In a comparative scenario, he agreed that both the African and American Presidents, in nature, are vest with executive power but quickly pointed out that the difference between the two is the extent to which the said power is exercised. In this view, he concluded that "The Africanness" of the presidency in African refers to the fact that it is largely free from such limiting constitutional devices, particularly those of a rigid separation of powers."⁵⁵ Implying that the powers of African presidency extends to other branches of government, a fact I strongly concur with because my observation reveals that in Zambia the powers of the President are physically felt in Parliament through the front bench which comprises the Vice-President who is leader of government business in the House⁵⁶ and ministers collectively.

In order to understand the powers of the President, it's better to acquaint ourselves with the law from which the President derive his powers. In Zambia, the Constitution under Article 33(2) which vest executive power in the President, it states:

"The executive power of the Republic of Zambia shall vest in the
President and subject to the other provisions of this constitution,

⁵⁴ B.O. Nwabueze, Presidentialism In Commonwealth Africa, London C. Hurst & Co. (1974), P. 104

⁵⁵ Ibid P. 105

⁵⁶ Ibid P. 18

shall be exercised by him either directly or through officers subordinate to him.”

Further Article 33(1) of the constitution states that “The president shall be the Head of State and the Government; and, the Commander-in-Chief of the Defence Force.” Looking at the undefined executive powers bestowed in one person, I would agree with Professor Nwabueze observation that the Zambian President like many other African counterparts has tremendous powers in that:

- a) as a Head of government he is responsible for the running of government institutions as well as a body of ministers; and,
- b) as the Head of State he is the Chief public representative of a country; and,⁵⁷
- c) as a Commander-In-Chief of the Defence Forces he is responsible for the operational use of the armed forces.⁵⁸
- d) he is executive President of which his limits of power is not defined.

Going by the said provisions of the law, it is unquestionable that the executive powers extends its influence up to the legislative branch of government through the front benchers. The front benchers being subjected to the doctrine of separation of powers are bound by the collective decision of the cabinet where the President is the Head of Government. Therefore, as the Head of government in charge of running the government institutions and supervising a body of ministers, the President (as executive) commands respect and power over the ministers as he is the appointing authority⁵⁹ who is at the same time is capable of withdrawing the appointment.⁶⁰ The Vice-President who is the leader

⁵⁷ Ibid P. 177

⁵⁸ Ibid P. 69

⁵⁹ Ibid P. 82

⁶⁰ Article 46 (2) of the 1991 Constitution as amended by the 1996 Constitution

of the House in Parliament is also appointed by the President.⁶¹ And as leader of the House in charge of Government business in the House, the Vice President supervises Government business, defending the rights and immunities of the members by referring matters of breach of privileges to the Orders Committee, and he is in charge of moving motions for adjournment of the House.⁶² Therefore, he holds an influential position in the House which can change the course proceedings into compromise members of the House.

The influence of executive powers in the House is also extended into the House through the nominated Members of Parliament who are nominated by the President⁶³ and serve in the House at the mercy of the President as he can withdraw the nomination at anytime he thinks fit.⁶⁴ The other link by which the power of the executive branch of government is felt in the House is through the Speaker of the National Assembly. According to Article 69(1) of the constitution the Speaker of the National Assembly is elected by the Members themselves from among persons who qualifies to be elected as members of National Assembly. Experience has shown that due to majoritarian influence or manipulation by the executive branch of government the Speaker of the National Assembly has been coming from the ruling party. The executive's worry is that losing the influential speaker's chair to the opposition would, in the views of the government, imply losing control of Parliament. The interest of the ruling government in capturing the speakers position was seen during the First Session of the Ninth National Assembly in which the election of the Speaker of National Assembly was characterised by violence as Members of Parliament hull missiles at each other after the Presiding officer (Clerk of the National Assembly) suggested to the House that the election would be conducted

⁶¹ Article 44 (5) of the 1991 Constitution as amended by the 1996 Constitution

⁶² Article 45 (2) of the 1991 Constitution as amended by the 1996 Constitution

⁶³ Ibid P. 19

⁶⁴ Article 68 of the 1991 Constitution as amended by the 1996 Constitution

by a secret ballot contrary to the normal Parliamentary open ballot procedure regulated by standing orders No. (3) and (4).⁶⁵ As it was a foregone conclusion that, at that time, the opposition being in majority⁶⁶ and solidly united would win elections, the Clerk of National Assembly, who is also an appointee of the President under section 3 (1) of the National Assembly staff Act Cap 257, in unprecedented manner cancelled the elections and referred the matter to the High Court for interpretation and guidance on Articles 63, 69, 70, 84 and 87 of the constitution of Zambia and No.3 standing orders of 1998 of the National Assembly. The reference of the matter to the High Court by the Clerk of the National Assembly is, in my view, an indication of how executive interferes with the independence of Parliament through the Presidential appointees such as the Clerk of National Assembly because, firstly, the Clerk of National Assembly has no locus standi as an individual to sue Members of Parliament because in **Re NALUMINO MUNDIA (1971)ZR 70** it was held that High Court has no power to interfere with the exercise of the jurisdiction of the National Assembly in the conduct of its own internal proceedings. Secondly, I wonder whose interest he was serving and, thirdly as a mere civil servant he had no powers to prevail over decisions of Parliament. In the view of this, the then Law Association Chairman Christopher Mundia, strongly advised that "Parliament is omnipotent in legal theory therefore it has power to change a man into a woman and vice versa. In short, it has power to do anything even beyond imagination if it deems them fit and appropriate in the interest of the nation and does not therefore take kindly to encroachments on its privileges, rights and powers."⁶⁷ Evidently, the surprise surprising withdraw of the case from the High Court before it was heard on the Vice Presidents instructions was a clear indication that the executive extends its powers into the affairs of Parliament to be specific, through the Clerk of the National

⁶⁵ Article 74 of the 1991 Constitution as amended by 1996 Constitution

⁶⁶ Daily Parliamentary Debates, Friday 25th January 2002

⁶⁷ The Post, Thursday, January 10 (2000) P. 5

Assembly. Further a Speaker elected under partisan influence cannot, in my view, be impartial to discharge business in the interest of the Nation. In my understanding, the following remarks do not inspire confidence in Parliament:

“Parliament has lost integrity under Mwanamwambwa charges B.Y.”⁶⁸

“Amusa is not fit to be Speaker”⁶⁹ “Kavindele accuses Speaker of bias”⁷⁰

“Speaker should resign”⁷¹ “Speaker should resign demands Sata”⁷²

A Parliament which is compromised by the powers of the executive loses its track as a check on the executive contrary to Article 51 of the constitutions which states:

“The Cabinet and Deputy Ministers shall be accountable collectively to the
National Assembly.”

If Parliament, so to say, forfeits its power to check tremendous power of the executive the rights of citizens are endangered and public funds becomes unaccounted as seen by following scandals:

“TASK FORCE CHARGES CHILUBA WITH THEFT OF K200

BILLION”⁷³ (This is the 1st President in the third Republic)

“CHILUBA BRIBES JUSTICE NGULUBE... with cash payments of over \$168,000”⁷⁴

(This is the President and Chief Justice)

CHUNGU FACES ARREST... for money laundering, theft and bribery”⁷⁵

(This is the former intelligence Chief in Chiluba’s government)

⁶⁸ The Sunday Post, January 27, (2002). P. 3

⁶⁹ The Post, Wednesday January 23 (2002) P. 1

⁷⁰ The Post, Tuesday February 5 (2002) P. 3

⁷¹ Saturday Post, March 8 (2003) P. 3

⁷² The Post, Friday, November, 8 (2002) P. 1

⁷³ The Post, Wednesday, August 6, (2003), P. 1

⁷⁴ The Post, Monday, June 24, (2002) P. 1

⁷⁵ The Post, Tuesday, June 25, (2002) P. 1

“LEVY WONT COME OUT OF THE MAIZE SCAM – Kavindele.”⁷⁶

(This is the second President in the third Republic).

These and many more scandals if left unchecked by Parliament renders Parliament a Laughing-stock.

3.3 Party patronage

The word patronage means “the support and encouragement given”⁷⁷ Therefore, party patronage in this context mean the support and encouragement given by the party cadre to his party. In line with this, the Zambian Republican Constitution under Article 1(I) accommodates plural politics. It states:

“Zambia is a unitary, indivisible, multi-party and Sovereign State.”

By this provision it implies that the National Assembly constitute Members of Parliament from different political parties across the country. In this regard, the constitution encourages elected Members of Parliament to confine themselves to their political party which sponsored them to Parliament. Otherwise, if a Member of Parliament opts join another party, under Article 71(2), he forfeits his seat in Parliament. This means, therefore, that Members of Parliament are discouraged from jumping from one party to another. Indirectly, it is an encouragement to be loyal to their parties. However, the effect of party patronage is that the party with more Members of Parliament in the House take advantage over less represented parties.

Experience in Zambia has it that the ruling party has always dominated the House. Starting with the Vice-President who is the leader of the House, Nominated Members of Parliament, Ministers and other MMD MPS are MMD party members who for their existence in Parliament owe it to their

⁷⁶ The Post, Tuesday August 26, (2003), P. 1

⁷⁷ Ibid P. 850

party. Therefore, for their party to remain in government, they ensured that they support their party policies in Parliament. In the process of doing that they surrender their principles of parliamentarism to party-patronage, hence, affecting the independence of the legislature because the interest of their party comes first.

No wonder Professor Nwaubeuze was attracted by the comment from Mr. Wilson (a commentator) whom he quoted as having said:

“Patronage has continued to be a powerful armour in the control apparatus of government a fact which, it said, has unbalanced the constitution by making Parliament subservient to the will of the executive.”⁷⁸

When a serious matter comes up for consideration in Parliament, political party leaders, in this regard, summon their Members of Parliament for a caucus (secret meeting) to advise them on the position the party has taken of which they would be asked to project in Parliament no matter their individual opinions about the subject. Such a position was taken by MMD party in a motion to the Constitution of Zambia Amendment Bill No. 17/96 which saw the then Vice President Brigadier General Godfrey Miyanda – leader of the House spearheading the ruling party’s campaign in the House to amend the Constitution through the process of Parliament instead of the Constituency Assembly⁷⁹ as recommended by the Mwanakatwe Constitutional Review Commission.

In his debate in the House he said:

“I have genuinely brought this Bill to enable us time to debate.

In fact I have heard people saying that in a few days time the

⁷⁸ Ibid P. 276

⁷⁹ Daily Parliamentary Debates, Thursday 2nd May 1996 of the 5th Session of the National Assembly

debate on the constitution will over because the MMD are in majority in Parliament. We are seriously waiting to produce a document which will ensure that what we are concerned about as citizens is implemented.”⁸⁰

This speech reflected political patronage. It is the political patronage by the MMD in 1996 domineering House, caused the end product of this current Constitution to be amended through Parliament amid chanting from the ruling MMD Members of Parliament, “Kaunda walala wala”⁸¹ apparent reference to the first Republican President Dr. Kaunda whose candidance was barred by the newly passed clause within the Constitution MMD Members of Parliament reflecting patronage stance as their aim was to dislodge Dr. Kaunda.

The product of party patronage in this constitutional making process did not only disadvantage Dr. Kaunda but a lot of citizens because the same document is today undergoing the fourth amendment under the Mung’omba Constitution Review Commission (2003). The effects of a Party tailored constitution which are being felt today is that the government is compelled to refund the exercise amid the budget overrun. As a result of party patronage recommendations made by the Mwanakatwe Constitutional Commission Review in 1996 such as having ministers appointed out side parliament were rejected by the Chiluba government.⁸²

Had this been implemented it would have facilitated checks and balances on the executive and could have prevented the much talked about “economic plunder scandals.”

⁸⁰ Ibid P. 4

⁸¹ The Post, Tuesday September, 24 (1996) P. 12

⁸² Ibid P. 115

3.4 Appointments of opposition Members of Parliament to ministerial portfolios.

Constitutionally, there is no illegality on President Mwanawasa in appointing opposition Members of Parliament to Ministerial positions since Article 46(2) clearly states:

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

Therefore, any Member of Parliament irrespective of any political party can be appointed minister by the President. However, the practice of appointing opposition Members of Parliament into government is a new phenomenon in the Zambia political scenario as evidenced by resistance from the opposition parties resulting into granting of court the injunction against President Mwanawasa prohibiting him from appointing opposition numbers of Parliament into his government.⁸³ Controversies characterising these appointments do not augur well with spirit of democracy. Already a number of parties have suspended or expelled from the party their Member of Parliaments who have accepted the appointments. For instances, Forum for Development and Democracy Party (FDD) President General Christon Tembo was quoted as saying, "all the Members of Parliament who have accepted President Mwanawasa's appointments should consider themselves to have left FDD."⁸⁴ This was in apparent reference to appointments of Hon. Dipark Patel Minister of Commerce, Hon. Chance Kabaghe-Deputy Minister for Agriculture, and Hon. Geoffrey Samukonga-Deputy Minister for Commerce.

⁸³ The Post, Saturday, February 8 (2003) P. 1

⁸⁴ The Sunday Post, February 9, (2003) P. 1

In the camp of Zambia Republican Party (ZRP) some party members felt that Hon. Silvia Masebo should be expelled while a good numbers felt that she should be separed for accepting a ministerial job.”⁸⁵

Another party the United Party for National Development (UPND) which had its member Hon. Kennedy Shepade appointed Deputy Minister for Works and Supply, maintained that Shepande had forced himself out of the party for accepting a ministerial appointment.⁸⁶

From these experiences, I am of the view that these appointments instead of bringing unity has brought disunity in the country eventually affecting the independence of Parliament because the appointees would assume a front bench bench, forfeiting the role of checks and balance on the executive because they become part of executive.

It must be appreciated that political parties are elected to the national Assembly on the basis their party policies and they are expected to sell them in Parliament, therefore, in the situation where one is appointed as minister the vision of the party diminishes as it is not sold in Parliament.

One the other hand, whilst I put a blame on the executive, for making such appointments, I feel that some opposition Members of Parliament are also unprincipled by accepting the appointments because they are aware of such implication that goes with it as front bench in the House. In this regard I concur Benjamin Mutambo who stated:

“Our MPs should also learn to respect their party position if democracy is to be entrenched and not propagating personal interests which are at variance with their sponsors who happen to be the parties that sent them to Parliament.”⁸⁷

⁸⁵ The Post, Thursday February 13 (2003) P. 1

⁸⁶ The Post, Wednesday February 12 (2003) P. 1

⁸⁷ The Post, Wednesday February 5 (2003) P. 12

However the inference that I have made out of these appointments is based on the following observation:

- i) that because of the executives' prosperity for power it has infiltrated parliament, rendering it a rubber stamp;
- ii) that the executive intent, seemingly, is to dismantle the opposition and monopolise Parliament.

It is surprising that some Members of Parliament had gone to the extent of inviting the President to extend the appointments to their parties. For instance the current Minister of Local Government and Housing Silvia Masebo was reported to have urged President Mwanawasa to extend the olive branch to her party to have Members of Parliament be appointed in government.⁸⁸ This view indicates loss of hope in having an independent legislature. I have observed that these appointments have brought disunity in Parliament between appointees and their parties.

⁸⁸ The Post, Thursday January 30, (2003) P. 2

CHAPTER FOUR

BASIC SOLUTIONS

From the constitutional point of view, the *Zambian* legislature has not been given the independence as desired by its citizens in the “Third Republic” – an era that re-introduced multi-party politics.⁸⁹ There was a bit of hope in 1996, when the Mwanakatwe constitution Review Commission made several recommendations towards the constitutional amendments which included among other things the separation of powers between the legislature and the executive but the government vehemently rejected the idea.⁹⁰ Up to this time *Zambia* is still grappling with the problem of enacting an acceptable constitution that could stand the test of time. They need a constitution that could inspire hope in its citizens. The constitution that could uphold the independence of the legislature. In this regard believe that for the *Zambian* legislature to acquire its deserved independence the following suggestions are worth a consideration:

4.1 Constitutional re-organisation

Zambia has been independent for thirty-nine years now “From independence, every *Zambian* constitution has provided for a strong executive, a President wielding substantial power.”⁹¹ The power in my view, that poses a threat to individual rights and freedoms as demonstrated by the invocation of the state of emergency which saw the unlawful detentions of a number of opposition party leaders which included among other persons the former Republican President Dr. Kaunda and *Zambia* Alliance for Progress party President Dean Mungomba⁹² for allegedly involvement in the

⁸⁹ Dr. Alfred Chanda, “*Zambia’s Fledgling Democracy: Prospects for the future*” *Zambia Law Journal* Vol. 25-28 (1993-96)

⁹⁰ The Mwanakatwe **Constitution Review Commission Report**, Article 19 (a) June 1995.

⁹¹ Muna Ndulo and Robert B. Kent, “**The Constitution of Zambia**,” *Zambian Law Journal*, Vol 30 (1998), p. 26.

⁹² *Mungomba v. AG.* (1997) HP/2617 unreported

1997 captain 'solo' coup d'état plot.

This executive power has been viewed as a negation to the newly acquired democracy of the multi-party dispensation of the 'third republic'. The need to change the 'status quo' by distributing power equally among the other two branches of government has been frustrated by constitutional restraints such as Article 79, which empowers Parliament as the only institution to alter the constitution. The danger posed by such a scenario is that in the face of an executive dominated Parliament, as the current situation, the constitution making process is left at the discretion of the President instead of the people of Zambia because a constitution is the people's document. Therefore, in the current form where the executive dominates Parliament, Parliament cannot be vested with such a huge responsibility of altering the constitution as it cannot be trusted. For the best results, the constitutional making process must be withdrawn from Parliament and given to the people.

Further, a look at the constitutions, shows that there is a conflict between the two systems which we have imported in the constitution i.e. the British Westminster model of Parliament under Article 46 (2) where ministers are appointed from the National Assembly and the American constitutional democratic system under Article 1 (4) which provides for the constitution to be above all persons and all the three branches of government. In this respect, the constitution appears to have embraced both systems resulting into a situation where executive has domination over Parliament, a position which makes it difficult for the legislature to check the powers of the executive. Under the Westminster Model, system the system accommodates all the three organs of the state as part of the legislature, unlike in the USA where there is a clear separation of powers with a mechanism of checks and balance. In relation to this, the Zambian situation has faced a lot of difficulty on which of the two systems to follow. That's why I am advocating for a constitutional re-organisation so that the better

of the two, i.e. the American system is applied so as to clear the conflict.

4.2 Separation of powers

According to G.R. Harns, “the purpose of separation of powers theory is to prevent any single branch of government from controlling the other two”⁹³ thereby effecting a check on each other’s powers in order to prevent arbitrariness. Our Zambian constitution under Article 46 (2) allows the fusion between the legislative branch of government with that of the executive branch. As I have explained earlier this scenario has weakened the independence of the legislature because the executive dominates the House. In this regard, I propose that for the effective operation of legislature, ministers be appointed outside the legislature as is the position in the United States of America. I am not in favour of the British Westminster model because it disappointed the people of Zambia because the system has been tried since Zambia’s independence in 1964.

4.3 Executive powers to be expressly defined and closely checked.

The Zambian constitution just like the American one provides for powers of executive Presidency under Article 33 (2) of Zambian constitution. The clause provides: “The executive power of the Republic of Zambia shall vest in the President.” Similarly Article II of the USA Constitution provides that; “The executive power shall be vested in the of the United States of America. These Constitutions having provided for the executive powers, do not expressly define all the executive powers as the case is regarding the legislature and the judiciary. It is this lack of clear definition of executive power in the Zambian constitution that has given the Zambian President a more powerful position over the legislature.

⁹³ Fred R. Harris, Americas Democracy, Scott Forestman and Co (1983) 2nd ed. P. 13.

Referring to undefined executive power in the USA, Louis W. Koenig stated that, “ The constitution does not grant the President “executive power” language in the Constitution of which, the Supreme court has sometimes interpreted executive powers to include certain powers normally associated with administrative chief⁹⁴” This is the similar position in the Zambian constitution with regard to the definition of executive power which is not defined. Therefore in Zambia, too, the executive power is unlimited.

With this position, therefore, as the President exercises such executive powers there is need by , the legislature be alert in case the President abused his office to oppress peoples’ rights. In Zambia legislature having been fused with the executives does not effectively check executive powers like the American Congress. For instance, scandals like the ‘Watergate’ was investigated by the House Judicial Committee of the Congress which made recommendations for impeachment proceedings against the then American President Richard Nixon.⁹⁵ In Zambia, such kind of checks are not available as demonstrated by Parliament's failure to impeach the then sitting President Chiluba for abuse of office until he left office that's when his presidential immunity was lifted at the instigation of his successor President Mwanawasa but not Parliament⁹⁶

4.4 Appointments of National Assembly administrative staff not to be done by the President.

The President, under Section 3 (1) of the National Assembly staff Cap 257 of the laws of Zambia, is empowered, to appoint the Clerk of the National Assembly. Such appointment tend to weaken the

⁹⁴ Louis W. Koenig, **The Chief Executive, Harcourt Brace and World, Inc. New York**, (1996) p. 158.

⁹⁵ Ibid p/ 151.

⁹⁶Frederick T.J. Chiluba V A.G. (2002) HP/0030/P 1

independence of Parliament in that the appointee's loyalty will be inclined towards the appointing authority other than Parliament as it happened during the election of Speaker at the First Session of the Ninth National Assembly where the Clerk of the National Assembly sued the opposition Members of Parliament for objecting his self-imposed electoral procedure for the election of the Speaker. His conduct was a total reflection of his loyalty to the executive. Therefore, such kind of behaviour can only bring confrontations with the Members of Parliament knowing that they are not his appointing authority. In this regard the most effective solution is to have a Clerk of the National Assembly be appointed by the National Assembly itself to move side by side with the separation of powers. It cannot augur well to have a legislature that is separated from the executive but retained by the Clerk who is an appointee of the executive.

4.5 Appointments of Members of Parliament to Minister Portfolios must cease.

Though the Zambian constitution under Article 34 (2) grants the President power to appoint any Member of Parliament he thinks fit to Ministerial Portfolio, the idea weakens the independence of Parliament in that the appointees become bound to the doctrine of collective responsibility. These appointments entail that as backbenchers in the House, the appointees cannot criticize the government. Secondly the strength of the opposition is reduced. These appointments, in my view, undermine the essence of Article 1 (1) of the Zambian constitution, which promotes the existence of multi-party politics. I am of the view that the law of appointing Ministers from Parliament must be amended in such a way that, the President must not appoint any member of the opposition into the government. In this way it would discourage inter-party defections, which are rather unnecessarily and expensive on by-elections. Therefore, there should be no government jobs for any party defectors.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.0 CONCLUSION

Zambia as a state enjoys its thirty-nine years of independence this year 2003. Up to this time, the country is still grappling with the problem of finding a suitable constitution which can stand the test of time. As at now there has been four constitutional amendments from the time of its independence from Britain in 1964. Attempts to enact a constitution which is able to answer to the people's needs have failed as most of the constitutions were not people centred but government based.⁹⁷

In this modern world, it has been observed that for a government, to be well organised it must be centred around a constitution. This therefore, means that a constitution is a very important document. Generally a constitution is known as a body of fundamental doctrines and rules of a nation from which the government and its people derive their rights and duties.⁹⁸

Zambia having been a British Colony acquired the British system of government which was based on parliamentary democracy. The effects of this system is still felt in Zambia even after amending the constitution for four times. The Zambian Legislature up to this time is modelled under the Westminster system where the executive and legislature fuse together.

After 1991 when Zambia re-introduced Multi-party politics, the constitution was amended to embrace a semblance of constitutional democracy which recognises the idea of a constitutional supremacy

⁹⁷ The Mwanakatwe Constitution Review Commission Report (1996)

⁹⁸ Ibid 94

supreme.⁹⁹ By “a semblance of constitutional democracy”, I mean that Zambia has not, fully implemented the American system of constitutionalism where there is an effective system of separation of powers between the three arms of government. It appears from experience, that the previous governments have had favoured the parliamentary system of governance because of their strong resistance to implement in full the American system of constitutional governance based upon open society and equal distribution of powers between the three branches of government. My conclusion as to why the Zambian governments favours the British Westminster model is not the fact that the system was entrenched into the minds of the Zambian politicians because of having been colonised by Britain, but this is because of wanting to take advantage of the executive dominance of the legislature in order to pass the laws that will justify continuity of power. This is so because the parliamentary system does not provide for checks and balance between the branches of government. Nevertheless, I must, state here, that in both the systems, i.e. parliamentary and constitutional, the legislature, in the process of execution of its functions enjoys its freedom and independence in the House. But the only problem in Zambia is the executives interference in legislative. The House of Commons in the UK and the Congress in the USA undoubtedly enjoy the independence of expected of them with no interference from the executive.

Similarly, though the Zambian Parliament is somehow entangled in both systems, the members of Parliament also appear to enjoy the freedom and independence to some extent under the safeguard of the constitution and various legislation. The independence which the Zambian legislature enjoy is, however, shaky in that the executive interferes in its operations because of the encroachment of the executive on the legislature. From experience, there have been incidents in Zambia indicative of

⁹⁹ Article 1(4) of the constitution of Zambia

the interference in independence of the legislature by the executive through the back benchers influencing the House to pass laws that are partisan based. The current Zambian Republican constitution is an example that was enacted by strong and domineering hand of the executive merely to achieve personal and partisan interest such as the elimination of the former president Dr. Kaunda from the presidential race.

The interference into parliamentary independence can only be circumvented by enacting the constitution modelled on the USA constitutional democracy which allowed the legislative to be separated from the executive. It must be appreciated that Parliament is significant in the promotion of individual rights through enacting just laws and checking the excess of the executive. And as such, it must be detached from the executive branch. Other factors that appears to impair the independence of the Zambian legislature such as excessive powers of the executive, appointments that borders on the weakening the pillars of the legislature and constitutional provisions that aims at weakening the legislature and must be adequately discouraged for the betterment of the citizens.

5.1 RECOMMENDATIONS

Having established the factors that negatively contributes to the independence of the Zambian legislature, I hereby , suggest the following recommendations which may help out to uphold the much cherished independence of the Zambian legislature;

5.1 (a) Separation of Powers

I propose that Article 46(2) of the Zambian constitution which provides for the office of minister to be appointed amongst members of National should be repealed and that the constitution be amended

to accommodate the system of separation powers where power can be distributed equally amongst the three branches of government as operated under Article I(1), Article II(1) and Article III(1) of the American constitution. Under this scenario, the Zambia parliament cannot be dominated by the executive as it would be detached from it.

In this way, Parliament would have power to check the excess of the executive effectively because the House would be constituted by legislators only.

5.1 (b) The Speaker of the National Assembly must be non-partisan

Though practice in most Parliaments of the world allows to elect the Speaker of the House from the existing political parties, I am of the view that, with Zambia's fledging democracy, the idea should be discouraged in Zambia as it has contributed to the weakening of the independence of the legislature. Experience has shown that, the Speaker has been biased towards his ruling party in the conduct of his parliamentary business. Therefore my recommendation is to have the Speaker elected outside the partisan lines so that he can conduct business of the house impartially. However, the candidate must have the similar qualifications to that of Members of Parliament and be must be elected by Members of Parliament.

5.1 (c) Ceasation of Presidential appointments

The President must completely cease to appoint any serving Member of Parliament to government portfolio because the appointee is not free in making independent decisions for fear of severe consequences from the appointing authority.

Equally, the president must cease the appointments of the National Assembly Clerk and must

therefore, leave it in the responsibility of Parliament itself.

5.1 (d) Nomination of Members of Parliament must cease.

Article 68 (1) of the Zambian Constitution which provides for the president to nominate a member of Parliament must be repealed as it only extends the executive influence in the House other than the offering of professionalism to the House.

5.1 (e) Alteration of the Constitution

The constitution is the supreme law of the land and it is ranked above all persons and all the branches of government, and as such it should not be left to Parliament alone to alter it. I therefore, suggest that whenever, there is need to alter the constitution the Zambian citizens of the voting age must have a final say after recommendations by Parliament.

5.1 (f) Parliament not to be dissolved by the President

The power granted to the President under Article 88 (6) to dissolve Parliament at any time he thinks fit must be withdrawn as it amounts to the interference in the affairs of Parliament, thereby hindering its independence. The provision must be repealed.

5.1 (g) Executive power to be closely checked by the legislature

The President is a representative of the whole nation, the generalism of administration, the people's choice. The nation and its Parliament look to him for guidance. But Parliament should not abdicate its function to the executive. It must closely monitor his activity in case of abuse of office that could lead to violation of people's rights. In the USA, the upper chamber of the Congress has provided for

the protection of individual rights before its committees. Therefore, even the Zambian parliament must create committees in the House which may specifically aim at monitoring the executive power regarding the violation of rights.