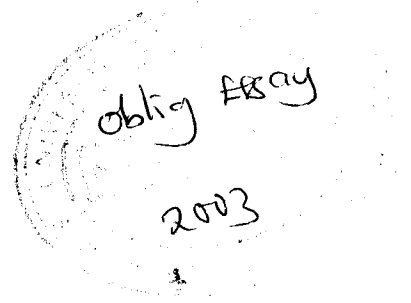


THE UNIVERSITY OF ZAMBIA

SCHOOL OF LAW



I recommend that the obligatory essay prepared under my supervision by;

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**CONSTRAINTS ON THE LEGAL FRAMEWORK AND INSTITUTION
GOVERNINIG THE LEGISLATURE; ZAMBIAN CASE STUDY**

BY

ARTHUR SIKE (JR)

A dissertation submitted to the faculty of laws of the University of Zambia in partial fulfillment of the requirements of the award of the degree of Bachelor of Laws (LLB)

The Faculty of Law
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October, 2003.

DEDICATION

This piece of work is dearly dedicated to my late Dad Arthur Sike (senior), my dearest late brother Kabunda Israel Sike and my always loving and caring mum, Lillian Kalunga Sike who has brought happiness to me and the level of education I have attained so far is for this reason attributed to her. To you mum, I say, keep the faith in me.

ACKNOWLEDGEMENTS

In a work of this kind, it is not without difficulty to record my indebtedness to a number of people who have inspired me at different stages of my academic endeavors and also, to recognize friends and colleagues who have silently given me their unwavering support in my intellectual pursuits. Amidst a busy working life, I would like to earnestly thank the heavenly Father firstly; my acknowledgements would thus be incomplete therefore, without recording the inspiration that I have drawn and continue to draw - from professional colleagues, family and friends who include Mr. Kanja Mpundu for so ably supervising my work despite his busy schedule; Mr. Palan Mulonda for the support and inspiration, Mr. Stanley Kabamba Mumba, Mr. Lubinda Linyama, Mr. Steven Simwanza, Mr. suzyo Dzekedzeke and Mr. Benson Siame whose contributions to my work as fellow students remains invaluable; Miss Mwati Elizabeth Kaulung'ombe for the strength and encouragement, to you, am grateful. Indeed, my sincere gratitude also goes to Mrs. Jane Phiri for the tireless efforts and professionalism in typing this work. I remain accountable for any shortcomings in this work.

ARTHUR SIKE.
University Of Zambia, December, 2003.

LIST OF ABBREVIATIONS.

| | |
|-------------|--|
| ANC | African National Congress |
| BSAC | British South African Company |
| FDD | Forum for Democracy and Development |
| HP | Heritage Party |
| MCC | Members of the Central Committee |
| MMD | Movement for Multiparty Democracy |
| NPP | National Progressive Party |
| NR | Northern Rhodesia |
| UFP | United Federal Party |
| UNIP | United National Independence Party |
| UPND | United Party for National Development |
| ZRP | Zambia Republican Party |

LIST OF CASES AND TABLE OF STATUTES

a. LIST OF CASES

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British Railways Board V. Pickin (1974) W.L.R. 208

Chiluba V. The Attorney General 2003 ZR.

Miyanda V. Chaila (1985) ZR 193

Maxwell Mwamba and Stora Solomon Mbuji and the Attorney General, Supreme Court of Zambia Judgment Number 10 of 1993

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b. LIST OF STATUTES

The 1991 Constitution of Zambia, Chapter One of the Laws of Zambia As Amended in 1996

The 1964 Constitution

The 1973 Zambian One- Parties Participatory Constitution

The National Assembly, Powers, Privileges and Immunities Act, Cap.12.

The State Proceedings Act, Cap. 206, Laws of Zambia.

ABSTRACT

Essentially, the dissertation has primarily focused on the legal framework governing the appointments of Members of Parliament belonging to both the ruling party, (Movement for Multi- party Democracy), and other opposition political parties to Cabinet, within the Zambian perspective. The afore-mentioned has been considered in the context relating to the adequacy of the law presently, since it is the author's view that the recent appointments of opposition party Members of Parliament to Cabinet by the President, (Mr. Manawasa) in the quest of desired national unity has facilitated for the opposition political parties to expel their Members of Parliament who were appointed, basing their argument on the fact that those appointed Members of Parliament to Government had breached the Party's policy and regulations.

The exposition has endeavored to illustratively demonstrate that the President is given latitude by the law to appoint Cabinet Ministers from among Members of Parliament. However, the law currently, has demonstrated to be insufficient to insulate the Legislature from being held to ransom from political parties, hence the failure of the Legislature to realize its potential and function with regards to effectively represent the citizenry who elect the Members of Parliament by adult suffrage. Thus far emphasized, the expelled Members of Parliament have necessitated for Bye-elections which are costly and more so, creating an imbalance in the House, in which case, the electorates are losing out from being represented

In view of the foregoing, the author has emphatically stated that the law has to be reviewed because it (Law) is constrained in this regard, and that opposition political parties should stop interfering with this important institution, save to say that, political parties in Zambia are regarded as clubs, and their actions are justified, hence, emerging as supreme over the Legislature.

Furthermore, the thesis has examined the independence of the Judiciary with regards to its effectiveness in policing the Legislature. However, a postmortem has exemplified that the Judiciary in Zambia is timid, in that political interference has regrettably taken centre stage. This has affected the effective policing of the Legislature, thus, the failure in realizing good governance and constitutionalism in Zambia.

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CHAPTER ONE

1.0 THE HISTORICAL DEVELOPMENT OF THE LEGISLATURE IN ZAMBIA

1.1 INTRODUCTION

In the quest for clearly comprehending the nature and fundamental basis of the legislature, it is paramount to define the term 'Legislature' as it will feature prominently in this dissertation.

In its simplistic sense, 'Legislature' is meant to imply a group of people who assemble and have the mandate to enact and amend laws.¹

Narrowing this definition to the Zambian perspective, the Legislature is an organ that comprises of the President and the National Assembly as elucidated by the constitution.² It is the constitution that legitimates the Legislature by giving it the legislative power of making and passing laws as clearly exemplified in Article 62 of the constitution.

In view of the afore-mentioned, it is cardinal to state briefly that the Legislature in Zambia is a creation of the constitution. In Zambia, the constitution is supreme and therefore, the principle of supremacy entails that all institutions (including the Legislature) derive and must derive their

¹. A. S. Hornby, Oxford Advanced Learner's Dictionary of Current English, 6th ed. 2000, P. 677, Oxford: University Press.

². Chapter one of the Laws of Zambia, Article 63

legitimacy from the constitution, and that any action or decision by any institution must be in conformity with the constitution.

A noteworthy aspect exemplified in **Re Thomas Mumba**³ entails the very fundamental basis of the supremacy of the constitution. Mr. Justice Chirwa in the captioned case above, asserted the judicial supremacy of the constitution in Zambia by stating that:

"In countries like Zambia where there is a written constitution, the constitution is the supreme law; any other laws are made because the constitution provides for their being made; and are therefore subject to it. It follows therefore, that unless the constitution is specifically amended any act that is in contravention of the constitution is null and void."

Therefore, the legislature is limited with regards to how far it can exercise its power. The sovereign power is vested in the people in whom the constituent power to determine the constitutional order is vested. To this extent, in the exercise of their sovereign power, the people have devised a constitution, as the supreme law of the land.

Considering that Zambia is a former colony of Britain, it is imperative to mention that Zambia has not inherited the character of the British legislature with regards to its sovereignty.

³. (1984) ZR 38

Within the United Kingdom, and its dependent territories, the Legislature which is Parliament, is sovereign in as much as its legislative competence is unlimited and possibly illimitable, save in response to fundamental political changes rendering the formal concept of sovereignty meaningless.⁴

Further, the mentioned sentiments above can be cemented by the words of Venn Dicey who lamented, emphatically that:

*"The British Legislature can do anything, and there is no person or Body in the kingdom with power to set its acts aside".*⁵

In view of the foregoing synopsis of supremacy of the constitution of Zambia over the legislature with specific regard to the comparative analysis of the British sovereignty of the legislature and Zambian Legislature, recourse will be had in identifying the constraints that have undermined the Legislature in Zambia to fully realize its potential. This proposition will be confined to the present legal framework which has regrettably demonstrated to be inadequate to insulate the legislature from interference from both the ruling party and opposition political parties in Zambia. The preceding mooted proposition will be discussed in length after carefully examining the historical development of the Legislature in Zambia.

1.2 The Zambian Legislature (1918 - 1924)

⁴ . This general proposition is not founded on judicial decisions but is illustrated by the decisions in **Vanhall Estates Limited v. Liverpool Corporation (1932) 1KB 733**

Zambia like any other British colonies was to establish a legislative council which was regarded as a central institution representing imperial authority and local interests.⁶

Davidson further explains that the legislative council was largely instituted to propagate the European demands, which called for a more responsible Government⁷. This notion was firstly mooted during the period of the British Southern African Company rule. Davidson on the same page states that these demands had, first all, culminated in the formation of an Advisory Council in 1918 which was composed of five (5) elected members out of which one represented the Europeans of the former North-Western Rhodesia and one represented the Europeans of the former North-Eastern Rhodesia.

It should be submitted however, that the Advisory Council was regarded to be passive or rather ineffective though it is incontrovertible that it remains to be the genesis of the Legislature. It should be settled at this point that the President and National Assembly constitute Parliament. Therefore, the term legislature can be used synonymously with the term Parliament as both entail the existence of an institution of consultative government or rather, an

⁵ . R. F. V. Heuston, Essays in Constitutional Law, 2nd Ed. (1999), P. 1, India: Universal Law Publishing Co. Pvt. Ltd.

⁶ . N. M. Chibesakunda, The Parliament of Zambia, (2001), P. 20, Lusaka: Venus Stationery

⁷ . J. W. Davidson, The Northern Rhodesia Legislature Council, (1946), P. 18 London: Faber and Faber

assembly of representative of a political nation or people, often the supreme law-making authority.⁸

In light of the above, it should be observed that the Council did not effectively transmit the settlers' views in the territory's administration as it had no legislative or executive authority which remained vested in the Administrator of the British South African Company (BSAC). Nevertheless, the European settlers continued to agitate for more political control in the governance of the territory around 1924 when Northern Rhodesia was placed under the direct administration of the BSCA.

A Legislative Council was therefore born to replace the Advisory council. However, it should be stated that the Legislative Council did not entail that the constitution document was to be transformed: being the Northern Rhodesia Order in Council of 1911.⁹ This was owing to the fact that the Advisory Council still existed as prescribed under the Northern Rhodesia Order in Council, Article 13.

It is evident therefore, to suggest that the Legislative Council was created to mainly broaden the affairs of the white settlers and more so empower the settlers to initiate ordinances as were necessary for the efficient and effective

⁸ . N. Wilding and P. Laundy, An Encyclopaedia of Parliament, (1968), P. 520, London: Cassel.

⁹ . Chibsekunda, *Supra*, P.21

administration of justice, the raising of revenue and generally for the peace, order and good governance of Northern Rhodesia.

Principally, the legislative Council can be summarized by an excerpt of the proceedings of the First legislature council as:

"The Council has been instituted as you know as any Advisory Council to the Administrator, and though it has no Legislative or executive powers, you will be able to advise on any proposed legislature affecting European interests and not of two urgent a nature and I shall be glad to consult you whenever possible and to have your advice on the more important regulations that may be needed under any proclamation."¹⁰

1.3 The Legislative Council (1924 - 1962)

The nature and function that the Legislative Council was perceived to be based on was still unsatisfactory to the Europeans. Sir Donald Cameron, a white settler in central Africa observed that:

"Though the legislative council was vested with something of Parliament savour and Fendenencies (for a long time), it remained more nearly akin to an advisory body than a responsible parliament."¹¹

¹⁰. First Legislative Council, held in Livingstone, 25th September, 1918 and as extracted from Government Gazette

It was from this premise that political pressure from various interest groups facilitated for the change in the nature and functions of the legislative council in 1925. The white settlers lamented that it was time they enjoyed the advantage of parliamentary government, where they would enact laws to enhance their Welfare.¹²

With such remarkable developments, the Legislative Council was viewed as a vehicle that would ultimately champion the cause of early African nationalists who consequently took over political control in 1964.

It is interesting to note that the council did not have African members as Mr. Moore's remarks confirmed this proposition when he elucidated that:

*"The natives (Africans) do not come into contact with this house, they are governed in the sense that they are legislated for by the people, but they are governed by the people who employ them....."*¹³

However, Constitutional changes were influenced by the prominence of African interests to be recognized in the Legislative Organ. This subsequently led to the 1945 constitutional amendments which enabled three Africans to represent their fellow blacks.¹⁴ Such developments profoundly advanced the

¹¹ . Davidson, Supra, P. 34

¹² . Chibesakunda, Supra, P. 23

¹³ . Davidson, Supra, P. 68

¹⁴ . D. C. Mulford, The Northern Rhodesia General Elections, (1967), P. 7 - 9, London: Oxford University Press

legislature's role in the Zambian society as it was used as a tool to represent a cross section of people regardless of race, colour or creed.

1.4 The Legislative Assembly (1964 -72)

After gaining independence on the 24th of October 1964, Northern Rhodesia (N.R.) became the independent Republic of Zambia under a constitution which recognized Dr. Kaunda as first president. What is paramount to note is that Zambia continued with the same pattern of elections and composition of the Members of Parliament who had to be citizen's of Zambia over 21 years¹⁵ and were to be elected on the basis of universal adult suffrage. Therefore, there were no new major constitutional changes as the legislative power was still to be vested in Parliament. In the main, it would be correct to suggest that the Legislature after independence was similar in all respects to the legislature that existed in the colonial era as was created by the colonial constitution.

1.5 The Legislature (1973 - 1990)

In 1973, Zambia became a one-party participatory system as was clearly elucidated by Article 4(1) stated that:

¹⁵ . The constitution of Zambia, 1964, S. 61

*"There shall be one and only one political party or organisation in Zambia, namely the United National Independence Party (UNIP) in this constitution referred to as the party."*¹⁶

Various stakeholders became skeptical about how much democracy would have been exercised in Zambia's one party participatory democracy; suffice it to say that the Zambian Legislative organ did not deviate from the commonwealth procedures and methodical scrutiny of bills and government policies.

However, as time went on, the government devised an administrative mechanism that gradually eroded participatory democracy in the legislative organ of Zambia. Kaunda the President then, appointed almost every Member of Parliament as District Governors, Provincial programmes coordinators, Minister of State and Members of the Central Committee. This ploy undermined the institution of the legislature; hence it failed to realize its potential. Kaunda employed such a strategy because most Government Bills were seen to be inimical to the interest of the majority of Zambian citizens and as such, were thrown out.¹⁷

¹⁶ . Constitution (Amendment) No. 5 Act, 1972

¹⁷ . Chibesakunda, *Supra*, P. 46

This brought a lot of misunderstanding and conflict, between the Legislature and government thus Kaunda 'Dangled a Carrot' to the Members of Parliament so as to win their support.

1.6 The Legislature in the Third Republic

In 1990, a group of concerned Zambians and other stakeholders came together to plan and come up with ways of how best to advance the political future of Zambia. This was as a result of the discontentment among Zambians as they accused the one party rule to be undemocratic, thus did not champion the ideologies of constitutionalism and good governance.

This saw the birth of the Movement for Multi-party Democracy (MMD). Among its objectives was to re-introduce multi-party politics in Zambia. This entailed that Kaunda's government had to repeal Article 4 of the 1973 constitution so that the country can revert to a multi party political system that he did by passing of Act No. 20 of December 1990 by Parliament.

On November 2, 1991, the dawn of the new multi- party democratic system in the Third republic began in Zambia. Principally, one characteristic that negatively impacted the development of the Legislature during this period was the numerical difference between the members of the back bench and

members of the ruling party, which was very narrow.¹⁸ The ruling party (MMD) was in majority thus, the debates were biased and most laws were made to appease the appointing authority, in this case, the President.

The afore-mentioned statements clearly eroded the principles of transparency, accountability, democracy and the rule of law. Most founding members of MMD resigned as a way of registering their discontentment.

It should be observed that under the third Republic, the legislative power was still vested in Parliament and the National Assembly consisted of 150 elected members, not more than eight nominated members: and the speaker of the National Assembly.¹⁹

1.7 The Legislature Today (2003)

Presently, Zambia is going through an interesting phase with regards to the appointments of opposition members of government by president Levy Mwanawasa in the name of desired national unity. The appointments appear to be generating more confusion in our opposition political parties that may have the effect of weakening and consequently impairing the capacity and dynamism of our multiparty political system.²⁰

¹⁸ . Chibesakunda Supra, P. 50

¹⁹ . Article 62, 63(1) (2) (b) (c) respectively of chapter one of the laws of Zambia.

²⁰ . See, Sunday Post, February 9, 2003, P. 12

In light of the above, the afore-stated observation when narrowed down to the aspect of effective performance of the Legislature entails that its very role and function is currently being hindered. This can therefore be attributed to the fact that the ruling party (MMD) and opposition political parties are holding the Legislature to ransom. Opposition political parties are threatening to expel the members of parliament who have accepted the appointments from their party. Consequently, it will be observed that the legislative function and mandate of the Member of Parliament elected by universal adult suffrage²¹ to represent the citizenry is slowly watering down.

It is from this premise that the dissertation will proceed to examine the legal framework as to whether it is adequate enough to insulate the legislature from interference from both the ruling party and opposition political parties. The captioned concern if not carefully curbed would lamentably constrain the legislature from realizing its potential to champion democracy and good governance.

²¹ . Article 63 (2) of the Zambian Constitution

CHAPTER TWO

1.0 THE LEGAL FRAME WORK GOVERNING THE LEGISLATURE VIS- A' - VIS THE CONSTRAINTS.

1.1 INTRODUCTION

A properly functioning Legislative system in Zambia is an ideal yet to be realized. There are a number of reasons to account for this sad situation.

Presently, the most prominent and challenging issue that seems to be disrupting or limiting the effective performance of the Legislature as an institution mandated to enact laws through elected Members of Parliament, is the recent expulsions of opposition Members of Parliament elected to ministerial positions from their respective parties.

In view of the above, this segment of the dissertation will prominently focus on the current political situation in the country, where opposition political parties and the ruling party are at logger heads owing to the fact that opposition Members of Parliament have been offered positions as cabinet Ministers to the dislike of their parties on which ticket they were elected on. ¹

¹ The "New Deal Government" under President Levy Mwanawasa has since reaffirmed its commitment to achieving a more unified nation considering the present political mood which is undoubtedly fragmented. To remedy this, the President appointed opposition members of parliament to government on the 9 th of February 2003 to produce the so much talked about national unity...see Sunday Post. Editorial comment on the captioned date above.

It has thus been observed generally, that the present law has lamentably failed to insulate the Legislature from such conflicts. This has therefore, compromised the effectiveness of this institution as too much time is being spent in courts by both expelled Members of Parliament and their respective parties.

1.2 THE PAST AND PRESENT LEGAL FRAMEWORK GOVERNING THE LEGISLATURE WITH SPECIFIC REGARD TO APPOINTMENTS TO CABINET.

In the effort of trying to understand and appreciate the law that regulates the appointments of Members of Parliament to Cabinet, it is of paramount importance to carry out a speedy postmortem of how this law has developed from the time of independence to date. This would therefore, postulate a clear understanding on how Zambia has molded its law in the wake of determining its socio-economic, political and cultural principles whose basis of efficacy depends on the legal and institutional framework established. However, these principles seem to be underplayed following the recent appointments of the opposition Members of Parliament, as the Legislature is failing to realize its potential.

1.2.1 THE 1964 CONSTITUTION

It is cardinal to observe that, when Zambia gained independence on 24th October 1964, it inherited a Constitution that was purely based on principles and interests of its colonial masters. It is therefore, inevitable at this stage to note that the British law making institutional system, which is a product of nearly nine hundred years of steady and unbroken development, is what is adopted by many countries in the world, including Northern Rhodesia (Now Zambia).²

In view of the above, it is worth noting that the Legislative power was vested in Parliament which consisted of the President and the National Assembly³ and further that, the constitution, prescribed the number of Members of Parliament, the number being; seventy five inclusive of the nominated members. The former were to be elected by secret ballot and by universal adult suffrage.⁴

However, the issue to be considered is whether the constitution during that period allowed the President to appoint his Ministers from other political parties other than the ruling party and more so, the sufficiency of the law to insulate the Legislature, completely from being held to ransom from political parties. Regard must be had to the fact that Zambia was at that stage a

² N.M. Chibesakunda, The Parliament Of Zambia, (2001), p.7, Lusaka: Venus Stationary.

³ The Constitution of the Republic of Zambia, Appendix 3 to the Laws of Zambia, 1995 Edition, Section 57.

⁴ 1964 Constitution, Section 58.

multiparty state. There were a number of strong opposition political parties like the African National Congress (ANC) led by Mr. Humphrey Nkumbula, a white settler political party, the United Federal Party (UPFP), which was later known as the 'National Progressive Party' (NPP).⁵

With this background, UNIP had fifty six elected members in Parliament, ANC had eighty seats and the NPP had ten members.⁶

In light of the foregoing, it is evident that the legal frame work was not different from what is prescribed in the current Constitution as the paper will illustrate below. Section 44(2) of the independence constitution enacted that;

“Appointments to the office of Minister or Junior Minister shall be made by the President from among members of the National Assembly.”⁷

This therefore, illustrates that the President was given latitude to appoint his Ministers even from opposition political parties. However, the President then, (Kaunda) did not exercise this constitutional right vested in him. It can thus be suggested that the issue of how adequate the legal framework was, then, did not arise and one had the impression 'prima-facie' that the political parties could not exercise their power to jeopardize or interfere with the Legislature by either suspending or expelling its members who are in Parliament on grounds similar to what is pertaining presently.

⁵ William Tordoff and Ian Scott, “Political Parties : Structure and Policies,” in politics in Zambia by William Tordoff (ed), 1974, p. 107, Manchester: University Press.

⁶ Muna Ndulo, Law in Zambia, (1984), p. 115, Lusaka: East African Publishing house Ltd.

⁷ 1964 Constitution.

1.2.2 THE 1973 ZAMBIAN ONE - PARTIES PARTICIPATORY CONSTITUTION.

Nyerere eloquently lamented in justifying the establishment of a one-party system of government that;

“Given the two party system.....some limitation of freedom is essential both at election time and in debate – in order to enforce party discipline and unity and we have seen that these restrictions are not necessary where you have only one party. It seems at least open to doubt, therefore, that a system and that one which can permit no party to leave its members their freedom is undemocratic where there is one party, and that party is identified with the nation as a whole, the foundations of democracy are firmer that they can ever be where you have two or more parties, each representing only a section of the community”⁸

Thus, in Tanzania, the establishment of a one- party state seemed to rest on a persuasive ground, whereas in Zambia, the story is however, almost opposite.

The government through Kaunda envisaged the creation of a one- party state clearly stating that it would not be by ‘force’ but through a ‘consensus’⁹

However, it was a recognised fact later that the potency of the opposition had tremendously increased and one of the obvious efforts of the results of the

⁸ Quoted in **The Executive in African Government**, by B.H. Selassie, 1974, Chapter five generally London: Heinemann, London

⁹ Lawrence Shimba, the Origins and Spread of One Party States in Commonwealth Africa. Their Impact on Personal Liberties: A Case Study of the Zambian Model, Muna Ndulo(Ed), 1984, p. 116, Lusaka: EAPublishing Ltd.

1968 elections was that it worked against the government's plan for the destruction of the opposition through the ballot.

In view the above, Kaunda now insisted that government's decision to bring about a one-party state through legislation was in accordance with the wishes of the people, as evidenced from his speech:

*"Since independence, there has been a constant demand for the Establishment of a one-party state in Zambia. The demands have Increasingly become more and more widespread in all corners of Zambia."*¹⁰

Though Nwabueze observed that these demands which the President was referring to were by UNIP partisans, and should not be taken as conclusive of the wishes of the Zambian people as whole.¹¹

The above mentioned developments subsequently led to the coming up of a land mark case of **Nkumbula v. The Attorney General for Zambia**¹² in which it was argued that the one-party state would create a constitution system whereby certain individuals or a group of individuals would be denied the same basic, fundamental rights to freedom against discrimination on grounds of political opinion. However, though the case is an important one in the

¹⁰ Press Conference on February 25, 1972. Quoted in the report of the One-party Commission, para.2, 1972.

¹¹ Nwabueze, Presidential in Commonwealth Africa, 1974, p. 225, London: Hurst &Co.

¹² HP/CONST/Ref/1/1972, of April 1972, unreported.

constitutional history of Zambia, and it discusses the compatibility of a single-party system with the enforcement protection of Human rights, it was dismissed on flimsy grounds among the noted ones, the court asserted that his rights could not have been infringed upon unless and until the constitution was amended and the one-party state established.

With this background, the government went ahead and formally established the one-party state on 13th December, 1972, when the Constitution Amendment Act,¹³ implementing the decision received the Presidential assent. The constitutional amendment enacted that:

There shall be one and only one political party in Zambia, namely, United National Independence Party (UNIP).¹⁴

Narrowing the state of affairs to the theme of the dissertation, it is clear that opposition political parties were made obsolete implying that all cabinet Ministers belonged to one party, UNIP.

Further, Article 63 prescribed that the legislative power of the Republic vested in the Parliament which consisted of the President and the National Assembly.¹⁵ Additionally, Article 64(a) of the One-Party constitution, stipulated the composition of the National Assembly, stating that, there shall be 155 Members of Parliament elected by adult suffrage, and Article 66 enacted that the president could nominate not more than ten Members of Parliament.

¹³ Constitution (Amendment) (No.5) 29 of 1972.

¹⁴ Section 12A (1), Supra.

¹⁵ The 1973 Zambia One-Parties Participatory Constitution.

It should be emphasised thus far that, for one to become a Member of Parliament. Article 34(1) stated that:

“No person shall be selected as a candidate for any parliamentary or local Government election or by-election unless he/she is a member of the Party”.¹⁶

The legal framework during that period entailed that the recent state of affairs where the opposition political parties are expelling their members who have been elected to Cabinet could not exist, owing to the fact that all cabinet Ministers belonged to one party, UNIP.

1.2.3 THE 1991 CONSTITUTION AS AMENDED IN 1996

The passing of Act No. 20 of December, 1990 by Parliament, entailed that Article 4 of 1973 Republican Constitution which authorised the existence of only one political party UNIP, was to be repealed.

The Act also amended Article 64 concerning the composition of National Assembly providing for hundred and fifty seats in Parliament, the hundred and fifty Members were to be elected and eight to be nominated by the President. With the inclusion of Speaker and the President brought the number to 160.¹⁷ This saw the registration of the Movement for Multiparty Democracy (MMD), as a political party in January 1991.

¹⁶ Chapter viii, The United Nations Independence Party Constitution.

¹⁷ Chibesakunda, Supra.p.49.

However, what is the borne of contention for consideration is that the legal framework governing the appointment of the Members of Parliament to government enacts that:

“Appointments to the office of Minister shall be made from amongst Members of the National Assembly”.¹⁸

It is paramount to note thus far that, the government under Chiluba (former President) which reigned from 1991 to 2001 did not appoint opposition party Members of Parliament to form his Cabinet. Therefore, the issue of how adequate the law was with regards to insulating the Legislature from the interference of political parties did not ensue as the legal machinery to appoint, was not invoked.

1.3. THE GOVERNMENT OF ‘NATIONAL UNITY’ UNDER ‘THE NEW DEAL’ OF PRESIDENT LEVY MWANAWASA.

“There is no doubt that the need for national unity is a compelling one in the new nations of Africa, and that any arrangement which would foster its realization must be adhered to. Moreover, it is only when national unity, and therefore stability, is assured that the government can proceed effectively to plan and execute socio-economic projects intended to raise the level of standards of living among the people”.¹⁹

¹⁸ The 1991 Constitution of Zambia as amended in 1996.

¹⁹ Shimba, Supra, p. 117

In light of the aforementioned, president Mwanawasa has embarked on a scheme to enhance political stability in the nation which he emphasises is attainable through the appointment of opposition Members of Parliament. He has further lamented that on many forums that these appointments will undoubtedly advance national governance by the inclusion of all capable Zambians regardless of party affiliation.²⁰ The President has gone further to say that he will appoint more Members of Parliament should there be more vacancies in his Cabinet. He has retaliated to strong criticisms, that some Members of Parliament are valuable to good governance, hence the interest to include them in his Cabinet.²¹

However, the idea of appointing Members of Parliament as Cabinet Ministers in the 'new deal' has brought a lot of debate and most importantly, controversy has taken centre stage. Some quotas of society are of the view that the manner in which the President is handling the entire issue will not surely bring love, peace and unity in the country, suffice it to say that what brings development in any nation is when all people – regardless of their political party affiliation – unite with a motive and purpose of working together in spite of their difference.

This indeed, is what is known as unity in diversity.

It should further be stated that this is not a new phenomenal considering what is happening in other parts of the world for instance South Africa, America and Britain where opposition leaders work side by side or together

²⁰ Daily Mail, Wednesday, 16, 2003, p.1

²¹ Sunday Post, July 13, 2003, P. 1

with the government of the day to fulfil a national agenda. In America for example, George Bush's election was very controversial and up to now it casts doubt whether he was genuinely elected or not. However, this has not stopped the democrats to work together with the republicans.²²

In view of the foregoing observations, Brigadier- General Godfrey Miyanda president for Heritage Party crowned it all when the Court granted him an injunction to restrain President Mwanawasa from appointing members of the opposition to Cabinet.

In his ex-parte summons, Miyanda argued that the appointments of the opposition Members of Parliament to Ministerial office would be unconstitutional, illegal' and not reasonably justifiable in a multiparty and democratic society. He argued further that the appointment of opposition Members of Parliament was contrary to public policy and offended the principle of separation of powers... "And thus, negates the tenets of genuine multiparty and democratic state to which the government of Zambia Subscribes, and is obliged to promote, protect and prescribe."²³

Despite all these debates and controversies, President Mwanawasa went ahead and appointed opposition Members of Parliament in his Cabinet. Mr. Dipak Patel, who is Lusaka Central Forum for Democracy and Development (FDD) MP, was appointed Commerce, Trade Industry Minister, while Ms

²² Commentary On Unity in diversity, Sunday Post, February 9, 2003, p.1

²³ As prayed by Miyanda,.....quoted from the Sunday Post, February 9, 2003, p.1

Masebo, the Zambia Republic Party (ZRP) MP, became the Minister for Local Government and Housing. Other opposition MPs appointed were Matero MP Chance Kabaghe (FDD) now Deputy Minister for Ministry of Agriculture, Ronald Banda (Heritage Party) Deputy Minister, Mines, Kabushi MP, Neddy Nzowa (Heritage Party) as Deputy Minister of Tourism, Environment and Natural Resources. United Party for National Development's Nangoma MP Kennedy Shepande was Deputy Minister in the Ministry of Works and Supply, while UNIP MP for Chama South Chile Nguni is now Deputy Minister for Labour and Social Security and FDD Chawama MP Geoffrey Samukonga is new Deputy Minister for Commerce, Trade and Industry.

1.3.1 CURRENT LEGAL FRAMEWORK GOVERNING APPOINTMENTS OF OPPOSITION MEMBERS OF PARLIAMENT.

Amidst all these debates and controversies surrounding the appointments of opposition members of Parliament, President Mwanawasa has argued that the appointments are within the confines of the law and has wondered why opposition political parties are contesting his decision. He further communicated through his former Chief Government Spokesperson Honourable Newsteadimba that the opposition political parties are driven

by the hatred of Mwanawasa in their mooted intention to expel opposition Ministers from their parties.

It is from this premise that the paper submits that there is no legal basis whatsoever in expelling the opposition Members of Parliament appointed as Ministers from their parties because they have not crossed the floor in Parliament to join the MMD.

In fortifying the above proposition, it is apparent that the President has the constitutional right mandated by Article 46(1) which enacts that:

“there shall be such Ministers as maybe appointed by the President and Article 46(2) further stipulates that the appointments to the office of Minister shall be made from amongst Members of the National Assembly”²⁴.

It is paramount to note thus far that the law does not state that the President should only appoint Ministers from his party (MMD) only. He is given wide discretion to appoint even from opposition political parties if he so desires, hence the recent appointments.

Additionally, it should be clearly stated further that the appointed opposition Members of Parliament to Cabinet does not entail crossing the floor as contended by some quotas of society and opposition political parties.

In fact most of these MPs have retaliated and emphatically stated that they have not left the parties that sponsored them and have no intentions of doing

²⁴ Constitution of Zambia, Chapter one.

so²⁵. They are therefore, in conformity with the law and thus, not in breach of Article 71 (2)(c) which states that:

*A member of the National Assembly shall vacate his seat in the Assembly-
In case of a political party other than the party of which he was an authorised 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.”*²⁶

It is worth of note at this point that the mostly relied on case of the **Attorney-General v The Movement for Multiparty Democracy, Akashambatwa Mbikusita Lewanika, Fabian Kasonde, John Mulwila, Chilufya Chileshe Kapwepwe, and Katongo Maine**,²⁷ by the opposition and certain sections of society could be distinguished from what is presently unfolding in that, in the mentioned case above, the Supreme Court held that after carefully interpreting Article 71(2)(c) and marrying this particular provision to the evidence before it, the respondents vacated their seats in the National Assembly on 12th August, 1993, the date on which they announced their resignation from the MMD, the party on whose ticket they were elected to National Assembly. Therefore the ‘catch’ is hinged on an elected member seizing or joining a political party or becomes an independent, then and only

²⁵ For instance, Geoffrey Samukonga, FDD Chawama MP lamented that his expulsion from the party would be illegal and challenged for accepting President Mwanawasa’s offer of ministerial jobs because he was still a member of FDD though FDD President Lt.General Tembo strongly stated that all members of Parliament who have accepted the appointments should consider themselves to have left the FDD...Sunday Post, 9th February, 2003. p. 1

²⁶ Constitution of Zambia, Chapter one

²⁷ S.C.Z Judgment No. 2 of 1994

does he/she lose his/ her seat in Parliament as aptly exemplified above. It is this paper's submission that the suspended and expelled MPs do not fall in any of the category, and thus far, qualify to be appointed as Cabinet Ministers and more importantly, represent their constituencies without any form of intimidation from their respective parties.

1.3.2 THE STATUS AND MANDATE OF POLITICAL PARTIES TO EXPEL ITS MEMBERS

Indeed, borrowing from one scholar's words Gordon, it can be observed that in Zambia, there is a "perpetual intestine struggle open and secret"²⁸ between opposition political parties and the ruling party as the two can not reach a consensus with regards to the appointments of opposition Members of Parliament to Cabinet., though one is bound to concur with the view that the appointments are tailored to have an all- inclusive government that would adequately address the problems the country is facing, bearing in mind that all Manifestoes of political parties point to the aspect of development regardless of their ideologies and thus it is difficult to appreciate why the

²⁸ J. Gordon-Controlling State, Paper prepared by Mr. Justice Phillip Musonda, Judicial Review in Zambia, p.2, 2003

opposition are failing to co-operate and join government to address the problems confronting the country.

However, opposition political parties have retaliated by rejecting the offer for Ministerial position saying they were only ready for a government of National unity based on proportional representation. Further, the opposition parties like UPND went ahead and formally expelled its Nangoma MP Kennedy Shepande over Levy's appointments and stated that they forthrightly reject appointments as well as any future appointments under the diabolical and manipulative scheme., though Shepande responded by stating that he would fight the expulsion to the highest court of the land.²⁹

It should be stated that though the law gives President Mwanawasa the prerogative power to appoint any one from among Members of Parliament without consulting anyone, political parties have got a status of a club that has specific policies, rules and regulations that govern its members,³⁰ and the Members of Parliament are not an exception. Therefore, these opposition political parties are deriving the mandate to expel these MPs based on their internal regulations which regrettably these MPs are going against. For instance, the UPND National Committee is justifying its actions by stating that it's the party's policy that no member of the party can accept the appointments without firstly consulting the National Management

²⁹ the Post, February 11, 2003. p. 1

³⁰ As was established in the case of **Sondashi v. Miyanda as Secretary General of the MMD**, 1997, ZR, P.1 and **Nkumbula v. Attorney General** (1978), ZR.

Committee, as doing so would be going against the party's policy, rules and regulations.³¹

In the main, the paper would like to restate its earlier contention that the Zambian Legislature has lamentably failed to perform as expected and thus cannot realize its potential owing to the limited legal provision to insulate it from political interference. It is incontrovertible that the very foundation and role of this institution is to enact laws and Members of Parliament are a conduit in which such a fundamental process is facilitated.

However, opposition political parties seem to be holding the legislative function to ransom since these expulsions of Members of Parliament who have accepted Cabinet positions are not representing the people (electorates) who voted them into office and most importantly, these Members of Parliament were elected by universal adult suffrage.³² Further, meaningful development is currently being hindered and subsequently, standards of living are slowly watering down, though when one ventures into the polemics of jurisprudential thought, some proponents such as Hohfead created a conceptual framework analysing the issue of whether a Member of Parliament has the legal right to represent his electorates.

³¹ President UPND-Anderson Mazoka's interview on Radio PHOENIX, 22ND July 2003.

³² Article 63(2). Chapter One of the Laws of Zambia.

In view of the afore stated, the law was established in the case of **Chaffers v. Goldsmid**³³ that, there is no right in a person desirous of petitioning the court to compel any particular Member of the House to represent such petition and no action will lie against any member for refusing to represent such a petition. An MP has the discretion to refuse on the rationale that, they would be too many petition he would have to table before the house if it were so. However, in Zambia the practice is that an elected Member of Parliament has an implied obligation to represent his electorates' failure to which he might be forced to resign or faces to losing the next election save to say there is no legal basis.

Indeed, it can be further observed that the law is inadequate as the political parties presently stand out to be supreme and the law that governs the Member of Parliament's tenure in office is being superseded or rather, rendered redundant because of the heavy constraint surrounding the law being discussed. The paper would thus far emphasise share the same concerns with one UPND's Luena Member of Parliament, Crispin Sibetta who strongly stated that "the decision by the President to choose his Cabinet from among all Member of Parliament across party lines shows that the constitution has a lacuna save to say that it is legal."³⁴ However, it is paramount to note that it is this identified lacuna that needs to be rectified if at all it exists in the legal provision under discussion.

³³ [1894] 1 Q.B 186

³⁴ The Post, Thursday, February 20, 2003, p.6

In light of the foregoing, it is the papers submission that Zambia as a young democracy should take extra care in the manner it will handle this issue confronting the Legislature as it has undoubtedly constrained the law governing this institution. Therefore, whatever decisions will be made should ensure that sovereignty and power does not lie in a few individuals but the people of Zambia.

CHAPTER THREE

1.0 THE JUDICIARY; AN INSTITUTION MANDATED TO POLICE THE LEGISLATURE: JUST HOW INDEPENDENT IS IT?

1.1 INTRODUCTION.

It is incontrovertible that the Judiciary is the only institution presently policing the Legislature in Zambia. With this in mind, this segment of the thesis will examine the Judiciary as an institution authorised to regulate the Legislature, owing to the fact that, a critical examination entails that the Judiciary is currently timid or better still, shays away from effectively regulating the Legislature even though it has the necessary power to do so as elucidated in Article 94 of the Constitution of Zambia.¹

Among the constraints that hinder the Judiciary to fully realise its potential which this Chapter will confine itself to is the evident political interference and further to this mooted concern, it will be appreciated that political interference affects the independence of the Judiciary. Thus, the chapter will endeavour to

¹ Which states that the High Court, which forms part of the Judicature in Zambia, shall have the unlimited and original jurisdiction to hear and determine any civil or criminal proceeding under any law; thus the law governing the Legislature is equally subject to the powers conferred to the High Court to regulate the activities of the Legislature.

illustrate that, indeed, the Judiciary in most instances fails to impartially handle certain matters that come from the Legislature, or better still, seems to pay allegiance to the political mood prevailing in the country.

1.2 THE INDEPENDENCE OF THE JUDICIARY

Article 91(2) and (3) of the constitution in Zambia respectively; de jure, guarantees the independence of the Judicatures as it enacts that;

“ the judges, members, magistrates and justices, as the case may be, of the Courts mentioned in clause (1) shall be independent, impartial and subject only to this constitution and the law and shall conduct themselves in accordance with a code of conduct promulgated by Parliament.”

Further Article 91(3) states that *“the Judicature shall be autonomous and shall be administered in accordance with the provision of an Act of Parliament.”*²

It is evident from the above provisions that the law is clear as it stresses the importance of having an independent and autonomous Judicature for the effective interpretation of the entire law governing Zambia in all respects

It is the authors view that for the Legislature to function and perform effectively, regard must be had to ensuring that the role the Legislature plays in enacting laws through elected representatives of the people is strictly confined to the legal

² Chapter one of the Laws of Zambia.

framework that creates and regulates its activities, therefore, the Judiciary has got a mammoth task as an institution commissioned to police the Legislature so as to align its role for checks and balances purpose, hence avoiding arbitrariness. In Zambia however, the Courts have in most instances failed to leave up to this challenge of ensuring that the actions of the Legislature are within the confines of the law and more so, exhibited characteristics that do not suggest independence. Indeed, the independence of the Judiciary cannot be overstressed if Zambia is to have a Legislature whose actions would be legitimate. In the case of **Miyanda V. Chaila**, the Court categorically observed the Importance of having an independent Judiciary when Sakala, Justice then, held that: *“the public have the right to have independence of the Judiciary preserved; the absolute freedom and independence of judges is imperative and necessary for the better administration of justice.”*³

Additionally, it can further be observed that on the international plane, the concept of an independent Judiciary has received recognition evidenced by the provisions of the International Convention on Civil and Political Rights which sets out the necessity for equal treatment before the law and also advocates for the determination of matters by an independent and impartial Court system.⁴

³ [1985] ZR 193.

⁴ Article 14 of the, The International Convention on Civil and Political Rights (ICCPR).

In further understanding the concept of the independence of the Judiciary; Sir Ninan Stephen defined independence of the Judiciary by making reference to the State:

“ what its precise meaning must always include is a state of affairs in which judges are free to do justice in their communities, protected from the power and influence of the state and also made immune as humanly possible from all other influences that may affect their impartiality.”⁵

1.2.1. THE INDEPENDENCE OF THE JUDICIARY VIS’A’ VIS POLITICAL INTERFERENCE.

As contended by one scholar, the independence of the Judiciary in Zambia indeed faces many challenges and among the notable ones is political interference, which undoubtedly has continued to hinder the full realisation and achievement of the rule of law.⁶

However, before illustrating certain instances in which the Courts have fallen prey to political interference, it should be stated from the onset that what

⁵ N.Stephen, “Judicial Independence,” the Inaugural Oration in Judicial Administration, Australian Institute of Judicial Administration, 21st July 1989.

⁶ Paper prepared by Hope Ndhlovu, “The Judiciary and Protection of Human Rights in Southern Africa,” in Human Rights Review, September, 2002.

constitutes political interference is not easily defined as it will vary from scholar to scholar. It also depends on the subject or topic under consideration. In view of the foregoing, political interference can be understood as the meddling in the functions of a judicial system by any participant that are involved in the decision making process of a society and such meddling being done outside the confines of the law.⁷

Further to this proposition, Professor Nwabueze asserts that independence of the Judiciary should not only be confined to the independence from the Legislature or Executive branches of government, but must be extended to the independence from political influence of organs of the Government or the public or from a judge's inclination towards a particular political party or interest group in society.⁸

In view of the outlined scenario above, the question still persists as to whether the Judiciary in Zambia has and continues to effectively police the Legislature amidst the controversies and debates surrounding the governance of the country.

In the quest of endeavouring to understand and appreciate the above concerns, the thesis will confine itself to certain important instance which undoubtedly

⁷ Eisenstein James, Politics and the Legal Process, 1973, p. 79, New York: Harper and Row.

⁸ .B.O. Nwabueze, Judicialism in Commonwealth Africa, 1974, p. 288, London: Brown and Sons.

compromises the very role and function of the Judiciary and prima-facie that the Legislature in most instances goes off tangent in performing its function.

1.3. THE KAUNDA REGIME 1964 TO 1991

During the Kaunda era, the Legislature was entirely dominated by the ruling party then, UNIP, from about 1973 to 1990, since Zambia was a one party participatory state. This scenario saw Parliament as a conduit in rubber stamping any policy the government deemed fit to become law. It could thus be suggested that the courts had in most instances interpreted the law to appease the Executive and the Party. In cementing this proposition, a very note worthy case in which the courts made a decision which no doubt, is bad law is the case of **Re Nalumino Mundia**⁹ in which leave was refused for the reason that the High Court did not have the power to interfere with exclusive jurisdiction of the National Assembly in the conduct of its internal affairs. The court was so timid in that it did not take into account Zambia's constitutional position. It further failed to firstly recognise Article 94 which gives the High Court unlimited and original jurisdiction to hear and determine any proceedings under any law. It should be appreciated that Parliament has its own internal proceedings and the jurisdiction of the House is exclusive as was illustratively held in the immunity case.¹⁰

⁹ [1970] ZR p. 70.

¹⁰ In the case of *Chiluba v. the Attorney General*, the courts held that Parliament was within its mandate to remove the former President's immunity in the interest of the State as it rightly followed its own procedure.

However, the author shares the same views expressed by Lord Denning who observed in the case of **British Railways Board v. Pecking**¹¹ that “ *it is the function of the Court to see that the procedure of Parliament itself is not abused, and that undue advantage is not taken of it. In doing so the Court is not trespassing on the jurisdiction of the Legislature itself. It is acting in aid of the Legislature and I might add, in aid of justice.*” This clearly illustrates that in Zambia, the Legislature is amenable to judicial review and the Courts have the sole mandate to keep it in check and not shying away like it does in most instances due to political pressure evidenced in the Mundia case at that time, as the courts out rightly failed to give audience to the applicant without bothering to inquire whether procedure was followed or not. This is totally unacceptable if the due process of the law is to thrive and most importantly, the rule of law.

1.3.1 THE CHILUBA REGIME 1991 TO 2001

The inclination towards everything British is still very strong in Zambia. Article 87 of the constitution¹² provides that the National Assembly and its members shall have such powers, privileges and immunities which maybe prescribed by an Act of Parliament. Sub Article 2 provides that, notwithstanding the powers, privileges and immunities which maybe conferred on the National Assembly and its members, the law and customs of the Parliament of England apply to the

¹¹ [1974] WLR 208

¹² Chapter one of the laws of Zambia.

National Assembly with such modification as may be prescribed by an Act of Parliament.

The provisions are interesting in many respects. They arose in response to cases, in which perhaps for the first time, the powers of the Legislature to punish for contempt were questioned. In the case of **The People v. The Speaker of the National Assembly, Exparte, Fred M'membe, Bright Mwape and Lucy Sichone**,¹³ the applicants were found guilty of contempt of the House and a warrant of committal was issued by the Speaker of the National Assembly ordering their arrest and detention. It was the first time, in the history of the country that a person was sent to jail by the National Assembly.

The powers and the procedure followed was that developed by the British Parliament contrary to the Zambian system. In application for a Writ of habeas corpus, one of the issues which arose was the extent of the powers of the National Assembly to commit anyone to prison for contempt. The Courts held however, that in Zambia, the decision and actions of Parliament are subject to the scrutiny by the Courts to ensure compliance with the constitution. The duo were released with emphasis that the National Assembly did not have power to imprison anyone for contempt. However, even though the Judiciary deserves a plus in reaching at this brilliant decision, it exhibited an element of timid ness in the author's view, in that political forces then were at play and this could be

¹³ 1996 Case, unreported.

noticed in the sense that, instead of concretely taking his stand, the judge, Kabaso Chanda then, sent this matter back to the Legislative organ for further deliberations instead of finalising the entire matter in court.

It is the author's view that the position the judge took was not in the interest of furthering the role and function of the Courts. It would have been prudent for him to settle the matter once and for all within the institution mandated to do so, to avoid further and future anomalies. But it appeared that he wanted to incorporate the Legislature in his decision so that it could appear as though it was a stakeholder in the decision ultimately.

During the Chiluba era, the political mood had in most instances compromised the function and role of the Judiciary. A number of rulings delivered were beyond imagination and in fact, set very bad precedents. Judges are so reluctant and casual in effectively and advancing the role of the Courts, which is so absurd and defy logic. In fortifying the above proposition, the case of **Maxwell Mwamba and Stork Solomon Mbuli and the Attorney General**,¹⁴ the applicants who were members of the opposition party challenged the appointment by the President of two members of his political party who had previously been investigated for trafficking in drugs. The challenge was premised on Article 44 of the Constitution which provides:

¹⁴ SCZ Judgment No. 10 of 1993.

“ As the Head of State, the President shall perform with dignity and leadership all acts necessary or expedient for, or reasonably incident to the discharge of the executive functions of government, subject to the overriding terms of the constitution and the laws of Zambia which he is constitutionally obliged to protect, administer and execute.”¹⁵

The substance of the case was that by appointing the two members of Parliament to Ministerial positions the President had acted contrary to the provisions of Article 44 of the constitution. However, what is the issue is that since the applicants were from the opposition party in Parliament and that the National Assembly was dominated by the then ruling party MMD, the House indirectly influenced the Courts to rule in favour of the State due to the majority number of Members of the Parliament who endorsed the appointments save to say, in their individual capacities as evidenced in the sentiments of the four judges of the Supreme Court who observed that *“ the desirability of encouraging individual citizens to participate actively in the enforcement of the law and the undesirability of encouraging meddling private “ Attorney Generals” to move the Courts in matters that do not concern them especially that, the Members of the ruling party are in agreement with the appointments and most importantly are in majority”¹⁶*

This indeed is regrettably a serious deviation from the principle elements of the Rule of Law in that the Courts lamentably failed to rise to the occasion of

¹⁵ Chapter one of the laws of Zambia.

¹⁶ Supra Judgment 4.

ensuring that political interference which was in form of using government machinery even before the Courts ruled and the sentiments made by the Members of Parliament in the House did affect the role of interpreting the matter fairly. It is the author's submission that the Legislature in the above case, endorsed the appointment even though in Zambia, the Legislature has got no such powers to ratify any persons appointed to a Ministerial position. The solidarity exhibited by the ruling Members of Parliament profoundly intimidated the Courts to an extent that they had no option but rule in their favour.

Perhaps the most frightening and uncalled for instance in which the Legislature grossly interfered and eroded the very nature and independence of the Judiciary was when the former Clerk of the National Assembly, Mwelwa Chibesakunda wrote to the Chief Justice Matthew Ngulube, advising him to hear, as quickly as possible the case in which the State had appealed against a High Court order which stayed for the proceedings on the 1999 University Bill pending presidential assent.

The following is an extract of the letter from Mr. Chibesakunda to the Chief Justice.

"I wish to bring to your attention, Sir that the appeal is of utmost urgency and I, therefore, request that the same be heard and determined before the prorogation of the current session of Parliament expected around 3rd December, 1999. According to Parliament practice and custom, all

*proceedings pending before the House lapse at the time Parliament prorogues. You may wish to know, Sir, that the President has indicated willingness to assent the Bill save that he has been advised not to do so before the matter is determined by the Supreme Court and also in view of the order issued by the High Court to stay any further proceedings related to the same. I am also confident, Sir, that a decision of the Supreme Court on this matter would serve to fore stall any further attempts by any interest groups to circumvent the legislative process.*¹⁷

Following this letter the Supreme Court quickly held a hearing. It reversed the decision of the High Court and denied the applicants judicial review. Indeed, the Judiciary clearly exhibited a lack of independence and professionalism from those wielding political power. This was a typical case of political interference and the lack of respect for the Courts. No wonder, the Minister of Legal Affairs George Kunda, State Counsel, lamented that “members of public institutions must respect and accept the judgements of the courts if democracy and the rule of law is to be held in high esteem in Zambia.”¹⁸

The letter above exemplifies the timid ness of the Judiciary. There is no law in Zambia which mandates the Legislature to directly instruct the Judiciary to

¹⁷ Obtained from the Zambia Human Rights Report, 1999, p. 68, Lusaka: Published by Afronet.

¹⁸ The Post, Thursday, July 31, 2003, P.3

quickly hear a matter however urgent, even if it involves the President assenting to a Bill.

In view of the foregoing, it can be observed that in Zambia the Doctrine of Separation of Powers is abused and as Montesquieu, observed, that political liberty can only be achieved where there is no abuse of power. ¹⁹ Perhaps it should be submitted that there can be no law or theory that can guarantee complete or absolute Separation of Powers as it is the case in almost all countries that judges are appointed by the Executive working together with the Legislature as the point of ratification.²⁰

1.3.2. THE MWANAWASA REGIME 2001 TODATE

Presently, the 'new deal Government' under Mwanawasa has placed more emphasis on enhancing the concept of the rule of law and separation of powers if Zambia is to attain acceptable standards of good governance.

However, this ambitious proclamation by the President is yet to be confirmed. Recently as stated above, there has been debate and controversy surrounding the appointment of Members of Parliament from the opposition to Cabinet and thus, the Courts are yet to adjudicate on these matters in the event that people with the recognised locus standi at law challenge these appointments as was the case

¹⁹ O' Hood Philips and Paul Jackson, Constitutional and Administrative Law, 7th Edition, 1987, P. 13, London: Sweet and Maxwell

²⁰ In Zambia, it is provided for under Articles 93 and 95 of the Constitution.

when Miyanda endeavoured to move the Court, suffice to say that his application was ignored since the law in Zambia is that, an individual cannot place an injunction against Government,²¹ and more so, President Mwanawasa strongly stated that he is not amenable to the jurisdiction of the Courts whilst acting in his official capacity as President²²

These are issues that will test the independence of the Judiciary in policing matters emanating from the Legislature. Further, the appointment of Nevus Mumba as Vice -President has also been marred by controversy and currently, the matter is in the Courts of Law and the Solicitor General, Sunday Nkonde, is *on record as having warned members of the public not to comment on the controversial appointment*, as doing so would, according to him, be contempt of Court. However, the need for the independence of the Judiciary must not be used as justification for suppressing the freedom to hold and express opinion. To muzzle the voice of the public by threats is lame as contended by one scholar, Ngenda Akalemwa.²³ Therefore, with this in mind, what is of concern to this dissertation is how the Judiciary will preside on the matter taking into consideration that the Vice- President is the leader of the House and the Constitution demands that he should be a member of Parliament either nominated or elected. In this case, the contention is that Mumba was caught up

²¹ State Proceedings Act, Section , Laws of Zambia.

²² Sunday Post, February, 9, 2003, P.4

²³ Sunday Post, July 13, 2003

with Article 65²⁴, since he was a candidate in the preceding General elections and he lost, hence the contention that he does not qualify to be nominated as Member of Parliament. This is what facilitated Edith Nawakwi of the opposition party. FDD, to file a petition in the High Court to have the same annulled.

In view of the foregoing, the author will wait patiently as commenting further would be 'contempt of court' even though the author is entitled to his own opinion or expression as guaranteed in the Constitution.

Indeed, the decision that will be reached in the mentioned case above will determine how entrenched the independence of the Judiciary is in the present regime, amidst political pressures from the opposition, ruling parties and the public.

The advanced assertion primarily translates into the Courts possessing the muscle to determine legality of any act done by the Legislature. The idea of checks and balances seeks to make the separation of powers more effective by balancing the powers shared by The three organs of Government.

²⁴ Chapter One of the Laws of Zambia.

It is thus the author's view that, recognising that man has the propensity to abuse power vested in him by the law; it is paramount to have neutral institutional machinery not influenced by any unwarranted efforts to impede check on the exercise of power.

CHAPTER FOUR

1.0 RECOMMENDATIONS AND CONCLUSION

Presently, there is a general consensus that good governance and sustained development Programmes are the tenets health for the smooth functioning of government activities. To realize the above, it's the authors submission that the three organs of government; being Executive, Legislature and Judiciary should work independently form political interference. The independence of the three Arms of Government would undoubtedly, enhance constitutionalism, effective administration of justice and Human Rights, transparency and accountability.

1.1 RECOMMENDATIONS

Having endeavored to illustratively explain the inadequacy of the present legal framework governing the appointments of opposition Members of Parliament within the context of opposition political parties holding the Legislature to ransom, the paper recommends that;

With the coming of up the newly constituted Constitution Review Commission; there is an urgent effort and need for people to participate and review the law pertaining to the appointment of Cabinet Ministers since the present law prescribes that the President can appoint a Minister from among Members of Parliament, which evidently, has brought misunderstandings.

It is the authors view that it is either that, that particular provision is left as it is to give the President latitude to appoint a Minister from among Members of Parliament but further add that once an opposition Member of Parliament is appointed to Government in the interest of the nation, it is only the President who will have the sole mandate to disappoint them from office regardless of the party's policy and regulations regarding such an appointments on whose ticket the particular Member of Parliament was elected on; or, alternatively, that particular provision should be abolished and replaced by a law which will only allow the President to appoint Ministers from amongst Members of Parliament belonging to the ruling party , since in Zambia, this phenomenal though fundamental in enhancing nation unity, has been misconstrued and appears foreign.

The first recommendation might appear to be harsh and undemocratic, but in actual fact, it will lessen unnecessary By-elections which interlia, seem to be the

order of the day and more importantly, expensive to conduct, considering Zambia's raked economy.

Additionally, it can be recommended that a member of Parliament should have a constitutional right to represent his Constituency for a period of five years with emphasis that this right cannot be taken away by any other Institution, Organization, or Club which facilitated his election to Parliament, except where the people in that particular constituency who elected him into office by adult suffrage say so. This will certainly deter opposition political parties from interfering with the tenure of a Member of Parliament as this interference subsequently affects the functioning of the Legislature. The Legislature will thus be independent from political interference, which is a destructive plague to achieving good governance. Additionally, it is worth of note that the people will be given the mandate to effectively participate in issues regarding governance. In the same breath, parties should therefore, be content and careful as to whom they adopt to stand and represent them in that Constituency.

Furthermore, it is the author's submission that, perhaps, it is time Zambia had to do away with the idea of political parties adopting who will represent them in a particular constituency.

The people themselves should choose amongst themselves whom to adopt and elect to represent them. This will undoubtedly make them stakeholders in the

running of Parliamentary affairs. The elected candidate to Parliament should be given five years as tenure of office which he has to complete disregarding any incidental events that would call for his removal except in circumstances of death, illness or insanity rendering him or her incapacitated.

In light of the foregoing, it is fair to state that political parties have not fulfilled their function such as representing citizens' interest,¹ by making informed decisions before expelling their Members of Parliament appointed as Cabinet Minister. Indeed, if these parties fail to generally incorporate the electorates' views who appointed these expelled Members of Parliament, it is difficult to see how such parties can observe and promote good governance and importantly, take peoples views in issues affecting the nation at large.

With regards to the Judiciary; the author recommends that with the President being empowered to appoint the Chief Justice, Supreme Court and High Court judges², this creates a problem in that these people appointed pay allegiance to the appointing authority and thus, fail to independently reach acceptable justice. Therefore, there is need to review the law in a way that judges are separately appointed by an independent body i.e. The Judicial Service Commission, not involving the President as the case is.

¹ Dr.A.W. Chanda, Transparency International Zambia, National Integrity Systems Country Study Report Zambia, 2003, P. 19, Lusaka: Published by TIZ.

² Chapter One of the Laws of Zambia, As 93(1), 93(2), 56 respectively.

Further, there is need to have a complete separation of powers, where the three organs will be independent from each other and not where the President (Executive) has a hand in i.e. appointing Members of Parliament to Cabinet and Judges. This creates tension and ultimately, political interference whenever a judge is considering a case from the Legislature.

CONCLUSION

In considering the current political debate in Zambia, one gets the distinct impression that the country is at the cross roads and unless political issues are handled with great care and sensitivity, the country could easily degenerate into political turmoil.³In this regard, the author would like to narrow this observation to the conflict currently generating disunity and mistrust between the ruling party and opposition political parties in Zambia, particularly to the appointments. It is the dissertation submission that the law governing appointments of Ministers should be seriously and urgently reviewed to allow the Legislature to function and effectively represent the electorates' view. As illustrated in the preceding Chapters, one common feature that is prominent is that the political parties are holding the Legislature to ransom which has consequently affected the Legislature from realizing its potential.

However, as posited above, this major role in terms of enacting laws and promoting checks and balances to other organs of Government⁴ tremendously watered down, since most expelled Members of Parliament are out for By-elections, the ruling party is slowly dominating owing to the recent appointments.

³ Muna Ndulo, *The Monitor*, The Zambia Political Crisis, Friday, June 1- Thursday 7, 2001, p.1

⁴ Chanda, *Supra*, P.16

Additionally, it should be observed that if the independence of the Judiciary is to be something worth talking about, there is need to respect the rule of law in that the Legislature should function within the confines of the law which establishes the basis of its existence and ultimately avoid arbitrariness.

Equally, the Judiciary should not fall prey to political interference. Similarly, judges should exhibit a high level of Excellency and professionalism when confronted with issues of national concern, i.e. whether to pay allegiance to the appointing authority, and where the law is clear on what steps to take, the law should thrive. Ultimately, the above discussion narrows down to a degree of morality from those entrusted with authority, if the institutionalized structures of our legal system are to be purposeful enterprises as asserted by L. Fuller, a jurist.

He further applies jurisprudential polemics by lamenting to the fact that, the law should be seen to be an instrument that has a moral insight in it as it enhances societal welfare only if those charged with political power are considerate and uphold justice as a prerequisite imposed by the law.⁵

To crown it all, the representative shares of Legislators and practical lawyer in the evolution of society through law are, however, determined both by the

⁵ W. Friedman, *Legal Theory*, Firth Edition, 1967, P. 20, London: Stevens and Sons.

political structure of society and by the extent to which the Legislative machinery can satisfy the need for social change⁶. Indeed, this remains the challenge that a dynamic country like Zambia should raise to, if the Law is to be of any value and compatible with socio-economic, political and cultural changes.

⁶ Friedman, *Supra*, P.80.

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