

**SEPARATION OF POWERS IN THEORY AND PRACTICE: A ZAMBIAN
PERSPECTIVE**

By

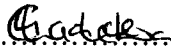
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Being a Directed Research essay submitted to the University of Zambia Law Faculty in partial fulfilment of the requirements for the award of the Bachelor of Laws (LLB) Degree.

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I, GRACE CHALWE CHILEKWA, Computer Number 27000702 do hereby declare that this is my genuine work and to the best of my knowledge, no similar piece of work has previously been produced at the University of Zambia or any other institution for the award of the Bachelor of Laws Degree or any other award. All other works cited or used in this essay have been duly acknowledged.



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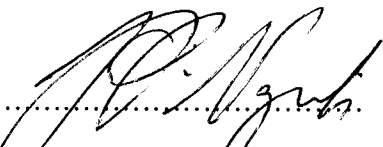
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.....
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ACKNOWLEDGEMENTS

I would firstly like to thank the Lord God Almighty for the successful completion of this paper. Special thanks go to my parents Regina Kalila Chilekwa and Mwape Chilekwa for their immeasurable love and support as well as their contribution to this paper.

I also thank my supervisor, Mr. Sangwani Ng'ambi without whom this paper would not have been possible. He not only supervised my work but also made valuable suggestions which improved the quality of my work.

Special thanks also go to my four best friends who have ever been so loving and supportive. Chishimba Gabriel Chilekwa, Kabanda Leah Lopa Chilekwa, Chileya Gideon Chilekwa and Chisha Gwyneth Chilekwa. You guys have always been able to see the best in me and encouraged me even when things seem impossible. Thank you for believing in me.

I also wish to thank Chisha Charles Chilekwa, Chola Chella, Jane Chibale, Mulenga Chella, Bethel Kaimba and Chuza Chella for their love, support and generally being so helpful. You enabled me to finish this paper in good time, thank you.

Special thanks to Judge Lombe Chibesakunda and Judge Philip Musonda for their time and invaluable contribution to this paper.

To my friends Etambuyu Mulele, Mwaanga Kasoongola, Natasha Chilambwe, Mukonde Natasha Mungo, Nambeye Joan Katebe, Mirriam Chila, Precious Namonje Katongo, Precious Miselo Nakalumbi, Mwape Kalumba, Nakasakwa Ruby Chilyepa, Kabuba Muyauka and Jane Nobutu Kabayo, thank you for being so loving, supportive and encouraging. Etambuyu, you have especially been my uplifting voice when things seemed impossible throughout my stay at UNZA, thank you for never growing weary of my problems.

I also thank Tafara Chenda for ever being so helpful and supportive throughout my stay at UNZA. Your willingness to help others is certainly rare.

DEDICATION

To the memory of my late brother, Graham Chilekwa Chilekwa who believed in my ability to achieve even before I did.

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CHAPTER ONE

THE DOCTRINE OF THE SEPARATION OF POWERS IN THEORY

1.0 INTRODUCTION

The doctrine of separation of powers as propounded by Montesquieu entails separation of the organs of government, which are the executive, legislature and judiciary as institutions, as well as in their powers. Legislative power requires the making of laws while judicial power is the announcing of what law is by the settlement of disputes. Executive power refers to the power to formulate and implement policies within the boundaries defined by the law. The doctrine of separation of powers provides for the separation of institutions and non-interference of one institution in the functions of another unless it is operating as a check in order to balance the powers. This concept does not provide for the unwarranted influence of an organ in the operations of another.

According to Montesquieu, political liberty is possible only when there is no abuse of power and to prevent such abuse by the people in authority, one power should be a check on the other. When the executive and legislative powers are vested in one body or person, there is no liberty. Similarly, there is no liberty when judicial power is not separated from the executive or legislative branch.¹ Vesting legislative and judicial power in the same body or person would result in the exposure of the life and liberty of the subject to arbitrary control; for the judge would be then the legislator. Similarly, when executive power is vested in the judiciary, the judge might behave with violence and oppression in exercising his powers as he will not check himself. There would be so much arbitrariness and hence a violation of people's rights and freedoms without any protection where the same body is empowered to exercise these three powers of enacting laws, executing the public resolutions, and settling the disputes of individuals.²

The doctrine of separation of powers essentially defines the boundaries within which the powers of government should be exercised and entails that no single person or body of persons should have ultimate authority. John Locke, in his work; the Second Treatise of Government, states as follows:

The three organs of state must not get into one hand as it may be too great a temptation to human power-seeking frailty for the same people who have the power to make laws also to have in their hands the

¹ O.H. Phillips, Constitutional and Administrative Law, Sweet & Maxwell, London, 2001. Page 12

² Montesquieu, The Spirit of Laws, G. Bell & Sons Limited, London, 1914. Page 355

power to enforce them; for if they did, they might come to exempt themselves from obedience to the laws they had made, and to adapt the law, both in making and in enforcing it, to their own private advantage.³

Similarly, Thomas Jefferson stated that the powers of government should be so divided and balanced among several bodies so that no one body could go beyond their legal limits, without being effectively checked and restrained by the others.⁴ Therefore, the legislature, executive and judiciary should be separate and distinct so that no person should exercise the powers of more than one of them at the same time. It is therefore necessary that these three branches are entirely separate from each other to prevent the abuse of power and ensure that no one of them is under the influence and control of the other. When these powers are placed in separate hands, we are sure of efficiency in the execution of these powers on the grounds of division of labour. This means that no organ should possess the powers of another.

The value of this doctrine does not lie in its rigid application but in checks and balances. The theory of checks and balances entails that each organ of government shares in the powers of the others, exercising a certain level of control over each others' actions in order to prevent abuse of power hence supplementing the doctrine of separation of powers. Therefore a total separation of powers is not the best approach to take as it would not enable checks and balances because each organ would create its own boundaries with no one to ensure that power is exercised within these boundaries. The idea of checks and balances which is the prevention of the abuse of power vested in these organs would then have no value at all. It can hence be seen that checks and balances prevent the domination of a particular organ which results in maintaining a balance amongst the three organs of government.

According to Montesquieu, the safety of the whole Constitution depends on the balance of these powers and on their mutual interdependency on one another.⁵ Therefore, a Constitutional separation of powers is important in maintaining a political system in which the abuse of power is checked as it is possible for any man vested with power to abuse it and use it to his own advantage. The implementation of this doctrine is necessary to ensure constitutionalism and the rule of law which are important aspects of separation of powers which should be present in every democratic state.

³ <http://press-pubs.uchicago.edu/founders/documents/v1ch10s3.html>. Accessed 6th December, 2010.

⁴ <http://press-pubs.uchicago.edu/founders/documents/v1ch10s9.html>. Accessed 6th December, 2010.

⁵ R. Shackleton, Montesquieu: A Critical Biography, Oxford University Press, Oxford, 1961. Page 299

Phillips shows that different countries have different levels of separation of powers and that the value of this doctrine lies in checks and balances. He states that the United States of America goes further than any other country in applying this doctrine. It is shown that;

The federal executive power is vested in the President, the federal legislative power in Congress and the federal judicial power in the Supreme Court. The President has the power to assent to or veto Bills but his cabinet members are not members of Congress which means they cannot sit or vote in Congress but the three branches are connected by checks and balances hence no complete separation of powers.⁶

The case of *Kilbourn v Thompson*⁷ lends credence to this doctrine. It was stated in this case that the powers of the government are divided into executive, legislative and judicial branches and it is essential to the successful working of this system that persons instructed with power in any one of the three branches are not permitted to encroach upon the powers conferred to the others but that each, shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other.

The separation of powers is certainly an important aspect of every democratic State. It deals with aspects such as the rule of law, constitutionalism and checks and balances and ensures efficiency and the non-interference of one organ in the functions of another. Separation of powers entails that the functions of government are differentiated into legislative, judicial and executive bodies. Therefore, they should be performed by distinct organs made up of different bodies of persons. This ensures that each organ is limited to its own sphere of action without encroaching upon the others and hence independent within that sphere.⁸ To avoid arbitrariness, Constitutions should be designed in a way that ensures that no organ of government is made to do things which it is not empowered to do and that institutions adhere to the various aspects of separation of powers such as the rule of law, constitutionalism and checks and balances.

1.1 CONSTITUTIONALISM

The effective implementation of the doctrine of separation of powers is an essential instrument for constitutionalism. The concept of constitutionalism is based on a political order that is governed by laws and regulations.⁹ It aims at the supremacy of the law and not of individuals and so when government operates within the confines of the Constitution and other laws, constitutionalism is achieved. When there is constitutionalism in a country, the

⁶ O.H. Phillips, Constitutional and Administrative Law. Page 12

⁷ 103 U.S 168 (1880)

⁸ A. C. Kapur, Principles of Political Science, S. Chand & Company Ltd, New Delhi, 1996. Page 471

⁹ J. C. Johari, Principles of Modern Political Science, Sterling Publishers Private Ltd, New Delhi, 1989, Page 50

powers of government are limited by the constitution and all the organs operate within the scope of their authority which ensures non arbitrariness. As a result, the rights of the citizens are protected as no authority acts beyond its prescribed powers, which essentially means that there is no abuse of power.

Constitutionalism recognises the need for government in order to have an ordered society but clearly insists on placing a limitation on the powers of government in order to avoid an arbitrary political order. It is not enough for a country to have a Constitution, the Constitution must limit the powers of government and put in place measures to ensure that these powers are not abused. There should therefore be a constitutional guarantee of individual rights enforceable by an independent judiciary as well as the existence of an independent legislature to act as a check against the temptations of power on the part of the executive which is the dominant authority in most cases.¹⁰

Constitutionalism is closely tied with democracy. Government can and should be legally limited in its powers and its authority depends on its observing these limitations.¹¹ As a result, in every democratic society, there are a number of democratic control measures used to limit the government. There is the need for free and fair elections to be held at regular intervals so that the will of the people is reflected. If the people are happy with the government of the day, they re-elect them into power. The freedom to create and belong to an opposition party is needed for this mechanism to be effectively implemented. This mechanism ensures that the government observes the laws in exercising its powers in order to win the favour of the people.

The government must be accountable to the people. It must therefore be able to justify its actions and point to the law as the basis of its authority hence not acting outside the scope of that authority. Constitutionalism basically entails that the government acts according to the constitutional principles as Constitutions play an important role in building democracy as well as the guarantee of people's rights. They enhance democratic development in addition to being a legal tool. When there is constitutionalism, the type of government is that in which power is distributed and limited by a system of laws that those in power must adhere to and respect.

¹⁰ B. O. Nwabueze, *Presidentialism in Commonwealth Africa*, C. Hurst & Co, London, 1973. Page 256

¹¹ Constitutionalism. plato.stanford.edu/entries/constitutionalism. Accessed 8th December, 2010.

1.2 CHECKS AND BALANCES

The theory of checks and balances entails that each organ of government shares in the powers of the others or exercises a certain level of control over each others actions hence supplementing the doctrine of separation of powers. As a complete separation of powers is not practical, the idea of the concept of checks and balances is to make the separation of powers more effective by balancing the powers of one organ against those of another through a system of positive mutual checks exercised by the organs of government upon one another.¹² Every organ is therefore allowed a minimum interference in the operations of another in order to prevent one organ from becoming the dominant authority and exercising undue influence on the other organs. As a result, these organs exercise their powers in a way that benefits the people as political liberty is ensured and power used for the intended purpose.

A clear illustration is that under the American Constitution, there is need for Senate's approval with regard to appointments by the President and the making of treaties in order to ensure that the President does not abuse his authority. However, the fact that valid appointments can only be made with the advice and consent of Senate does not make such appointments the joint responsibility of Senate and the President.¹³ This still remains the voluntary act of the President which Senate, in checking that the President does not abuse his powers can only ratify or reject. The case of *Myers v United States*¹⁴ in which the Supreme Court held that the consent of Senate does not mean that it makes the appointment clearly illustrates this position.

In sharing judicial powers, the President has the power to pardon people convicted of crimes, execute decisions of the court and appoint Judges subject to ratification by Senate. With regard to legislation, the President has power to veto Bills. Congress establishes the size of the federal courts and when necessary impeaches the Judges from office. The Supreme Court through judicial review has the power to declare any law that is inconsistent with the Constitution void to the extent of its inconsistency.

In addition, when the executive acts beyond the scope of its authority, the court declares the act unlawful. The court also has power to interpret Acts that are in dispute as was the case in

¹² J. C. Johari, Principles of Modern Political Science. Page 358

¹³ B. O. Nwabueze, Presidentialism in Commonwealth Africa. Page 30

¹⁴ 272. U. S. 521 (1926)

*McCulloch v Maryland*¹⁵ where the Court stated that Congress' powers to control the nation's money supply and collect taxes did imply the power to create a bank. In this case, Congress in 1816 chartered the Second Bank of the United States. In 1818, the State of Maryland passed legislation to impose taxes on the bank. McCulloch, the cashier of the Baltimore branch of the bank refused to pay the tax claiming that the fine imposed by the State of Maryland for operating the bank was an improper interference with the operations of the federal government. The court held that Congress had the power to incorporate the bank and that Maryland could not tax instruments of the national government employed in the execution of constitutional powers. It therefore had no power to interfere in the bank's operation by taxing it.

In light of the above, this paper examines how Zambia, and where necessary, other democratic jurisdictions implement this doctrine. It will analyse the extent to which Zambia has applied this doctrine and also make recommendations as to its effective implementation to ensure constitutionalism and the rule of law which in turn leads to political liberty. It cannot be over emphasised that the liberty of individuals is only enhanced when there is respect for the rule of law by every institution which in turn results in no institution having control over the others.

1.3 STATEMENT OF THE PROBLEM

Article 1 of the Zambian Constitution¹⁶ states inter alia that Zambia is a democratic state and that the Constitution is the supreme law of the land. The notion of separation of powers is therefore subject to these two principles. The Constitution provides each arm of government with specific functions and clearly lays down a separation of powers which it is envisaged would enhance checks and balances.

At present however, the Zambian executive seems to be the dominating authority due to non-effective checks and balances hence no balance of power among the three organs of government. There is therefore need to analyse the implementation of the doctrine of separation of powers in Zambia with reference to other jurisdictions where necessary from which Zambia could learn although there may be a possible abuse of power in these countries by the executive which in most cases, is the dominant authority.

¹⁵ 17 U. S. 316 (1819)

¹⁶ Constitution of the Republic of Zambia

1.4 GENERAL OBJECTIVE OF THE STUDY

This paper, as a general objective seeks to show the benefits of adhering to the doctrine of separation of powers through the implementation of effective checks and balances that ensure constitutionalism and the rule of law.

1.4.1 SPECIFIC OBJECTIVES

1. To examine the level of adherence to the doctrine of separation of powers in Zambia.
2. To examine whether there is adherence to the rule of law and constitutionalism in Zambia which are important aspects of the separation of powers.
3. To examine whether there is judicial independence in Zambia which is an important aspect of every democratic state.

1.5 SIGNIFICANCE OF THE STUDY

Ever since African countries gained independence, the trend in most has been that a great amount of power is vested in the head of state and for democratic states, in the executive. The result is such that the executive exerts a lot of influence on the functioning of the other organs of government. As a result, their independence is compromised and hence the possibility of political liberty being reduced to a great extent. This paper therefore shows the importance of the non-rigid application of the doctrine of separation of powers by having effective checks and balances so as to ensure that there is no arbitrariness and a balance of power among the three organs of state is achieved.

1.6 METHODOLOGY

The research was a qualitative one done through desk research and interviews where these were relevant and possible. Therefore, great use was made of literature in this field of study and the internet was consulted as well. An analysis of the Zambian system was undertaken with reference to other jurisdictions where necessary.

1.7 THE HISTORICAL AND CURRENT FRAMEWORK OF THE ZAMBIAN CONSTITUTION

Zambia's constitutional development which dates back to the 1960's has involved transitions from a multi-party state, to a one party state and finally, to the current multi-party system through the three republics. All the three republics have had the presence of the three organs

of state namely; executive, legislature and judiciary despite the transitions the Constitution has undergone. These institutions have however, in certain aspects operated differently under the different political setups.

The First Republic which lasted from 1964 to 1972 was under the British negotiated Constitution which conferred upon Zambia, the status of a democratic self governing state. This Constitution which expressly provided for Kenneth Kaunda as the first President¹⁷ vested broad executive powers in the President. The creation of ministries was vested in Parliament. However, the Ministers and the Vice President who formed Cabinet¹⁸ were appointed by the President and they served at his pleasure. The role of Cabinet was to advise the President on government policy and any such matters as were referred to it. The President also had the power to veto legislation and the powers of detention which impacted negatively in a great way on the protection of fundamental rights.¹⁹ The tenure of office for the President which corresponded with that of Parliament was five years unless the President dissolved Parliament or was removed for mental or physical incapacity, violation of the Constitution or gross misconduct.²⁰ The Constitution also provided for all legislative powers to be vested in Parliament which consisted of the President and the National Assembly. The National Assembly comprised of 75 elected members and up to 5 members nominated by the President.²¹

The judiciary was also provided for with the High Court and Court of Appeal as the superior courts of record. The High Court had unlimited and original jurisdiction to hear and determine any civil and criminal proceedings under the law.²² The appointment of the Judges of these two courts was done by the President on the advice of the Judicial Service Commission. However, the Chief Justice was appointed by the President in his own discretion.²³ In addition to this, the Constitution contained the Bill of Rights and these fundamental rights were enforceable in the courts of law. These were however subject to respect for the rights and freedoms of others and for the public interest.

¹⁷ Section 32 of the Constitution of Zambia, 1964

¹⁸ Section 45 (1) of the Constitution of Zambia, 1964

¹⁹ M. B. Ndulo, and R. B. Kent, Constitutionalism in Zambia. *Journal of African Law*. Vol. 40, No.2. 1966. Page.261

²⁰ Sections 33(1), 35 (2), 36 (5) of the Constitution of Zambia, 1964

²¹ Sections 57, 58 (1) (a), (b) of the Constitution of Zambia, 1964

²² Section 98 (1) of the Constitution of Zambia, 1964

²³ Section 99 (1) (2)

The Second Republic characterised by the supremacy of the President was a great departure from the First Republic that was based on the supremacy of the law. This is because the few educated people that were in power engineered the transformation of a multi-party state into a one-party state hence the slogan 'One Zambia, One Nation' becoming in effect 'One Zambia, One Nation, One Party, One Leader'. The Constitution provided for the existence of only one party or organisation, namely; the United National Independence Party (UNIP) which was to be referred to as the party. It also stated that no person was entitled to form or belong to any political party or organisation other than the party or to assemble or associate with, or express opinion or do other things in sympathy with such a political party or organisation.²⁴ This was due to the aspirations of the members of the ruling United National Independence Party (UNIP) to create a 'democratic' process of political participation that was not divisive. They stated that this was due to the demands by an overwhelming majority of the people. This aspiration was reflected in the preamble to the UNIP Constitution which was annexed to the Republican Constitution in accordance with section 4 (1) of the Republican Constitution and stated as follows:

RECOGNIZING that the party shall be the leading political force and shall continue to be a revolutionary mass organisation in which participatory democracy shall be rigidly and strictly maintained, welded together by patriotism and the voluntary acceptance of belonging to it.²⁵

President Kaunda set up a Constitution Commission under then Vice-President Mainza Chona to recommend what form a one-party participatory democracy in Zambia should take. The government however departed from some of the Commission's recommendations as it was not bound to accept them. For instance, the Commission had suggested a limit to the tenure of office of the President and had proposed to curtail his veto powers but these proposals were rejected by the government. Legislation to establish the one-party state was passed in 1972 but the new institutions of the Second Republic were not set up until the following year.²⁶

The structure of the one-party state was such that all the three organs of government existed but the executive was supreme hence interfering in the operations of the others. Although the Constitution provided for the judiciary, it was not as independent and impartial as it should be as it was subject to executive interference. This was seen in the case of *Eleftheriadis v The*

²⁴ Article 4 of the Constitution of Zambia, 1973

²⁵ The Constitution Of The United National Independence Party

²⁶ Report of the National Commission on the Establishment of a One-Party Participatory Democracy in Zambia, Lusaka, 1972.

*Attorney General*²⁷ in which Chief Justice Doyle decided to allow the application for a writ to issue. This was an application for a writ of habeas corpus, the applicant having been detained for an offence believed to be unsustainable in law. The Chief Justice who did not know that the executive was not happy with his decision travelled to attend a conference in Germany. Upon his return, he found that Justice Silungwe, the Minister of Legal Affairs and Attorney General was appointed Chief Justice within the few weeks of his absence. This shows that in order for the Judges to maintain their offices, they had to deliver judgements in accordance with the wishes of the executive hence the observance of the rule of law being compromised.

Similarly, the executive was not happy with the decision of the Judge to discontinue the detention of the applicant in an application for habeas corpus in the case of *Mike Kaira v Attorney General*.²⁸ They waited for the Judge's application for renewal of his contract which they turned down to his disappointment. This was so because renewal was almost automatic then. As a compromise however, they appointed him Director of the Legal Services Commission. Around this period, the executive made two more secret transfers of Deputy Chief Justice Leo Baron to the Industrial Relations Court as chairman and Supreme Court Judge Bruce-Lyle to the Anti-Corruption Commission as Commissioner. Regardless of these transfers, these people remained officers of the law hence the legal system being ineffective and corrupt due to strong interferences of the executive.

The executive power was vested in the President as in the First Republic. However, the office of the Vice President was abolished and replaced with that of the Secretary General of the party who apart from being responsible for the administration of the party, was the President's deputy and was empowered to carry out the duties of the President when the President was incapacitated.²⁹ This is because UNIP believed that the real mandate to govern belonged to the party hence the government being owned by the party. They therefore believed that the two could not be separated. Therefore, for as long as they pleased UNIP, there was no way to foster transparency on the part of those in government so that such people were voted out.

The Constitution also introduced the office of the Prime Minister who was responsible for heading government administration and was the leader of government business in the National Assembly. The Cabinet which was appointed by the President from among members

²⁷ (1975) ZR 69

²⁸ (1980) ZR 65

²⁹ Articles 37, 40 (3) (a) of the Constitution of Zambia, 1973

of the National Assembly³⁰ was supplemented by the central committee of the party which was empowered to formulate the policy of government and advise the President with respect to the policy of the party. In the event that there was a conflict in the decision taken by Cabinet and that of the central committee, that of the central committee prevailed hence reflecting that the party was supreme and had a lot of influence on the actions taken by the executive.³¹ Supremacy of the party meant supremacy of the President as he was the head of the party and the executive.

As in the First Republic, legislative power was vested in Parliament.³² However, the position of Parliament was compromised in that everyone had to belong to UNIP hence legislating in a way that conformed to the wishes of the government. This is because the party membership was a prerequisite to membership of the legislature. The impact of the one-party state on the Bill of Rights and democracy was devastating. Article 4 clearly violated the fundamental rights of citizens. A severe limitation on the right to freedom of assembly and association, particularly the formation of political organisations was enforced by this Article. Freedom of expression was also limited which resulted in non-criticism of the government. People who were not members of UNIP were completely excluded from the political process hence no opposition parties to keep the ruling party in check and ensure that there is no arbitrariness and that the will of the electorate is implemented and the rights of the people recognised and respected. It can be clearly seen that the Second Republic was characterised by an executive that was supreme with no existence of checks and balances and a Constitution that lacked the support of the majority of the people as it did not reflect their will as it was discriminatory and violated their rights.

The Constitution of Zambia embraces the doctrine of separation of powers, not in its strict sense because there is the requirement of checks and balances as it provides for the three organs of government in stating that all legislative, executive and judicial organs of state shall be bound by the Constitution.³³ There is no express mention of the separation of powers but the framework is such that the three organs of government are provided for. The Constitutional framework in the current Third Republic is similar to that of the First Republic. It provides for a multi-party democratic system and guarantees the protection of the Bill of Rights which entails the respect of the fundamental rights and freedoms which are

³⁰ Articles 48, 50 of the Constitution of Zambia, 1973

³¹ Articles 7, 12 (3) of the Constitution of the United National Independence Party

³² Article 63 of the Constitution of Zambia, 1973

³³ Article 1 (4) of the Constitution Of The Republic Of Zambia

enforceable in the courts of law.³⁴ The current system shows that the presence of opposition political parties participating in democracy ensures that the government works effectively for the benefit of the people, upholding the Constitution and all other laws if they are to remain in power. They mount pressure on the government of the day to ensure that it lives up to the expectation of the electorate. They also provide alternative leadership in the event that the incumbent leadership violates the laws of the land and fails to satisfy the needs of the people as well as recognise and respect their rights.

The Zambian Constitution does not refer to the doctrine of separation of powers but the framework of government outlined in the Constitution presupposes the existence of the doctrine. The Constitution expressly provides for and clearly states the functions of the three organs of government; executive, legislature and judiciary³⁵ which ensures the non-interference of each of these organs in the functions of the others as they are checked in the event that the interference occurs. This results in the effective implementation of the doctrine of separation of powers. The ultimate benefit of this doctrine is that the three institutions are able to check on each other and ensure that duties are carried out correctly within the confines of the stipulated authority.

1.8 CONCLUSION

Ever since African countries gained independence, the trend in most, as is the case with all newly independent states, has been that a great amount of power is vested in the executive. The effect of this is that the executive exerts a lot of influence on the functioning of the other organs of state. As a result, their independence is compromised and hence the possibility of political liberty being reduced to a great extent. It is therefore necessary for every country to ensure the non-rigid application of the doctrine of separation of powers by having effective checks and balances so as to ensure that there is no arbitrariness, and that adherence to the rule of law and constitutionalism as well as a balance of power among the three organs of State are achieved. What Montesquieu advocated for was the prevention of an absolute union of these powers in one person. Checks and balances ensure that the organs of government exercise the powers within the confines of the law and for the intended purpose.

³⁴ Article 1, Part III of the Constitution of the Republic of Zambia

³⁵ Articles 44, 62 & 91 of the Constitution of the Republic of Zambia

CHAPTER TWO

THE LEGISLATIVE ARM OF GOVERNMENT

2.0 THE ZAMBIAN LEGISLATURE

The legislature, which is the law maker as it is empowered to enact laws and make alterations to the Constitution subject to the Constitution, is comprised of the National Assembly and the President who make up Parliament.³⁶ The legislature, through various committees monitors the performance of government such as the Public Accounts Committee which ensures that the allocated resources are used for the intended purpose.

In checking the executive, the National Assembly is empowered to impeach the President in instances where he violates the Constitution or for gross misconduct. This shows that Parliament ensures that the President acts within the scope of his authority, upholding the rule of law and constitutionalism as he is not exempt from governing in accordance with the law even though he has immense powers as the Head of State. The National Assembly also ratifies appointments made by the President such as those of High Court Judges, Secretary to the Cabinet, Attorney General, Solicitor General and the Director of Public Prosecutions.³⁷ Ratification by the National Assembly is meant to ensure that these appointments are based on merit and not the ability of the President to manipulate these officers and use their positions to advance his own interests.

The South African Constitution has gone a step further with regard to the power of Parliament to ensure that the executive acts within the confines of the authority conferred on it by the Constitution. The President has to act in accordance with the law and ensure that he carries out the will of the people. If he does not, the National Assembly which is the representative of the people will recall him from office. This is because the members of the National Assembly are empowered to change the government by passing a vote of no confidence in the President and, or the Cabinet if it feels that the executive is not governing satisfactorily. If the National Assembly, by a vote supported by a majority of its members, passes a motion of no confidence in the Cabinet excluding the President, the President must

³⁶ Article 62 of the Constitution of the Republic of Zambia

³⁷ Articles 37, 53, 54, 55, 56, 95 of the Constitution of the Republic of Zambia

reconstitute the Cabinet and if it is a vote of no confidence in the President, the President and the other members of the Cabinet and any Deputy Ministers must resign.³⁸

Thabo Mbeki, South Africa's former President was forced to resign from the presidency after losing a power struggle with his rival and current President Jacob Zuma in the African National Congress Party (ANC). He resigned following the ruling ANC's request that that he do so due to his alleged abuse of power in trying to quash his rival by interfering in Jacob Zuma's legal prosecution for corruption. Although it was not the National Assembly that passed a vote of no confidence, his party members, some of whom are members of the National Assembly reflected in their voting that he had lost their support and was therefore not fit to be President. The result was that Kgalema Motlante had to finish off the remaining seven months of his second term.

Zambia was in the process of adopting a new Constitution, which Draft Constitution was not enacted having failed to master the majority of support in Parliament by 15th April, 2011. It would have explicitly empowered the National Assembly to scrutinise and oversee actions of the executive, approve an increase or decrease in the number of ministers and deputy ministers, approve the establishment or dissolution of government ministries as provided under the Constitution, approve international treaties and agreements before they are ratified or acceded to, approve the emoluments of the President as well as other officers specified under the Constitution and approve or ratify states of public emergency or threatened states of emergency as well the measures to be undertaken during these periods.³⁹ The result therefore would have been that only genuine states of emergency would be declared and the President would not be able to do as he wishes as the approval of Parliament would be required.

The authority of the legislature to carry out all these functions ordinarily puts it in a position where it is able to ensure that the executive does not abuse its authority or act to the detriment of the Zambian citizens. Furthermore, the ability of the National Assembly to scrutinise acts of the executive puts it in a position where it ensures that the government of the day effectively carries out its mandate and that it does so in accordance with the law.

Parliament basically has the power to ensure that in carrying out their functions, the other branches act within the scope of their authority and do not violate the law. This extends to the power of Parliament to pass laws with retrospective effect which in essence makes earlier

³⁸ Sections 89, 102 of the Constitution of the Republic of South Africa

³⁹ Article 142 of the Draft Constitution of the Republic of Zambia

judicial decisions irrelevant and unenforceable. In doing so, Parliament is able to cure anomalies in the event of the judiciary having made a decision based on political opinion or interference by the executive as opposed to a decision being based on merit. It is therefore possible for Parliament to pass retrospective legislation overturning a judicial decision as was the case in *Burmah Oil Co. Ltd v Lord Advocate*⁴⁰ when Parliament simply by-passed a court decision by enacting new legislation. This case concerned the destruction of oil fields in Burma by British forces during the Second World War. The sabotage was committed in order to prevent the plantations from falling into the hands of the advancing Japanese army. The House of Lords held, by majority, that although the damage was lawful, it was the equivalent of requisitioning the property. Any act of requisition was done for the good of the public, at the expense of the individual proprietor, and for that reason, the proprietor should be compensated from public funds. The result of the case was that Burmah Oil Company was entitled to receive compensation for their destroyed plantations. In the end however, this result was frustrated by the passing of an Act of Parliament with retrospective effect, the War Damage Act 1965, which exempts the Crown from liability in respect of destruction of property caused by acts lawfully done by the Crown during, or in contemplation of the outbreak of law in which it is engaged.

In addition, it was held in *Ujagar Prints v Union of India*⁴¹ that a competent legislature can always validate a law which has been declared invalid by the courts provided the infirmities and vitiating factors noticed in the declaratory judgement are removed or cured. Such a validating law can also be made retrospective. If, in the light of such validating and curative exercise made by the legislature, granting legislative competence, the earlier judgements becomes irrelevant and unenforceable, that cannot be called an impermissible legislative overruling of the judicial decision. All that the legislature does is to usher in a valid law with retrospective effect in the light of which the earlier judgement becomes irrelevant.

The problem with the legislature exercising such powers in Zambia is that the competence of the legislature is compromised by the fact that ministers are appointed from Members of Parliament and the executive therefore has a lot of influence in the enactment of legislation. The executive may take advantage of this power and ensure that whenever they are not happy with a judicial decision against which they cannot appeal and secure a victory, legislation is

⁴⁰ [1965] AC 75

⁴¹ (1989) 179 ITR 317

passed so that the decision of the court is overturned hence becoming irrelevant and unenforceable. Although this is meant to be a check on the judiciary, it would in effect serve to advance the interests of the executive to a great extent in a one party dominant state like Zambia.

Clearly, the ability of the legislature to effectively check the executive is somewhat compromised by the fact that the Constitution provides that ministers shall be appointed from amongst members of the National Assembly.⁴² The effect of this is that members of the legislature are part of the executive and as such are given prestigious positions with privileges such as access to cars and international travel among other things that they want to continue enjoying. As a result, in carrying out its functions, if the majority of members are from the ruling party as is often the case, decisions will not be based on merit but on the desire of the ministers to maintain their positions and the privileges that come with them. Democracy entails that the people choose their leaders and so the majority of Members of Parliament being from the ruling party is really a decision of the people. However, the caliber of most these Members of Parliament who are only interested in furthering their interests and not effectively carrying out their functions is what compromises the competence of Parliament.

The power of the President to appoint ministers from the National Assembly enables him to lure even members of the opposition parties to the ruling party as he can appoint them as ministers if he wishes. As a result, debates are sometimes based on opportunism. This means that the members will debate in a way that will please the executive in order to create opportunities for appointment as ministers. This creates a lot of division in the opposition and consequently undermines the role of the opposition in ensuring that the government rules in accordance with the rule of law and implements the wishes of the electorate.

Cabinet positions function as a reward for uncritical loyalty to the President as not being in good terms with the President means removal from office as a Minister. A clear illustration is the removal of Mike Mulongoti, Minister of Works and Supply who is said to have an independent mind and is hence difficult to control which shows that only people who do not express their views but only agree with the President in order to please him can secure their ministerial positions.⁴³ As a result, more often than not, appointments are not meritorious but are based on how loyal people are to the President and hence mediocre men are left to run the

⁴² Article 46 (2) of the Constitution Of The Republic Of Zambia

⁴³ The Post Newspaper, 19th February 2011

country. What we then see is the failure of these people to properly advise the President for fear of losing their jobs.

The Draft Constitution, if adopted would not have done anything to change the position of the appointment of ministers from Parliament in order to ensure a credible, independent and competent Parliament. It would have only affirmed the current position which compromises its independence. It provides that the President shall appoint not more than twenty-one persons as ministers, or such number of ministers as the National Assembly may approve, from amongst members of the National Assembly.⁴⁴ This was clearly in conflict with the proposed Article 147 (1) of the Mung'omba Draft Constitution which provides that the President appoint as ministers, persons who are qualified to be elected as members of the National Assembly but are not members of the Assembly.⁴⁵

The National Constitutional Conference resolved to adopt Article 147 (1) with amendments which became Article 130 (1) of the Draft Constitution. There were a number of reasons given for this decision. It was stated that the environment in Zambia was not yet conducive for ministers to be appointed from outside the National Assembly. Ministers who were also Members of Parliament were best suited for the job because they were accountable to the people who elected them as ministers appointed from outside Parliament would owe allegiance to the appointing authority and not the electorate. It was further stated that ministers who were members of the ruling party would promote national unity in Parliament due to collective responsibility which would not be the case where ministers were appointed from outside Parliament, and if the President was allowed to appoint ministers who were not elected by the people, he or she would be tempted to practise nepotism and regionalism.

Members of the National Constitutional Conference in favour of the appointment of ministers from Parliament further stated that the system had been working well for the country and if there were weaknesses, the best approach would be to correct those weaknesses and not change the system as there was nothing wrong with it. The current system was best suited to achieve professionalism as the President would nominate professionals to Parliament and then appoint them as ministers.⁴⁶

⁴⁴ Article 130 (1)

⁴⁵ The Draft Constitution proposed by the Wila Mung'omba Constitution Review Commission

⁴⁶ Initial Report of the National Constitutional Conference, June 2010. Page 458

However, the National Constitutional Conference was blind to the fact that the weaknesses of this system which undermine the independence of Parliament are actually rooted in the appointment of ministers from Parliament and hence correcting these weaknesses without changing the system is almost impossible. The appointment of ministers from within Parliament has already weakened the National Assembly as it is and hence the system is not working as well as is claimed. The trend is that Members of Parliament who hold ministerial positions simply endorse decisions which have already been agreed upon in Cabinet in line with the principle of collective responsibility. In addition, due to Zambia being a one party dominant state, Members of Parliament from the ruling party find it easy to form a quorum in the National Assembly and are therefore able to pass laws without the support of Members of Parliament from the opposition political parties. This clearly defeats the principles of separation of powers and compromises the ability of the legislature to effectively check the executive. Furthermore, appointment of ministers from Parliament does not eliminate the potential problem of nepotism and regionalism as it can easily be exercised even with the current system.

Maintaining the position of appointing ministers from amongst Members of Parliament has for a long time denied Zambia the opportunity to achieve a Parliament that is effective in carrying out its legislative function as well as checking the executive and judiciary because the executive is still able to ensure that the outcome of any debate and legislation passed is to its advantage. Mediocre men are still left to run the country as the President is able to appoint ministers who he can control to further his interests in Parliament without taking into account the professional capacity of these people. These Members of Parliament do not even implement the will of the electorate as they are only focused on pleasing the President in order to keep the benefits that accompany their ministerial jobs. The result is that Zambia is hindered from developing which leaves a lot of people in poverty, a situation which urgently needs to be rectified.

Another factor that compromises the ability of the legislature to effectively check the executive is that voting is sometimes based on party lines and not individual opinion. During the debates of the Public Order Act and the Broadcasting Act, the Secretary General of the opposition United Party for National Development (UPND) warned that any UPND Member of Parliament who supported a Bill that the opposition had decided to reject would be

disciplined.⁴⁷ Similarly, threats of losing gratuity by the late President Mwanawasa to Movement for Multi-Party Democracy (MMD) Members of Parliament over their reluctance to support the Local Government Bill which sought to extend the term of councillors to five years shows that the principle of separation of powers is not effectively upheld as there is manipulation or interference in the functions of the legislature by the executive. The threatened MMD members of Parliament all voted in favour of the Bill hence not exercising their conscience in doing so but only making a decision that was imposed on them.⁴⁸ This clearly shows that the President has so much power that he uses to intimidate and manipulate the people's representatives.

In exercising its powers, the legislature has at times violated the Constitution. It has however been checked in order to keep it within the confines of its authority and balance the powers of the three organs of government. In the case of *Mmembe and Others v The National Assembly*⁴⁹ Parliament decided to exercise judicial power in adjudicating and imposing an infinite prison sentence on journalists that were perceived to have violated its privileges. The journalists wrote a contemptuous article about the conduct of the members of the National Assembly. The National Assembly then decided to impose an indefinite prison sentence on them and the High Court held that the National Assembly had no powers of adjudication under the Constitution as such powers are constitutionally lodged in the judiciary.

2.1 CONCLUSION

The legislature is clearly intended to carry out its functions in a way that ensures that the executive carries out its functions correctly. It also participates in ensuring the independence of the judiciary through the ratification of judicial appointments. However, the legislature's check on the executive is not as effective as it should be because ministers who are part of the executive are selected from the National Assembly. As a result, these people exercise some form of restraint in checking that the executive has acted within the scope of its authority in order to safeguard their positions and the privileges that come with them.

⁴⁷The Monitor, 8-11 February 2002

⁴⁸Times of Zambia, 6 August 2004

⁴⁹93/HP/147

CHAPTER THREE

THE JUDICIAL ARM OF GOVERNMENT

3.0 JUDICIAL INDEPENDENCE

In the modern constitutional state, the principle of an independent judiciary has its origins in the theory of separation of powers whereby the executive, legislature and judiciary form three separate branches of government which in particular constitute a system of mutual checks and balances aimed at preventing the abuse of power. Judicial independence entails that there is no interference with the work of the judiciary. It essentially means two things. Firstly, there should be no interference with the work of the judiciary by the other organs and secondly, judges should have a secure tenure of office and not be dismissed easily.

The independence of the judiciary entails independence of the individual Judges and the institution as a whole. Despite the need for the judiciary to exercise its responsibility without being influenced by the executive, legislature or other institutions, it is subjected to various pressures that may compromise its ability to do so. There are therefore a number of factors that determine the independence of the judiciary in every country. The mode of appointment of the Judges, tenure of the judicial office, remuneration and the manner in which the Judges may be disciplined or removed play an important role in ascertaining how independent the judiciary is.

It is only an independent judiciary that is able to dispense justice impartially, basing its decisions on the law even when it takes into account the need to balance the expectations of society and the law as it is. An independent judiciary plays an important role in ensuring that the rights and freedoms of individuals are protected. For the judiciary to efficiently fulfill its role in society, the general public must have full confidence in its ability to carry out its functions in an independent and impartial manner. When the public loses its confidence in the judiciary, it will not be able to fully perform its role or will not be seen to do so by the people. An independent and impartial judiciary upholds the entire structure of a free and democratic constitutional order. Therefore, unless Judges and prosecutors and lawyers inclusive, are able to exercise their professional duties freely, independently and impartially, and unless the executive and legislature are likewise always prepared to ensure their

independence, the rule of law will certainly be eroded and with it, effective protection of the rights of the individual.⁵⁰

In the Canadian case of *Valiente v The Queen*,⁵¹ the Supreme Court discussed the notion of judicial independence and impartiality. It was stated that judicial independence connotes not only a state of mind but also a status or relationship to others, particularly to the executive branch of government that rests on objective conditions or guarantees. By contrast, it described the concept of judicial impartiality as referring to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. Impartiality implies that Judges must not harbour perceptions about the matter put before them and they must not act in ways that promote the interests of one of the parties while putting the other at a serious disadvantage.

Every country takes into account certain considerations in selecting a person for appointment to judicial office. Although this may differ from country to country, Principle 10 Of the Basic Principles of judicial independence which are neutral with regard to the appointment of Judges and hence ensure no bias⁵² provides a standard that may serve as a reference point. It states as follows:

Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of Judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory.⁵³

This principle essentially means that irrespective of the method of selection of Judges that a country adopts, candidates' professional qualifications and their personal integrity must constitute the sole criteria for selection. Consequently, Judges cannot lawfully be appointed based on their political views as opposed to them being appointed on merit. This is because such would undermine the independence of the judiciary and public confidence in the administration of justice.

⁵⁰ Human Rights in the Administration of Justice: A Manual on Human rights for Judges, Prosecutors and Lawyers. Chapter 4: Independence and Impartiality of Judges, Prosecutors and Lawyers. Page 117

⁵¹ (1985) 2 S.C.R 673

⁵² Basic principles on the independence of the judiciary adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by the General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

⁵³ Human Rights in the Administration of Justice: A Manual on Human rights for Judges, Prosecutors and Lawyers. Chapter 4: Independence and Impartiality of Judges, Prosecutors and Lawyers. 123

Appointment of Judges by the executive or legislature exclusively may pose a threat to the independence of the judiciary in addition to lack of security of tenure especially in situations where Judges are employed on temporary contracts or where they are easily dismissed. Inadequate remuneration is also likely to compromise the independence of the judiciary as it may entice Judges to engage in corruption and decide their cases based on how they are benefitting from the parties. According to Principle 7, the judiciary must be provided with adequate resources to enable it perform its functions properly. In addition, Principle 7⁵⁴ provides that the term of office of Judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law. Failure to ensure this will not only render the judiciary unable to perform but may also render it amenable to undue pressure and corruption.

Furthermore, prevailing circumstances in a particular situation may also determine the independence of the judiciary. For instance, a Judge may be influenced by the sentiments of the general public when deciding a case that involves rape. However, the judiciary has both the right and duty to ensure fair court proceedings and issue reasoned decisions. Public criticism of the judiciary by either the executive or legislature that is aimed at intimidating judicial officers or arbitrary detentions and direct threats to their lives, including killings and detentions by either the state or the individuals involved may also undermine the judiciary's independence.⁵⁵ In ensuring judicial independence, Principle 1 requires all institutions to abide by the judgements rendered by the courts even when they do not agree with them.⁵⁶ This is because such respect for judicial authority is essential for the maintenance of the rule of law and constitutionalism as well as respect for human rights.

In further ensuring its independence, the judiciary must be able to handle its own administration and matters that concern its operation in general. This includes the assignment of cases to judges within the court to which they belong as this, according to principle 14 of the Basic Principles of Judicial Independence, is an internal matter of judicial administration.⁵⁷ This ensures that there is no inappropriate or unwarranted interference with the judiciary.

⁵⁴ Basic principles on the Independence of the Judiciary

⁵⁵ Human Rights in the Administration of Justice: A Manual on Human rights for Judges, Prosecutors and Lawyers. Chapter 4: Independence and Impartiality of Judges, Prosecutors and Lawyers. 116

⁵⁶ Basic principles on the Independence of the Judiciary

⁵⁷ Human Rights in the Administration of Justice: A Manual on Human rights for Judges, Prosecutors and Lawyers. Chapter 4: Independence and Impartiality of Judges, Prosecutors and Lawyers. 120

3.1 THE ZAMBIAN JUDICIARY

The Constitution of Zambia provides for an independent and impartial judiciary that is subject only to the Constitution and the law and which is required to conduct itself in accordance with the code of conduct promulgated by Parliament. The judiciary consists of the Supreme Court of Zambia, the High Court for Zambia, the Industrial Relations Court, the Subordinate Courts, the Local Courts and such lower courts as may be prescribed by an Act of Parliament.⁵⁸ The judiciary is an autonomous institution and hence it is not subject to any direction from any other institution or individual. The other organs should therefore ensure that they do not interfere with the functions of the judiciary in carrying out their functions.

The Supreme Court is the final court of appeal which only acts as the court of first instance in the case of a Presidential election petition. The High Court on the other hand has, except in matters in which the Industrial Relations Court has exclusive jurisdiction under the Industrial and Labour Relations Act, unlimited and original jurisdiction to hear and determine any civil and criminal proceedings under any law.⁵⁹ In the case of *Zambia National Holdings and United National Independence Party v The Attorney General*,⁶⁰ the jurisdiction of the High Court was affirmed. It was held that no cause is beyond the competence and authority of the High Court; no restriction applies as to type of cause and other matters as would apply to lesser courts. However, the High Court is not exempt from adjudicating in accordance with the law including complying with procedural requirements as well as substantive limitations such as those one finds in mandatory sentences or other specification of available penalties or, in civil matters, the types of choice of relief or remedy available to litigants under the various laws or causes of action.

As Zambia was undergoing a process of adopting a new Constitution which was not fruitful, the Draft Constitution also had provisions on the three organs of State. With regard to the Judiciary, it established as superior courts, the Supreme and Constitutional Court, the Court of Appeal, the High Court and the Industrial Relations Court. The only significant developments that would have been made had the Constitution been enacted are the establishment of the Constitutional Court and Court of Appeal. The Supreme Court as is the current position was to be the final court of appeal except in constitutional matters and in addition to jurisdiction conferred on it by the Constitution or any other law, it would have had

⁵⁸ Article 91 of the Constitution of the Republic of Zambia

⁵⁹ Articles 93 (1), 94 (1) of the Constitution of the Republic of Zambia

⁶⁰ (1994) S.J. 22 (S.C.)

appellate jurisdiction to hear and determine appeals from the Court of Appeal. The Constitutional Court was to have original and final jurisdiction in matters of Presidential election petitions, disputes between the organs of state or state institutions, determination of jurisdiction of the court in matters and any constitutional matters that would have been provided for by the Constitution or an Act of Parliament. It would also have had appellate jurisdiction in all matters of interpretation of the Constitution, determination of whether an Act of Parliament or Statutory Instrument contravened the Constitution and the determination of questions of violation of the Bill of Rights.⁶¹

The Court of Appeal would have had jurisdiction to determine appeals from the High Court, Industrial Relations Court and tribunals. With regard to appealing to the Supreme Court, if the Court of Appeal refused to grant leave to appeal on any matter, that decision was to be final and binding. In relation to the High Court, it would not have had unlimited and original jurisdiction in matters in which the Constitutional Court would have had original and final jurisdiction in addition to proceedings in which the Industrial Relations Court has exclusive jurisdiction.⁶²

The Chief Justice, Deputy Chief Justice and Judges of the Supreme Court are appointed by the President subject to ratification by the National Assembly. For the High Court Judges, they are, subject to ratification by the National Assembly appointed by the President on the advice of the Judicial Service Commission.⁶³ In the Draft Constitution, the Judges of all the superior courts, including the Chief Justice and Deputy Chief Justice were to be appointed by the President on the advice of the Judicial Service Commission, subject to ratification by the National Assembly. This means that until people see the need to change the position, the President himself selects the Judges of the Supreme Court as the advice of the Judicial Service Commission is not required. What this means is that in this one party dominant state where a party controls the National Assembly, it will endorse the will of the President in carrying out its function of ratification as the majority of members are from the ruling party. What this results in is the appointment of Judges who may easily be manipulated by the President hence compromising the independence of the judiciary.

The system in South Africa is more likely to ensure that Judges are appointed meritoriously unlike the current Zambian system with regard to the appointment of Supreme Court Judges.

⁶¹ Articles 178, 185, 187 of the Draft Constitution of the Republic of Zambia

⁶² Articles 191, 194 of the Draft Constitution of the Republic of Zambia

⁶³ Articles 93, 94 of the Constitution of the Republic of Zambia

In South Africa, the appointment of Judges of any of the courts is not the sole responsibility of the President. He is required to consult certain authorised institutions. Therefore, the President, after consulting the Judicial Service Commission and the leaders of parties represented in the National Assembly, appoints the President and Deputy President of the Constitutional Court and, after consulting the Judicial Service Commission, appoints the Chief Justice and Deputy Chief Justice. The Judges in the various courts are appointed by the President on the advice of the Judicial Service Commission. As for the Judges of the Constitutional Court, the President of the Court and the leaders of the parties present in the National Assembly must also be consulted.⁶⁴

Judges of the Supreme Court and High Court are entitled to hold office until they attain the age of sixty-five. However, the President on the advice of the Judicial Service Commission may permit a Judge who has attained such age to continue in office for a period necessary to enable him deliver judgement or to do anything in relation to proceedings that were commenced before him before he attained that age. This clearly ensures that justice is dispensed as the people that were dealing with particular cases are left to deliver their judgements. The President may also, in accordance with the advice of the Judicial Service Commission appoint a judge who has attained such age for a further period not exceeding seven years as the President may determine.⁶⁵ This enables people of integrity to continue being part of the system and contribute to the development of the law. However, such continuance in office of Judges would be much more transparent if left to be determined by the judiciary itself based on merit and not the President. The involvement of the President is clearly an interference in the judicial system especially that there is a possibility of the President appointing people that he feels will adjudicate in favour of the executive hence compromising the independence and integrity of the judiciary.

The Draft Constitution provided for Judges of superior courts to hold office until they attained the age of seventy. In the event that proceedings that were commenced before the attainment of such age were concluded, the Judge concerned may have continued in office for a period not exceeding six months in order to conclude such proceedings.⁶⁶ This would have been a positive development as judges would only continue in office for a defined reasonable period for purposes of concluding proceedings that were commenced before them and not

⁶⁴ Sections 173, 174 of the Constitution of the Republic of South Africa

⁶⁵ Article 98 (1) (a), (b) of the Constitution of the Republic of Zambia

⁶⁶ Article 201

because the President felt that they should continue. Such a provision would have ensured the limitation of the possible influence of the executive on the judiciary as well as the attainment of personal independence of the judges and the judiciary as a whole.

According to the Constitution, a Judge may only be removed from office for inability to perform their functions due to infirmity of body or mind, incompetence or misconduct. If the President considers the question of removal of a Judge, he is required to appoint a tribunal of current or former judicial officers to investigate the matter. Where the tribunal advises the President that the Judge ought to be removed from office, the President shall remove such Judge.⁶⁷ The Draft Constitution also had a provision empowering a person with a complaint against the inability of a judge of superior court to perform his functions due to infirmity of body or mind or a breach of the code of conduct by such Judge to submit a petition to the Judicial Complaints Authority which petition, after determination of its merit would be subjected to the same procedure as the current one.⁶⁸ This would have been a very good development because individual citizens would have been able to participate in ensuring that only credible persons of integrity who respect the ethics of the profession are left to hold judicial office.

With regard to remuneration, the Draft Constitution would have required Parliament to enact legislation to provide for the emoluments and other terms and conditions of service of judges. It also stated that the emoluments of the Judges would not be reduced to their disadvantage during their tenure of office.⁶⁹ This would have clearly provided some financial security for the judicial officers who at the moment may be amenable to engaging in corrupt practices. This leaves room for a lot of alterations in relation to their finances which may even be to their detriment. The end result of this is a non-independent judiciary which lacks the confidence of the people.

The current position of Zambia with regard to tenure of office and remuneration can be contrasted with that of South Africa. The South African Constitution undoubtedly provides for a situation that will certainly encourage the independence of the judiciary. According to section 176, a Constitutional Court judge is appointed for a non-renewable term of 12 years, but must retire at the age of 70. Other judges will hold office until they are discharged from active service in terms of an Act of Parliament. In addition to this, the salaries, allowances

⁶⁷ Article 98 (2), (3) of the Constitution of the Republic of Zambia

⁶⁸ Article 203

⁶⁹ Article 204

and benefits of judges may not be reduced. Section 177 clearly provides for the instances for which a judge may be removed from office. One may only be removed if the Judicial Service Commission finds that the judge suffers from incapacity, is grossly incompetent or is guilty of gross misconduct and the National Assembly calls for that Judge to be removed, by a resolution adopted with a supporting vote of at least two thirds of its members.⁷⁰ Ensuring a secure tenure of office and the non reduction of the salaries of these judicial officers makes them less amenable to the temptations of engaging in corrupt practices.

The power vested in the Zambian President to appoint a tribunal to determine the question of removal of a Judge may compromise the independence of the judiciary. He may appoint serving or former judicial officers who he may be able to easily manipulate so that a Judge who he dislikes is removed even if it is not really necessary to do so. With regard to remuneration however, Judges have some form of security as the alteration of their salaries to their disadvantage after they have been appointed is prohibited by Article 119 (3) of the Constitution.

The Constitution creates an independent judiciary and the oath of office taken by Judges and Magistrates obligates them to follow the Constitution and administer the law without fear or favour. However, there is usually the question of whether the courts have carried out their functions in a manner consistent with judicial independence given that they have enormous powers that they can use to undermine policy objectives and enable those in government to act contrary to the rule of law and constitutionalism.

In order to ensure independence, the judiciary should be left to determine its own budget. The Draft Constitution had a provision to the effect that the judiciary shall annually prepare and submit its budget estimates to the Minister of Finance who shall determine the budget of the judiciary.⁷¹ Although it is important that the Minister takes into consideration the equitable sharing of natural resources, budget determination of the judiciary should be left to the judiciary as it knows best the resources required for its functioning and a restricted court budget may undermine the efficiency of the judiciary as well as its independence. Insufficient funds allocated to the judiciary may make judicial officers amenable to corruption especially by the executive branch which is likely to take advantage of the situation and ensure that it has judges under its control.

⁷⁰ Constitution of the Republic of South Africa

⁷¹ Article 182 (1)

The independence of the Zambian judiciary is in a way compromised which has created among the people reluctance to take political disputes to courts. This is clearly shown by the unwillingness of the opposition political parties to file a presidential election petition after the 2006 elections due to the lack of confidence in the judiciary which in some cases is more inclined to deliver judgement in favour of the executive.

A clear illustration is the case of *The Attorney General, The Movement for Multi-Party Democracy v Lewanika and Four Others*⁷² the Supreme Court gave itself power to legislate not conferred on it by the Constitution which was evidently meant to accommodate the position of the executive to have the members of the National Assembly who had resigned lose their seats. Article 71 (2) (c) provided that 'a member of the National Assembly shall vacate his seat in the Assembly; in the case of an elected member who becomes a member of a political party other than the party of which he was an authorised candidate; if he is an independent, joins a political party.' It had no provision for a member who resigned from a political party and became an independent Member of Parliament. The Supreme Court added the words vice versa to the provision so that it should read; a member of the National Assembly shall vacate his seat in the Assembly, in the case of an elected member, if he becomes a member of a political party 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 vice versa.

In checking the executive however, the judiciary has subjected a number of executive actions to judicial review hence proving that no administrative action or inaction is beyond review. The case of *Roy Clarke v The Attorney General*⁷³ was an application for leave for judicial review against the decision by the Minister of Home Affairs to deport the applicant pursuant to section 26 (2) of the Immigration and Deportation Act. The decision to deport the applicant was as a result of an article in the Post newspaper of 1st January 2004 which satirised the Permanent Secretary and Minister of Home Affairs and which they alleged was inimical to national security. It was held that the decision to deport the applicant violated the Constitution and was hence quashed. An appeal to this judgement was dismissed.

⁷² (1994) S.J. 2 (S.C.)

⁷³ 2004/HP/003

The case of *Mwamba and Mbuzi v The Attorney General*⁷⁴ also illustrates that executive actions are subject to review by the courts. The appellants challenged the constitutionality of the President's action in appointing self implicated mandrax dealers as Minister and Deputy Minister. Although the appeal was dismissed, it shows that the judiciary does perform its role in ensuring that the executive acts within the scope of its authority.

Similarly, legislation is reviewable as was the case in *Christine Mulundika and 7 Others v The Attorney General*⁷⁵ in which the appellants were arrested because they violated section 5(4) of the Public Order Act which required any person holding a public meeting to obtain a permit. It was held that this provision contravened Articles 20 and 21 of the Constitution which provide for the protection of freedom of expression and freedom of assembly and association respectively, and was therefore null and void. This clearly shows that the courts play a very important role in ensuring that the legislature adheres to the rule of law and constitutionalism. Furthermore, the executive is checked in ensuring that it does not take advantage of legislation that is inconsistent with the Constitution to further their own interests as the Constitution which is the supreme law of the land binds every individual and institution.

Similarly, the Supreme Court in the United States of America in the case of *Marbury v Madison*⁷⁶ declared an Act passed by Congress as unconstitutional and therefore void. William Marbury had been commissioned Justice of the Peace in the District of Columbia by President John Adams in the 'midnight appointments' at the very end of his administration. When the new administration did not deliver the commission, Marbury sued James Madison, Jefferson's Secretary of State. Chief Justice John Marshall held that, although Marbury was entitled to the commission, the statute that was the basis of the particular remedy sought was unconstitutional because it gave the Supreme Court authority that was implicitly denied it by Article III of the U.S. Constitution. It was held that section 13 of the Judiciary Act of 1789 was unconstitutional to the extent that it purported to enlarge the original jurisdiction of the Supreme Court beyond that permitted by the Constitution. This therefore shows that the judiciary will check the legislature and ensure that it does not enact laws that are contrary to the Constitution.

⁷⁴ 1993/SCZ/10

⁷⁵ SCZ J. 25 of 1995

⁷⁶ 5 U.S (1 Cranch) 137 (1803)

3.2 CONCLUSION

Judicial independence is clearly an aspect that Zambia aims for and has attained to a certain extent. The Draft Constitution with regard to the judiciary was aimed at ensuring that the judiciary in carrying out its functions is not easily influenced by the executive or tempted to engage in corrupt practices. The provision establishing a Constitutional Court as is the case in South Africa would have certainly led to the effective functioning of the judiciary as cases involving the rights of the people and the functioning of the organs of State would have been dealt with expediently due to the Courts specialisation in Constitutional matters only.

CHAPTER FOUR

THE EXECUTIVE ARM OF GOVERNMENT

4.0 POWER THEORIES

The powers vested in the three organs of government should not be excessive but should be effectively checked and exercised within the confines of the law. Therefore, there are power theories that define the extent to which executive power is to be exercised.

Residual power is the power that is retained by a government authority after certain powers have been delegated to other authorities and may not be specifically assigned. It therefore refers to the functions of government that remain after legislative and judicial functions have been taken away.⁷⁷ It is by nature quite difficult to control because executive power need not always be expressly provided by legislation.

For instance, Article 44 (1) of the *Zambian Constitution*⁷⁸ simply states that the President shall perform with dignity and leadership all acts necessary for the discharge of executive functions of the government subject to the overriding terms of the Constitution and the laws of Zambia. Therefore, as long as it is rightfully exercised, it is not illegal even if it is not expressly provided for by law. The residual power theory clearly shows that the President has authority independent of an enabling law to execute any action necessary for the government of the nation provided it is not positively prohibited by law.⁷⁹

The theory of inherent powers, which is similar to the residual power theory depends on a distinction between powers that are explicitly spelled out in the Constitution or in Statutes, and those that a government, or an individual officer of government, possesses implicitly, whether owing to the nature of sovereignty or to a permissive interpretation of the language of the Constitution.⁸⁰ Inherent powers are therefore those that the Constitution has not expressly given but which necessarily derive from an office or position of the national government. The executive has authority to carry out any function that is inherently executive in nature, hence able to act without prior authority conferred in every case by specific legislation. Therefore, executive powers must be construed expansively but confined to acts that are inherently executive in nature.

⁷⁷ B. O. Nwabueze, *Presidentialism in Commonwealth Africa*. Page 1

⁷⁸ *The Constitution of the Republic of Zambia*

⁷⁹ B. O. Nwabueze, *Presidentialism in Commonwealth Africa*. Page 4

⁸⁰ B. O. Nwabueze, *Presidentialism in Commonwealth Africa*. Page 4

The exercise of inherent powers can be clearly seen in America. The inherent power of the President derives either from the language of the vesting clauses of Articles I and II of the Constitution, or from the role of the chief executive as commander of the armed forces and as the official primarily responsible for the maintenance of law and order, or from the status of the President as head of a sovereign nation.

The 'war on terror' has given rise to new claims that the president has inherent power and responsibility to protect national security. After the attacks of 11 September 2001, an American citizen, Yasser Esam Hamdi, was captured on a battlefield in Afghanistan. In July 2003 a Federal Court of Appeals in Richmond, Virginia, ruled that President Bush could deny him access to a lawyer and detain him indefinitely as an enemy combatant. The vesting clause of Article I places in Congress "all legislative power herein granted," whereas the corresponding clause in Article II states that "the executive power" is vested in the president. It is argued that subsequent language in Article II specifies certain presidential responsibilities but it was not meant to be exhaustive.⁸¹

The specific grant theory states what executive power is and how it can be exercised and controlled. "The President can exercise no power which cannot fairly and reasonably be traced to some specific grant of power or justly implied and included within such express grant as proper and necessary to its exercise."⁸² Therefore, the powers are specifically enumerated in legislation and the executive cannot do anything that is not expressly provided for by law. This theory therefore provides sufficient control measures for the exercise of executive power unlike the inherent and residual power theories which vest so much power in the executive. With so much power evidently vested in the executive, there is clearly need for effective checks and balances.

In the case of *Cunningham v Neagle*,⁸³ it was admitted by the United States Supreme Court that the laws the President is to see executed are those manifestly contained in the Constitution and those enacted by Congress. This means that every action that the executive takes should be backed by the law.

⁸¹ www.historycommons.org/entity.jsp?entity=yaser_esam_hamdi. Accessed 20th February, 2011.

⁸² B. O. Nwabueze, *Presidentialism in Commonwealth Africa*. Page 13

⁸³ 133 U.S. 1 (1890) 83

4.1 THE ZAMBIAN EXECUTIVE

The executive power is vested in the President who exercises it either directly or through officers subordinate to him. He is elected to office by the people of Zambia for a five year term and is eligible for re-election for another term only. Therefore, a person that has been elected twice cannot be re-elected. As the Head of State, he is required to perform with dignity and leadership all acts that are necessary for the discharge of executive functions subject to the Constitution and other laws which he is constitutionally obliged to protect.⁸⁴ The system of electing a President in South Africa is different from that of Zambia as it is not necessarily the people of South Africa that elect the President but the National Assembly hence the Zambian system being more representative of the people. The system is such that the leader of the political party or coalition of parties that wins a majority of the seats in the National Assembly is named President. Once the President is elected from the National Assembly, he ceases to be a member of parliament. The President and his ministers are individually and collectively responsible to Parliament, of which they must be elected members.⁸⁵

As the executive has a lot of influence over the Constitution making process, the trend has been that it ensures that provisions that will safeguard its interests are included in the Constitution. A clear example is the provision in Article 34 (3) (b)⁸⁶ which requires one's parents to be Zambian citizens by birth or descent in order to qualify as a candidate for election as President. The inclusion of this provision was clearly targeted at preventing the first President, Kenneth Kaunda from contesting the 1996 Presidential elections by then President, Fredrick Chiluba and his government.

With regard to the Draft Constitution, the government advocated for a provision requiring one to have as a minimum academic qualification, a first degree or its equivalent from a recognised University or its equivalent.⁸⁷ This was clearly aimed at preventing Patriotic Front President Michael Sata from contesting the 2011 Presidential elections by President Rupiah Banda and his cabinet as he is perceived not to have any degree. What the ruling Movement for Multi-Party Democracy (MMD) was trying to do in essence is eliminate its biggest rival so that it has an unfair advantage during elections. However, this provision would have been

⁸⁴ Article 33 (2), 35, 44 (1) of the Constitution of the Republic of Zambia

⁸⁵ Section 86, 93 of the Constitution of the Republic of South Africa

⁸⁶ The Constitution of the Republic of Zambia

⁸⁷ Article 108 (1) (e)

to the detriment of many other Zambians who would wish to contest the Presidential elections but hold no degrees for them to be able to qualify. It was indeed a potentially unfair provision as academic accomplishments do not always entail good leadership skills. The Draft Constitution provision sought to deny people who may be able to discharge executive functions with dignity and leadership such an opportunity due to the selfish ambitions of the people in government.

Due to the enormous powers that the executive has, it is at times able to violate principles that constitute the framework of the Constitution with no penalty whatsoever. A classical example of disregard for the doctrine of separation of powers and the rule of law is when a former Defence Minister Michael Mabenga, whose election to the National Assembly was nullified on the ground of corruption and theft which the Supreme Court held had been proven beyond the balance of probability in the case of *Michael Mabenga v Sikota Wina and Others*,⁸⁸ was given a post that only people of integrity who have the confidence of the people should hold. Upon being removed as Defence Minister, he was appointed Vice Chairman of the ruling MMD party and subsequently chairman. This was clearly an act of disobeying a court order by a President who is constitutionally ordained to enforce the law. The nullification by the Supreme Court of his position was a clear indication that he was not fit to hold a leadership position as he had failed to carry out his duties with integrity.

In addition to portraying a total lack of respect for the judiciary, such an action also sends a message to the judiciary which is sometimes influenced by the executive, that if further allegations of corruption are raised; such a person should not be convicted as he has the favour of the President.

The dominance of the executive over the other organs of government is rooted in an unfair allocation and distribution of functions in the Constitution. The executive headed by the head of state and government has enormous powers which every Constitution that Zambia has had has upheld. This is because the President has always dominated the Constitution making process and approves the process and content by appointing the Constitutional Commission and by him and his cabinet rejecting the people's views which they do not like as the President is not bound by the Commission's recommendations.

⁸⁸ SCZ J. 15 of 2003

The case of *Derrick Chitala v Attorney General*⁸⁹ is a clear illustration of this position. The appellants were contesting among other things, the enactment of the Constitution by the National Assembly. They perceived this to have been made in bad faith in that the objective was not to ensure the legitimacy of the Constitution but for the President and his Cabinet to determine a Constitution furthering their own interests. The adoption of the Constitution by the National Assembly was contrary to the recommendation by the Mwanakatwe Constitution Commission to have it adopted by a Constituent Assembly and National Referendum. It was stated that the President had not acted in an improper manner as the Inquiries Act did not state the procedure to follow after the recommendations have been made to the President and his action did not seek to frustrate the purpose of the Inquiries Act as many other wishes of the people would be addressed. What the court meant in essence is that regardless of how much support a recommendation had, the executive could choose to only implement recommendations that were best suited to them.

The executive also has a lot of influence in oversight institutions such as the Anti Corruption Commission and Human Rights Commission. Essentially, these are mostly supposed to check the executive power as they are the repository of cohesive power. The executive does sometimes interfere in their functions that are aimed at ensuring adherence to the rule of law and constitutionalism. It was discovered for instance, in the case of *Mazoka and Others v Mwanawasa and Others*⁹⁰ that the executive had interfered in the investigations of the Task Force on Corruption. When the Task Force on Corruption wanted to investigate Mr. Hutwiler, a motor vehicle importer and Zambian resident who supplied the MMD with 150 vehicles paid for from the intelligence account, as testified by the Director General of Intelligence, Xavier Chungu, he was protected by State House.

One factor that has induced presidential abuse of power is that impeachment of the president is an impossible task in a one party dominant state. Party discipline entails that a member of parliament must back the party position or he risks being expelled from the party. When expelled from the ruling party, there is a possibility that one loses the opportunity of one day becoming a minister and if already a minister, his ministerial position and the privileges that come with it as it involves access to a lot of governmental resources. An opposition Member of Parliament may also lose his seat which means loss of an income and other allowances that Members of Parliament enjoy. It is also seriously doubted that a speaker elected into office by

⁸⁹ SCZ J. 14 of 1995

⁹⁰ (2005) ZR 138

the ruling party in a one party dominant state can easily put the impeachment process in motion. Through for instance, the appointment of unnecessary ministers such as Minister without portfolio which means an additional person receiving the allowances and privileges that come with the job.

Therefore, although the executive may appear to be the weakest branch due to the ways in which it can be checked by both the legislature and the judiciary, it is in fact the one branch that exerts the most influence on the other branches and plays a major role in undermining their independence especially in a one party dominant state. The dominance of parliament by one party only results in the members of the National Assembly affirming the position of the executive when a matter is subjected to debate based not on merit, but on the desire to keep their ministerial jobs and the benefits that come with them or the need to be in favour with the President in order to be considered for appointment as a minister.

Furthermore, the appointment of judicial officers is in essence done by the executive only as ratification by the National Assembly in a one party dominant state is essentially ratification by members of the ruling party. This results in the ability of the executive to manipulate the judiciary or the lack of impartiality of Judges because they feel indebted to the people who appointed them. The case of *Bush v Gore*⁹¹ clearly illustrates that sometimes the court makes political and not judicial decisions. In this case, Al Gore, a Democrat tried to have the votes in Florida recounted. The case went all the way to the Federal Supreme Court who decided in favour of the Republican presidential candidate George Bush. It was held that any manual recount of votes seeking to meet the December 12 'safe harbour' deadline would be unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. The point to note however is that most of the Justices such as Clarence Thomas, Antonin Scalia and Sandra Day O'Connor were appointed by George Bush Senior and Ronald Reagan, both Republicans who collectively, had ruled for twelve years. In comparison, only a minority such as Ruth Bader Ginsburg and David Souter, who ruled in favour of Al Gore, had been nominated by Bill Clinton and Jimmy Carter, both Democrats. This clearly illustrates that the appointment of Judges by the President undermines the independence of the judiciary who evidently take into account political considerations when adjudicating.

⁹¹ 531 U.S. 98 (2000)

4.2 CONCLUSION

The executive is the dominant organ than manages to exercise some influence in the functioning of the other institutions and hence is not effectively checked. As a result, it sometimes acts outside the scope of its authority which makes the balance of power impossible. To state that the executive is responsible to Parliament is in essence stating that they are responsible to themselves because they are members of Parliament. Checking themselves is therefore not possible as they will clearly want to keep their positions. The power of the South African Parliament to pass a vote of no confidence ensures that the executive carries out its functions within the scope of its authority, upholding the rule of law and constitutionalism, an approach that would be beneficial for Zambia to adopt. This is a very good way of checking the executive. However, if it so happens that the country continues to be a one party dominant state where the ruling party dominates Parliament, then the provision on the vote of no confidence will have no use as Parliament will not be able to effectively check the executive in order to safeguard their ministerial positions.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.0 CONCLUSION

The separation of powers is necessary for every state as adherence to it, not in its strict sense but in a way that allows for the organs to share in each others powers, ensures that these organs exercise their powers within the scope of their authority hence achieving political liberty which is only possible when there is no abuse of power. The value of the doctrine of separation of powers clearly does not lie in its rigid application but in checks and balances. Zambia embraces the doctrine of separation of powers but has not applied it to a large extent as the structure of the Constitution is such that though it enables the organs to check on each other, it allows for a large amount of unwarranted interference especially by the executive, in the functioning of the other organs of government. The result is that since the executive has so much power, it is able to exercise some degree of control over the legislative and judicial branches.

Parliament ensures that the President acts within the scope of his authority mostly by ratifying or rejecting his appointments. The purpose of this is to ensure that appointments are based on merit and not any selfish interests of the President and the people that he appoints. The legislature is able to check on the judiciary through its power to pass retrospective legislation overturning a judicial decision. The judiciary on the other hand checks the executive and legislature by subjecting legislation and executive actions to judicial review in order to ensure that no constitutional principles are violated and the rule of law is adhered to as these organs exercise their powers. As for the executive, it acts as a check on the legislature through the Presidents power to veto legislation. It also acts as a check on the judiciary in that it is the President who appoints Judges hence ensuring that credible and competent people hold such office.

These checks are meant to ensure that the organs balance their powers against each other so that no one organ becomes too powerful and dominates the other. However, the situation is such that the executive has a lot of influence over the other branches. This is because the structure of the Constitution is such that it entrusts the executive with a lot of powers that it is able to use in the interference of the functioning of the legislature and judiciary. Ministers are appointed from Parliament and for them to continue enjoying the privileges that come with

ministerial jobs or in order for them to ensure that they are considered for appointment, they exercise their powers in a way that pleases the President or furthers his interests. Since Zambia is a one party dominant state, the ruling party in Parliament is able to form a quorum and endorse what has been decided by cabinet which makes the opposition that is supposed to ensure that the executive carries out its mandate and does so in accordance with the law, irrelevant. Incompetent men are then left to run this country.

With regard to the judiciary, judicial officers are appointed by the President and though Parliament ratifies the appointment of High Court Judges, it merely acts as a rubberstamp. Supreme Court Judges are not even appointed on the advice of the Judicial Service Commission which means that the President can appoint whoever he pleases even if they are not competent. These enormous powers that the President holds lead to a judiciary that is corrupt and not independent. This in turn compromises the doctrine of separation of powers whose aim is to ensure that no one organ dominates the other and that there is no abuse of power.

5.1 RECOMMENDATIONS

In order for Zambia to fully benefit from the doctrine of separation of powers, it must ensure that checks are fully utilised so as to ensure that the powers of all these organs are balanced and no organ dominates the other. This will result in the country adhering to the doctrine effectively. It should therefore be able to change a number of things.

Firstly, the appointment of Ministers from Parliament should be done away with. This will to a certain extent contribute to the credibility of Parliament which will be able to carry out its functions based on the capability of the Members and not opportunism. Furthermore, Parliament should be empowered to be able to override the President's veto as is the case in the United States of America so that members do not fear the dissolution of Parliament based on the President's opinion. Appointing Ministers from outside Parliament will ensure that professionalism is taken into account hence credible and competent people leading the country because appointments would then be meritorious.

Secondly, the appointment of Judges should be a preserve of the Judiciary and the Judicial Service Commission who are better able to identify people in the legal profession deserving of these positions based on professional qualifications and personal integrity. This will result in an independent and impartial judiciary that will uphold the ethics of the profession and

ensure that justice is dispensed. The determination of the judiciary's budget and the emoluments of the individual judges should be left to the judiciary as when the Minister of Finance allocates to it inadequate resources, the individual Judges become amenable to Corruption in order to make extra money which undermines the independence of the judiciary as a whole.

Thirdly, in order to effectively check the executive and ensure that the will of the electorate is carried out, the National Assembly should be empowered to exercise a vote of no confidence in the government of the day in addition to its power of impeachment, if it feels that the government does not uphold constitutional principles or if it has failed the people. This would certainly be appropriate as the Members of Parliament are the representatives of the people elected to advance their interests and are in a better position to know what the people in their Constituencies desire than the President. There should however be an option of a vote of no confidence either in the President's cabinet only or the President and his cabinet.

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