"ARE THE CURRENT ZAMBIAN CONSTITUTIONAL PROVISIONS SUFFICIENT IN PREVENTING ABUSE OF POWER BY THE EXECUTIVE ORGAN OF GOVERNMENT?"

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ABSTRACT

This paper discusses reasons why democratic governance cannot be attained by the Zambian government without deliberate commitment to the maintenance of values and principles of democracy, good governance and the rule of law. Zambia prides itself to be a democratic and peaceful country. However, accountability, openness and responsiveness to the needs of citizens has been a challenge despite this great record, which has come as a result of free, fair and peaceful elections recorded consecutively since Zambia became a multi-party democracy. The partial fusion of the Executive and Legislative organs of government ably qualified by provisions of the current Constitution, makes it difficult to hold government accountable by the governed. Consequently, presidential appointment of Cabinet Ministers from Parliament equally weakens legislative ability of checking and balancing powers of the Executive. Moreover, appointment of judges by the President is another factor that punches holes in judicial independence and injures the last line of defence. It is as such imperative that the colossal presidential powers are reduced to allow a flourishing democratic society.

In the view that the current Constitution does not have adequate provisions to prevent abuse of power by the Executive; this thesis has made recommendations for the Constitution to be amended to provide effective ways of balancing power between the three arms of government. This will inevitably create an environment of mutual accountability in government and construct a platform where the electorate could question irregular administrative actions.

CHAPTER ONE

SEPARATION OF POWERS

History has taught us that society needs laws and rules to govern how individuals within that society relate; where there are no such laws, society fails and history provides opulent evidence of civilizations that failed because of weak governance structures.[1] There has been insistent debate on the Zambian Constitution over the last few years with many calls for the need to review the separation of powers between the three branches of government because provisions of the current Constitution are inadequate to prevent abuse of authority by the Executive. This dissertation will examine whether or not there are sufficient measures in place to prevent abuse of power under the current Zambian constitutional regime.

Chapter one will discuss residual and inherent power theories that define the extent to which executive power is to be exercised and Zambia's constitutional regime vis-à-vis extensive executive powers. An in-depth look at the concept of separation of powers will precede an overview of the concept of separation of powers as practiced in Zambia. Further, a brief discussion on what is currently prevailing in South Africa – a relatively new democracy compared to Zambia in terms of checks and balances, will ensue. The chapter will later discuss Zambia's constitutionalism, its democracy and the rule of law.

1.0 Introduction

Even with laws and rules to govern communities, society needs to question who will make the laws and rules, who will enforce them and who will issue punishment for breaking such laws and rules. It is perhaps through introspection that society grew stronger and civilizations lasted longer as governance structures improved.[2] In late fourth and fifth century, it was commonplace that codified law brought justice for all and was the foundation for democracy.[3] The essentiality of the importance of strong governance structures was cardinal to the materialization of governments. The better a government was able to make law, enforce it and punish law breakers, the longer it was able to last. The more primitive forms of governance vested all

[1] Foxhall L and Lewis ADE, Greek Law in its Political Settings: Justifications not Justice (1996) p9.
[2] Ibid.
[3] Ibid.

authority in one organ or institution, which was typified in Africa by chiefdoms and kingdoms.[4] With the continued evolution of governance structures, society identified the need for the separation of the powers exercised by the machinery through which sovereign power was expressed and a way to ensure that each sub-organ acted within the strictures of authority vested in it.[5]

A democratic government typically comprises of three organs: the executive, legislature and judiciary. The executive is the branch of government responsible for effecting and enforcing laws. The legislature is the branch in charge for making statutory laws, whilst the judiciary's role is to interpret laws and administer justice. The nature of the power vested in each organ often requires that there be a limit placed on the manner in which such powers are enjoyed. This is often done through a Constitution. A Constitution is, to put it simply, a document that creates the organs of government, defines their functions and powers, and regulates their relationship with each other and with the individual. While separation of powers is crucial to the working of government, some have argued that it seems unrealistic to state that there should be an absolute lack of overlap. Governmental powers and responsibilities will inevitably overlap, for the very reason that they are too complex and integrated to be neatly compartmentalized. The doctrine of separation of powers is usually understood from Baron Montesquieu's[6] view, whose core argument was that political liberty can only be achieved where there is no abuse of power by one organ of government. It follows, therefore, that to combat abuse of power in the government triangle, it is necessary that one arm of government should be checked by another. The separation of powers principle promulgates the prevention of tyranny instigated by the conferment of enormous power on a person or organisation. Therefore, there is need to create organizational, formal and procedural divisions of public power to ensure that public authority is wisely exercised and not abused.[7]

While recognizing the fact that Zambia's model of separation of powers should be interpreted and judged based on the country's historical experiences and political environment, there is need to have a Constitution that provides a clear framework for effective provision of checks and

[4] Supra (n1).
[5] Ibid.
[6] The Spirit of Laws (1748).
[7] De Vos P and Freedman W, South African Constitutional Law in Context (2014).

balances, and one that fashions levels of functionary specialization by the three branches of government. Having the experience of a colony, one-party state and now the multiparty dispensation, Zambia could learn from South Africa's Constitutional Court submission by Ackermann J, who reasoned that:

> "*South African courts would over time develop a distinctively South African model of separation of powers, one that fits the particular system of government provided for in the Constitution and that reflects a delicate balancing, informed both by South Africa's history and its new dispensation, between the need, on the one hand, to control government by separating powers and enforcing checks and balances, and, on the other, to avoid diffusing power so completely that the government is unable to take timely measures in the public interest."*[8]

Furthermore, it is agreed that Zambian constitutional law is based on the separation of powers.[9] Even though not clearly spelt out, the institutional arrangements provided under parts IV to VI of the Constitution infer the separation of functions between the executive, legislature and judiciary. Nevertheless, the separation of powers in Zambia is a fallacy, and what exists instead is partial fusion of the executive and legislature.[10] This partial fusion of the executive and legislature has always been criticized on the basis that it does not ensure the necessary independence envisaged by the framers of the Constitution.[11] This observation therefore raises the question of whether there are sufficient measures in place to prevent abuse of power and whether there should be a stronger legal right to challenge misuse of powers by the executive branch of government. Some sectors of society, including opposition political parties; academics and Civil Society Organizations such as the Jesuit Centre for Theological Reflection,[12] have called for the enactment of a constitution that would clearly spell out the separation of powers.

It is imperative to note that there cannot be clear-cut separation of powers between the three arms of government as appreciated by experiences from other jurisdictions like the United Kingdom

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[8] *De Lange v Smuts NO and Others* (CCT26/97) (1998) ZACC 16; 2001(30SA 3B2 (CC); 2001(5) BCLR 423 (CC) para 17.

[9] Part IV to VI, Constitution of Zambia, Chapter 1 of the Laws of Zambia (1996).

[10] Chanda AW, Constitutional law in Zambia (2006) p14.

[11] Mbao LM, the politics of constitution-making in Zambia: where does the constituent power lie? Draft paper presented at the African network of constitutional law conference on fostering constitutionalism in Africa (2007) p13.

[12] Institute for security studies situational report. Zambia's constitution making process, addressing the impasse and future challenges, (2014) p11.

and South Africa. The current South African Constitution is silent on the nature of distribution of power between the three organs of government. However, the Constitutional Court argues in ***South African Association of Personal Injury Lawyers v Heath and Others*** that even though the principle of separation of powers is not expressly mentioned in the Constitution, it is implied and has authority equivalent of that of other provisions which *are* explicit.[13] The Court believed that the absence of express stipulation of separation of powers in the Constitution should be read against the substantive and institutional arrangements provided for in its structure, which is a clear indicator of the framers' intent to provide for the doctrine. In agreeing with the court's reasoning, De Vos and Freedman contend that the separation of powers doctrine can be inferred from the manner in which the Constitution distributes functions between the three branches of government, the placement of specialized staff to carry out functions, and the framework of control and collaboration between the branches of government and respective personnel.[14] The duo's argument is further strengthened by the Court's decision in ***Certification of the Constitution of the Republic of South Africa,*** where the Constitutional Court dealt with the assertion that the Constitution's allowance of members of the legislature to be members of the executive was a breach of the doctrine of separation of powers, because it rendered the legislature ineffective due to the powerful influence that the executive would impose on the law making organ. In counteracting this assertion, the Court argued that there are various models of separation of powers:

> *"While in the USA, France and the Netherlands members of the executive may not continue to be members of the legislature, this is not a requirement of the German system of separation of powers. Moreover, because of the different systems of checks and balances that exist in these countries, the relationship between the different branches of government and the power or influence that one branch of government has over the other, differs from one country to another. ... No constitutional scheme can reflect a complete separation of powers: the scheme is always one of partial separation. ... It can thus not be said that a failure in the final Constitution to separate completely the functionaries of the executive and legislature is destructive of the doctrine. Indeed, the overlap provides a singularly important check and balance on the exercise of executive power. It makes the executive more directly answerable to the elected legislature."*[15]

[13] (CCT27/00)(2000) ZACC 22; 2001 (1) SA 883; 2001(1) BCLR 77 (28 November 2000) paras 18-22.
[14] De Vos Supra (n7).
[15] (CCT 23/96)(1996)ZACC 26; 1996 (4) SA744 (CC); 1996(10) BCLR 1253(CC) (1996).

However, the above assertion by the Constitutional Court is yet to be proven correct in the one-party dominant South African political dispensation. As the Constitution requires that members of Cabinet are collectively accountable to Parliament, it is quite difficult for them to put on the hat of parliamentarians and speak against their own Cabinet decisions. Otherwise, the National Assembly would pass a vote of no confidence.[16] South Africa's proportional representation electoral system makes it even harder for Members of Parliament from the ruling party to challenge decisions of the executive for fear of reprimand and eventual loss of their parliamentary seats.

In Zambia, calls for a clear and streamlined separation of powers in Zambia's constitutional law regime is seen in the Mung'omba Draft Constitution.[17] This transformative development has inspired this dissertation, which seeks to lay a foundation for not only ensuring the existence of clear separation of powers in Zambia, but also the establishment of an effectively functioning governance system, whose three arms operate independently, whilst at the same time offering checks and balances on one another, and which is modelled after Zambia's historical experiences and political evolution.

1.1 The Executive's Residual and Inherent Powers

When defining the extent to which executive power is to be exercised residue and inherent power theories are helpful.[18]

Residue 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. They relate to certain functions of government that remain after legislative and judicial powers have been taken away, and residue powers are not always required to be expressly provided for under statute.[19] Article 44(1) of Zambia's Constitution plainly provides that:

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[16] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* (CCT16/98) [1999] ZACC 11; 2000 (1) SA 1; 1999 (10) BCLR 1059 (1999) para 41. Murray and Stacey (2005) 18.32.

[17] Report of the Mung'omba Constitutional Review Commission (2005) p315. A Technical Committee on the Constitution Making Process was appointed by the President to review the Mung'omba and National Constitutional Conference as well as collect submissions from the people of Zambia.

[18] Ibid.

[19] Ibid.

> *"As the Head of State, the President shall perform with dignity and leadership all acts necessary or expedient for, or reasonably incidental to, the discharge of the executive functions of Government subject to the overriding terms of this Constitution and the Laws of Zambia which he is constitutionally obliged to protect, administer and execute."*

This provision simply means that as long as these powers are exercised in a proper manner, it is not illegal for the President to do so even when the acts he carries out are not expressly provided for under any law. Thus, residual power theory clearly suggests that the President has authority independent of an enabling law to execute any action necessary for the government machinery to operate functionally, provided the action in issue is not expressly prohibited by law.[20]

The theory of inherent powers is similar to residue power theory and thrives on the difference between powers that are expressly outlined in legislation, and powers impliedly possessed by government or civil servants, by virtue of sovereignty or allowable interpretation of provisions of the Constitution.[21] Inherent powers are not expressly provided for in a constitution, but consequently derived from a functionary in public service. For instance, the executive has authority to perform duties which are inherently executive in nature, therefore the executive could act without prior authorisation granted in every matter by specific statute.[22] Thus, executive powers must be construed expansively, but confined to acts that are inherently executive in nature and no other.[23] Clearly, with a combination of residual and inherent executive powers in place, there is need for such excessive executive powers to be checked through the system of checks and balances.

1.2 Zambia's Constitutional Regime vis à vis Extensive Executive Powers

It has been observed time and again that the typical African presidency, to which Zambia is not an exception, is largely free from limiting constitutional devices, particularly those of a rigid separation of powers.[24] Presidential powers in Zambia's constitutional regime extend to other branches of government. Similar to other countries in Africa, the Zambian executive system combines both the presidential and parliamentary systems. The President is part of the legislature and appoints Cabinet from the National Assembly. Nevertheless, the President and Cabinet do

[20] Nwabueze BO *Presidentialism in Commonwealth Africa* (1973).
[21] Ibid.
[22] Philips O *Constitutional and Administrative Law* (2001) p23.
[23] Ibid.
[24] Op cit Nwabueze (n20).

not serve subject to Parliament's confidence. This is evident in the manner in which the executive power of the President in Zambia is tangibly felt in Parliament through the front bench, which comprises the Vice-President, leader of government business in the House, and Cabinet Ministers who are constitutionally mandated to operate collectively.[25]

The Zambian presidential powers are enshrined in the Constitution, which is the supreme law of the land.[26] Part IV of the Constitution vests executive authority in the President of the Republic of Zambia, who is both Head of State and the Executive. Article 33(1) creates the Office of the President as it states that, *"there shall be a President of the Republic of Zambia who shall be the Head of State and of the Government and the Commander-in-Chief of the Defence Forces."*

Article 33 (2) further provides that,

> *"The executive power of the Republic of Zambia shall vest in the President and, subject to the other provisions of this Constitution, shall be exercised by him either directly or through officers subordinate to him."*

Article 44 of the Constitution outlines the functions of the President, and that he must

> *"perform with dignity and leadership all acts necessary or expedient for, or reasonably incidental to, the discharge of the executive functions of Government subject to the overriding terms of the Constitution and the Laws of Zambia, which he is constitutionally obliged to protect, administer and execute."*

However, the Constitution does not define the executive functions or activities the President is supposed to execute and neither does it provide any guidance on the functionaries of the executive organ of government. While it may be challenged to give a clear-cut definition of the executive power, it is inferred that the remainder of the power after the deduction of judicial and legislative powers would equate to executive powers.[27] Executive powers, in short, encompass policy formulation and implementation, initiation of legislation, maintenance of law and order, protection and enhancement of economic and social welfare, foreign policy direction and carrying out of general administration of governmental departments.[28] It is the bestowal of such

[25] Supra (n9) article 51.
[26] Ibid article 1(3).
[27] Supra (20).
[28] Shukla VN, *Constitution of India* (1980); *Ram Jawaya Kapoor v State of Punjab* AIR (1955) SC 549:1955 2 SCR225.

undefined and wider powers on a single office of the Presidency that can result in excessive exercise of power.

In 1996, the President's decision to sell government and council houses to sitting tenants ahead of the general election, under the mask of empowering citizens to own property, but in reality to win favours from electorates, could not be constitutionally challenged. The introduction of a slush fund or brown envelopes was another way the executive was able to abuse its exercise of authority without being challenged because of the Constitution's discretionary provision of wide powers on the executive.

Further, the executive power vested in the President can be exercised either directly by him or through the Cabinet, which includes the Vice-President and Ministers all of whom are appointed by the President. The Cabinet is responsible, under the directives of the President, for conducting government business, including the administration of government ministries and departments.[29] Cabinet Ministers are, however, not allowed by law to delegate authority to their Deputy Ministers. A Deputy Minister can only act on behalf of a full Cabinet Minister if the President has expressly conferred authority on the person. This means that no member of the Cabinet, Deputy or Provincial Minister can discharge any duties without direct authority from the President. The implication is that ultimate executive authority is vested in the Presidency. Ministers are at the mercy of the President, as he has the power to remove them from office at any time. This gives the President a lot of leverage over his subordinates.

Even the Vice-President, who is leader of government business in Parliament and in charge of supervising government business, as well as defending the rights and immunities of parliamentarians by referring matters of breach of privilege to the Orders Committee for disciplining of Ministers, is appointed by the President.[30] Therefore, the Vice-President's influential position in parliament cannot go without bias towards the appointing authority for fear of losing his position, hence compromising the way in which decisions are made in the house.

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[29] Supra (n9) article 46(1) (2) provides that: "there shall be such Ministers as may be appointed by the President. A Minister shall be responsible, under the directions of the President, for such business of the Government including the administration of any Ministry or Department of Government as the President may assign to such Minister. "

[30] Ibid article 45(2) provides: *"The Vice-President shall be appointed by the President from amongst the members of the National Assembly."*

In addition, the executive's influence in parliament is extended through eight presidential nominees who serve as Members of Parliament and/or as Ministers.

Article 68(1) states that:

> *"The President may, at any time ... appoint such number of persons as he considers necessary to enhance the representation in the National Assembly as regards special interests or skills, to be nominated members of the National Assembly, so, however, that there are not more than eight such members at any one time."*[31]

Further, Article 46(2) of the Constitution provides that: *"Appointment to the office of Minister shall be made from amongst members of the National Assembly."* The Constitution does not make any restriction as to which party the appointee should come from. This entails that Cabinet Ministers can be drawn from the ruling party and the opposition parties. Certain sectors of society believe that Zambia's current practice of appointing Members of Parliament from the opposition is a political strategy aimed at weakening the opposition so that the ruling party may have an upper hand in dominating business in the National Assembly with a majority vote when making critical decisions. It is trite that once an opposition parliamentarian is appointed to a Cabinet position, that person becomes automatically bound by the doctrine of ministerial collective responsibility, as provided for under article 51 of the Constitution, and automatically forfeits the role of checks and balances on the executive. This kind of arrangement leads to dominance within the National Assembly by the executive and the ruling party, and thereby attenuates parliament by rendering it a rubber stamp of the executive.

Further, the President is Commander-in-Chief of the Defence Forces and commands operational authority over the armed forces.

1.3 Separation of Powers vis à vis Checks and Balances

Montesquieu stressed the significance of separating powers in a democratic dispensation. He said:

> *"When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because many apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. Again there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the*

[31] Supra (n9) article 68.

subject would be exposed to arbitrary control; for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with violence and oppression."[32]

Montesquieu argued that splitting judicial, executive and legislative powers would augment freedom of the governed and in the process prevent oppression, tyranny and violence. In agreeing with Montesquieu's idea, Madison opined that:

"... the accumulation of all powers, legislative, executive and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed or elective, may justly be pronounced the very definition of tyranny".[33]

But Madison recognized that Montesquieu, who drew encouragement from Britain's uncodified Constitution, erred in inferring a solid compartmentalization of the three arms of government. He argued that some Upper House members equally performed judicial functions and members of the executive were appointed parliament. Madison expounded that Montesquieu was not advocating for full separation, but the concept: *"[W]here the whole power of one department is exercised by the same hands which possess the whole power of another department; the fundamental principles of a free constitution are subverted."*[34]

Madison argued that separation of powers could be constitutional valuable: "*... by so contriving the interior structure of the government as that its several constituent parts may, be their mutual relations, be the means of keeping each other in their proper places."*[35]

Suffice it to say that the value of the doctrine does not lie in its rigid application, but in the checks and balances. The doctrine of checks and balances on the other hand entails that each organ of government shares in the powers of the other, exercising a certain level of control over each other's actions in order to prevent the abuse of power, and hence supplementing the doctrine of separation of powers.[36] The idea of checks and balances preventing the abuse of power vested in these organs also prevents the domination of any one particular organ, which results in maintaining a balance among the three organs of government.[37] It deals with aspects

[32] Supra (n6).
[33] Madison, Hamilton and Jay, *The Federalist Papers* (1987).
[34] Ibid p304.
[35] Ibid p319.
[36] Supra (n22) p23.
[37] Ibid.

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.[38] Separation of powers provides for the division 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.[39]

Political philosophers and constitutional lawyers have wondered whether separation of powers could create inefficiency.[40] **Cass Sunstein** argues that the doctrine of checks and balances could derail government: [41] *"The system of separation of powers … constrains government, by making it harder for government to act."* However, Sunstein also argues:

> *"So long as it is understood that no branch of government is actually the "people," a system of separation of powers can allow the citizenry to monitor and constrain its inevitably imperfect agents. And a system of separated powers also proliferates the points of access to government, allowing people to succeed within the legislature even if they are blocked or unheard within the executive or judicial branches*."[42]

It can thus be argued that the guiding principles underlying the doctrine of separation of powers relate to the significance of thwarting abuse of authority. In particular, this concept ensures functional specialization of the arms of government. The doctrine further plays a role in enhancing human rights and constitutional democracy which is based on the key values of accountability, responsiveness and openness.

De Vos and Freedman contend that there is no universal model of separation of powers, and that there is no separation that is absolute in democratic systems of government.[43] They contend that this principle could be incorporated in a Constitution by a tight or loose division of functions and staff, or by less or more potent machinery that would permit the enforcement of checks and balances of one organ of government by another.[44]

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[38] Supra (n22) p23.
[39] Barber NW "Prelude to the Separation of Powers" 2001 (60) *Cambridge Law Journal* 59.
[40] Ibid.
[41] Sunstein *Designing Democracy* 98-99, CR *Designing Democracy: what constitutions do* (2001).
[42] Ibid.
[43] Ibid.
[44] Supra (n7).

In the case of ***De Lange v Smuts NO and Others,***[45] South Africa's Constitutional Court refrained from comparing the South African implementation of the principle of separation of powers against models of other countries because South Africa was unique both in its historical development and political background.

If well implemented, separation of powers doctrine recognizes the functional independence of branches of government, whilst also allowing the concept of checks and balances to focus on the need to ensure that constitutional order usurpation of power among the three branches of government. The doctrine anticipates unavoidable invasion of three branches of government on each other's terrain.[46]

1.3.1 Zambia's Experience

Zambia's Constitution does not expressly provide for the doctrine of separation of powers, but the institutional arrangements outlined in all the constitutional regimes of the country infer its existence. Parts IV, V and VI of the Constitution call for the division of authority of government into three main branches of government: the executive, legislature and judiciary. The real value of the concept is not its rigidity as a three-fold classification of power, but in maintaining the balance of power between the various organs through checks and balances. However, the challenge in Zambia lies in the constitutional order which allows partial fusion of the executive and the legislature. This practice has led to some difficulties which have been translated in the actual working of the constitutional order.[47] Even though the current Constitution implies provision for separation of powers, in reality, the executive branch of government has stronger control and influence on the functionaries of the legislature and the judiciary. As the Constitution gives the President power to appoint Cabinet Ministers, Parliament's mandate of making laws independently is unattainable because it has become an extension of the executive. In addition, members of the National Assembly have more allegiance to their respective parties than to their constitutional mandate of enacting progressive legislation and acting as a check on the executive. Motions and acts of parliament are voted for not on merit, but on party lines and therefore there is no objectivity in the manner business is conducted. Unpopular motions and

[45] Supra (n8) para 60.
[46] Supra (n10).
[47] Sangwa JP The Constitutional Framework of Administrative Law (class notes unpublished) (2005).

legislation are affirmed strictly on partisan lines.[48] Some of the appointments made by the President to constitutional offices are ratified by Parliament not on merit, but because of allegiance to the appointing authority.

As for the judiciary, partisan traits can be seen in the manner in which adjudications are conducted.[49] Judges of the Supreme and High Courts are appointed by the President, subject to ratification by parliament, after consultations with the Judicial Service Commission. Some judges are appointed because they are useful to the executive branch of government and not because they are fit and proper to hold judicial positions. The bias in these imposed judges is normally seen when they are called to resolve matters of political significance as they mostly find for government.

The above scenario has basically turned the legislature and judiciary into rubber stamps for the executive, causing the President to emerge as a powerful force, much stronger than parliament and judiciary as institutions. This position is, unfortunately, not highlighted by the Constitution, but has been created by the undefined powers bestowed in the President. Unrestrained usurping of power by the executive has been allowed by the other branches of government for a myriad of reasons, among them monetary gains, fear of persecution by government machinery and failure to uphold constitutional responsibilities.

1.3.2 South Africa's Experience

The South African Constitution provides for separation of powers between the three arms of government with apposite checks and balances to guarantee accountability, responsiveness and openness. [50] This is outlined in the Constitutional Principle VI of the constitutional principles negotiated in 1990 at a multi-party negotiating process, and attached to the interim Constitution of the Republic of South Africa 200 of 1993, finally adopted in the 1996 Constitution.

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[48] Supra (n47).

[49] An example is one by the name of Meebelo Kalima who was appointed as Director of Public Prosecution (DPP) by the President. With a majority vote from the ruling party, Parliament ratified his appointment despite representations from the Law Association of Zambia that he was not fit and proper to hold the constitutional office of DPP. Months later, Mr. Kalima was suspended by the President on allegations of improper conduct and a tribunal was set to investigate the allegations and probe the possibility of his removal from office.

[50] Section 1(d) Constitution of South Africa (1996).

Premised on the above background, both the 1993 interim Constitution and the 1996 final Constitution outlined sharp division of power between the three arms of government. The basic structures and powers of Parliament were prescribed, including the initiation and/or preparation of legislation, ensuring executive accountability and exercising watchdog role over State organs.[51] Considered critical was the election government as well as parliamentary oversight on the executive. The process involved substantive checks on the executive, by way of judicial intervention, mainly by the solid position enjoyed by the Constitutional Court. The Constitution gave Parliament wide authority and far-reaching powers, influential in public policy making; focused on Parliament's position in modelling policy as well as monitoring and evaluating its implementation by the executive.

However, despite the powers enshrined in the Constitution for Parliament to hold the executive accountable; this mandate is hindered by the same Constitution which gives power to the President to elect and appoint the executive from Members of Parliament. The National Assembly has the power to elect the State President,[52] and the Presidents selects the Deputy President[53] and all Cabinet Ministers save for two,[54] from the National Assembly. The system of checks and balances on the executive by Parliament would only be effective if members of the legislature were totally different from members of the executive, as practiced in the United States of America. Despite members of Cabinet being collectively and individually accountable to Parliament in exercising power and performing their functions,[55] this is not always the case because allegiance by Cabinet Ministers is divided between the State President, political parties they represent, as well as Parliament. Currently, most Cabinet Ministers are from the ruling

[51] O'Regan K Checks and Balances Reflections on the Development of the Doctrine of Separation of Powers under the South African Constitution (2005).
[52] Section 86(1) op cit (n50).
[53] Ibid section 91(3) (a).
[54] Ibid section 91(3) (b) and (c).
[55] Ibid section 92(2).

party, the African National Congress (ANC), which is a dominant party,[56] and morally pay utmost allegiance to the party that appoints them to the National Assembly.[57]

1.4 Zambia's Constitutionalism, Democracy and Rule of Law

Bo Li[58] defines constitutionalism as a structure of political organisation founded and administered by a grand norm – the Constitution, which could only be amended by the electorates will through parliamentary representatives, while observing the rule of law, separation of powers, checks and balances and good governance, and ensuring that rights of citizens are respected and development is guaranteed.[59] Constitutions therefore are enacted to delimit and control the power of a government and to ensure that principles that govern the legitimacy of government action and control of the use of power are adhered to, through the provision of checks and balances. These principles are basically what defines constitutionalism and they emphasise: the need for power to be dispersed among institutions of the State to avoid abuse – the principle of separation of powers;[60] that there must be an independent judiciary and court system, which is an essential requirement for both the rule of law and separation of powers;[61] that the exercise of power should not exceed legal boundaries prescribed by Parliament and those entrusted with power should be accountable;[62] the need to ensure that the exercise of power esteems rights of individuals;[63] and that government and the legislature are made accountable to the governed who have entrusted them with power - doctrine of responsible government.[64]

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[56] Supra (n7) p109: "The Constitution establishes not only a parliamentary system of government in which the majority party in the National Assembly forms government, but also a system of party government. Party government is a system of government in which political parties have a decisive influence on the way in which the government is composed, on government policy and on the actions of the elected representatives in the legislative."

[57] Mathisen HW Tjonneland EN, Does Parliament Matter in New Democracies? The Case of South Africa 1994-2000 (2001). Mathisen submits that there is always a difficult act for a dominant majority parliamentary group between implementing party policy and exercising control over Cabinet and executive implementation.

[58] *What is Constitutionalism:* Perspectives? (2000).

[59] Ibid.

[60] Giussani E *Constitutional and Administrative Law* 1ed (2008) p5.

[61] Ibid.

[62] Ibid.

[63] Ibid.

[64] Ibid.

Constitutionalism provides that in a democracy like Zambia, the Constitution is the highest and most important law as it spells out the political, legal and social and economic governance arrangement. It is further expected that all subsequent laws and the behaviour of polities be based on the rules and values of the Constitution. The Constitution is therefore considered as paramount law that promotes and protects democracy. Hence, if the process of making the constitution and the content are not up to standard, the end result is compromise in the nature of democracy and rule of law; and injury on rights of individuals.[65] It is imperative, therefore, to understand that democracy without safeguards can be harmful to itself and to the governed. Unfortunately, Zambia still has a lot of work to do if the laws and the behaviour of government and its departments and agents are to be based on the rules and Constitutional values. As seen earlier, provisions of the Constitution are inadequate to curtail abuse of authority by the executive and to check on the competence of the legislature.

1.4.1 Democracy in Zambia

Democracy entails government by the people, for the people. This means that all citizens should be able to have their say in one way or another in the governance of the State and in everything that affects their lives, either directly or through representation, by every citizen having the possibility to engage government or make personal contributions on governance issues or the decision-making process. For instance, a citizen can make a position known through a vote or by use of modern technology/social media and by means of their democratic representatives such as Members of Parliament or Councillors.[66] To the contrary, Zambia's democracy only thrives during general and parliamentary elections. After elected representatives take up office, it is difficult for electorates to make ineffective representatives answerable. Aggrieved members of the public usually wait for another five years to air their views through the ballot. Judicial reviews and appeals to administrative injustices are rare and only the elite take up the challenge to counter unlawful government activities. And unlike South Africa's Constitution and related legislation - Promotion of Administrative Justice Act (PAJA), which provides for administrative justice, Zambia's Constitution is silent on this matter.

[65] Human Rights Commission - Zambia *Constitutionalism and Human Rights* (2008) p5.
[66] Kolar M, *What is Democracy?* (2005).

1.4.2 Zambia's Rule of Law

Another area where Zambia as a country is lagging behind is the observance of the rule of law. The degree to which this concept is true in Zambia could be a subject of debate.[67] Rule of law is a central tenant of modern constitutional democracy. The United Nations defines it like this:

> "*It is a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.*"[68]

According to Zambia's Human Rights Report of 2008,[69] the rule of law is not respected in the dispensation of justice. Observations indicated that individuals' rights to prompt trial were undermined due to inadequate courtrooms and therefore cases were unnecessarily delayed. Furthermore, rules pertaining to pre-trial detentions were not adhered to. Occurrences of deferred and miscarriage of justice as well as delayed appeal hearings were observed. It follows that interference of the executive in the operations of the judiciary results in the rule of law being disregarded. The inability of the legislature to make the executive accountable for its flaws is equally a denunciation of the rule of law. Zambia ought to learn from other jurisdictions like South Africa, in maintaining the rule of law and not rule of men.

1.5 Statement of the Problem

Lack of clear definition of presidential powers in the current Zambian Constitution is a lacuna in the law and a conduit of abuse of authority by the executive. Article 33(2) of the Constitution[70] vests unlimited executive powers in the President. The President has power to appoint and dismiss his Cabinet, which includes the Vice-President, who is the leader of

[67] Supra (n47).
[68] Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, United Nations Rule of Law (2004).
[69] Supra (n65).
[70] Supra (n9).

government business in the National Assembly. This creates a partial fusion of the legislature and the executive because Cabinet Ministers represent both branches of government. The result is the inability of the legislature to provide effective checks on the exercise of authority by the executive. Worse still, appointment of members of the opposition to Cabinet positions weakens the mechanism of checks and balances.

The appointment of judges by the executive is another serious threat to the doctrine of separation of powers and constitutionalism. Judges who are appointed by the executive will not effectively raise a red flag to the executive in the event that there is unlawful exercise of authority or the excessive use of it. Inadequate funding of the judiciary and poor infrastructure is another deterrent in the pursuit of constitutional democracy and in driving the judiciary's mandate of providing checks and balances on the executive.

Currently, there are calls in Zambia to enact a Constitution that would clearly define and limit the excessive powers of the President, as well as streamline the roles of the three branches of government, in order to enhance the effectiveness of the separation of powers doctrine.[71] A notable achievement towards the need to have clear and streamlined separation of powers in Zambia's Constitutional law regime could be seen in the Mung'omba Draft Constitution, whose recommendations are supposed to be included by the current Technical Committee appointed by government in 2011 to draft a new Constitution.[72]

The public outcry for judicial reforms in Zambia has inspired this dissertation. The focus of this work is to lay a foundation that would propose constitutional provisions of clear separation of powers in Zambia's governance system as well as amplify the need for constitutional limitation on exercising executive powers. The need for the establishment of an effectively functioning system of government, whose three arms operate independently, while providing checks and balances on each other, cannot be over-emphasized.

[71] Supra (n12) p11.
[72] Supra (n17).

1.5.1 Research Aims and Questions

The aim of this dissertation is to investigate the veracity of the argument that separation of powers in Zambia is a fallacy; that what exists is partial fusion of the Zambian legislature and executive, which does not ensure the necessary independence envisaged by the framers of the Zambian Constitution.[73]

The dissertation will further seek to answer the following two research questions: are there sufficient measures in place to prevent the abuse of power under the Zambian constitutional regime? Does the existing constitutional regime offer citizens a legal right to challenge misuse of powers by the executive branch of Government?

1.5.2 Methodology

In order to answer the first research question, an analysis will be offered of the state and effectiveness of Zambia's constitutional framework in offering adequate checks and balances and thereby compartmentalizing the very essence of the doctrine of separation of powers. The dissertation will also draw on a brief comparative analysis of the application of the doctrine of separation of powers in South Africa. The Zambian Constitution and the South African Constitution will be used as case studies to draw lessons, if any, and this will seek to answer the second research question.

To achieve the above tasks, this dissertation will adopt a desk research method, namely: consultation of the Constitution of Zambia, the Constitution of South Africa, articles, journals, textbooks, periodicals, paper presentations, newspapers and research via online presentations on the subject matter, with full acknowledgement of sources.

1.5.3 Significance of the Study

It has been observed that there exist loopholes and a lacuna in the Zambian Constitution as regards safeguards that would ensure accountability on part of the executive, and a framework that would promote effective checks and balances on the executive's power and authority, by the judiciary. Equally, there have been a number of instances in which the independence and integrity of the judiciary appeared to be compromised because of the manner in which judges are

[73] Supra (n10) p15.

appointed. Furthermore, there have been numerous occasions on which the executive has appeared to have too much power at its disposal, resulting in abuse of power in one way or another. These observations seem to suggest that there appear to be a lack of adequate checks and balances on the executive branch of Government in Zambia, a situation which renders the autonomy of both the legislature and judiciary impractical.

According to a report on African governance,[74] many African countries' executive branches of Government, including that of Zambia, have historically been the most powerful division of Government. In Zambia, the tendency of the executive to monopolize power and abuse discretionary authority has been observed throughout the country's constitutional regimes, in different forms and means.[75] For instance, Bertelsmann Stiftung[76] has highlighted the shortcomings of legal boundaries in the context of exercising executive powers, hence advocating for a system of legal regime that seeks to set boundaries or limit executive powers. It asserted that in the Zambian context, the executive's dominance clearly extends beyond the stipulations of the Constitution. It further asserts that the legislature is poorly equipped to act as an effective check on government actions, and only in very rare cases has the legislature vetoed executive decisions.

The former Chief Justice Ernest Sakala's thesis on the autonomy and independence of the judiciary[77] highlights realities and challenges that have confronted the judiciary's independence over the years, as a result of the executive's authority to appoint judges. However, Justice Sakala did not advocate for an absolute separation of powers.

Professor Alfred Chanda[78] emphasized that an executive that is checked by other wings of government is absolutely critical for prevention of abuse of powers by the President, who is both the Head of State and the Executive. It is worth noting that both Sakala and Chanda's arguments are not focused on constitutional regime that places clear limits on the executive, which this dissertation now seeks to address.

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[74] Economic commission for Africa, African governance report (Addis Ababa: At Economic commission for Africa (2005) p119.
[75] Ibid.
[76] Bertelsmann Stiftung, BTI 2012 - Zambia Country Report. Gutersloh: Bertelsmann Stiftung (2012) p12.
[77] Sakala EL The Autonomy of The Judiciary in Zambia: Realities and Challenges (1999) p23.
[78] Supra (n10).

1.6 Conclusion

The Zambian Constitution does not expressly mention the existence of the separation of powers. However, it outlines a framework of government that presupposes the existence of the doctrine by clearly providing for and stating the functions of the three organs of government - the executive, legislature and judiciary. The framework ensures non-interference of each of these organs in the functions of the others as they are checked in the event that interference occurs. The main problem lies in the wide and unlimited powers bestowed on the presidency, which are subject to abuse by the executive. The need, therefore, to limit these powers is of utmost urgency. In addition, the empowerment of the judiciary to make its own judicial appointment of personnel, free from interference by the executive, is of paramount importance. Only then will the supremacy of the Constitution and the rule of law become alive in Zambia.

This chapter has endeavoured to look at residual and inherent power theories that define the extent to which executive power is to be exercised. Zambia's constitutional regime vis à vis extensive executive powers has been discussed. The concepts of separation of powers as propounded by Montesquieu; Zambia and South Africa's system of checks and balances have equally been discussed. The discussion on separation of power ultimately shows that there can never be a clear-cut division between the three spheres of government, but that in one way or another there is bound to be allowable intervention into operations of the other branches of government; moreover, courts in South Africa have attested to this fact on a number of occasions.[79] The chapter further deliberated on Zambia's constitutionalism, its democracy and the rule of law. The next chapter will thus look at the independence of the Zambian legislature and executive appointments.

[79] Supra (n15); (n7).

CHAPTER TWO

INDEPENDENCE OF THE LEGISLATURE: ZAMBIA IN COMPARISON WITH SOUTH AFRICA

This chapter will look at the concept of legislative independence and the effects of executive appointments. As already mentioned, the Zambian Constitution allows the President to appoint members of the legislature to Cabinet, and this includes members of the opposition parties and nominated Members of Parliament. Similarly, the Constitution of South Africa allows the President to appoint his Cabinet from members of the legislature. This partial fusion of the legislature and executive negates the concept of checks and balances and renders the legislature a rubber stamp of the executive. Both the Zambian and South African perspectives will be interrogated. The aspect of party patronage which has dominated the Zambian and South African legislature will also be elucidated. Zambia's Constitution does not provide guidelines on the interplay between party politics and legislative representation. Equally, South Africa's constitutional failure to provide clear guidance on relationships between political party leaders who may not be Members of Parliament and their elected representatives unavoidably creates a platform for micromanagement.

This thesis asserts that the tendency of the executive to influence Members of Parliament to represent the views of the executive is a masked system of dictatorship, defeating the purpose of checks and balances. A dictatorship could have a constitution, but in reality the Constitution and other legislative provision serve to increase than limit powers by of the State by giving enormous authority to the leader or dominant group.[80] In such circumstances, the Constitution could be amended with minimum or no consultation of the polity, and the end result is abuse of authority. Sometimes, dictatorships allow liberal constitutional provisions for purposes convenience sake or to pacify international opinion and process creating a platform for society to implement change. Where laws represent the ideals of the select, the theory of rule of law.[81] In his influential pamphlet, Common Sense, Paine[82] noted that in absolute monarchies, "*the king is the*

[80] Paine T The Rights of Man (1791).
[81] Ibid.
[82] Supra (n80).

law, while in free, self-governing communities, the law is king. Constitutional limits are based on the idea that the power of the law – the rules laid down by the people's representatives – is superior to the power of any individual or group."

2.0 Introduction

The legislature is the organ of government responsible for making statutory laws.[83] In this regard the Zambian Constitution provides: *"The legislative power of the Republic of Zambia shall vest in Parliament which shall consist of the President and the National Assembly."*[84]

As one of the three branches of government, one of the main roles of the legislature is to provide checks and balances on the other organs of the State through: representation of electorates in the National Assembly; enactment of legislation; budget approval and vetting; monitoring government policies and conduct of the executive. The legislature's role is to ensure democratic governance which promotes consistent and fair elections, transparency and accountability while guarding against any form of dictatorial tendencies.[85] Consequently, exercise of power for legislative functions is considered an important element in nurturing constitutionalism, as it constitutes the baseline for enabling exercise of power by the executive, accountability and provision of feedback on the impact of executive power on the populace.[86]

However, the Constitution also gives power to the President to influence the legislature. It defines how Parliament is to exercise its legislative power in article 78(1) and provides: *"subject to the provisions of this Constitution, the legislative power of Parliament shall be exercised by Bills passed by the National Assembly and assented to by the President."* Article 78 further goes on to set out the procedure for the promulgation of legislation by Parliament, perhaps better masking the evident trend by the legislative draftsmen of allowing executive influence by including the President in the procedure of promulgation. The Acts of Parliament Act[87] which states it *"...provides for the form and commencement of Acts; to provide for the procedure following the perusing of Bills; and provides for matters incidental to or connected with the*

[83] Black's Law Dictionary 5th Edition.
[84] Supra article 62 (n9).
[85] Part X 14.1.1 National Constitutional Conference Initial Report, Zambia (2010).
[86] Oyewo O Constitutionalism and the Oversight Functions of the Legislature in Nigeria, paper presented at African Network of Constitutional Law conference on Fostering Constitutionalism in Africa Nairobi (2007).
[87] The Acts of Parliament Act, Chapter 3, Volume 2 of the Laws of Zambia.

foregoing," highlights the role of the President in enacting legislation by providing: *"As soon as may be after a Bill has been received by the Clerk of the National Assembly… the Clerk of the National Assembly shall: (c) cause the said copies to be presented to the President for assent."*[88]

The intention of the draftsmen is especially clear in section 6 (2) of the Acts of Parliament Act which categorically provides: *"a Bill shall become an Act on the signature by the President of the first of the said copies."*

Thus, where a Bill has been presented to the President for assent, the President has the power either to accept or reject it. Article 78(4)[89] provides that:

> *"where the President withholds his assent to a Bill, he may return the Bill to the National Assembly with a message requesting that it reconsider the Bill or any specified provision thereof and, in particular, any such amendments as he may recommend in his message; when a Bill is so returned, the National Assembly shall reconsider the Bill accordingly, and if the Bill is passed by the National Assembly on a vote of not less than two-thirds of all of its members, with or without amendment, and presented to the President for assent, the President shall assent to the Bill within twenty-one days of its presentation, unless he sooner dissolves Parliament."*

Although the framers of the Zambian Constitution retained a high priority on Presidential duties, the Constitution provides insignificant defined instructions on the Presidential role of Head of State and Government.[90] It is true that presidential administrative powers have matured as the Presidency has mellowed. However, the Constitution authorizes the President to demand for activity reports from civil servants/controlling officers from all government departments.[91] This requirement entails division of labour within government and expressly establishes a pyramid, and the President is by default the chief administrative officer.

One of the most important administrative powers of the President is to appoint people to high-level positions, some of which are subject to approval/ratification by Parliament, including the Attorney General, Solicitor General, the Director of Public Prosecutions and Judges.[92] Lack of a

[88] Supra (n87) section 5(2).
[89] Supra (n9).
[90] Supra (n9) article 44.
[91] Supra (n9) Part IV.
[92] Ibid.

merit-based system of appointment makes it extremely susceptible to discretionary and even illogical appointment to constitutional offices.

2.1 Legislative Independence

The importance of an independent legislature cannot be over-emphasized. For the National Assembly to provide meaningful and effective safeguards on the powers of the executive, it should be independent from interference by the executive. The National Assembly should not be a *de facto* component of the executive, but a distinct and independent organ. Connectivity between legislative independence and performance of a watchdog role, and constitutionalism is evidently understood against the contextual absence of effective institutional checks and limitations on exercise of executive authority.[93]

2.1.1 Legislature in Zambia

Under the Constitution, the Zambia's legislative power shall be vested in Parliament, which comprise the President and the National Assembly.[94] The role of the legislature is to operate as an independent law-making branch of government, empowered to enact laws and make necessary alterations to the Constitution and any other laws, and through parliamentary committees, monitor the performance of government departments.[95] Its major functions include representation of constituencies in Parliament, legislation, overseeing of public policy and conduct of government, and vetting and approving the national budget when presented by the Minister of Finance on behalf of the executive.[96] The legislature is therefore meant to check actions, decisions and activities of the executive organ in order to curb unlawful actions by Cabinet and other government departments.[97] Article 51 provides that Cabinet shall be accountable to the National Assembly,[98] but as the Constitution allows the President to appoint Cabinet Ministers from among Members of Parliament, it creates a beneficial environment for

[93] Supra (n20) p243.
[94] Supra (n9) Part V article 62.
[95] Ibid articles 78 to 82.
[96] Supra (n9) articles 78 to 82.
[97] Section 14.1.1 Initial report of the National Constitutional Conference (2010) p477.
[98] Supra (n9).

the executive to influence both the operations of and the law-making process in the National Assembly.

Equally, influence exerted on the legislature by the executive could make it possible for the legislature to override court decisions which do not favour the government of the day, through enactment of counter legislation. Scholars in the United States of America have alluded to the fact that the U.S. Supreme Court could be inhibited by Congress in constitutional cases.[99] And to prove their assertions, two tests were conducted: firstly, a rational-anticipation model examined the degree to which Court moved away from its predilections in a quest to circumvent Congress overrule. Secondly, an institutional maintenance model investigated how the Court protected itself from attacks by Congress on its "*institutional prerogatives by scaling back striking of laws when the distance between Court and Congress"* increased*."*[100] In the case of ***Rostker v Goldberg,***[101] Court ruled in favour of the male-only Military Service Act, with the majority of judges stressing the importance of deferring matters relating to the raising of an army to Congress. The Court's ruling justified Congress' exclusion of women from draft registration. It is said that in this case, the Supreme Court was "*facing off against a Congress that had made its preferences clear*" and could have taken further action if an unfavourable Court decision was made. The Court therefore would be said to have acted under duress in order to avoid being overridden by Congress, by upholding the discriminatory law and sidestepping the scrutiny test in ***Craig v Boren,***[102] and departing from a similar principle that was dissented in ***Michael M v Superior Court.***[103] On the day the decision was made in *Rostker,* legislation to negate federal courts jurisdiction over legislation promulgating the male-only drafts was introduced by a Congressman in one State. The act clearly meant to challenge Court's institutional authority by taking away its authority. In a similar manner, unfavourable judicial decisions could easily be overturned by the Zambian legislature through the influence of the dominant executive. However, other proponents of the concept of checks and balances argue that in doing so,

[99] Sega JA, Westerland C, Lindquist SA *Congress, the Supreme Court, and Judicial Review: Testing a Constitutional Separation of Powers Model* (2011).
[100] Ibid.
[101] 453 US 57 (1981).
[102] 429 US (1976).
[103] 450 US 456 (1981). Justice Stevens dissented from the Court's decision allowing gender-based differences on underage sex, while Justice Blackmun concurred in the result, but rejected the analysis that the law was justified because males and females were "not similarly situated."

Parliament is able to cure anomalies in the event of biased decisions by the judiciary; decisions as those based on political opinion or interference by the executive, as opposed to rulings based on merit.

As noted earlier, article 78(1) of the Zambian Constitution provides that the Parliament's legislative shall be "*exercised by Bills passed by the National Assembly and assented to by the President,"* giving the President the power to reject a Bill. It is therefore clear that it is very difficult or even impossible for the legislature to pass a piece of legislation that is meant to disadvantage the executive.[104] This illustrates an inherent deficiency in the process of enactment of legislation within the Zambian legal system, in that it is heavily dependent on the will of the executive. It can be debated that because the President is duly elected, the current system in Zambia does not undermine the independence of the legislature. However, the Constitution vests in Parliament the law-making function; the lacuna in the law is the unclear division between executive and legislative functions performed by the President as part of Parliament.

2.1.2 Legislature in South Africa

The South African Constitution has benefited from the fact that, having gained independence later than most African countries, the Constitution integrated many democratic principles that were overlooked by older democratic Constitutions. The South African Constitution does not only establish the organs of government, but vests the necessary authority in the organs as promulgated.

The South African Cabinet consists of the President, Deputy President and Cabinet Ministers.[105] The National Assembly elects the President both Head of State and National Executive, from Members of Parliament at the National Assembly's first sitting after a general election.[106] Equally, Parliament can remove the President on instances of grave violation of the Constitution or the law, stern misconduct or inability to perform his duties.[107] This provision enhances the executive's accountability to the legislature and also superimposes the doctrine of checks and

[104] Supra (n9) article 78(6).
[105] Supra (n50) section 91(1).
[106] Ibid section 86(1).
[107] Ibid section 89 (1).

balances by making the National Assembly an effective check on the executive. The powers of the President are enshrined in the Constitution,[108] and the Republic's executive authority is vested in him.[109] The President is required by law to exercise this power and cannot abdicate the exercise of such a power by unlawfully delegating it to a third party as any such delegation would be rendered invalid.[110] In this regard, the South African Constitution endeavours to minimize discretionary use of executive authority by stipulating, to a large extent, how the executive powers are to be exercised. Presidential authority under the South African Constitution is not absolute in that there are limits unequivocally placed Presidential authority.[111] The President ought to act in accordance with the Bill of Rights,[112] and according to the principle of legality, he should not misconstrue his power, but act in good faith.[113] This means that the President is constitutionally bound by the provision of the Bill of Rights and may not act in a way that would impermissibly infringe on the rights secured in the Constitution.[114] To this extent the South African Constitution expressly limits the instances when the executive can interfere with the enjoyment of the rights of individuals. The provisions effectively provide a straightjacket for the manner that executive powers are used and make it easier for the other organs to carry out their functions in providing effective checks and balances.

As Head of Government, the President has the sole authority to appoint the Deputy President, Cabinet, Deputy Ministers from among Members of Parliament, and two other Ministers from outside Parliament.[115] He also holds corresponding power to dismiss ministers. The appointment of all Cabinet Ministers in Parliament, save for two, affirms the principle of parliamentary government, which ensures that the executive is directly accountable to its electorate by allowing democratically elected representatives to check and control the conduct of

[108] Supra (n50) section 83(a).
[109] Ibid section 85(1).
[110] Supra (n16) SARFU.
[111] Supra (n7) De Vos P; e.g. S 174 of the South Constitution, on appointment of judges. S 101(1) Ibid, decisions by the President should be in writing if taken in terms of legislation or has legal consequences (SARFU III).
[112] *President of the Republic of South Africa and Another* (CCT11/96) (1997) ZACC 4.
[113] Op cit (n16) SARFU III Court held: *"There can be no doubt that when the Constitution vests the power to appoint commissions of inquiry in the President, he may not delegate that authority to a third party. The President cannot abdicate the exercise of his power by unlawfully delegating that power conferred on him as Head of State."*
[114] Op cit (n7) De Vos.
[115] Supra (n50) section 91(3) (b) and (c).

the executive.[116] The role of Ministers is not outlined in the Constitution, but the President assigns powers and functions to the various Ministers.

Further, the Constitution requires the President to exercise executive authority collectively with Cabinet Ministers. Equally, members of Cabinet are individually and collectively accountable to both the President and Parliament when performing their duties.[117] Cabinet members therefore have an obligation to act together to retain the confidence of the National Assembly, which would pass a vote of no confidence if Cabinet did not fulfil its mandate.[118] Disagreements may take place when debating issues, but once a decision is made, all Cabinet members are bound by it and have to take collective responsibility and accountability. A member of Cabinet who cannot tolerate nor defend Cabinet decisions has the option of resigning from Cabinet.

Ministers must act in line with the code of ethics given by statute.[119] While the President, in his capacity as Head of Government, bears ultimate responsibility for ensuring that the national government complies with the law,[120] Cabinet Ministers bear responsibility for day-to-day operations in their respective departments. Section 92 (2) of the Constitution gives the National Assembly power to hold individual members of the Cabinet accountable, while section 102 (1) offers the National Assembly power to pass a vote of no confidence in Cabinet or individual members in an event that there is a lack of accountability. However, due to party dominance within Parliament, application of section 102 (1) is practically ineffective. The Constitution establishes not only a parliamentary system of government in which the majority party in the National Assembly forms government, but also a system of party government.[121]

The Deputy President's powers are not defined by the Constitution; it does however state that "*he/she shall assist the President in the execution of government functions.*"[122] In this case, the

[116] Currie and De Waal (2001) p254.
[117] Supra (n50) section 85(2) read with section 92(2) provides that members of the Cabinet are collectively responsible to Parliament.
[118] Supra (n16) para 41. Murray and Stacey (2005).
[119] Op cit (n50) section 96.
[120] *Magidimisi v Premier of the Eastern Cape and Others* (2180/04, ECJ031/06) (2006) ZAECHC 20 (2006) para 20 to1.
[121] Supra (n7) De Vos: Party government is a system of government in which political parties have a decisive influence on the way government is composed, on government policy and on the actions of elected representatives in the Legislature.
[122] Op cit (n50) section 91(5).

President prescribes the extent to which the Deputy President is involved in running government affairs.

It is interesting to note that even as much as the President and Cabinet have significant powers, the Constitution places substantive limits on these powers as it provides for review by courts. Courts can review the exercise of power by the President and set aside any decisions by the President on substantive grounds, in order to uphold the founding value of the supremacy of the Constitution and respect for the rule of law. In the case of ***Democratic Alliance v The President of the Republic of South Africa***, the Court ruled that "*the Constitution provides that an order of constitutional invalidity of any conduct of the President has no force unless it is confirmed by this Court."*[123] In that case, both the Supreme Court of Appeal and the Constitutional Court ruled that the presidential appointment of Mr. Menzi Simelani as National Director of Public Prosecutions was invalid. This provision enhances the role and authority the judiciary in South Africa has, with regards to checks and balances.

What is more, the principle of legality requires that when the President or members of Cabinet are exercising their power, they ought to act rationally and in good faith. In ***Albutt v Centre for the Study of Violence and Reconciliation and Others,*** the Constitutional Court stated that:

> "*the Executive has a wide discretion in selecting means to achieve constitutionally permissible objectives. Courts may not interfere with the means selected simply because they do not like them … but where the decision is challenged on grounds of rationality, courts are obliged to examine the means selected to determine whether they are rationally related to the objective sought to be achieved."*[124]

In ***Democratic Alliance v President of South Africa and Others,*** the Constitutional Court further illuminated that *"rationality review is concerned with evaluation of a relationship between*

[123] CCT 122/11 (2012) ZACC 24; S 172(2)(a) provides: "The Supreme Court of Appeal,…may make an order concerning the constitutional validity of an Act of Parliament, or provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court."

[124] *President of the Republic of South Africa and Another v Hugo* (CCT11/96) (1997) ZACC 4; 1997 (6) BCLR 708; 1997 (4) SA 1 (18 April 1997) para 29; SARFU III para 148; *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC).99 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC) 5 to 58; Masetlha para 23; *Minister for Justice and Constitutional Development v Chonco and Others* (CCT 42/09) (2009) ZACC 25; 2010 (1) SACR 325(CC); 2010 (2) BCLR 140 (CC); 2010 (4) SA 82 (CC) (30 September 2009) para; *Albutt v Centre for the Study of Violence and Reconciliation and Others* (2010) ZACC 4 para 49; *Democratic Alliance* para 31.

means and ends: the relationship, connection or link between the means employed to achieve a particular purpose on the one hand and the purpose or end itself."[125]

Despite the Constitutional mandate for courts to review actions of the executive, courts have to balance their duty to enforce the Constitution and the principle of legality with respect for the fact that decisions made by the President and the executive often contain political components with which courts should be slow to interfere.[126] The South African courts hence stated:

> "*the rule that executive decisions may be set aside only if they are irrational and may not ordinarily be set aside because they are merely unreasonable or procedurally unfair has been adopted precisely to ensure that the principle of the separation of powers is respected and given full effect. If executive decisions are too easily set aside, the danger of courts crossing boundaries into the executive sphere would loom large."*[127]

In incidents were courts test the action of the President for rationality, actions by the President may not be invalid simply because "*they disagree with the wisdom of the presidential decision and substitute it with their own opinions."*[128]

However, Du Plessis and Scott[129] argue that variable standards for the rationality review adopted by courts undermine respect for the rule of law. The Constitutional Court's judgments on legality challenge the use of different levels of scrutiny by either applying stringent tests or taking a far more differential approach.[130] "*There is a need to avoid imprecise and open-ended citing of the President in litigation. Litigants should ensure that the precise unconstitutional conduct attributable to the President is clearly highlighted.*[131]*"* For instance, when making a decision to call the President as a witness, courts are to ensure that the dignity, status and efficiency of the President's office are safeguarded, while ensuring that there is no impediment in the court's administration of justice.[132]

From the above illustration, it is clear that the principle of Cabinet solidarity accentuates the fact that South African executive authority is a collaborative venture and hence the need for members

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[125] Op cit.
[126] Ibid.
[127] Supra (n130) *Democratic Alliance; Albutt (n131)*.
[128] Supra (n7) De Vos.
[129] Ibid.
[130] Ibid.
[131] *Von Abo v President of the Republic of South Africa* (CCT 67/08) (2009) ZACCI15.
[132] Supra (n16) SARFU III para 242.

of Cabinet to take collective action and share responsibility for their actions.[133] This collaborative nature achieves two things: firstly, compliance with the Constitution's requirement for Cabinet to operative collectively;[134] and secondly the retention of confidence of the National Assembly. Further, despite enormous powers vested in the President and executive, the Constitution gives power to the judiciary to check the exercise of those powers. The judiciary serves as an effective mechanism to check and counter the exercise of power by the President and other members of the executive, to prevent a breach of the Constitution and the law in general, or unlawful delegation of duties by the executive. Courts also promote the principle of separation of powers, by recognizing the functional independence of the other branches of government. The principle of checks and balances focuses on the desirability of ensuring that the constitutional order, as a totality, prevents the branches of government from usurping power from one another.

2.2 Partial Fusion of Executive and Legislative Power

Democratic governance emphasizes the need for logical and rational discussions, arguments, options and compromise on matters of public policies in pursuit and fulfilment of citizens' needs and public interest. Legislative oversight is therefore an integral obligation in promoting and protecting public interest.[135] In a democracy, separation of powers is essential to avert abuse of authority by any organ of government and to safeguard freedom for all.

2.2.1 Zambia's Experience

In Zambia, the independence of the legislature appears to be compromised in the sense that the Constitution allows the appointment of Ministers from among Members of Parliament, [136] therefore, giving the executive significant influence in both the formation and enactment of legislation.

[133] Op cit para 41.
[134] Supra (n50) section 96(3).
[135] Supra (n86).
[136] Supra (n9) article 63 (1) (c).

The President can even lure members of the opposition parties to the ruling party by appointing them as ministers, a strategy used to weaken the effectiveness of the legislature so that the ruling party may have an upper hand in controlling business within the House. This is so because once a member from the opposition is appointed to a Cabinet position, the appointee automatically becomes bound by the doctrine of ministerial collective responsibility by Cabinet Ministers or any other Minister, as the case may be,[137] thereby forfeiting the role of checks and balances on the executive as they become part of the executive.[138] This practice compromises the quality of debates in Parliament and leads to biased voting and decision-making based on opportunism. A good example is after the 2001 general elections, when for the first time in Zambia no single party dominated the seats in Parliament. In order to gain majority in the National Assembly, the President extended an olive branch to the opposition by appointing several of its members to ministerial positions. This move saw close to ten Members of Parliament resigning from opposition parties to join the ruling Movement for Multiparty Democracy, which later created a dominant position in Parliament.[139] Since then, it has been a trend for Presidents to appoint members of the opposition to ministerial positions, to the detriment of the concept of checks and balances on the executive. The end result is the ultimate erosion of legislative independence as there is a fusion of power between the executive and legislature.

At this stage, Zambian politics are deemed to be a source of employment and not a service to the public. Most candidates who make it into Parliament hope to be appointed as ministers for their own pecuniary and collateral interests. As Members of Parliament, who are not ministers, tend to be less critical of the executive in anticipation of ministerial appointments, the legislature is not able to fully act as a check on the executive branch of government.

Executive influence is further extended through the nomination of eight Members of Parliament, as pointed out earlier. The power of nominating Members of Parliament is usually defended as

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[137] Op cit article 51 states: the Cabinet and Deputy Ministers shall be accountable collectively to the National Assembly.

[138] Ibid article 46(1) (3) provides: there shall be such Ministers as may be appointed by the President. A Minister shall be responsible, under the directions of the President, for such business of the Government including the administration of any Ministry or Department of Government as the President may assign to such Minister. Article 47(1) The President may appoint such Deputy Ministers as he may consider necessary to assist Ministers in the performance of their functions and to receive or perform on behalf of Ministers such of the Ministers' functions as the President may authorise in that behalf.

[139] www.parliament.gov.zm accessed on 14th October 2014.

being "necessary in order that the House might be given the benefit of the services of persons with experience and proven ability who might not wish to subject themselves to the ordeal of an election."[140] However, Professor Nwabueze notes that, *"...the argument is somewhat disingenuous, and looks like a disguise to mask the real motive, which is the desire of the government to increase its support in the Assembly."*[141] This inhibits the ability of the nominated Members of Parliament to independently provide the special skills upon the basis of which they may have been nominated. The Constitution further gives the President power to revoke the appointment of any nominated Member of Parliament and appoint a replacement.[142] With this provision, it is trite that nominated Members of Parliament would not challenge actions of the executive for fear of losing their seats. The nomination of Members of Parliament is a guised imposition on the electorate, especially because the nominated Members of Parliament will not represent any constituent, but rather the views of the appointing authority, in this case the executive.

As long as the President retains the power to appoint the Vice-President and Cabinet Ministers from both the ruling and opposition parties, as well as to nominate Members of Parliament, the constitutional safeguard of checks and balances by the legislature on the executive will continue to be a facetious formality, and will continue to make the legislature a *de facto* organ of the executive.

The partial fusion of the executive and the legislature is further exacerbated by party patronage. The Constitution in Article 71(2) (c) provides that:

> *"a member of the National Assembly must vacate his seat in the Assembly in the case where the elected member joins a political party other than the party of which he was an authorised candidate when he was elected to the National Assembly, or, if he was an independent candidate, he joins a political party, or, if he was a member of a political party and subsequently becomes an independent."*[143]

With this provision of the law, Members of Parliament are, by inclination, forced to be devoted to the sponsoring party at the expense of objectivity and service to the Republic. Worse still, appointment of party whips in Parliament is another strategy used to ensure that all Members of

[140] Supra (n20) Nwabueze p279.
[141] Ibid.
[142] Supra (n9) article 74.
[143] Supra (n9).

Parliament sponsored by a particular party remain perfunctorily loyal to that party without any opportunity to remain objective and independent. Professor Nwabueze notes that:[144]

> *"…while admitting the necessity for party discipline in parliament; the whip has unfortunately been applied in Africa so stringently as to become a negation of parliamentary independence. The reason is that party unity is interpreted as demanding that an MP must never speak, much less vote, against the government…"*

By definition, this extends to Members of Parliament speaking out against the sponsoring party. When a Member of Parliament opposes the views of his political party he is viewed as a traitor and, most likely than not, expelled from the party. Party patronage is most visible when it comes to voting. Members of Parliament usually vote in alignment with what the specific political parties they represent want. Even where a Member of Parliament is opposed to a particular view, he or she will not vote according to what he or she feels is right or is beneficial to the interests of the people he or she represents.

In closing, the ability of the executive, through the President, to directly influence the composition of the National Assembly in its favour greatly compromises the democracy of Zambia.

2.2.2 South Africa's Experience – Post 1996 Era

As alluded to in the preceding chapter, the South African Constitution provides for separation of powers between the three wings of government, with appropriate checks to ensure accountability, responsiveness and openness, and adherence to the rule of law.

However, South Africa's system of party government hinders executive scrutiny by Parliament as the system cannot operate in isolation, but requires participation by political parties. The system of checks and balances on the executive by Parliament would only be effective if members of the legislature were totally different from members of the executive. The current scenario is that most of the Cabinet ministers are from the ruling party, the African National Congress (ANC), which is a dominant party,[145] and morally pay utmost allegiance to the party that appoints them to the National Assembly.

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[144] Supra (n20) Nwabueze.

[145] Supra (n7) De Vos p109: "The Constitution establishes not only a parliamentary system of government in which the majority party in the National Assembly forms government, but also a system of party government. Party

Furthermore, the ANC has a centralized party control method that ensures that party directives are carried out by its members; if not, Members of Parliament risk being recalled, such as in the case of former President of South Africa, Thabo Mbeki. The ANC has defined party policies which Members of Parliament pursue, through the National Working Committee and the National Executive. Communication between the party and Members of Parliament has been established through formal channels and institutions. Lodge[146] argues that ANC's approach in Parliament and conduct of business in parliamentary groups is inspired by its ideology. Customarily, the ANC possess indifferent approach to "*formal procedures of bourgeois democracy which have often led to willingness among ANC leaders to blur the distinction between the party and the State and to view any opposition as counter-revolutionary attempts to frustrate transformation."*[147] This state of affair renders ineffective Parliament's role of holding the executive accountable.

Political parties have been strengthened in Parliament by the anti-floor crossing in the Constitution. Members of Parliament who resign or are expelled from the party lose their seats. This tool works as an advantage to political parties by keeping their members in check, but a disadvantage to Parliament by not holding the executive accountable because Members of Parliament are rendered ineffective for fear of expulsion by the appointing authority.

It is also clear that weak and fragmented opposition parties in the National Assembly and small parties allied to ANC, basically reinforcing the ANC's dominant position in which it occupies almost two-thirds of the seats; holding the executive accountable by Parliament becomes futile as the majority of Members of Parliament do not oppose centralized-closed decisions by the executive, nor do they voice their concerns over unproductive policies. For instance, the 1994 code of conduct for ANC Members of Parliament provides that:

> "*all elected members shall be under the constitutional authority of the highest decision-making bodies of ANC, and decisions and policies of the highest ANC organs shall take precedence over all other structures, including ANC structures in parliament and*

government is a system of government in which political parties have a decisive influence on the way in which the government is composed, on government policy and on the actions of the elected representatives in the legislative."

[146] Lodge T South African Politics since 1994 (1999).

[147] Ibid.

government. Further, no attempt should be made to use of parliamentary structures to undermine organizational decisions and policies[148]".

From this, it is clear that independent action by Members of Parliament is definitely limited if ANC dominates parliamentary business, and therefore defeats the purpose of Parliament being a watchdog over the activities of the executive.

Additionally, the role of external organizations, in particular alliance between ANC, communist party and trade union movements has contributed to ANC's dominance on parliamentary committees. For example, decision taken before the 1999 elections to empower ANC national leadership to select candidates for position of premier in provinces, and mayors of big cities, took away the mandate of decision-making from the ANC caucus in elected assemblies. This action by the ANC contributes to Parliament's weakness in providing checks and balances on the executive.

Furthermore, government departments are highly specialised and big in size, and technocrats are usually subservient and loyal to Cabinet.[149] Therefore, when summoned by Parliament to provide explanations on policy issues, the allegiance of bureaucrats is to Cabinet Ministers.

Chapter three of the Constitution outlines principles of cooperative government, which promulgate cooperation among organs of the State by way of mutual trust and good faith. In ***Uthukela District Municipality v President of the Republic of South Africa,***[150] the Constitutional Court declined to decide on a matter on grounds that government departments had not attempted to resolve their dispute through alternative mechanisms before opting for litigation. From the provision of the Constitution and the case in issue, it is certain that a precedent has been set for institutions of government to be careful when checking on each other's performance. The above law encourages cooperation among State organs, but is retrogressive when it comes to pursuing matters of accountability. As seen from the case of ***Lindiwe Mazibuko MP v Speaker of the National Assembly and Others*****,** Parliament was reluctant to table the motion of passing a vote of no confidence in the President; one would assume because of issues of allegiance to political parties, and also the principle of cooperative

[148] Mathisen HW The ANC in Parliament 1994-1999 (2000).
[149] Mathisen HW, Tjonneland EN, Does Parliament Matter in New Democracies? The Case of South Africa 1994 – 2000 (n6).
[150] Supra (n50) section 41(1) (h); 2002 (11) BCLR 1220 (CC).

government. The Speaker of the National Assembly and the Chief Whip argued that the contention by Ms. Mazibuko could be resolved in-house without seeking the courts' intervention.

From the discussion above, it is difficult to conclude that Parliament, with all powers and institutional arrangements bestowed on it by the Constitution, could hold the Executive accountable. Reason being, that the Constitution coupled with parliamentary legislation political parties a strong position in Parliament. Secondly, the ideological distance between opposition parties and ANC's vision of radically transforming the political structure inspires top-down decision-making and allegiance among Members of Parliament. Further, the ANC's dominant position with almost two-thirds of seats in Parliament and at the same time being at the helm of executive power, renders the doctrine of separation of powers weak, and Parliament holding the executive accountable impracticable.

2.3 Conclusion

The system of separation of powers divides duties of a nation into legislative, executive and judicial functions. Responsibilities are assigned between the three branches of government in order to promote accountability. The legislative powers in Zambia and South Africa are exercised by the National Assembly, which have the mandate of making laws and supervising the implementation process. The National Assembly in both countries exercises control over the executive; to this end the National Assembly is supposed to check the work of the executive and the administrative institutions. This dispensation allows for the enhanced independence of the legislature with respect to fulfilling its functions.

The chapter endeavoured, for comparative reasons, to examine South African constitutional provisions with regards to the powers of the executive. Aside from the operational differences identified, the chapter has shown the inherent weakness of constitutional provisions to effectively differentiate the powers of the various organs of government. Although the South African Constitution does imply separation of powers, the chapter has highlighted how the courts have interpreted the constitutional provision to enhance the theory of separation of powers with regards to executive power. The chapter has identified the similarity between both Constitutions with regards the influence the President has as the head of the executive in both countries' systems with respect to appointment of Cabinet. The chapter identified party patronage as a

weakening factor in both countries, and the dominance of the African National Congress party in South Africa in particular, making it difficult for efficient checks on the executive by the legislature.

In Zambia in particular, the executive, through the President, is intricately involved in the efficient functioning of the legislature. The Constitution of Zambia has fused the legislative and executive functions. This is not only achieved through the President being a part of the National Assembly, but is further extended by allowing the President to nominate Members of Parliament, who have not been duly elected. This chapter has similarly shown that the President has power to appoint members of the National Assembly to Cabinet positions, hence binding them to executive decisions and weakening the efficiency of checks and balances. The Zambian system is further weakened by party benefaction with regards to holding seats in Parliament and the influence party ideology has in the way Members of Parliament make decisions and cast votes. This has placed the Zambian public secondary to the immediate needs of the party and weakened the democratic essence of the National Assembly.

This chapter has underscored the importance of a legislature that is independent of the other organs of government. Failure to achieve this provides the platform for masked dictatorship.

The next chapter will look at Zambian judicial autonomy and independence.

CHAPTER THREE

JUDICIAL AUTONOMY AND INDEPENDENCE

Sustenance of democracy requires an independent, impartial and upright judiciary. The focus of this thesis is guardianship of the Constitution as a sub-category of administration of justice in the enhancement of accountability vis à vis checks and balances, democracy and the rule of law. The Constitution, laws and policies of a country must create a platform which ensures that the justice system is truly independent from other branches of government in order for the concept of separation of powers and checks and balances to operate at an optimal level.[151] It can be useful to look to South Africa, and specifically to ***South African Association of Personal Injury Lawyers v Heath and Others***, in which the court held that:

> *"The separation of the judiciary from other branches of government is an important aspect of the separation of powers required by the Constitution, and is essential to the role of the courts and under the Constitution. It is the duty of courts to ensure that the limits to the exercise of public power are not transgressed. Crucial to the discharge of this duty is that the courts be and be seen to be independent."*[152]

This chapter will focus on Zambia's judicial system; the appointment of judges by the executive and resulting problems, and the security and tenure of office for judges will both be highlighted. The role of the Judicial Service Commission will also be discussed. Courts in Zambia have sometimes failed to declare *ultra vires*, or unlawful actions by the Executive; we shall investigate the Courts' reluctance to perform their constitutional mandate.

3.0 Introduction

Administration of justice is the primary function of the judiciary, although it may be mandated to perform other functions that are not judicial in nature, including law interpretation/making functions (judge made law) and guardianship of the Constitution.[153]

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[151] Ndulo M Judicial Reform, Constitutionalism, and the Rule of Law in Zambia: From a Justice System to a Just System, Law Association of Zambia Annual Conference (2012).
[152] Supra (n13) para 25.
[153] http://www.preservearticles.com/201012251625/functions-of-the-judiciary.html Accessed August 2014.

The judiciary is empowered to perform direct checks on the powers of the other organs in a unique way, as an individual aggrieved by the decision of the executive or the legislature has direct recourse through the judiciary. On the other hand, when one is aggrieved by the decision of the judiciary in Zambia, there is no recourse after a Supreme Court ruling. This makes the judiciary the policing organ.

Historically, the status of judiciary or justice system has always been held in very high regard; this is true even in tribal societies where justice was administered by Chiefs. The social structure of a society cannot be sustained without peace and harmony, which is possible only with the enforcement of rule of law. To this end, the Zambian judiciary has played a critical role in upholding the peace that has so far been enjoyed by the country. An ideal social order is impossible to achieve without an independent, impartial judiciary that guarantees equal protection of law to all. Excellent judicial performance is dependent on good and equitable laws, made by legislature and interpreted by a candid and impartial judiciary.

Judicial independence is the cornerstone of good governance. Independence of the judiciary involves two tenets: separation of the judiciary from executive and legislative powers, and residual of power in persons who are not members of the executive nor the legislature.[154] According to De Vos,[155] *"judicial independence is a fundamental concept of constitutionalism in as far as functioning of courts are concerned, and is a pivotal requirement for the effective functioning of the concept of separation of powers."* Courts ought to be given latitude to exercise their judicial authority in an environment that promotes impartiality and is devoid of bias and prejudice.[156]

[154] Supra (n153).
[155] Supra (n7) De Vos p70: Section of the South African Constitution provides that courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice; and no organ of the State may interfere with the functioning of the courts.
[156] *Minister of Health and Others v Treatment Action Campaign and Others* (No 2) (CCT8/02) (2002) ZACC 15; 2002 (5) SA 721; 2002 (10) BCLR 103 para 99 court held: "…primary duty of courts is to the Constitution and law, which they must apply impartially and without fear, favour or prejudice."

3.1 Judicial Autonomy and Independence in Zambia

The Constitution of Zambia outlines in very general terms the composition and functions of the judicature in part VI.[157] Article 91 sets out the judicature as comprising *"the Supreme Court of Zambia, the High Court of Zambia, the Industrial Relations Court, the Subordinate Court, the Local Court and such other courts as may be prescribed by an Act of Parliament."*[158] It is clear that there is no express provision in the Zambian Constitution that vests judicial power in any organ of government.

Zambian legislation appears to recognise the importance of an autonomous and independent judiciary. Article 91(2) provides:

> *"The Judges, members, magistrates and justices, as the case may be, of the courts mentioned in clause (1) shall be independent, impartial and subject only to this Constitution and the law and shall conduct themselves in accordance with a code of conduct promulgated by Parliament."*[159]

Beyond the Constitution, The Judicial (Code of Conduct) Act[160] promulgates the standard expected of judicial officers in the conduct of their duties. Section 3 of the Act provides: *"A judicial officer shall uphold the integrity, independence and impartiality of the judicature in accordance with the constitution, this Act or any other law."*[161]

The Constitution of Zambia and the Judicial (Code of Conduct) Act have been criticised as being *"eloquent for what is left out than what is contained."*[162] However, a positive to be drawn is the recognition in the legislation that true independence and impartiality extends beyond the law to the personal integrity of those that constitute the judicature. It is also the acknowledgment that the current Zambian legislative framework leaves gaps, leading judicial officers to often look to international and foreign frameworks to provide aspirational guidelines. It is therefore commonplace that reference is made to the Bangalore Principles of Judicial Conduct and the American Bar Association's Code of Judicial Conduct.[163]

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[157] Supra (n9).
[158] Ibid.
[159] Ibid.
[160] The Judicial (Code of Conduct) Act, Act No 13, Laws of Zambia (1999).
[161] Ibid.
[162] Malambo VB Judicial Code of Conduct and Ethics, Induction Course for newly appointed Judges (2014).
[163] Ibid.

In order to fully appreciate the principles governing judicial independence and autonomy, it is important that the need for such independence and autonomy is discussed in general terms so as not to digress from the topic of discussion. Judicial independence is founded on the premise that an impartial, independent and fair judiciary is crucial to any justice system. It has thus been noted that a judiciary of unquestionable integrity is the consciousness of a nation and a foundation necessary to uphold the rule of law and tenets of democracy. When other forms of protection flop, the judiciary safeguards freedoms, individual rights and public interest against infringement.[164] Without independence and autonomy the judiciary would lack the authority to pass judgment on society. Key to the efficient functioning of any democratic institution is the public acceptance of the authority those institutions have.[165] The Zambian Constitution in Article 1(2) provides:

> *"All power resides in the people who shall exercise their sovereignty through the democratic institutions of the State in accordance with this Constitution."*

Simply put, this means that the true authority for the judiciary is public acceptance and confidence in the judiciary. It is therefore imperative that the judiciary comprises men and women who recognise that to enjoy this acceptance, they must be independent, impartial and have the necessary integrity to warrant the support of the public. The integrity of any judiciary is the sum total of the personal integrity of the people that comprise it.[166] Having established the importance of the personal integrity of judicial officers, it is important to understand the mode of appointment of judicial officers in Zambia.

3.1.1 The Supreme Court

The basis for holding judicial office in the highest court in Zambia, the Supreme Court, is stated under Article 93 of the Constitution of Zambia, which provides:

> *"(1) The Chief Justice and the Deputy Chief Justice shall, subject to ratification by the National Assembly, be appointed by the President.*

[164] Supra (n162).
[165] Malambo VB, Zambia Institute of Advanced Legal Education, Professional Conduct and Ethics Lecture on Judicial Code of Conduct (2013).
[166] Op cit (n162).

(2) The judges of the Supreme Court shall, subject to ratification by the National Assembly, be appointed by the President."

In Zambia, the President appoints judges and Parliament ratifies such appointments. Simply put, the appointment of judges is, by law, granted to the executive. It would seem that the role given to the National Assembly of ratifying the appointees was an attempt by the draftsmen to restrict the powers of the executive in appointing judges to the Supreme Court. This has, however, not been realised, as the President has vast influence on Parliament, as pointed out in the previous chapter. The fact that in most cases the President will belong to a party that enjoys a majority in the National Assembly means that there is literally no restriction as to who the President may appoint.

3.1.2 The High Court

The Constitution of Zambia provides for the High Court for Zambia under Article 94(1) and to this end states:

"There shall be a High Court for the Republic which shall have … unlimited and original jurisdiction to hear and determine any civil or criminal proceedings under any law and such jurisdiction and powers as may be conferred on it by this Constitution or any other law."

The High Court is the second highest court in Zambia and as such has been ruled to have unlimited and original jurisdiction. The 'unlimited' jurisdiction of the court was expounded on the case of ***Zambia National Holdings Limited & United National Independence Party v The Attorney General,***[167] where it was aptly held that:

"the High Court has unlimited jurisdiction in that no cause is beyond its competence and authority, but it is not exempt from adjudicating in accordance with law and complying with procedural requirements and substantive limitations such as mandatory sentences and types or choice of relief."

In its *obiter dictum,* the court further illustrated on the High Court's jurisdiction by stating:

"It is inadmissible to construe the word 'unlimited' in "vacuo" and then to proceed to find that a law allegedly limiting the powers of the Court is unconstitutional. The expression 'unlimited jurisdiction' should not be confused with the powers of the High Court and the various laws."

[167] Supreme Court of Zambia, Judgment No. 3 of 1994, 1993-1994 Zambia Law Reports.

Despite the provisions of Article 94(2) regarding the division of the High Court into divisional courts,[168] there are no Acts of Parliament that create any such divisions within the High Court. The High Court does, however, sit as a divisional court in certain instances.

Article 95(1) of the Constitution provides for the appointment of puisne judges to the High Court and states that *"the puisne judges shall, subject to ratification by the National Assembly, be appointed by the President on the advice of the Judicial Service Commission."*

By law, the Chief Justice is an ex-officio judge of the High Court,[169] implying that when the Chief Justice descends to sit as a puisne judge, he or she exercises the powers of a High Court judge and decisions can be appealed against. This power of the Chief Justice is exercised where there is need to give guidance on law or procedure.

3.1.3 Role of the Judicial Service Commission

The only difference between the appointment of judges to the Supreme Court and of judges to the High Court is the role of the Judicial Services Commission. The introduction of the Judicial Service Commission in the appointment of judges to the High Court appears to be an attempt at placing a fetter on the Presidential powers. The Judicial Service Commission was established under Article 123(1) of the Constitution, with its functioning and composition provided for in the Service Commissions Act.[170]

Unlike other pieces of legislation under Zambian law that expressly provide for the functions of the institutions they establish, the Service Commissions Act was a meagre attempt by draftsmen to provide a generic framework for the commission. Rather than provide specificity as to its functions, the Act does not even define the functions of the Commission. It simply states in its preamble *ipsissima verba*: *"An Act to provide for appointments in the Public Service for the functions and powers of the Judicial Service Commission…"*

It is clear that there was a major oversight on the part of the draftsmen and legislators with regards to the functions of such a sensitive institution. Instead, the functions of the Judicial Service Commission can only be understood with regards to practice. Practice has dictated that

[168] Supra (n9).
[169] Ibid article 94 (3).
[170] The Service Commissions Act, Chapter 259, Volume 15, Laws of Zambia (1995).

the Judicial Service Commission is responsible for recruitment, charge and discipline of judicial staff in the High Court in the President's stead. Section 5 of the Act provides:[171] *"Subject to section fourteen, the President may give to the Judicial Service Commission…such general directions as the President may consider necessary, and the Commission or that person shall comply with such direction."*

To place emphasis on the role of the Commission in the appointment of judicial officers, Section 6 (1) of the High Court Act[172] provides that "*the Registrar and Deputy Registrar of the High Court are to be appointed by the Judicial Service Commission."*[173] The Registrar and Deputy Registrar in Zambia exercise judicial powers and make rulings on interlocutory matters and matters which may be disposed of in chambers. In addition, the Judicial Service Commission is mandated under Section 5 of the Subordinate Courts Act[174] *to act in the name and on behalf of the President in appointing persons to hold or act in the office of magistrate.*

The Service Commissions Act, however, makes a better attempt at defining the composition of the Judicial Service Commission in Section 8, which does not attempt to veil the clout the President enjoys in the appointment of its members. Section 8 (3) openly states: *"The members of a Commission shall be appointed by the President."* Despite this bold placement of extensive powers on the President, the Act lists persons who may be members of the Commission, including the Chief Justice, Attorney General, Secretary to Cabinet, Chairman of the Public Service Commission, a Judge nominated by the Chief Justice, Solicitor General, a Member of Parliament, a representative from the Law Association of Zambia, Dean - Law School, University of Zambia and one member appointed by the President. In reality this means that the President directly or indirectly has influence over eight of the ten people who form the Judicial Service Commission, as seven members are appointed to their positions by the President, whilst one member is nominated by the Speaker of the National Assembly, but appointed by the President.

It is evident from the above that the executive has been given significant authority in the appointment of officers to judicial positions. This has the effect of greatly compromising the

[171] Supra (n13).
[172] The High Court Act, Chapter 27 Volume 3, Laws of Zambia (2002).
[173] Ibid.
[174] The Subordinate Courts Act, Chapter 28 Volume 3, Laws of Zambia (1998).

integrity of those appointed to hold judicial office. In order to place further restriction on the power of the executive in the appointment of judges and magistrates, it would have been prudent to include measures to ensure appointment to such offices is merit-based and to ensure that only the most qualified persons are ever appointed to hold the office of judge. In this regard the Zambian legal framework again falls short as it provides rather lax requirements for one to be appointed as judge in either the Supreme Court or the High Court. Article 97(1) of the Constitution provides that for one to qualify, that person

a) *Holds or held high judicial office*
b) *Holds one of the specified qualifications and has held one or other of the following qualifications:*
   - in the case of a Supreme Court judge, for a total period of not less than fifteen years;
   - in the case of a puisne judge, the Chairman and Deputy Chairman of the Industrial Relations Court, for a total period of not less than ten years.[175]

A reading of the foregoing provisions highlights the ease with which even a person with low moral integrity can hold the office of judge. The law in its current state places no emphasis on merit-based appointment and leaves too much freedom for discretionary appointments, which greatly undermines the integrity of the judiciary. It would therefore be greatly gainful not only to the judiciary, in the execution of its functions, but also to democratic tenets that even the appearance of such impropriety with regards the appointment and quality of person to hold judicial office be dispensed with.

3.1.4 Conditions of Service in the Judiciary

Another sphere that requires that the judiciary be protected from undue influence of the other arms of government is the need for non-executive interference in determining the conditions of service and other appointments of judicial officers. The need to protect the judiciary from interference stems firstly from the relationship created between the organs of government, when one is the remunerator. In a situation where one organ is responsible for determining the conditions of service and salaries of another, this creates a relationship akin to the *master-servant* relationship. In Zambia, the salaries/conditions of service are primarily governed by the Judges

[175] Supra (n9).

(Conditions of Service) Act, which states in section 3[176] *"there shall be paid to a Judge such emoluments as the President may, by statutory instrument, prescribe."*

The legislators in this case again did not veil the authority placed on the President in determining judges' conditions of service. When the person responsible for appointing is also responsible for determining salaries and conditions of service of judges, independence of the judiciary appears to be corroded. It is, however, to the credit of the President that judges in Zambia are well remunerated, which generally ensures less external or private interference in the functioning of the judiciary.

Once a person has been appointed as a judge in the High Court or Supreme Court, they are, by virtue of such appointment, qualified to hold other statutory positions. It is often common place that holding such office will mean that a judge receives an increased income. The clearest example of this is the case of the Chief Justice, who, by virtue of holding that office, is Presiding Officer in presidential elections.[177] Although this is the case in many jurisdictions, it raises problems and questions not only to the judge's credibility, but also of the integrity of the judge in performing the functions mandated in any other *ex-officio* capacity. The American Bar Association Canons of Judicial Conduct provides that a judge should minimise the risk of conflict of interest between his judicial functions and any extra-judicial function.[178] To this end, the Judicial (Code of Conduct) Act provides in Part III that judicial officers shall not conduct activities outside their office which create doubt on judicial officers' capacity to act impartially.[179] A broad reading of this section would display the legislator's intent at minimising the risk of conflict of interests amongst judicial officers.

3.1.5 Security of Tenure and Dismissal of Judges

The starting point for the protection of the tenure of judges is the Constitution of Zambia, which provides categorically that *"a person holding the office of a judge of the Supreme Court or the office of a judge of the High Court shall vacate that office on attaining the age of sixty-five*

[176] The Judges (Conditions of Service) Act, Chapter 277, Volume 15, Laws of Zambia (1996).
[177] Supra (n9) article 41(1).
[178] The American Bar Association, Code of Judicial Conduct Canon 3.
[179] Supra (n160) section 11.

years."[180] This provision simply means that if a person is appointed judge in either the Supreme Court or the High Court, they are ideally only supposed to vacate the office upon attainment of the age of sixty-five. It would, however, be exceedingly careless if the legislative draftsmen did not envisage a situation other than the above-mentioned. To this extent, articles 98(2) and 98(3) attempt to provide guidance on the procedure of removal of a judge from office. Article 98(2) states:

> *"A Judge of the Supreme Court, High Court, Chairman or Deputy Chairman of the Industrial Relations Court may be removed from office for inability to perform the functions of office, whether arising from infirmity of body or mind, incompetence or misbehaviour and shall not be so removed except in accordance with the provision of this article."*[181]

This article is very progressive in that it is clear and leaves no room for wider interpretation. However, it does not set out a precise procedure that would allow for the investigation of the grounds for removal of a judge from office. To answer the question of procedure for removal of a judge for incapacity, article 98(3) provides:

> *"If the President considers that the question of removing a judge of the Supreme Court or of the High Court under this article ought to be investigated, then:-*
> *(a) He shall appoint a tribunal which shall consist of a Chairman and not less than two other members, who hold or have held high judicial office;*
> *(b) The tribunal shall inquire into the matter and report on the facts thereof to the President and advise the President whether the judge ought to be removed from office under this article for inability as aforesaid or for misbehaviour."*[182]

It appears, the draftsmen again gave power to the President, which in turn emphasises the *master-servant* relationship existing between the President and judicial officers. If the Constitution was couched in more general terms, legislators would have probably prescribed a more democratic procedure for investigating judges.

Separation of powers must not be understood as excluding other organs from the functions of one organ, just as the doctrine of checks and balances should not be understood to mean that an organ of government cannot place on itself restrictions on the exercise of certain powers. These doctrines must allow for each organ to protect those sacred innate structures from external

[180] Supra (n9) article 98(1).
[181] Op cit article 98(2).
[182] Ibid article 98(3).

influences. In the case of the judiciary, this would include protecting its office holders from even the slightest bit of external control. Judges have a definitive obligation on decisions that pertain to rights, freedoms and duties of both natural and juristic persons in their jurisdictions. It is equally the duty of every judge to ensure that even the mere appearance of impropriety is eliminated. In Zambia, this has the potential of raising a conflict of interests between the duties the judge owes to society in the performance of his functions and what is expected of him by the appointing authority.

Finally, even though judicial independence has various definitions, the ultimate meaning is the ability of judicial personnel to have the sovereignty of deciding cases on own merits, without external interference. Security of tenure precludes arbitrary dismissal of judges, while financial security "*provides an arm's length mechanism, through special remuneration structures, for determining the salaries and benefits of Judges."*[183] Administrative independence gives the judiciary an opportunity to govern itself. Whereas the said protections relate to judges, benefits trickle down to members of the public who depend on courts to administer the rule of law. In Zambia, essential conditions for the independence of the judicature are weak and leave no room for wider interpretation to enhance judicial independence.

3.2 Declaration of Executive Actions *Ultra Vires* by Courts

Judicial authority is the power given to judicial officers to exercise their functions, that is to say hearing matters and passing judgments. The Zambian Constitution does not expressly vest the judicature with judicial authority. The closest Zambian legislation comes to this is in the short preamble of the Supreme Court Act,[184] which provides that this is *"an Act to provide for the Constitution, jurisdiction and procedure of the Supreme Court of Zambia; to prescribe the powers of the Court; and to provide for matters connected therewith or incidental thereto."*

To interpret that this introduction gives judicial authority to the Supreme Court would require the widest of latitude in interpretation of the provision. This appears to have been an error on the part of the draftsmen. In democratic societies the law plays an important role in defining not

[183] http://www.provincialcourt.bc.ca/about-the-court/judicial-independence, Accessed August 2014.
[184] The Supreme Court of Zambia Act, Chapter 25, Volume 3 of the Laws of Zambia (1959).

only the relationship between the organs of government, but also the interaction between individuals and government, and between members of the public. Where the law does not expressly make provision for certain procedure and practice, there is room for interpretation. It is dangerous for a democratic society to leave to interpretation the core tenets of democracy. It is for this reason that the Mung'omba Constitution Commission endeavoured to vest judicial authority in the judicature by providing that *"the judicial power of Zambia shall vest in the courts and shall be exercised by the courts in accordance with this Constitution and the laws."*[185]

The High Court Act, however, goes further in vesting judicial authority by stating that the Act *"amends the law with respect to the jurisdiction and business of the High Court, and with respect to the officers and offices of the High Court, and otherwise with respect to the administration of justice and the validation of certain acts."*[186] Although not expressly, legislators appreciated the mandate of the court with regards administration of justice. Zambian courts have recognised the need for protection from external influences and have held that *"the public have a right to have the independence of the judiciary preserved; the absolute freedom and independence of judges is imperative and necessary for the better administration of justice."*[187]

The strength of any judicial system lies in its ability to carry out its functions efficiently and consistently. For the purpose of this chapter, the focus is on the judiciary's role in the guardianship of the Constitution vis à vis declaration of executive actions as *ultra vires*. The judiciary has, to put it simply, the role of ensuring all the organs of government carry out their functions in accordance with the law. The Zambian courts have recognised the need for separation of powers,[188] but have also pragmatically recognised that the judiciary forms part of government. To this end, in a landmark case it was stated:

> *"Who is the government? On an elementary level, I would say that the government is the executive, the legislature and the judiciary. If there are any merits in this ground it would*

[185] Supra (n17) article 194(1).
[186] Supra (n172).
[187] *Godfrey Miyanda v Mathew Chaila* (High Court Judge) (1985) Z.R 193 (H.C).
[188] *Datson Suilupa v Fales Namusiku* (1985) ZR 21 (HC).

appear to me that this court has an interest in the matter and therefore should not preside over the matter. With the greatest respect, I feel this ground is very childish."[189]

This was in a criminal case where the interests of the State were questioned by the defendants, who requested that the Attorney General, who is government's chief legal advisor, should withdraw from the case.

It is this paper's submission that the judiciary has no greater test than the one it faces in a democratic society. Whilst in undemocratic societies the judiciary is often merely a tool of the executive and passes judgment openly in favour of government policy and idealism,[190] in democratic societies such as Zambia, the judiciary has to pass judgment on the assessment of the rights of the parties and on the strict interpretation of the law.

The Zambian judicial system must be lauded for its firm stance on executive interference with the rights of the individual. In the case of ***Fredrick Mukongolwa*** the courts held *"...the order to remove the applicant from office was illegal and ultra vires the powers of the Minister. The order also amounted to maladministration because the applicant was being forced out of the office..."*[191] This was in a matter where a minister attempted to interfere with an appointment in a local authority. It is often the case in weak democratic societies that the judiciary has difficulty passing judgment against other branches of government, as identified in the ***Shamwana Case,***[192] because on an elementary level the judiciary is an organ of government and as such has vested interest in any case where government is sued. It is therefore a hallmark of a strong judicial system if it can freely and without fear of persecution pass judgment against an organ of government that acts *ultra vires* its authority.

Further, it is interesting to take note of the political environment in which the courts make certain decisions. Often, courts interpret the law whilst keeping in mind government policy at a

[189] *Shamwana and Others v The People* (1985) ZR 41 (HC).
[190] A strong argument for this position is the analysis of judgments past during Nazi Germany where the courts regardless of moral inclination made judgment on the strict interpretation of law and policy no matter how inhumane.
[191] *Frederick Mukongolwa Mushambatwa v Livingstone Municipal Council and the Attorney-General* and in Re Local Government Act 22 of 1991 Statutory Instruments no 137 and 138, (1991) and in Re State Proceedings Act, Cap 92 of the Laws of Zambia.
[192] Op cit (n189).

particular time and public perception; this allows the courts to carry out their functions whilst leaving the executive and parliament to carry out their functions.

In South Africa, the courts have to balance their duty to enforce the Constitution and review actions of the executive with respect for the fact that decisions made by the President and the executive often contain political components with which courts should be slow to interfere.[193] The South African courts hence stated:

> "*The rule that executive decisions may be set aside only if they are irrational and may not ordinarily be set aside because they are merely unreasonable or procedurally unfair has been adopted precisely to ensure that the principle of the separation of powers is respected and given full effect. If executive decisions are too easily set aside, the danger of courts crossing boundaries into the executive sphere would loom large."*[194]

In Zambia, it has been noted that the judiciary is often overlooked, with the legislature and the executive usurping the function of interpreting the law. This is not by design, but rather from a lack of knowledge within the general public with regards to the role of the judiciary. The lack of judicial precedents on interpretation of statutes is often avoided by parties where there is a possibility of quick settlement.[195] This was the case when the Anti-Corruption Act[196] was amended after the executive declared section 37 to be unconstitutional. Under the Zambian criminal law system, every person charged with a criminal offence is presumed to be innocent until he/she is proven or has pleaded guilty.[197] The burden of proof is on the prosecution to demonstrate culpability beyond reasonable doubt as established in ***Woolmington v Director of Public Prosecutions***.[198] Zambian courts have further held: *"the burden of proof does not lie on the accused and therefore there is no onus on the accused to give reasons for the manner in which prosecution witnesses testify against him."*[199]

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[193] Supra (n123).
[194] Ibid*; Albutt* (n24).
[195] Michael Musonda Company Law Lecturer Zambia Institute of Advanced Legal Education, Lecture on lack of Company Law Jurisprudence in Zambia.
[196] The Anti-Corruption Act, Chapter 91 Volume 7, Laws of Zambia (1980).
[197] Supra (n9) article 18(1) (2) (a).
[198] *Woolmington v Director of Public Prosecution* (1935) A.C 462.
[199] *Sikota v The People* ZR 42 HC (1968).

The repealed section of the Anti-Corruption Act required that a public officer must provide information on the source of property, and that failure to explain the property would result in the public officer being charged with an offence. The argument advanced by the executive was that this provision effectively shifted the burden of proof onto a public officer suspected of being corrupt and went against the provision of article 18 of the Constitution of Zambia. Although this argument was rightly founded, it was premature of the executive to interpret the law when that is the function of the courts. The controversy surrounding the amendment was also amplified by the political connotations it held. It has been a trend in Zambia that with the coming into power of a new government there is intense scrutiny and prosecution of former leaders. The amendment of the Anti-Corruption Act was seen as a pre-emptive move by the then ruling party to escape prosecution. As highlighted earlier, if given the chance, the courts would have interpreted the section as being unconstitutional and so the correct procedure would have been to allow the courts to interpret the law and declare the provision null and void.[200] The argument raised against the amendment of section 37 of the Anti-Corruption Act was that the Constitution deviates from its earlier provision and allows for that an accused must prove certain facts.[201] As highlighted earlier, the absence of judicial decisions to give clear guidance on certain subjects within the Zambian legal sphere makes it difficult to draw conclusions on what is the exact position of law.

The role of the judiciary therefore cannot be overstated, especially with regards to acting as a check on the powers conferred on the other organs of government. Because the Zambian courts have been bold enough to pass judgment against the various organs of government, interpreting certain statutory provisions as unconstitutional,[202] the legislature has attempted, through various statutes, to oust the jurisdiction of the courts in hearing certain matters. This should, however, not be interpreted as usurping or in any way limiting the powers of the judiciary, but rather that *"the legislature has decided that certain matters should be solely for the executive, the court has no role to play as such issues contain no legal issues to be resolved."*[203] In ***Sondashi v The***

[200] Supra (n9) article 1(3).
[201] Supra (n9) article 18(12).
[202] In the matter of section 53 (i) of the Corrupt Practices Act, 10 of 1980 and in the matter of articles 20 (7) and 29 of the Constitution and in the matter between: Thomas Mumba - Applicant and The People - respondent ZR 38 HC (1984).
[203] *Ludwig Sondashi v The Attorney General* (2000) ZLR (S.C.).

Attorney General,[204] the courts seemingly recognised their role as that of interpretators of law and that certain matters went beyond the realm of law, and as such the judiciary was rightly excluded from handling such matters.

However, the Zambian courts have in recent times been criticised for succumbing to the influence of the executive. This has been as a result of the executive's role in the appointment of judges. This criticism has further been sparked by the high number of opposition Members of Parliament whose elections have been nullified by the courts. Whilst there has been a plethora of matters brought before the courts where the question is of an executive nature, many of these cases do not proceed on technicalities. This was the case where the Law Association of Zambia challenged the executive's appointment of the previous Chief Justice on the grounds that she was above the stipulated age of retirement and that she had not been ratified for the position she held.[205] In this case, the court held that the initial mode of commencement of the action was wrong. This case is not evidence of reluctance on the part of the judiciary to declare executive actions as *ultra vires*, but is rather an indication of the difficulty in finding precedents on the subject in Zambia.[206] In the recent case of ***The Attorney General v Nigel Mutuna & Others,***[207] the judgment of the Supreme Court has been met with tumult from scholars, who have questioned the veracity of the court's decision. The facts of the case are that the President suspended three judges using powers under article 98 of the Constitution. A tribunal was also constituted to make enquiries into the alleged misconduct of the suspended judges. However, the suspended judges sought leave from Court to stay proceedings in a quest to stop the President from proceeding with the tribunal, and simultaneously contested presidential powers to constitute a tribunal and to suspend them from office.

The matter was whether the President had contravened article 91 of the Constitution when he used powers provided under article 98. Article 91 gives the Judicial Complaints Authority power to hear complaints on judicial misconduct. The argument was that exercise of Presidential powers under article 98 should be on all-fours with article 91 and the President should engage

[204] Ibid.
[205] *Law Association of Zambia v The Attorney General and Philis Lombe Chibesakunda* 2013/HP/1393.
[206] Supra (n205).
[207] Supreme Court of Zambia, Appeal No. 88 of (2012).

both the Chief Justice and the Judicial Complaints Authority beforehand. The suspended judges argued that the President usurped power of the judiciary by appointing a tribunal to enquire on a case that was already before court. The High Court granted leave to stay proceedings on grounds that the suspended judges had *prima facie* grounds. The State applied that the leave and stay be discharged, but the High Court declined and ordered a trial of substantive issues raised by the suspended judges. The State then appealed the decision of the High Court not to grant the discharge of the stay, and the Supreme Court held that the President was right by law to suspend the judges.[208] The Decision of the Supreme Court was slated by Professor Muna Ndulo who stated: *"the adoption of the doctrine of executive supremacy led the Zambian Supreme Court to exhibit in its judgment unbelievable and worrying excessive deference to the Executive…"*[209] The *obiter dictum* of the learned Chief Justice raised questions on the readiness of the judiciary to declare executive actions *ultra vires,* as she stated without any legal basis that, *"the President is the overall authority on everything."*[210]

The practicality of the decision and how it was delivered will undoubtedly raise questions in the future as, although negative, a judicial precedent has been set. This will be binding on all inferior courts with regards executive authority and, in particular, the powers of the President.[211]

Today's modern State is possible only with the separation, independence and impartiality of the judicial system so that it may effectively protect citizens from the excesses of the executive. The judiciary is entrusted with the function of providing justice for all in the light of the universal principles of justice, with equal protection for everyone and equal penalty for all those who may violate its laws.

3.3 Conclusion

In democratic States such as Zambia, the judiciary protects citizens' rights and freedoms. It interprets laws, including the Constitution, thereby making case law in the form of judicial

[208] *The Attorney General v Nigel Kalonde Mutuna, Charles Kajimanga, Phillip Musonda* APPEAL No. 088/2012.
[209] Muna Ndulo http://www.zambia.co.zm/headlines/prof-ndulodisputessupremecourtjudgment. Accessed on 18 October 2014.
[210] Ibid.
[211] Ibid.

precedents to guide future decisions and filling any lacuna or illegal flaws in the law. Judicial independence possess a number of characteristics, but ultimately demonstrates that judicial officers have the liberty to decide cases on merit without external influence.[212]

This chapter has highlighted the flaws in the law and procedure with regards to appointment of judges and has identified the statutes that govern such appointments. The lack of a merit-based system of appointment makes the judiciary susceptible to infiltration by persons who do not have the required integrity to hold such a sensitive and important position. The chapter has also examined how Zambian statute endeavours to prescribe the independence of the judiciary in performing its functions and the conduct of its officers, and discussed how Zambian jurisprudence has adopted international standards and other national codes of judicial conduct.

The next chapter will be the final chapter of this dissertation and will encapsulate all discussions made in the first three chapters and then make recommendations.

[212] Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers, OHCHR p115.

CHAPTER FOUR

CONCLUSION AND RECOMMENDATIONS

4.0 Introduction

There has been insistent debate on the Zambian Constitution over the years with many calls for the need to review the manner in which various government organs operate in relation to each other. Some sectors of society, including opposition political parties, academicians and Civil Society Organizations such as the Jesuit Centre for Theological Reflection, have made calls for the enactment of a Constitution that would clearly spell out the separation of powers among the three wings of government. The current constitutional debate has been fuelled not only by the promises of the current government during its 2011 presidential campaign to enact a new Constitution, but also the appointment of a Technical Committee charged with drafting it.[213] The need for constitutional checks on the powers of government is important in order for democracy to flourish and to save it from self-destruction.

This Chapter will categorically set out conclusions from research carried out on whether the current Zambian constitutional provisions are sufficient in preventing the abuse of power by the executive.

4.1 Need for Extensive Checks on Executive Power by the Legislature

The concept of separation of powers demands the need to prevent abuse of power, as well as to ensure that efficiency and integrity is observed by government departments. The Zambian Constitution has not fully pronounced the doctrine of separation of powers, but has spelt out foundational rules in the layout of the Constitution. However, the major weakness of the Constitution is its inability to adequately provide for separation of powers between the various organs of government in order to prevent abuse of authority. Unlike the South African Constitution, that stipulates supremacy of the Constitution and rule of law, the Zambian Constitution does not make any pronouncement on the need to observe the rule of law. Failure to articulate the importance of the rule of law has resulted in many abuses in the governance and

[213] At the time of finalising this work, a draft Constitution had been released by government for final comments from the public – 23rd October 2014, Times of Zambia.

justice system, especially when it comes to maladministration of government resources, arbitrary arrests and prolonged incarceration of suspects.

The Constitution has further effectively weakened the democratic dispensation by giving the President in his capacity as Head of Government, power to veto legislation; and allowing him to nominate individuals to sit as Members of Parliament. Regardless of the need to draw from the experience of such nominated Members of Parliament, their nomination allows the President to exert influence over them and, habitually, decisions of the National Assembly.

The Constitution is particularly weak because it does not provide for efficient protection of the Zambian public from party patronage, which often places interests of a political party above the interests of the public, whom Members of Parliament are supposed to serve and represent.

The extensive residual power of the executive has made it functionally impossible for other organs of government to effectively check actions of the executive. For instance, the judiciary will be forced to pass unclear judgments because of lack of clarity in the law; and the dynamism of the law is fettered - rather than to suit the needs of society, legislation would be altered to suit self-regarding interests of the executive. Key to the development of a democratic system of governance is the need for legislation to be dynamic to suit the needs of the people. Legislation should effectively represent the views of the governed. If Parliament is compromised, then law ceases to be dynamic and development becomes unsustainable.

For comparative reasons, this dissertation made reference to the South African constitutional provisions with regard to executive power and how the doctrine of separation of powers has been fostered by the courts' interpretation of the Constitution. The research identified similarities in the role of the President under both Constitutions and similarities in the placement of the President as the effective Head of Government under both systems. The paper identified that the South African Constitution has limited Presidential authority by also vesting some of the powers under the Constitution in the National Assembly.

From the foregoing, it is evident that Parliament's lack of authority over acts of the executive is a great threat to Zambian democracy. The establishment of parliamentary committees to which the executive is accountable is not an efficient check on the functions of the executive, because the composition of parliamentary committees includes members of the executive. The executive

could therefore be said to have too much power, principally because Parliament is unable to serve as an effective check. Parliamentary sovereignty is also a key factor in the unchecked power of the executive. The fact that the Constitution of Zambia imposes limitations on the legislative competence of Parliament by emphasizing the executive's role in checking parliamentary power through presidential ratification of legislation, defeats the concept of checks and balances.

4.2 Cabinet to Comprise Distinct and Separate Individuals from Parliament

The paper has canvassed the Zambian legal and political system to show the need for a Cabinet distinct from the legislature so as to enhance the executive's accountability to the legislature. The efficiency of checks and balances is largely reliant on the concept of independence of each organ of government. The implication of having members of the executive who dominate the legislature is that they will push the agenda of Cabinet. When you have Cabinet Ministers in the legislature, it means that they have greater influence in the law-making and decision-making processes of the legislature. For the legislature to operate effectively, it must carry out duties electorates expect of it in a structure of representative democracy. The primary duties are making laws, representing constituencies and balancing power. For Parliament to be effective in carrying out those functions, there must be a system in place to protect its integrity by ensuring the executive does not exert its influence in the decision-making process.

To this end, there is an urgent need to ensure that the President is not permitted to appoint members of the legislature to be members of Cabinet and therefore effectively members of the executive.

4.3 Strengthening Parliament's Checks and Balances over the President

The current legislative regime in Zambia allows the executive to overrule the decision of the legislature through the President's power to withhold his assent to any proposed legislation to be passed by Parliament.[214] This provision lacks merit in that it places the authority of the executive over and above the actions of the legislature. The legislature has the important function of making laws, which the executive is mandated to ensure are complied with. As the

[214] Supra (n9) article 78(3).

executive power in the Republic of Zambia is vested in the President, the provision allows the President to decide what laws are promulgated.

This research has discussed at great length the importance of checks and balances on democratic States and has placed emphasis on the need to limit executive powers. Under the current system in Zambia, the only semi-effective method of controlling executive authority by the legislature is through parliamentary committees, which this research has shown to be ineffective in checking the powers of the executive by the legislature. After comparative analysis with the South African Constitution, this dissertation drew the conclusion that there is need to allow Parliament the authority to override executive decisions.

The importance of Zambia developing a structure of checks and balances which suits its needs cannot be overstated. Under the current provisions, the executive has extraordinary influence over the legislature. Whilst much emphasis is placed on the checking powers of the various government organs, there is need for a clear balance to be drawn so that no organ is more powerful than another. The only check the Zambian legislature has over the executive is provided for in article 37 of the Constitution, which discusses impeachment of the President. This research has shown that the Constitution has, through misdirection, placed unconscionable authority in the executive. The Latin maxim *"Certa debet esse intentio et narratio et certum fundamentum et certa res quae deducitur in judicium",* which means "*the design and narration ought to be certain, the foundation certain, and the matter certain that is brought into court to be tried,"* holds true in this regard. Because the President is effectively the appointing authority of the Chief Justice, who under the Constitution is responsible for constituting a tribunal to investigate any calls to impeach the President,[215] the law does not provide a certain foundation for the exercise of such power.

4.4 Constitutional Amendments

The Zambian Constitution has undergone reform in the past, but social and political developments have brought into question the need for a new Constitution, however the changes to the Zambian Constitution have focused on matters which can be considered trifling, and hence no Constitution has been made *ex nihilo*.

[215] Supra (n9) article 37(3).

This dissertation submits that calls for such an overhaul should not in any way undermine the significant achievements the constitutional regime has managed to achieve, but the new Constitution should expand the Bill of Rights and provide for the following rights:

- Presidential powers should be reduced.
- Cabinet Ministers and their deputies should be appointed outside Parliament.
- The number of nominated Members of Parliament should be reduced.
- The President should not appoint Judges.
- The Judiciary should be directly funded through the national budget and only then would judicial independence be realised.
- Right of access to information: this right is important because an informed nation is an equipped and empowered nation. The fight against corruption cannot succeed without transparency. Like South Africa, enabling legislation equivalent to the Promotion of Access to Information Act should be enacted to effect constitutional provision of this right.
- Right to administrative justice: open governance and accountability of the executive can only be achieved if members of the public are empowered to question government on issues that concern their welfare, and on prudent management of government departments.
- Right of access to courts should be enshrined in the new Constitution. Without this right, human rights abuses will continue to manifest in Zambia's justice system.
- Like the South African Constitution, which clearly spells out supremacy of the Constitution and the rule of law, the new Constitution should provide for observance of the rule of law.
- Zambia's judicial system should be overhauled and should bring on board qualified and well-trained staff. Judgments from Zambian courts leave much to be desired.
- The Constitution should provide for a Constitutional Court that would adjudicate constitutional matters.
- The Constitution should provide for basic values and principles that would govern public administration to ensure high standards of professional ethics, efficiency, effectiveness, transparency and accountability. Currently, it is difficult for members of the public and

civil society to demand accountability from public institutions, which are only accountable to Parliament. For instance, reports from the Auditor General's office are usually ignored by government ministries.

- The need for an independent and well-funded judiciary.

4.5 Conclusion

This study has argued that the current Zambian constitutional regime is not adequate to prevent abuse of authority by the executive. The paper has identified the need for an autochthonous constitutional dispensation to cater for the needs of Zambian society. To build this kind of Constitution the first step would be to allow experience to dictate what needs to be codified. Abuse of executive power in the past should dictate what the law ought to remedy, bearing in mind that a Constitution of any nation can only be as effective as its enabling legislation and institutions, fashioned to ensure the respect for the rule of law. Therefore, any changes to the Constitution should address deficiencies in the functioning of the organs of government from what experience has taught. The Constitution should be forward-looking and take into consideration any future eventualities and allow for essential dynamism. Historically, Zambian constitutional vicissitudes have shown tenacity for avoiding fundamental change. Thus, there is need for key areas of the Constitution to be reviewed and deficiencies addressed as recommended above and through the Mung'omba and current Draft Constitutions.

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