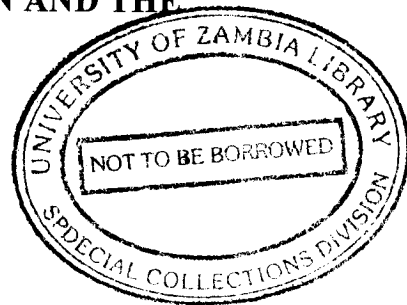


**NON-JUDICIAL CONTROLS OF ADMINISTRATIVE ACTIONS AND
DECISIONS IN ZAMBIA; AN OVERVIEW OF THE ROLE AND
EFFECTIVENESS, IF ANY, OF THE OMBUDSMAN AND THE
CONSTITUTIONAL ARRANGEMENT**



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DECEMBER 2006

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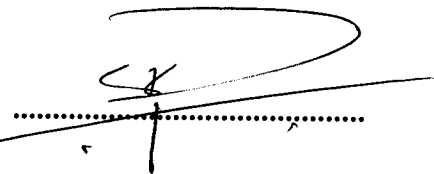
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DECLARATION

I, **Sitimela Oga**, DO HEREBY declare that I am the author of this work. This is purely through my ingenuity and ideas. However, to those works by other authors used in this paper, I have dully acknowledged their pieces of work through acknowledgments.

STUDENT NAME:.....SITIMELA OGA.....

SIGNATURE:..........

DATED THIS.....18th.....DAY OF.....DECEMBER.....2006

DEDICATION

In loving memory of my late father, **Mr. Pearson Similindi Sitimela** (1955 to 6.01.94). I will forever profoundly treasure the first 12 years of my life that I spent with you! I wish you were here to see the fruits of your investment.

And to my entire family without whom I could not have attained my education to this level.

ACKNOWLEDGEMENTS

First and foremost I owe my life to the **Lord God Almighty**. Indeed “They that wait upon the Lord shall renew their strength....”

My heartfelt thanks and gratitude to **Mr. S. E. Kulusika**, my supervisor, without whose professional guidance and valuable comments, this work would have missed the sense of direction.

To my mom, **Mrs. Delia Siafunda Sitimela**, the best mom one could ever have! The good in me is because of you. You were a little skeptical of me joining this noble profession, but I hope this makes you proud. Thank you a million more times for everything you have been, and have continued to be, my strength! God richly bless you!

To **Ms Patricia Mutinta Sitimela**, auntie, you are my mentor! You are my second father and mom, without whom this would have been a difficult road for me to tread. You have worked so hard to make me archive this dream. Your support is immeasurable and irrepayable. I will forever owe this to you, may God add an extra blessing to your life!

To uncle **Henry Sibanyati Sitimela** am indebted hugely for the support rendered. May God extend His hand of blessing upon you.

To the rest of my family, my brothers **Clyde, Myland, and Oscar**, my sisters, **Mutinta, Munkombwe**; my cousins **Muchimba, Mainza, Malilwe, Felistus, Oscar, Kwasi, Choolwe, Nameba(Nana)**, thank you guys for your unwavering support. May God bless each one of you according to your needs and may His bonds of love continue to bind US!!

I will definitely be unreasonable if I do not acknowledge the tremendous moral support from my friends, particularly **Mabvuto (Kalombovu), Akakulubelwa (Sweetie), Willie, Lucy, Cynthia, Sandra** and to my classmates/friends **Likezo (Hi...wee!), Jingala (Jingles), Jennipher (Jen), Akaketwa (Aka), Gracilia, Choongo (Chong 1), Matilda (Sweetie)**, what a blessing it has been to know you all! You are the new crop of resource that Zambia needs to make it a better place, GO GUYS THE SKY IS NO LONGER THE LIMIT BUT YOURSELVES!

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GENERAL INTRODUCTION

Since the dawn of welfare states in the 19th century, the state has assumed a very active role in the social and economic affairs of the people. The rapid increase in population and inequalities engendered by the industrial revolution on a scale hitherto unprecedented created new problems that forced the state to come out of its spectator role under the *laissez faire* ideology. Under this ideology, matters as to health, welfare, education, economics, were not the concern of the state. In the 19th century, the state took an active role to these matters. This implied, inevitably, regulation through law. Through various policies embodied in various pieces of legislation, the state has been able to control the socio-economic activities. The modern state has had the responsibility of regulating the economic, social and political activities of its citizens.

These developments have had an influence on the development of Administrative law. The main aim of governing, it is believed, is pursuing the public good or common welfare, but it has also been believed that power when vested in an individual or in a group of individuals collectively is bound to be misused or abused. Thus, Administrative law enters the 'scene' so as to protect citizens against the possible and indeed abuse of power. Indeed, 'power corrupts, and absolute power corrupts absolutely' makes sense in light of the functional role that the state has assumed. Administrative law determines the organization, powers, functions and duties of government and its administrative authorities.

The 'injection' of Administrative law in the running of government, it should be emphasized, is not to cast a shadow or latent mistrust on the authorities but be as it may be, public authorities can misunderstand their responsibility and so put at risk and endanger the lives of the citizens by their decisions.

The various functions performed by both the central and local government have called for a scope of administrative law procedures, mechanisms and processes whose *raison d'être* is to ensure that public authorities operate within the scope of their authority. These

processes, mechanisms and procedures are essential in the promotion of justice and ensuring that public officers conduct their duties within the confines and four corners of the law.

In a constitutional democracy political power belongs to the people, and is exercised directly by the people or delegated to their representatives. Whatever the situation may be, power has defined limits with ground rules, which all members of society are expected to observe. As public power is largely exercised by the executive branch, there is a need to ensure that officials of the state comply with the letter and spirit of the law. In this regard, some mechanisms and legal rules have been evolved over the years, within Zambia to deal with abuses of authority and misadministration by public officers. These are twofold; judicial and Non-judicial and constitutional. Judicial rules include judicial review of public actions by the courts while non-judicial control of public actions do not involve the courts and include Human Rights Commission, the Commission of Investigations (Ombudsman), Commissions of Inquiry, the Presidential constitutional system, Various Administrative Tribunals. These fall under the general umbrella of Non-judicial because the means they employ in ensuring that public agents and officers operate within the law do not involve the courts, per se. The matter of concern of this dissertation, however, is the latter, particularly the Institution of the Ombudsman and the Presidential constitutional system (specifically Parliament's role under the system).

The first chapter of the essay shall look at the historical précis to the adoption of a system of government, which combines some aspects of the American Presidential system and the Westminster Parliamentary system, at independence and its retention through to the third republic. Thereafter, the chapter will trace the origins of the Institution of the Ombudsman, its adoption, form, nature and structure as well as its powers, jurisdiction and composition.

Chapter two focuses on the role of Parliament as a non-judicial mechanism of administrative control under Zambia's unique system of government combining some aspects of the American Presidential system and the Westminster Parliamentary system.

The chapter will concentrate on how Members of Parliament (MPs) protect their constituencies against the administration. Further, the chapter will discuss what effect on the executive has the fact that Ministers, Deputy Ministers are supposed to be MPs and that they are collectively bound to the National Assembly. The chapter will also examine the influence that the ruling party with a majority of MPs has on parliament's effectiveness and also the role of the opposition parties and relation to Parliament. Finally, the chapter concludes by a brief prognosis.

The third chapter will concentrate on answering the question, whether the Commission of Investigations has been effective as a non-judicial tool in its investigation of abuses of authority. The chapter will also discuss how the current economic, political and social circumstances have affected the Commission's efforts in conducting investigations and curbing mal administration.

The last chapter, chapter four, concludes the whole dissertation by rendering a general conclusion on the performance of non judicial controls of public decisions and actions in Zambia and wind up by making recommendations to chapters two and three.

CHAPTER ONE

HYBRID OF PRESIDENTIAL AND PARLIAMENTARY SYSTEMS: HISTORICAL SYNOPSIS

Like many other African countries, Zambia has a unique executive system that mixes both the presidential and parliamentary systems. The President functions as both Head of State and Head of Government. The President is part of the Legislature and appoints the Cabinet from the Legislature. However, the President and the Cabinet do not serve subject to the Legislature's confidence. "The Presidential system is characterized by two main features. In the first instance, the Executive consisting of a single executive. Secondly the Executive is independent of the Legislature and the Judiciary."¹ Thus, the president is both head of state and head of government. The United States of America offers as an example of a presidential executive system. In a Parliamentary system "the Prime Minister is the Head of Government whilst another figure, such as a Monarch or elected President, serves as titular Head of State. The Head of Government and the Cabinet are constituted from the Legislature and they serve subject to the Legislature's confidence."² Britain serves as a very good example of a country with a parliamentary executive system.

¹ A. Chanda, (2004), Judicial Review of Executive and Legislative acts, p.19, (unpublished)

² CRC, (2005), The Final Report of the Mung'omba Constitution Review Commission, p. 47, Secretariat CRC, Lusaka

1.1 FIRST REPUBLIC (1964-1973)

The current system dates back to October 24, when Zambia became a sovereign independent state. Post independent Zambia adopted a unique system of government designed to keep the administration in control. “In the 1964 Constitution an attempt was made to blend neatly cabinet government with a United States version of presidential power. The executive power was a fair balance between a presidential model and a Westminster type of cabinet. The functions of head of state and chief executive were fused in the office of president. Although the executive president was expected to act in his own deliberate judgment, the advisory role of cabinet was given, nonetheless, constitutional recognition.”³ Under section 31⁴, executive power was vested in the executive and could be exercised directly by him or indirectly through officers subordinate to him (Ministers, deputy ministers, etc).

The legislative powers of the Republic were vested in parliament, which comprised of the President and a National Assembly.⁵ The President was a constituent part of parliament as no bill could become law without his assent.⁶

The Judiciary, with the Court of Appeal as the highest court, was also constitutionally recognized.⁷

³ Mwanakatwe Constitutional Review Commission, **The Final Constitutional Review Report**, www.Zamlil.ac.zm

⁴ 1964 Constitution

⁵ Section 57, *ibid.*

⁶ Section 71, *ibid.*

⁷ Section, 97, *ibid.*

The foregoing presupposes the endorsement of the doctrine of separation of powers. Consequently, endorsement of the concept of separation of powers in the Independence Constitution was an expression of the need to control power. “The concept calls for the division of the authority of government into three main organs of government; the legislature, executive and judiciary.... Its value lies in the emphasis on the checks and balances essential to prevent the abuse of enormous powers vested in the rulers.”⁸ To this end, Parliament (in particular) played a very important role in curbing abuse of authority by public officers.

1.2 SECOND REPUBLIC (1973-1991)

However, in 1973, the Independence constitution was amended to the extent that political pluralism was outlawed and Zambia became a One Party system of government. The new constitution provided under article 4 that, “There shall be only one political party or organization in Zambia, namely the United National Independence Party (UNIP)... the constitution whereof is annexed for information.”⁹ Hence, “it is apparent that the right to associate and to assemble for political purposes could only be exercised within the context of the ruling party.”¹⁰ Party membership was made a prerequisite for holding all political posts. All the 150 Members of Parliament (MPs) were members of UNIP. Despite this, Backbenchers played a vital role in the National Assembly as watchdogs of the electorate over government activities and policies. Bills which were viewed by

⁸ J.P Sangwa, (2005), The Constitutional framework of Administrative Law, p. 17, (unpublished)

⁹ The Constitution (Amendment) No. 5 Act (1972)

¹⁰ Extract from A.W. Chanda, (1992), Zambia: A Case Study in Human Rights in Commonwealth Africa, JSD Dissertation presented to Yale Law School, USA. www.Zamlil.ac.zm

backbenchers as detrimental to national interest were rejected.¹¹ This led to parliament being viewed as an opposition party within the one party system by the UNIP government. Indeed, President Kaunda emphasized this when he said,

“Parliament is not an opposition device to the party itself or to other party Institutions. Under our system I regard parliament as a committee of the Nationals Council charged with the reasonability of enacting laws of the Country.”¹²

In order to frustrate Parliament's efforts in checking the government, President Kaunda introduced an administrative mechanism which eroded participatory democracy in Parliament. He increased appointments of MPs into government positions and/or UNIP organs. This meant an increase of the front bench members with a corresponding decline of the backbenchers. Between 1975 and 1991, the front bench increased from 42 members to 77 as a number of backbenchers were appointed either into government or UNIP organs. Thus, the backbench decreased marginally from 87 to 46 during the same period.¹³ Evidently, there was a shift of the 'weight on the balances' within Parliament. The frontbench had the majority to vote for the government on motions and bills. Moreover, the doctrine of collective responsibility meant that the 77 front members were bound to support any government bill. Hence, “they could therefore, not be expected to freely criticize party and government policies, without putting their positions or careers in jeopardy. All the major policy initiatives came from the president were invariably adopted by the UNIP organs without any critical discussions of their merits or demerits. Any opposition to the president's views was treated harshly and denounced as enemies of

¹¹ Backbenchers were UNIP members but held no party or government positions and were not bound by the doctrine of collective responsibility.

¹² Speech to UNIP National Council on December 12, 1977, as quoted by A.W. Chanda, *ibid*

¹³ Hansards of National Assembly from 1974 to 1991

the state. What degree of freedom from the executive did MPs enjoy in practice? To what extent was the executive accountable to parliament?¹⁴

The writer subscribes to the sentiments expressed above. Despite the retention of the Presidential-Parliamentary system under the one party constitution¹⁵, in practical sense of it, the president was above all criticism, no one could openly oppose to his views. Parliament, too, became a 'defunct' institution *vis-a-viz* 'checking' executive actions. The institution became an attachment of the party, UNIP. "Since the ruling party claimed supremacy over all institutions in the country¹⁶, the National Assembly and the government were regarded as being merely instruments or agents of the party. (Therefore,) the National Assembly's role was merely to pass what ever legislation the party wanted (UNIP)."¹⁷ President Kaunda emphasized this when he said,

"... Under our system I regard parliament as a committee of the Nationals Council charged with the reasonability of enacting laws of the country."¹⁸

Clearly, the ideal role of parliament in a Presidential-Parliamentary system lost its value in the Second Republic as it became merely an 'agent' of the party and could not effect any checks and balances nor curb any abuse of power (so imminent in the One Party rule) of the executive. There was no more efficacy of the doctrine of separation of powers which is fundamental in a Presidential constitutional order.

¹⁴ A.W. Chanda, *ibid*

¹⁵ The constitution provide for existence of the three traditional arms of government: Executive, Parliament and Judiciary

¹⁶ Article 8 of the party provided "The Party ... shall have supreme authority over all state organs."

¹⁷ *ibid*

¹⁸ Speech to UNIP National Council on December 12, 1977, as quoted by A.W. Chanda, *ibid*

1.3 THIRD REPUBLIC (1991- 20...)

In 1990, however, there were increased calls for the abandonment of the One Party rule in the Republic. A return to political pluralism was being advocated for and spearheaded by the Movement for Multiparty Democracy, (MMD) as a pressure group. In December 1990, the MMD succeeded in forcing Kaunda's government to abolish the One Party system by amending the 'UNIP only party' clause in the Constitution. The Kaunda regime lacked legitimacy because it was not accountable to the people. The majority of the people were disenchanted with the one Party system.

A number of political parties were formed following the amendment to the constitution. On October 31, 1991, general elections were held at which the MMD (which transformed itself into a political party) won 125 seats of the 150 seats in Parliament and Chiluba beat Kaunda for the Presidency by a landslide victory claiming 997462 (76%) total votes cast¹⁹. Under the 1991 constitution, the structure of government similar to that which existed under the Independence constitution was retained. In the 1996 and current constitution, the structure still retains the presidential constitutional system. To this end, in an effort to ensure a firm system of checks and balances and control of exercise of authority by the executive, the current constitution retains the concept of separation of powers *albeit* with no express reference to that effect.

¹⁹ Electoral Commission of Zambia, 1991 General Elections Results, Lusaka

1.4 HISTORICAL SYNOPSIS TO THE ADOPTION OF THE COMMISSION FOR INVESTIGATION (OMBUDSMAN)

The Institution of the Ombudsman traces its origins in the Scandinavian region, particularly Sweden. In 1809 the office of *riksdagens justitieombudsman* (Ombudsman) was created to act as an agent of justice, that is, to see after the interests of justice in affairs between the government and its citizens. “The concept of Parliamentary Ombudsman has its origin in the Swedish history of governance. It operates through an autonomous office under Parliament with the mandate of ensuring compliance of public officers and authorities with the law. The functions of the Ombudsman are to investigate citizens’ complaints of executive or bureaucratic incompetence or injustice as a result of misuse of public authority or law. The scope of investigations usually excludes legislative and judicial conduct. The Swedish Parliamentary Ombudsman has existed for nearly two centuries. The concept of ombudsman has spread and can now be found in many other parts of the world. Examples are Finland, Norway, Denmark, New Zealand and the United Kingdom.”²⁰

1.5 ADOPTION MODE AND ITS EARLY YEARS

The institution has been in existence for the past 33 years in Zambia. Until 1973, “the only means of protecting the citizens against abuse by the administration was through the court’s power of judicial review..., an appeal to an administrative tribunal and seeking

²⁰ CRC, (2005), ibid

intervention of Parliament through a Member (thereof). ...²¹ The creation of the Commission for Investigation was in response to the demands for an institution (a cheaper and easily accessible one) other than the courts to control the use of power by public officers. Following the announcement by President Kaunda in 1970 that Zambia was to adopt a One-Party Participatory democracy, a number of concerns were raised by the general public. Among these was the issue of how to ensure that individual injustice and/or administrative abuse of power were to be kept at bay. In this regard, President Kaunda in 1971 announced his intention of establishing an office of the ombudsman. He said,

“...an important institution, the Ombudsman is to be introduced in the not too far distant future for anyone with such complaints as victimization, nepotism, tribalism, etc to have an independent judgment thereby building our social, economic, political and administrative structure, a future mechanism of checks and balances.”²²

In 1972 the Chona Constitution Review Commission was appointed to determine the constitutional framework for a one-party system of government. Among the Commission’s recommendations was the need for establishment of the office of the Ombudsman. It recommended that the Republican constitution should provide for the creation of the office of Ombudsman who shall be called the Investigator General. It further recommended that “the establishment of such an institution would have a number of benefits. The Ombudsman would be looked at as independent and impartial, factors critical to the survival of the institution. Complaints would be presented informally and without any costs. The Ombudsman would consider the whole filed, in which a complaint

²¹ J. P. Sangwa, (2005), Administrative Law in Zambia, (class notes, unpublished)

²² K.D. Kaunda, (1971), A Path for the Future, p. 41, Lusaka, Government Printers

would arise by allowing flexibility in investigating complaints, which is not possible with ordinary courts of law. The ombudsman would be of value to the administration. He would informally advise, remind and reprove public officers or institutions found wanting. The very fact that a complaint against a public officer or public institution can be considered by the Ombudsman was a significant restraint on public officers.”²³ The Government accepted all the recommendations and when the Constitution came into force in 1973, it provided for the Ombudsman in the form of a Commission for Investigations whose chairman was the Investigator General.²⁴

In 1974, Parliament enacted the Commission for Investigations Act²⁵ whose purpose was to provide for the powers, privileges and immunities of the Commission and make detailed provisions to enable the commission to perform its functions.

1.6 1991 CONSTITUTIONAL CHANGES AND CURRENT FORM

When Zambia reverted to multi-party pluralism in 1991, a new constitution came into force which had ramifications on the Institution. The 1991 Constitution only provided for the existence of the Investigator General.²⁶ It provided for the position of Investigator General appointed by the President in consultation with the Judicial Service Commission. Anyone who was qualified for appointment as Judge of the High court also qualified for appointment as Investigator General. The constitution also provided for a procedure for

²³ As quoted by J.P. Sangwa, *ibid*, p.27

²⁴ Articles 117 and 118 of The Constitution (Amendment) No. 5 Act (1972).

²⁵ Came into force on 16th August 1974

²⁶ Article 90 of the 1991 Constitution

removal from office thereof.²⁷ Further the Constitution enacted that powers, functions and procedures of the Investigator General shall be provided for under an Act of Parliament. Subsequently, a new Commission for Investigations Act was enacted and came into force on 6th September 1991. The Commission itself was now created under the Act since the Constitution only created the office of Investigator General. There was retention of a status quo when the 1996 and current constitution came into force.²⁸ In its current form, the powers, functions, procedures of the Investigator General and the Commission itself are embodied under the Commission for Investigations Act.²⁹

1.7 COMPOSITION AND STRUCTURE OF THE COMMISSION

The Commission comprises of the Investigator General as its Chairperson and three Commissioners appointed by the President subject to ratification by the National Assembly.³⁰ These serve under a three year but renewable term of a similar term.³¹ An array of officers drawn from the civil service provides a supporting role to the Commission. These include a Secretary; accounts officers, and two investigators.

1.8 FUNCTIONS, POWERS AND JURISDICTION

The Commission’s principle functions are basically to investigate complaints or allegations of maladministration brought to it by members of the public or on its own.

²⁷ Article 90, *ibid*
²⁸ Article 90, Chapter One on the Laws of Zambia
²⁹ Chapter 39 of the Laws of Zambia
³⁰ Section 4 of the Act, *ibid*
³¹ Section 5, *ibid*

The Commission has authority to investigate any complaints or allegations made against any person in the service of the republic and a person employed by a local authority. The Act further provides that the Republican President cannot be investigated by the Commission.³² Broad powers have been accorded to the Commission to investigate any matter of individual injustice or maladministration abuse of power or authority. Inclusive is tribalism, corruption, nepotism, intimidation and all forms of discrimination taken by or on behalf of any department or Ministry of government, any statutory corporation set up entirely or partly out of public funds voted by parliament, including institutions of higher learning. Investigations can be instituted on any member of the public service, security forces, Organisation within the Republic.³³

The Commission has the power to make orders, issue such writs which have the force of the same magnitude as orders made or writs issued by the courts of law.³⁴

However, under section 3(2), the Commission cannot investigate any matter before the court for determination or a decision of the court or any matter relating to the exercise of prerogative of mercy. Further limitations are placed on the Commission's powers; it cannot investigate a complaint if the complainant has or had the opportunity of obtaining relief by way of representation to an executive authority; where it is possible for the aggrieved person to obtain a relief or redress by means of an application, appeal, reference or review to or before a tribunal established by or under any law; nor hear a

³² Section 3, *ibid*

³³ Section 3, *ibid*

³⁴ Section 12, *ibid*

complaint if the aggrieved person has a chance of obtaining redress through the courts.³⁵

The Commission is expected to submit annual reports to the President and the National Assembly containing the summary of cases investigated and the action taken or recommended. This report to the Assembly should be submitted at least by the last day of each year (31st December)

1.9 CONCLUSION

This chapter has basically introduced the thrust of this dissertation being non-judicial controls of public officers (in particular, the Ombudsman Institution) and the Presidential Constitutional system (emphasizing on Parliament). It is apt to state that Parliament influence on the executive under our system of government cannot be overemphasized. Parliament has a run on the administration in that for one to be eligible for appointment as Vice-President, Minister, Deputy and /or Deputy Provincial Minister he/she must be an MP. Also, Cabinet and Deputy Ministers are accountable collectively to the National Assembly.³⁶ In addition, there is an assumption that MPs represent their constituencies as they are supposed to protect their constituencies from administrative decisions, which affect them negatively and cause the administration to make decisions that will benefit them. Over the years Parliament has been a watchdog over government activities through its control of government's financial administration, delegated legislation; scrutinize Constitutional appointments by the President.

³⁵ Section 10, *ibid*
³⁶ Article 51 of the Constitution, CAP One of the Laws of Zambia

Further, the chapter traced the origins of the Ombudsman Institution to Sweden in the Scandevia. The Ombudsman institution in Zambia is styled ‘Commission for Investigations’ chaired by the Investigator General assisted by three Commissioners. Its main responsibility is to investigate or inquire into allegations of abuse of administrative authority in public offices made against any person in the service of the Republic (a civil servant except the Republican President) and a person employed by a local authority.

The next Chapter examines Parliament’s performance as a non-judicial control mechanism of public actions and decisions under the Presidential constitutional system.

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The next Chapter examines Parliament's performance as a non-judicial control mechanism of public actions and decisions under the Presidential constitutional system.

CHAPTER TWO

THE PRESIDENTIAL CONSTITUTIONAL ARRANGEMENT SYSTEM: PARLIAMENT AS A NON JUDICIAL PUBLIC CONTROL MECHANISM

2.1 PARLIAMENT'S PLACE IN THE CONSTITUTION

The Zambian Constitution has enshrined the concept of Separation of Powers since independence albeit no express provision to that effect. The propounders of the Independence constitution early realized a need of curbing abuses of power thus, governmental power was divided into three main organs of governance; the legislature (Parliament- National Assembly plus the President), executive (the President) and judiciary (Supreme court, High Court, Industrial Relations Court, Magistrate Courts, Local Courts and any other court as may be created by Parliament) and this has been in effect to date.³⁷ The rationale for the concept is to provide for checks and balances among the three organs of government. The endorsement of the concept of Separation of Powers is an expression of the need to control the use of power by those in public administration. The doctrine of checks and balances is intended to prevent abuse of powers vested in the hands of the people who conduct governmental business. Each of the three traditional organs of government has a role to play to give effect to the doctrine of check and balances.

The Legislature (Parliament) plays a key role in providing checks and balances on the other organs of the State. The Zambian Parliament has a mandate to check the actions,

³⁷ Articles 62, 33, 91, of the Constitution of Zambia, respectively

decisions and activities of the executive in order that the power vested in the Executive is not abused by its officials. It plays its role through four main functions, namely:

- representing the people in Parliament;
- legislating;
- vetting and approving the budget; and
- overseeing public policy and Government conduct.

Historically, parliamentary arrangement under Zambia's system of government has never been an effective non-judicial mechanism for checking administrative actions. In reality Parliament has been and continues to be more of an extension of the Executive. The unique presidential system of political arrangement and its supporting constitutional framework and underlying ideals were alien to Zambia. Zambia's Independent constitution prescribed a presidential multi-party system of parliamentary government combining some aspects of the American presidential system and the Westminster parliamentary systems. "In the American presidential system and other western parliamentary systems where the systems are in place, its operation does not provoke total hostility between rival parties or coalition parties. Political parties perceive competition for political power as a mixed inter game, in which the competing parties have, not only ideologically antagonistic interest, but also significant interest in common to maintain competition for power."³⁸

³⁸ J.P Sangwa, (2005), The Constitutional framework of Administrative Law, (Class notes, unpublished)

Party politics were unknown among Africans until 1948 when the African National Congress (ANC) took part in elections. Sixteen years later, Zambia became an independent sovereign state. "In the post-Independent Zambia, politics took a different dimension from what the drafters of the Constitution envisaged."³⁹ The system of government as adopted based on western ideals could not operate smoothly in Zambia. It was therefore, not a surprising factor that in 1973, Zambia adopted a one party system of government. As noted already, this system of government reduced Parliament to a 'rubber stamping' role. The institution was lower in rank and function to UNIP, the one and only party. It was rightly observed that "Parliament was under threat of withering away and substituted by executive supremacy."⁴⁰ Parliament was ineffective in taking the executive and the administration to task to address national problems. This can be seen in the early 1990s when shortages of commodities became the norm of the day; riots intensified; health and education standards deteriorated. To this end, Parliament was accused of being there for decorative purposes since in reality it was a 'rubber stamp' of executive decisions.

When the Movement for Multiparty Democracy (MMD) came into power in 1990, a lot of hope arose in people's minds that the 'new' Parliament would come to their aid; that the executive would be held accountable and responsible for its activities; it was hoped that MPs would represent the electorates' wishes and wants and be protected against poor administrative decisions; that they (MPs) would have more allegiance to parliament as an

³⁹ J. P. Sangwa, (2005), Administrative Law in Zambia, (class notes, unpublished), p. 45

⁴⁰ J.M Lee, (1962), Parliament in Ghana, Vol. 16. p. 376

institution as opposed to their respective political parties, after all, they were collectively accountable to the National Assembly.

2.2 ELECTORATE AND THEIR REPRESENTATIVES (MPs)

The role of the Legislature is founded on the premise that it is composed of representatives of the people, in most cases elected directly by the people. Thus, it represents popular sovereignty and is the medium through which the people and the Government relate to each other. Consequently, there is an assumption that Members of Parliament (MPs) represent the interest of the electorate in their respective constituencies hence, MPs must explain to the people various decisions and policies of the government. In turn, the people must present their grievances to their MPs who must follow up on the complaints on their behalf with the relevant government ministries. And if need be, present the petitions to the National Assembly where the minister responsible may be required to respond to the issues raised. This arrangement works as a check on the administration in its implementation of various policies. Parliament should express the will and aspirations of the people. It should strive to ensure that the Government is responsive to their priorities and that it is transparent and accountable in its policy pursuits, resource allocation and utilization.

To this end, the electorate and MPs need to conduct regularly involved consultative meetings at which the people have an opportunity to present their views, interests and needs at the same time the MP concerned explains the policies that directly affect them

in the constituencies. In this way, MPs can protect their constituencies from administrative activities that may negatively affect them. A link is thus created between the electorate and parliament at which the interest of the people should rank paramount to those of the MPs and their respective political parties.

However, as far as the political scene in Zambia is concerned, the above is only ideal and yet to be realized. To begin with, there is no rapport existing between the electorate and their representatives in parliament. A number of the MPs feel less obliged to visit their constituencies or maintain constant contact. This has led to them being ignorant about the problems affecting the people in their respective constituencies. There is less consultative meetings between the electorate and their MPs. The only time that most MPs hold such meetings is at election time when they are lobbying for votes during their campaigns.

The problem worsens where the MP is a non resident (electoral laws in Zambia do not make residence a prerequisite to being a parliamentary candidate) or has a ministerial position which requires him/her to take ministerial residence in Lusaka. The unfortunate situation is that whether the MP discharges his/her mandate to the constituent it matters less as he/she will most likely retain their position as MPs for the same constituencies provided he/she stands as a candidate for a popular party and has full backing of the party. A serving example can be seen in Solwezi where Hon. B. Tetamashimba stood under the United Party for National Development (UPND) ticket in 2001 and won the Solwezi Central seat. Months later he was suspended from the UPND and he resigned to

join the MMD under which he contested the Solwezi Central seat in the by-election that followed and won the seat.

In 1991 during the multi party general elections, Enock Kavindele stood as a candidate for the Chingola seat under UNIP while Ludwig Sondashi stood as candidate for MMD for the same seat and won beating Kavindele. The two candidates later stood in the same constitution but Sondashi for National Party (a MMD break away party) while Kavindele stood for MMD and he won the elections. This was within a space of three years from the 1991 general elections. It is ironic, that a person who lost the elections would later win just because they are now sponsored by a popular party. Clearly, MPs are elected more on the strength of the party who sponsors their candidature and not necessarily on account of merit, their abilities and their standing in the eyes of the electorate.

Under the Zambia's electoral system, a particular political party chooses who should stand as candidate and not the people; consequently, party allegiance overrides commitment to the electorate and their plight. The respective MP would rather pay more allegiance to the party that sponsored him/her thus, where the interest of the party and the electorate clash, the MP is more likely to vote for his/her party's interests over those of the people.

Zambia's parliamentary arrangement as a non judicial control and check upon the administration leaves much to be desired. Parliament's role as a check on the government on behalf of the electorate is very questionable. What counts most for the MPs are party concerns as opposed to those of the electorate. This factor determines the conduct of the

MPs both in the National Assembly and Parliament. In the National Assembly, MPs who support the peoples' interest and views at the expense of the party's risk expulsion from the respective parties. This is even truer where the MPs concerned are from the ruling party. The hope of ministerial appointments lingers on and overshadows any counter interest of the electorate thereby avoid being seen as affronting the executive. Electorate's views are only given total attention if and when they are liaison with those of the Executive and their party.

2.3 RELATIONSHIP BETWEEN MPs AND THE ADMINISTRATION (EXECUTIVE ORGAN)

The Executive power in Zambia is vested in the Republican President.⁴¹ The president can exercise this power either directly by him/herself or indirectly through his delegates. These include the Vice President, Cabinet ministers and duty ministers. The vice president exercises powers specifically vested in him/her by the constitution and any other piece of legislation and such as assigned by the president.⁴² Ministers are responsible for such business of the government.⁴³ The President, Vice President and Ministers together form cabinet whose mandate is to formulate government policies and advise the president on matters of policy.⁴⁴

⁴¹ Article 33(2) of the Constitution of Zambia, Chapter one of the laws of Zambia

⁴² Article 45(4), *ibid*

⁴³ Article 46(3), *ibid*

⁴⁴ Articles 49 and 50 respectively, *ibid*

Parliament's influence on these officials with the responsibility of running the administration is seen in that for one to be eligible for appointment as vice president, minister or deputy minister, they must be a Member of Parliament. Further, it is provided that the cabinet and deputy ministers shall be accountable collectively to the national assembly.⁴⁵

However, the above situation is far from reality instead Parliament has been weakened as an institution of non judicial control of the executive. Members of parliament tend to be less critical of government activities in the hope of ministerial posts. Politics in Zambia has reached a sad stage where it is viewed as a source of employment and not as a service to the people. Hence, those who make it to the National Assembly hope to be further appointed as ministers and other influential positions as this entails a lot of pecuniary and collateral advantage. This power of appointment to ministerial position has been used by the president to weaken the opposition in Parliament. For instance, after the 2001 general elections, Zambia experienced for the first time a Parliament with no single party dominating seats. The MMD got 69 seats, UPND got 49, UNIP had 13 with 12 for FDD while HP got 4 with PF and ZRP each getting 1 seat. In order to weaken the opposition, president Mwanawasa resorted to appointing opposition MPs to ministerial positions. From the FDD, ZRP, UNIP and HP president Mwanawasa appointed their MPs to full cabinet ministers and deputy ministers. Close to 10 opposition MPs resigned at MMD's instance to rejoin the MMD and recontest the respective seats which they eventually and bounced back to Parliament as MMD Members of Parliament which then retained the dominating position.

⁴⁵ Article 51, *ibid*

2.4 THE RULING PARTY, THE OPPOSITION *VIS-A-VIZ* PARLIAMENT

Under Zambia's electoral laws, the political party whose presidential candidate wins the republican presidency is officially 'tagged' the ruling party while the rest of the parties 'form' the opposition.

The position of ruling parties in Zambia and the majority of Africa *vis-a-viz* Parliament has been one of dominance over the opposition in Parliament. As observed, "Ruling parties in Africa are mostly dominant parties who, not content with their overwhelming predominance, often resort to repression and perverted methods to perpetuate their rule and so exclude the opposition from ever coming to power."⁴⁶ This is true for Zambia and can be seen from the early years of independence. At independence, only three political parties existed; UNIP with 56 seats; ANC with 9 seats and UPP (settler party) with 10 MPs (elected on the reserved European roll). UNIP was officially the ruling party since Kaunda; its president became the first republican president. With 56 seats in Parliament, UNIP was a dominating ruling party, a position most favorable for the executive organ of government to manipulate and undermine parliament's role and effectiveness as an institution of checks and balances.

The 1968 elections saw UNIP, the ruling party, continue with its dominance with 81 seats while 23 for the ANC. It was therefore not easy for Parliament to conduct effective checks and balances. Finally in 1973 Zambia became a one party system of government.

⁴⁶ O.B Nwabueze, (1978), Constitutionalism in Emergent States, p. Fairleigh Dickinson University Press,
New Jersey

As noted in the first chapter, the administration under this system of government reduced the role of parliament to that of 'agency.' The institution of Parliament was no more than an agent whose role was only to make laws.

With the collapse of the one party rule in 1991, the MMD won 125 seats of the 150 in Parliament with its presidential candidate, Chiluba, winning the republican presidency while the remaining 25 went to UNIP. Thus the MMD became officially the ruling party and UNIP the only opposition party. However, the 1991 general elections merely created a shift from a *de jure* one party system to a *de facto* one party system. To all practical purposes, there was no opposition party. The new regime used the same manipulative methods of the old regime to diminish Parliament's performance as a non judicial public control mechanism. The MMD had over 83% of the seats in Parliament more than enough of the needed one-third to conduct business in the National Assembly. It was therefore easy for the Executive to enjoy unprecedented support for its policies in Parliament from its MPs. as UNIP's voice was 'too faint to be able to offer spirited opposition.

In the 1996 elections, the ruling MMD sought to 'wipe out' the opposition in an effort to effectively undermine the role of Parliament as a watch dog of the people over the administration. UNIP ended up boycotting the elections after substantial amendments to the constitution which made Kaunda, UNIP's presidential candidate, unqualified to stand as a candidate for the republican presidency. One of the amendments was the inclusion in the 'new constitution' of article 34 which gave the effect that a presidential candidate had

required number of votes on the strength of the party which sponsored it and not necessarily on merit. Unpopular legislation and motions are affirmed by Parliament on partisan lines.”⁴⁸ For instance, the amendment of section 123 of the Criminal Procedure Code⁴⁹ to make the offence of motor car theft unbailable in 2000⁵⁰ was spear headed by the then president, Chiluba, in an effort to ‘punish’ his enemies. It was common cause among the MMD MPs that the Bill was not a progressive one but simply that they had unreserved allegiance to the executive. Another example was the approval by Parliament of president Chiluba’s Presidential Slush Fund and hefty funding of the District Administrator’s office amid strong representations against approval of such unreasonable expenditure. (The Presidential Slush Fund was far in excess to poverty alleviation allocation).⁵¹ Invariably, the interest of the ruling party and the executive rank above those of the National Assembly and Parliament as public control institutions.

Amid all this, the opposition’s voice was ‘too small’ to be heard. The opposition was by far out numbered in both the Assembly and Parliament. However, in the 2001 post general elections results, the ‘odds’ occurred in Zambia’s democracy. For the first time in its history, Parliament was not dominated by any single party. The precedent set in the past elections was upset by the 2001 election results. The MMD got 69 seats, UPND had 49 seats, UNIP got 13 seats, 12 seats went to FDD, while HP got 4 seats with the remaining 7 shared between ZRP with 1, PF with 1 and 5 went to independent candidates. The MMD retained the ruling party ‘spot’ but was no longer the dominant

⁴⁸ J.P Sangwa, 2004, Administrative Law in Zambia, p. 12, (unpublished)

⁴⁹ Chapter 88 of the Laws of Zambia, the section deals with bail related cases

⁵⁰ ACT No. 23 of 2000

⁵¹ Human Rights Observer, 2001, Inter Africa Network for Human Rights Publication, Vol. 3

party in Parliament. Collectively, the opposition had 81 seats against 77 MMD members, 69 elected and 8 nominated. No Bill therefore, could be passed by the MMD government solely as it lacked the majority. A unified opposition would effectively make sure that the Executive does not manipulate Parliament by using members of parliament of the MMD, so people hoped. Indeed, a number of strides were 'scored' by the 'new' look Parliament. For the first time in the history of Zambia, the National Assembly declined to ratify the appointment of Caroline Sokoni as the Director of Public Prosecutions (DPP) for being unsuitable. A concerted representation from Law Association of Zambia (LAZ), Magistrate and Judges Association of Zambia (MAJAZ) and Anti Corruption Commission (ACC) to the effect that she lacked experience in criminal law to be DPP was enough for the National Assembly to decline the ratification.⁵² The Assembly also rejected the initial presented presidential travel expenditure after it was noted that billions of kwachas were spent on foreign trips by the president during the 2003 period at which some of them were unnecessary and unfruitful putting a drain on the tax payers.

However, this productive position was not to last for long. The executive realized that though it could manipulate the MPs of the ruling MMD, it could not easily do so with those of the opposition. In order to weaken the opposition in Parliament and strengthen the ruling MMD therefore, president Mwanawasa resorted to appointing opposition MPs to ministerial positions both cabinet and deputy. Close to 15 opposition MPs were appointed to ministerial positions. These include Hon. S. Masebo (ZRP's only seat Local Government); Hon. D. Patel (Trade and Commerce), Hon. G. Simukonga (Deputy Minister) and Hon. P. Nawa (Deputy Minister) (all from FDD); Hon. L. Phiri (UNIP.

⁵² The Post 25th September 2004

Over the years, Parliament has not lived to its expectations as an institution of non-judicial public control. The institution has become more like an extension to the Executive arm of government. The executive has, through various manipulative means, been able to undermine the role of Parliament as a watchdog of the people represented by the many Members of Parliament. Most MPs pay much allegiance to their respective political parties than to Parliament as an institution. To this end, the electorate has lost out on effective representation in both Parliament and the National Assembly. Parliamentarians only remember to go back to the people at elections time, emptying more promises so as to lure them for votes. The National Assembly has always been dominated by the ruling party, a very favorable position for the Executive to push through its policies without much difficulty. There was change just after the 2001 elections where for the first time, the opposition dominated the house. However, this did not last long as the Executive, once again, used crooked ways to reduce the number of opposition MPs so as for the ruling party to retain dominance. This is the unfortunate state that the Zambian Parliament has been reduced to, an extension of the executive organ. It is hoped that the recommendations to be made in chapter four will have a bearing towards transforming Parliament into a viable and reliable non-judicial public control mechanism.

The next chapter looks at another non-judicial public control ‘tool’, the office of the Ombudsman, evaluating its role and effectiveness (if any), amid the prevailing social, cultural, political and economic circumstances.

CHAPTER THREE

THE COMMISSION OF INVESTIGATIONS AS A NON JUDICIAL PUBLIC CONTROL MECHANISM

3.1 SETTING THE COMMISSION IN MOTION

As emphasized already in the previous chapters, in a constitutional democracy political power belongs to the people, and is exercised directly by the people or delegated to their representatives. Whatever the situation may be, power has defined limits with ground rules, which all members of society are expected to observe. As public power is largely exercised by the executive branch, there is a need to ensure that officials of the state comply with the letter and spirit of the law. The Ombudsman (Commission of Investigations), as a non judicial public control tool and as an institution of good governance, cannot be doubted as a necessity in ensuring that officials conduct their work within the limits of the law. A watchdog of the people over the administration, the Ombudsman is an essential tool in the enhancement of justice involving citizens and public officers through investigating complaints of edging abuse of power.

It must be aptly emphasized at this point that the Commission of Investigations (hereinafter as the Commission), is not intended to assume the role of a court of law neither a supra judicial body but rather a non judicial institution of public control through investigation of various complaints of maladministration on the part of the public administration. It is an investigative wing primarily instituted to investigate alleged administrative acts, omissions and/or decisions of public officials.

In order for the Commission to be set in motion, there must be allegations made by a member of the public or at the instance of the Republican President. The Commission cannot move on its own. According to the Act⁵³ the Commission can move on a complaint or allegation made by an individual or group of persons either in writing or orally to the Commission's secretary. Only meritorious and deserving cases which are within its jurisdiction can an inquiry be instituted aimed at ascertaining their genuineness. Section 12 excludes cases that are considered frivolous, trivial, made in bad faith, unnecessary, improper or fruitless.

The President is also empowered, where he deems fit, to direct the Commission to conduct an investigation into any allegations of abuse of authority by any public official.⁵⁴ Further, the Commission can investigate any allegation of maladministration or abuse of office or authority by any person to whom the Act⁵⁵ applies. However, all complaints must be made within a period of two years from the date upon which the facts giving rise to any such complaint or allegation became known to the complainant⁵⁶, though the Commission has got the discretion to receive complaints made outside the prescribed period.⁵⁷

Upon receipt of the complaint, the Commission's secretary reduces the complaint in writing (if originally orally given) and then submit it to the Investigator General together with the any other relevant documentation.

⁵³ Section 9 The Commission for Investigations Act; Chapter 39 of the Laws of Zambia

⁵⁴ section ibid

⁵⁵ ibid

⁵⁶ section 9(4) ibid

⁵⁷ proviso to section 9(4) ibid

The Investigator General, together with the other two Commissioners, sit down to determine whether or not the complaint is within its jurisdiction or if it merits an investigation. Three courses of action are imminent at this stage;

- i) if the Commission finds that the allegation or complaint is frivolous, vexatious or made in bad faith, it cannot take up such a complaint ⁵⁸
- ii) if the Commission discovers that a particular complainant has recourse to any executive authority, by way of an appeal, reference to or before a tribunal established by, under any law, or by way of court proceedings, it will not take up such a complaint and is not bound to give any reasons where it decides not to investigate but will advise the aggrieved person accordingly. ⁵⁹
- iii) where the Commission finds that the complaint is one made in good faith and within its jurisdiction, it conducts the investigations employing the rules of natural justice by affording either parties an opportunity to make representations.

All the proceedings are held in camera thereby excluding the public from attendance. ⁶⁰

The Commission is at liberty to obtain information from such persons in such manner, and make such investigations, as it thinks fit. ⁶¹ It has the powers to summon witnesses ⁶² and all evidence is attested to on oath through non rigid compliance to the rules of evidence and procedure. ⁶³

⁵⁸ section 10(2) *ibid*

⁵⁹ section 10 *ibid*

⁶⁰ section 16 *ibid*

⁶¹ section 17(b) *ibid*

⁶² section 13 *ibid*

⁶³ section 17 *ibid*

When both sides have been heard, members of the Commission analyze the evidence, make conclusions and appropriate recommendations to the President to take action. The President then informs the Commission of the action taken in rectification of the complaint or otherwise. In the end the complainant is informed of the outcome of the investigations by the Commission. However, the recommendations are not binding on the president.

3.2 EVALUATION OF THE COMMISSION FOR INVESTIGATIONS

The need for an institution such as this one cannot be questioned or doubted. It plays a leading role in the promotion of the rule of law in the administration of public offices and in the elimination of abuse of public office and authority. As a watchdog of the people over the administration, it is a very suitable mechanism to use especially by the under privileged who find litigation and other traditional means of dealing with citizens' complaints costly, tedious and prolonged. On the part of the Commission, there are no fees tendered, less procedural oriented making it a very informal and simple a process. Thus, powerless and deprived citizens find solace in the Commission by seeking cheaper means for justice for wrongs committed against them by government officials.

Further more, the Commission employs no adversarial style during its investigations meaning that there is usually a conducive and pleasant atmosphere unlike the antagonistic one that usually arise in a court of law.

There is no class of persons as to who can and cannot approach the Commission. Any person or public member who feels aggrieved by any government official can lodge a compliant.

Save for want of jurisdiction, the Commission's decisions are not a subject of judicial review.⁶⁴

"Small or minor" complaints which would not be worth the cost of an elaborate court process can be tolerated and satisfied by the Commission due to the simplistic nature and cheaper procedure.

The Commission is mandated to hold proceedings in camera to ensure confidentiality through investigations. Such an atmosphere works as an incentive for both official and the public to approach the Commission boldly and confidently.

Where it has received a compliant outside its jurisdiction, it plays an advisory role by advising complainants of possible avenues to take and/or remedies available to them under the law.

3.3 EFFECTIVENESS OF THE COMMISSION FOR INVESTIGATIONS

As stated already, the need for such non judicial public control institutions cannot be doubted. As one such institution, the Ombudsman institution has gained international recognition as both an effective mechanism of curbing administrative abuse of authority and as an institution of good governance. It is an institution that endeavors to ensure that there is legality in the administrative process by;

⁶⁴ section 23

- playing a preventive effect in that a number of administrative errors probably never occur because of its existence.
- carrying out investigations

Consequently, the Ombudsman bring “value added” to the operations of the administration by helping improve it through its (ombudsman) existence. “However,” as has been rightly stated, “ the experience of Zambia has shown that creating an institution is one thing (and) clothing the institution with the necessary powers to discharge its functions (properly) is another.”⁶⁵ Thus, the Commission has been impaired in its operations due to a number of ‘weaknesses’ currently faced including;

3.3.1 INSTITUTIONAL WEAKNESSES

Over three decades of being in existence, the operational circumstance of the Commission has changed from what they were at the time of its establishment. The economic, social and cultural aspects of the Zambian citizenry have under gone complex and huge changes. Socially, the population has more than doubled, corollary; the administrative process has to a greater extent also grown. Invariably, complaints, shall and have always been expected to increase. Economically, the Zambian economy has been falling since the early 1970s to this era and age. It’s a situation where more and more people get poorer by the day while a cross section of society gets richer and able to access the court process regardless of the cost. Therefore, it is no surprise to see more people opting for the Commission to hear their grievances as it is a cheaper means to the

⁶⁵ J.P Sangwa, (2005), Administrative Law in Zambia, p. 31 (class notes) (unpublished)

courts. However, a number of institutional weaknesses need attention in the hope of making the institution live up to its expectations.

- One of the major weaknesses is that the Commission has no power to order remedies once the substance of the complaint has been established. At most, the Commission can only submit a report to the President accompanied with conclusions and recommendations. Sad but true, there is no obligation on the part of the President to act on the recommendations, all the President can do is take such decision as he may think fit.
- It is difficult to understand section 10(1) ⁶⁶ circumscribing the powers of the Commission not to investigate a complaint where the complainant can obtain remedy by addressing his complaint to an administrative authority, tribunal or court. One would have thought that the establishment of the Commission was to provide people an institution with power to deal with complaints in the most expedient and inexpensive way, than would be entertained by the courts, administrative authority or tribunal indeed.
- As the current Commission for Investigations Act provides⁶⁷, the appointment by and accountability to the president of the Investigator General and other commissioners is a precarious state of affairs which undermines and compromises the commission's autonomy. This is a contradiction in terms as it violated the notion that one power ought to be balanced by a different power. Further, according to the spirit of section 8(b) of the Act ⁶⁸ the President can direct the

⁶⁶ CAP 39 of the Laws of Zambia.

⁶⁷ section 4

⁶⁸ "unless the President otherwise directs, in any case in which it considers that an allegation of maladministration or abuse of office or authority by any such person ought to be investigated."

Commission to inquire or not to inquire into the conduct of some people if he or she wishes. Having a scrupulous president might mean her/him abusing this power.

- Another serious draw back is that the Commission cannot move on its own unless on allegation/s of abuse of office by an aggrieved person or as directed by the President or where the Commission is of the view that a particular situation ought to be investigated.
- The reports that the Commission submits annually to the President and National Assembly are of little value as they are not for consumption by the majority of the citizenry and do not receive coverage of the media.
- Holding investigations in camera is a constraint on the Commission's transparency. When the current cultural trend calls for accountability and transparency in the public office, surely the Commission is no exception. Of course this is not to undermine the role that 'holding investigations in camera' plays especially as an 'incentive' for encouraging complainants to come forward and lodge their complaints without fear and also for the officer in question to be able to answer freely and confidently to the allegations knowing that all is confidential. However, holding investigations in camera underplays on the transparency of the Commission.

3.3.2 OPERATIONAL IMPEDIMENTS

Despite the role that the Commission plays in the administration of justice, it is one institution not free from operational constraints. The foremost operational constraint is insufficient funds. The Commission wholly depends on the central government for its funding. Due to this under funding, there is a trickling effect in that other sections of the Commission end up being ‘crippled’ too. These include transport, investigations, publicity (it needs to sell itself to the public) and other core logistical sections.⁶⁹ Thus, if the problem of insufficient funding could be addressed effectively and proficiently, other areas of the Commission’s operations would eventually under go the same boost.

3.4 CONCLUSION

The institution of the Ombudsman is one non judicial public control institution which is indispensable in a democratic state like Zambia. For Zambia, the Ombudsman, styled, Commission for Investigations, has been in existence for over three decades. This chapter has endeavored to show that over this period of its existence, however, the performance of the Commission has not been free from encumbrance. As an institution of good governance and watchdog of the people over the government, it plays an important role that ensures accountability, justice and legality in the public sector. With the current trends in the economic, social and cultural strand of Zambia since the early years of the Commission, it has been unable to operate efficiently. Institutional weaknesses as well as operational difficulties have made the work of the Commission not an easy one. It can

⁶⁹ Interview with Mr. Dzikedzeke, Legal Counsel/ Investigator, Commission for Investigations, 31/10/2006

thus be pointed out that the role and effectiveness of the Commission as a non judicial public control institution leaves much to be desired if the highlighted weaknesses and impediments are not looked into without more ado.

The next and final chapter, chapter four, summarizes the entire dissertation and makes recommendations to chapters two and three. It is therefore hoped that these recommendations will highlight ways in which these non judicial mechanisms can be made more effective, responsive and be able to live up to their *raison d'être*.

CHAPTER FOUR

GENERAL CONCLUSION AND RECOMMENDATIONS

4.1 BY WAY OF CONCLUSION

This conclusion is by way of summary of the three chapters discussed above. This paper undertook a study on the role and effectiveness of the Ombudsman and the presidential constitutional arrangement in Zambia as non-judicial controls of administrative actions and decisions. It was the thrust of this paper that after the dawn of the social welfare state era, the state has taken up running most of the sectors of the economy. With this being the case, an inevitable consequence was that in an effort to provide for the needs of its citizens, the government would trample on the rights of the people either inadvertently, ignorance or deliberately through its officers. Thus, mechanisms were put in place to act as checks on the government. In Zambia and many other states, the traditional way has been through the courts by way of judicial review, however, non judicial means were ‘created’ in an effort to enlarge access to justice by the majority. These include, Commissions of Inquiry, Various Administrative tribunals, Commission for Investigations, Human Rights Commission as non judicial institutions designed to ‘supervise’ the public institutions and officers and also the Presidential constitutional system of government specifically designed to keep the administration in control. Specifically, the dissertation under took an in depth study of two of the numerous non-judicial public control institutions and mechanism, this being an overview of the role and effectiveness of the ombudsman (Commission for Investigations) and Zambia’s

presidential system of government which combines some aspects of the Westminster system and the American presidential system.

Chapter one introduced non judicial controls of public officers and the presidential system of government dwelling on the role and effectiveness of the Commission for Investigations and Parliament in controlling and checking public actions and decisions. The chapter looked at the historical background to the adoption of the current system of government, a unique system that combines aspects of the American presidential system and the British's Westminster system. From the first republic when the system was adopted at independence through to the second republic when Zambia became a single party system of government.

In 1991 a new era dawned. The One party system was abandoned after 14 years to usher in the third republic of multipartism. The structure of government adopted was as the independence presidential system.

The chapter also dealt with another non-judicial public control tool in the name of the Ombudsman. The historical origins were traced to Sweden where the office of Parliamentary Ombudsman was first established in 1809. With the spread of the Ombudsman ideals, Zambia adopted the ideals and established the Ombudsman institution, operating under the auspices, Commission for Investigations. The Investigator General, assisted by three commissioners and all appointed by the republican president, chairs the Commission.

The principle functions, as outlined in the enabling Act ⁷⁰ are to investigate complaints or allegations of maladministration brought to it by members of the public, or as directed by the president. Its jurisdiction extends to any person in the service of the republic except the president and any person employed by a local authority.

Chapter two concentrated on the role Parliament plays as a watchdog of the people over the activities and actions of the executive arm of government. The paper endeavored to show that over the years, Parliament has not lived to its expectations as an institution of non-judicial public control. The institution has become more like an extension to the Executive arm of government being manipulated by the executive organ in order to undermine the role of Parliament as a watchdog of the people represented by the many members of Parliament. Most MPs pay much allegiance to their respective political parties than to Parliament as an institution. It is no wonder then that the electorate has lost out on effective representation in both Parliament and the National Assembly. Parliamentarians only remember to go back to the people at elections time, emptying more promises so as to lure them for votes. The National Assembly has always been dominated by the ruling party, a very favorable position for the Executive to push through its policies without much difficulty. Tables turned in the 2001 elections where for the first time, the opposition dominated the house. However, this did not last long as the Executive, once again, used crooked ways to reduce the number of opposition MPs so as for the ruling part to retain dominance. This is the unfortunate state that the Zambian Parliament has been reduced to, an extension of the executive organ.

⁷⁰ Commission for Investigations Act, CAP 39 of the Laws of Zambia

Chapter three discussed the role and effectiveness of the Commission for Investigations in light of the economic, social and political changes the Zambia has under gone. As an institution of good governance and watchdog of the people over the government, it plays an important role that ensures accountability, justice and legality in the public sector. However, it was the thrust of the chapter indicating that the current trends in the economic, social and cultural strand of Zambia since the early years of the Commission without corresponding changes, it has been unable to operate efficiently. Institutional weaknesses as well as operational difficulties have made the work of the Commission not an easy one. Truth to say then that the role and effectiveness of the Commission as a non judicial public control institution can be improved for the better.

4.2 RECOMMENDATIONS ON PRESIDENTIAL CONSTITUTIONAL SYSTEM OF GOVERNMENT (PARLIAMENT)

This paper has endeavored to show under chapter two how important the role parliament plays as a non-judicial public control ‘instrument’ but this has not been experienced in the case of Zambia. Parliament has been ineffective to live up to its *raison d’etre* both as a non-judicial administrative control mechanism and as an institution of checks and balances over the executive. “The consequence of these developments (as highlighted in chapter two) is that the legislative branch of government has always been an appendage of the executive branch of government and not as an independent institution with power

to check on the possible excesses of the administration.”⁷¹ Thus, it is hoped that these recommendations will facilitate ways of strengthening Parliament’s role.

4.2.1 ELECTORATE-MEMBER OF PARLIAMENT (MP) RELATIONS

One of the major problem as noted earlier is that of lack of communication between the electorate and their members. MPs only have time to go, consult, and offload empty promises to the electorate during elections’ companies. Once elected, most MPs abandon their constituencies only to reappear at election time. They (electorate) rarely have forums where they can present their grievances, needs, and interests with their members. The following is recommended;

- Local residence in a particular constituency should be one of the mandatory qualifications for one to stand as an MP in that particular constituency. According to the constitution ⁷² residence in a particular constituency is not prerequisite for one to be eligible to stand. Thus, most MPs do not feel obliged to go to their constituencies particularly those constituencies that are in the rural areas, and would rather reside in the town centers and cities, Lusaka especially. Therefore, making residence as one of the qualifications for eligibility would be one way of making sure that MPs are closer to their people at almost all times consequently providing an opportunity for dialogue. MPs would be seeing the problems affecting their people and the electorate would equally have the opportunity to

⁷¹ J.P Sangwa, (2005), Administrative Law in Zambia, p. 14 (class notes) (unpublished)

⁷² Art. 62(1), CAP One of the Laws of Zambia

present their grievances. This recommendation would operate better when considered with the next recommendation.

- There is need to establish constituency offices. In order to have a healthy electorate-member relation that would eventually result in effectively representing the interest and problems of constituents, it requires day-to-day efforts. This can only be possible when MPs have permanent offices in their respective constituencies. Such an office would provide an official meeting place to exchange ideas and information vital in carrying out the representative function of an elected member. Suffice to say that this recommendation was one of the reforms that the Parliamentary Reforms Committee on Reforms in the Zambian Parliament ⁷³ (whose underlying and broad goal is to create a ‘REAL’ parliament for Zambia, i.e. a parliament that is representative and responsive, efficient and effective, accountable and accessible and making the National Assembly more independent *vis-à-vis* the executive arm of government) and was one of the approved recommendations under the report. However, it is noted that as of the year 2006, only 40 of the 150 constituencies have had offices.⁷⁴ It is hoped that this process will be hastened so as consultative meetings could be able to take place in the remaining 110 constituencies.
- One of the recommendations made by the Mung’omba CRC⁷⁵ was ‘the power of recall.’ This is where the electorate would have power to recall a non performing MP with the view of a vote of no confidence. “The electorate shall have power to

⁷³ Parliamentary Reforms Committee on Reforms in the Zambian Parliament (2005), www.parliament.govt.org/reforms/ Phase One, November 2000

⁷⁴ Follow up Report by the Parliamentary Reforms Committee on Reforms in the Zambian Parliament (2005), www.parliament.govt.org

⁷⁵ Mung’omba Constitution Review Commission, Final Report (2005), p.412

recall an MP who is elected ... on the grounds of failure to perform.”⁷⁶ This would give the electorate a needed upper hand over their MPs which consequently would result in MPs becoming proactive to their constituencies. What is lacking at the moment is commitment on the part of the MPs. As long as they manage to win seats in Parliament, they lose track of ‘their’ people’s needs, grievances and demands.

- There is need for education for both the MPs and electorates. “Education is needed for both the MP and their people. The MPs need to understand their role (as representatives of the interest, desires and needs of the people; as watchdogs over the administration and its officers.) and the people need to know what to ask and expect from them.”⁷⁷

4.2.2 RELATIONSHIP BETWEEN MPs AND THE ADMINISTRATION (EXECUTIVE BRANCH)

In chapter two it was noted how the president uses his appointmental powers to appoint MPs from the ruling party (of late even from the opposition) to ministerial positions. This has actually weakened parliament as an institution of checks and balances to being an appendage of the executive. Hence, independence needs to be created between the executive and the legislature. Both the Mwanakatwe ⁷⁸ and the Mung’omba ⁷⁹ CRCs have had called for the appointment of ministers from outside parliament in an effort to

⁷⁶ *ibid*

⁷⁷ J.P Sangwa, *ibid.* p.14

⁷⁸ Art. 107 Draft Constitution

⁷⁹ Final Report, (2005), p. 341

strengthen the legislative wing of government. This position would have the following benefits;

- ‘complete’ separation between the executive and the legislature
- enhance respect of parliament as an institution of checks and balances within the MPs
- lessen ‘rigid’ allegiance to respective parties by MPs
- MPs would freely be able to criticize the administration without the apprehension of being seen as being at loggerheads with the government. a position which would otherwise reduce chances of appointment to ministerial positions.

Having a cabinet outside Parliament essentially entails that Parliament would be strengthened by making it independent, separate and distinct from the executive, so that it could effectively play its role to check on administrative actions.

4.2.3 RULING PARTY/OPPOSITION PARTIES *VIS-À-VIS* PARLIAMENT

The paper has shown how the position of ruling parties has been in Zambia, one of dominance over the opposition in Parliament and seeing the opposition as an ‘enemy’ and not as one able to make the next government. Consequently, the ruling party has endeavored to exclude the opposition from ever coming to power notwithstanding their dominancy in Parliament. Due to this dominance in parliament and the fact that the republican president is also the ruling party’s president (in most cases) with the powers of appointing a cabinet of MPs from his party in Parliament, Parliament has been reduced to

nothing but an appendage of the executive arm of government. Coupled to this has been the ‘problem’ of floor crossing in parliament which, in most cases, has been from the opposition to the ruling party propelled by selfish motives making the opposition weaker.

There is need to change the political belief that is being exhibited by political parties were they view each other as ‘enemies’ and not as partners only with dissimilar ideas. “At party level the existence of an opposition party or parties has to be accepted as necessary for the survival of the system of government adopted in Zambia.”⁸⁰ It is time to enhance unity and improve relations between the ruling party and those in the opposition; reduce suspicion, promote national development and stop the ‘bickering and fighting’ but rather cultivate a spirit of co-operation and consultation. Once parties realize that they are not ‘enemies’ but instead view each other as co-partners in national development, they will realize that parliament is not a ‘two part forum’; one for the ruling party and the other for the opposition but as an institution for checks over the administrative decisions and activities. To this end, the Mung’omba CRC have recommended that appropriate legislation be enacted in order establish mechanisms and a forum for the purpose of inter-party dialogue.⁸¹

Another area of concern is ‘floor crossing’, sometimes referred to as ‘political prostitution.’ These are defections from one party to another by some MPs, in total disregard of the interest of the electorate and without consulting them. Most of the defections have had a negative effect on the opposition by weakening it, thereby

⁸⁰ J.P. Sangwa, (2005), Administrative Law in Zambia, p.14, (class notes) (unpublished)

⁸¹ *ibid*, p. 558

plummeting Parliament's effectiveness. In both the Mwanakatwe CRC and its 'successor' the Mung'omba CRC it has been recommended that an MP who resigns from a party or joins another party should not be eligible to recontest in the by-elections for that particular constituency for the duration of that Parliament.⁸² The reasons submitted for this contention, which the writer of this paper subscribes to in totality include;

- to deter unnecessary and selfish propelled floor crossings
- guard against unnecessary expenditure being incurred through by-elections
- to deter MPs from resigning from their parties for rapacious reasons

Indeed when this stage is reached one cannot deny what a 'REAL' Parliament would have been 'created'. MPs would primarily concern themselves with representing views of their people and put aside their selfish motives which make them floor cross without even consulting the electorate who had initially voted them into office.

4.3 RECOMMENDATIONS ON THE OMBUDSMAN (COMMISSION FOR INVESTIGATIONS)

As noted already, the main function of the Commission for Investigations as a non judicial public institution is to receive and investigate citizens' allegations or complaints of maladministration in the public office with the view to redressing them expeditiously. Nevertheless, due to its institutional weaknesses and operational shortcomings, the Commission has been unable to effectively discharge this task. It is no secret, therefore, that there is need for a robust Commission with relevant powers and lesser problems to

⁸² *ibid*, p. 388

make it more effective as a non judicial public office control mechanism. This study has highlighted a number of both institutional and operational encumbrances that have made the work of the Commission difficult to run smoothly. It is in light of this that the paper makes the following recommendations aimed at strengthening the office of the Investigator General.

4.3.1 INSTITUTIONAL RECOMMENDATIONS

It is ironic when one considers this question, why create an institution like the Commission for Investigations with power to investigate wrongs but give it no power to take appropriate remedies? One cannot overemphasise more on the need to reform the Commission. What is needed is a Commission with enough power to take remedial measures as may be necessary given the prevailing circumstances of the case. There is need to amend the empowering Act⁸³ to give effect to this recommendation. In the alternative, the recommendations that the Commission makes to the president over a completed investigation shall be binding upon the president especially cases for disciplinary action against erring public officers.⁸⁴

It is equally recommended that investigations be conducted not in camera unless the nature of the complaint reveals that doing so would put at risk the complainant or that it would not be in the public interest to do so. This will also enhance publicity on the

⁸³ Commission for Investigations Act, CAP 39 of the Laws of Zambia

⁸⁴ Mung'omba CRC Final Report, *ibid*, p.645

activities, place and role in society of the Commission of which at the moment only a handful know of its existences and functions. Following from this;

The annual reports of the Commission should be availed to the public too for a wider consumption, including the press as this will equally enhance publicity of its activities.

It is recommended also that the Commission should be able to hear *any* complaint that has merit. “The fact that the complaint can be entertained through the courts of law, by an executive authority, or on appeal before a tribunal established under some Act of Parliament should not hinder one from presenting his case to the Commission. The only ground for the Commission to decline to investigate a complaint should be lack of merit. The complainant should have the right to choose where to seek remedies.”⁸⁵

It is difficult to conceive how an officer appointed by the President (executive) and accountable to the executive could be expected to effectively check and control the executive. The Commission needs to be totally independent and impartial. Thus, the Investigator General and the Commissioners should be appointed the National Assembly upon recommendation by the Judicial Service Commission and report directly to the National Assembly. In this vein, it was recommended the “Office of the Parliamentary Ombudsman shall be independent and autonomous and that in the discharge of the functions of the Office, the office-holder shall not be subject to the control of any person or authority;”⁸⁶

⁸⁵ J.P. Sangwa, *ibid*, p. 33

⁸⁶ *ibid*, p. 625

In its final report, the Mung'omba CRC ⁸⁷ made another essential recommendation to the effect that the Commission should, as opposed to the current situation, initiate on own motion or on a complaint received from any person, and investigate into cases of abuse of public office or authority or maladministration of justice in the public offices.....

4.3.2 OPERATIONAL RECOMMENDATIONS

The major operational constraint has been insufficient and irregular funding. This problem in turn has created a number of other logistical problems such as transport shortages, affecting other departments and the general well being of the Commission. The Commission is wholly dependent on the central government for its funds. It submits its budget to the ministry of Finance and National Planning for approval. But this is a precarious state of affairs as it poses the risk of sabotaging the Commission's financial autonomy by deliberately providing inadequate finances. It is submitted that there be established financial autonomy of the Commission. One way of achieving this is, as was recommended by the Mung'omba CRC,⁸⁸ is that the "Office of the Ombudsman should....control its budget as appropriated by Parliament. Hence, Parliament should be mandated to appropriate funds to the Commission from a consolidated fund. This will ensure both continuity of finances and financial autonomy, thus impartiality, efficiency and effectiveness guaranteed. It is no doubt that once the Commission receives timely

⁸⁷ Ibid, p. 625

⁸⁸ ibid, p. 626

and ample funding, there will be a trickling which will make other sections of the Commission operate effectively.

4.4 PROGNOSIS

In as much as these recommendations have been made, it remains on the part of the politicians with the political will needed to turn these recommendations into a reality. It is conceded that it is not the first time that some of these recommendations are being made, a number of scholars and constitutional review commissions have had made progressive recommendations towards making these two (presidential system and the Ombudsman) and other non-judicial public control mechanisms live up to their *raison d'etre*. However, the fact that recommendations are being conceived is an indication that nothing is being done, or still, that they are falling on deaf ears. Thus, it is urged that may the powers that be take these recommendations plus those in other manuscripts, articles, review commission reports, seriously for the betterment of these institutions and mechanisms of good governance.

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