

MANDATE OF THE JUDICIAL COMPLAINTS AUTHORITY:
ANALYSIS OF FAUSTIN KABWE V ATTORNEY GENERAL
2009/HP/0996

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Being a Directed Research essay submitted to the University of Zambia Law Faculty in
Partial fulfillment of the requirements for the Award of the Bachelor of Laws (LLB) Degree.

DECLARATION

I, **BWALYA CHALI**, do hereby declare that this Directed Research Essay is my authentic work and to the best of my knowledge, information and belief, no similar piece of work has previously been produced at the University of Zambia or any other Institution for the award of Bachelor of Laws Degree. All other works in this essay have been duly acknowledged. No part of this work may be reproduced or copied in any manner without the prior authorization in writing of the author.



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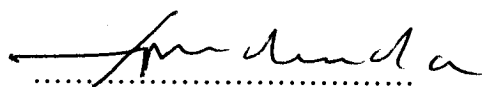
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2009/HP/0996**

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MR. FREDERICK MUDENDA

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ABSTRACT

The Judicial Complaints Authority is a statutory body established pursuant to the provisions of the Judicial (Code of Conduct) Act, No. 13 of 1999. Its primary function is to receive and investigate complaints made against judicial officers and thereafter submit its recommendations to “the appropriate authority”. The decision of the High Court in the case of *Faustin Kabwe and Others v Judicial Complaints Authority* confirmed this position. The purpose of this research is to examine whether the mandate of the Judicial Complaints Authority as set out under the Judicial (Code of Conduct) Act and espoused in the *Faustin Kabwe* case clothe it with sufficient power to act as an effective check on the Judicature of Zambia exercise of judicial power. This research first introduces importance of the notions of separation of powers and checks and balances that the need for the judiciary to be subject to checks and balances. It also illustrates the problem that stems from the fact that the mandate of the Authority is merely investigative and there is thus little shift in power and function as compared to the position before the establishment of the Authority thereby still rendering the judiciary subject to the whims of an arbitrary executive. This research further analyses the functions and mandate of the Judicial Complaints Authority and the decision in the *Faustin Kabwe* case and its import. In addition, this research engages in a detailed exposition of the link between the notions of separation of powers, checks and balances and independence of the judiciary as well as an examination the nexus between the notion of checks and balances with the functions and mandate of the Judicial Complaints Authority. This is followed by an analysis of the functions and mandate of bodies carrying out similar functions as the Judicial Complaints Authority in Zambia and within the Commonwealth was undertaken. Comparison was made with the Parliamentary and Ministerial Code of Conduct Tribunal in Zambia and the National Judicial Council in Nigeria and the Kenyan Judicial Service Commission. The

research concluded by illustrating that the functions and mandate of the Judicial Complaints Authority as they presently stand render the Judicial Complaints Authority an inefficient and ineffective player in furthering the achievement of effective checks on the judiciary. This research further outlined some recommendations that can be implemented in order to enhance the efficacy of the Authority as a check on the judicial power and superintendent of the Judicial Code of Conduct. These recommendations include; the setting of a specific time frame within which the Authority must undertake and complete its inquiry, vesting the Authority with the power to mete out sanctions, the making of the Authority's recommendations binding on the President, the specification of sanctions the Authority may impose and empowering the Authority to commence an inquiry of its own motion.

DEDICATION

“This is dedicated to my late mother Mrs. Rhoda Nanyangwe Chali in whose memory I toil towards my goals and also to my father Hon. Justice Isaac C.T Chali who always pushes me towards excellence!”

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I would also like to sincerely thank Mr. Frederick Mudenda, my supervisor who gracefully took the meticulous task of reading, correcting and offering valuable critic and suggestions on the content of the research. To him I owe a debt of gratitude for sparing his time and being available to offer invaluable guidance and to offer prompt feedback. Words alone cannot express my gratitude.

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I would also like to extend my gratitude to all those I have not mentioned who helped me with making this dissertation a reality and through the pursuance of my Bachelor of Laws Degree, I am extremely grateful. Finally, to God be the glory for he has seen me through all the highs and the lows. All this would not have been possible without Jehovah God. He is my Rock and my Refuge and things worked not according to my plans but according to his plans.

What more can I say? It's been real.

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CHAPTER ONE

1.0 INTRODUCTORY CHAPTER

1.1 INTRODUCTION

This research aims to engage in an analysis of the decision of the High Court in the case of *Faustin Kabwe and Others v Judicial Complaints Authority and Attorney General*.¹ In chapter one, a general introduction of the research will be made. In this vein, the gist of the decision in the Faustin Kabwe case will be stated and the problems arising out of it will be espoused. In chapter two the functions and the mandate of the Judicial Complaints Authority will be examined followed by a summation of the issues in contention in the case of *Faustin Kabwe and Others*. Chapter three will examine the notion of checks and balances and its interplay with the exercise of judicial power. It will be considered how the exercise of judicial power is checked under the current legal dispensation in Zambia and also the nexus between the concept of checks and balances with the functions and mandate of the Judicial Complaints Authority. This chapter will also contain an exposition of the principle of independence of the judiciary and how this affects the Authority in the discharge of its mandate. In chapter four it will be considered how bodies with similar functions and mandate as the Judicial Complaints Authority in Zambia exercise their functions and the extent of their mandate and powers. It will also be considered how checks on judicial power are achieved and implemented in the Commonwealth. Chapter five sets out the conclusions reached in this research and will also set out the recommendations on measures that can be put in place to enhance the efficacy of the Judicial Complaints Authority as a check on the Judicature.

¹ 2009/HP/0996

It is an essential characteristic of a democratic society that there must be rule of law and a system of checks and balances². The notion of checks and balances is a vital incident of the principle of separation of powers. “The idea of checks and balances seeks to make the principal of separation of powers more effective by balancing the powers exercised by three traditional arms of government being the Executive, the Legislature and the Judiciary through a system of respective checks on the power exercised by the governmental organs upon one another.”³ The judiciary, being one of the three arms of government is not immune from being subject to these checks and balances. The exercise of judicial power is subject to the Constitution, the rule of law and to the code of conduct promulgated by statutes which guide judges in the exercise of their power.⁴ These are among the many safeguards that democratic societies have put in place to ensure that the Judiciary does evolve to become an institution that exercises unfettered power and is beyond the control of any institution.

It is in this vein that the Judicial Complaints Authority (the Authority) was established pursuant to Act No. 13 of 1999 in order to act as a check on the exercise of judicial power and to render judges accountable to the people and the law. It is a settled principle of constitutional law that the judiciary acts as a check on the exercise of both executive and legislative power.⁵ This is achieved through, *inter alia*, judicial review of executive action and through the power to make decisions on the legality of legislation being passed by Parliament.⁶ It is thus imperative that in the same vein the judiciary checks the exercise of executive and legislative power, it too ought to be subject to similar checks. Judges must therefore conduct themselves and exercise judicial power in a manner that is consistent with the rule of law and it is therefore essential that in order to have checks and balances, there

² Jason Alder. *General Principles of Constitutional and Administrative Law*. 4th Ed. (London: Palgrave Macmillan. 1989) p. 92

³ B.O Nwabueze. *Constitutionalism in the Emergent States*. (Rutherford. Fairleigh Dickinson University Press. 1973) p. 20

⁴ See Articles 1(3) and 91 of the Constitution of Zambia, Chapter 1 of the Laws of Zambia

⁵ B.O Nwabueze. *Judicialism in Commonwealth Africa*. (London. C. Hurst & Company. 1977) p. 230

⁶ B.O Nwabueze. *Judicialism in Commonwealth Africa*. p. 229

must be a body to act as a check on the judiciary's exercise of this important function of adjudication and dispute resolution. This is one of the primary functions of the Judicial Complaints Authority.



It is essential in keeping with the doctrine of separation of powers and the notion of checks and balances that there ought to be checks on the exercise of judicial power. The existing checks on the Judiciary in Zambia are founded under Article 91(2) of the Constitution⁷ which provides that:

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

Further to this, Article 98(2) and (3) of the Constitution of Zambia provide for the procedure and grounds for removal of judges for among other grounds, misconduct.

It is against this backdrop that the decision in the case of *Faustin Kabwe and Others v Judicial Complaints Authority and Attorney General*⁸ will be examined. It will be considered whether the decision gives effect to the intended mandate of the Judicial Complaints Authority and whether the Authority is vested with the essential mandate and power to properly function as a check on the judiciary. This paper aims at engaging in a critical analysis of the powers and mandate of the Judicial Complaints Authority and whether it is vested with sufficient power to properly act as a check on the exercise of judicial power. Hence the question; “Is the Judicial Complaints Authority a body with a bark but no bite.”

⁷ Chapter 1 of the Laws of Zambia

⁸ 2009/HP/0996

1.2 THE NEED FOR CHECKS ON THE EXERCISE OF JUDICIAL POWER

It is an essential feature of a democratic society that there must be checks and balances and observance of the rule of law. This lies at the heart of the republican version of constitutionalism and the rule of law.⁹ It involves each branch having some control over the others but also requires each branch to be protected from undue influence by the others thus entailing the need for pragmatic compromise.¹⁰ The Constitutional order currently in place in Zambia adopts the republican version¹¹ of constitutionalism to a large extent and it follows that the notion of checks and balances is a fundamental feature of the constitutional order in Zambia.¹² The Judiciary, being one of the three arms of government is an essential player in the provision of checks and balances on the legislative and executive arms of government. For example, the Judiciary can through the procedure provided under Order 53 of the Rules of the Supreme Court of England, 1999, check the exercise of executive power and administrative action through its jurisdiction of judicial review proceedings.

In as much as the judiciary acts as a check on the legislative and executive branches of government, it too is equally subject to checks and balances in the exercise of judicial power. The Constitution of Zambia vests the High Court with original and unlimited jurisdiction.¹³ It has been held by the Supreme Court that in as much as the High Court has original and unlimited jurisdiction, such jurisdiction is not limitless as it must be exercised in line with

⁹ Jason Alder. *General Principles of Constitutional and Administrative Law*. 4th Ed. p. 92

¹⁰ Jason Alder. *General Principles of Constitutional and Administrative Law*. 4th Ed. p. 114

¹¹ This can be noted from the Preamble to the Constitution of Zambia in which it is declared that “WE THE PEOPLE OF ZAMBIA by our representatives, assembled in our Parliament, having solemnly resolved to maintain Zambia as a **Sovereign Democratic Republic**”

¹² Bryan A. Garner. *Black's Law Dictionary*. 8th Ed. (2004: Thompson West, St Paul) defines a Republic as follows” “republic, n. A system of government in which the people hold sovereign power and elect representatives who exercise that power. Nwabueze in *Constitutionalism in the Emergent States* defines constitutionalism as “a limitation on government, the opposite of despotic government”. The Republican version of constitutionalism is therefore the system of government in which the people hold the sovereign power and elect representatives who exercise that power and the government formed by these representatives is subject to constitutional limitations in the exercise of the sovereign power.”

¹³ Article 94 of the Constitution of Zambia, Cap 1 of the Laws of Zambia

Acts of Parliament.¹⁴ Thus the judiciary is equally subject to checks and balances provided by the law in the form of the provisions of Article 94 of the Constitution and the various Acts of Parliament that govern the jurisdiction of the various courts.



The judiciary just like the other wings of government is not immune to the pressures exerted by societal factors such as corruption and poor conditions of service. This is aptly pointed out by Kunda¹⁵ when he states that:

Of relevance here are the conditions of service which apply to judicial officers, and specifically to magistrates, local court justices and other members of staff in the judicature. The government should improve the conditions of service for these classes of judicial officers. For example, it is unrealistic to promulgate a code which requires a judicial officer to act impartially and without corruption if a judicial officer gets a salary that is not even sufficient to pay for his or her electricity bill.

The foregoing underlines the importance of having a body to act as a check on judicial officers as they carry out their functions. It is imperative that to promote public confidence in the judiciary that the judiciary must be subjected to checks and balances and acts of judicial misconduct appropriately dealt with.

It is also worth noting that the scope of conduct of judicial officers which may be monitored by the Judicial Complaints Authority is in this regard not limited to the discharge of their official functions.¹⁶ Even misconduct in their private lives can invoke the mandate of the Judicial Complaints Authority. This is recognised in the Complaints about the Conduct of Judicial Office Holders Code of Practice issued by the Lord Chief Justice under Section 16 of the Justice (Northern Ireland) Act 2002 wherein it is stated that:

¹⁴ Zambia National Holdings Limited and United National Independence Party v Attorney General (1993-94) ZR 115

¹⁵ George Kunda. *Justification for the Judicial Code of Conduct*. Zambia Law Journal. Vol. 32 . (Lusaka. University of Zambia Press. 2000) pp. 145 - 154

¹⁶ This falls within the broad ambit of Section 11(c) which requires a judicial officer to conduct himself in a manner that will not bring the integrity of the judicature into disrepute

The Code is primarily concerned with complaints about the conduct of judicial office holders acting in their official capacity. It should be recognised, however, that the high standards expected of those holding judicial office must be observed in many aspects of their conduct outside their judicial role. Complaints about conduct that occurred when the judicial office holder was not acting in an official capacity (“outside conduct”) might, therefore, be considered.¹⁷

1.3 FACTORS LEADING TO THE ESTABLISHMENT OF THE JUDICIAL COMPLAINTS AUTHORITY

Kunda¹⁸ aptly sums up the factors that necessitated and justified the establishment of the Judicial Code of Conduct and the Judicial Complaints Authority as the body to administer the code. It is noteworthy that prior to the enactment of the 1996 Constitution by the Constitution of Zambia (Amendment) Act No. 18 of 1996, there was no provision for a code of conduct.

He states that:

The constitutional provisions providing for a code of conduct were enacted for a reason, certainly parliament must have considered it necessary and in the best interest of the judicature to introduce a code of conduct. One can confidently say that the introduction of the Code was motivated by the desire to make the judicature operate much more effectively, independently and impartially, and with dignity and honour. These are noble reasons for which the Constitution provided for the Code of Conduct. In fact, without a code in place there can be no norm to guide the conduct of the judicature.¹⁹

It is clear from the foregoing that the necessity for a code of conduct and the Judicial Complaint’s authority was motivated by the desire to make the judicature operate much more effectively, independently and impartially, and with dignity and honour. This is in

¹⁷ Complaints about the Conduct of Judicial Office Holders Code of Practice issued by the Lord Chief Justice under Section 16 of the Justice (Northern Ireland) Act 2002. at p. 5.

¹⁸ George Kunda. *Justification for the Judicial Code of Conduct*. Zambia Law Journal. Vol. 32 . 2000

¹⁹ George Kunda. *Justification for the Judicial Code of Conduct*. Zambia Law Journal. Vol. 32 . p. 147

consonance with the notion of checks and balances. Further factors cited by Kunda include complaints against judicial officers of delays in delivering judgments for long periods, the behaviour of judicial officers in issuing scathing press statements like politicians and involving themselves in questionable business deals or dealing with dubious associates.²⁰

1.4 STATEMENT OF THE PROBLEM

In keeping with the notions of separation of powers and checks and balances, the Constitution of Zambia divides governmental functions and power among the three branches of Government, namely the executive, legislature and the judicature. The legislature promulgates the law while the executive implements the laws promulgated by the legislature. The judiciary on the other hand has the function of interpreting the laws and thereby acting as check on the legislature and on the executive in its implementation of the laws. The judiciary being the arm of government vested with the power to interpret the law, it is cardinal that it must command the confidence and trust of the citizenry.

Prior to the amendment of the Constitution by the Constitution (Amendment) Act No. 18 of 1996, judicial officers were only expected to be independent, impartial and subject only to the provisions of the Constitution and the law. There was no special body in place to monitor the judiciary and act as a check on the judiciary. This was founded on the premise that judicial officers were responsible enough and that they were to use their own judgment on how they are to conduct themselves in the discharge of their functions. There was no mechanism for disciplining judicial officers short of a removal from office in line with the provisions of Article 98(2) of the Constitution. Even then, the power to set the process of removal of an errant judicial officer outlined in Article 98(2) was and is exclusively vested in the President.

²⁰ George Kunda. *Justification for the Judicial Code of Conduct*. Zambia Law Journal. Vol. 32 .p. 149

Whereas the actions of every citizens and government institution are subject to examination by judicial officers, there was no mechanism in place to address concerns expressed against judicial officers short of removal under Article 98(2) of the Constitution. As a result, following the amendment of the Constitution in 1996, judicial officers were not only to be independent, impartial and subject to the Constitution and the law, but also to a code of conduct to be promulgated by Parliament.

The existing checks on the exercise of judicial power are thus now those set out in Article 98 of the Constitution of Zambia and in addition, the Judicial Complaints Authority is established to ensure compliance with the code of judicial conduct in line with the provisions of Article 91 of the Constitution. The decision in the case of *Faustin Kabwe and Others v Judicial Complaints Authority* is to the effect that the mandate of the Judicial Complaints Authority is merely investigative and the Authority is not a tribunal of law and fact to decide upon allegations of judicial misconduct. The effect of this decision is that the mandate of the Authority is merely to receive and investigate complaints of judicial misconduct. This gives rise to the question whether the mandate of the Authority enhances the application of the rule of law and the notion of checks and balances with regard to the exercise of judicial power.

The Judicial Complaints Authority is the body vested with the responsibility of ensuring compliance by judicial officers with the Judicial (Code of Conduct) Act and the code of conduct set out therein. In essence therefore its primary function is to act as a check on the exercise of judicial power and ensure that the same is done in accordance with the Constitution and the Judicial Code of Conduct. The essence of the Judicial (Code of Conduct) Act is to secure transparency and accountability within the judiciary as an institution.²¹ The Code would be meaningless and the essence of the Act defeated without any mechanism for

²¹ This can be gleaned from the provisions of Section 24 as read with Section 33 of the Act.

its enforcement. The function of the Judicial Complaints Authority is thus to be the vehicle through which enforcement of the Code is achieved.

The problem that arises in light of the decision in the case of *Faustin Kabwe and Others v Judicial Complaints Authority* which is the subject of this research is that the decision of the High Court in the said case is to the effect that the Judicial Complaints Authority only has investigative mandate. The Judicial Complaints Authority is not vested with the power to enforce its findings. Once the Judicial Complaints Authority makes its findings, it ought to pass these findings on to the “relevant authorities”. It follows thus that once this is done, the matter is out of the hands of the Judicial Complaints Authority and this then begs the question whether its powers as they stand and the procedures in place achieve its intended function of ensuring compliance with the Judicial Code of Conduct. This then renders the Judicial Complaints Authority like a referee in a football match without a whistle with which to stamp his authority on the game. One then wonders; is the Judicial Complaints Authority effective in its mandate as a check on the exercise of judicial power.

As the mechanisms in the Judicial (Code of Conduct) Act, 1999²² stand and as held by the court in the *Faustin Kabwe* case, the ultimate power to act as a check on the judiciary remains vested in the executive via the President and the Judicial Service Commission. It thus follows that in an environment where executive interference with the independent exercise of judicial power is rife, this then exposes the judiciary to undue influence by the executive in that the body acting as a check is liable to abuse this power.²³ This has the effect of eroding the independence of the judiciary. In circumstances where the conduct complained of is instigated by executive interference, this renders the role of the Authority nugatory as the very same body instigating misconduct is the enforcing authority.

²² Act No. 13 of 1999

²³ Muna Ndulo. *Judicial Reform, Constitutionalism, and the Rule of Law in Zambia: From a Justice System to a Just System*. pp. 12

This thus renders it necessary to have an independent and autonomous body which will act as a check on the judiciary but without interfering with the independent exercise of judicial power. The current procedure for enforcement of compliance with the Act by judicial officers under the Judicial (Code of Conduct) Act is susceptible to be subjected to political whims and caprice. It follows thus that it was necessary that the Judicial Complaints Authority ought to have been vested with more powers than the ‘investigative mandate’ that it currently has in order for it to properly fulfil the intention of Article 91 of the Constitution of Zambia. The problem that arises is that the Authority lacks the power to enforce its findings and if the “appropriate authority” takes no action on its recommendations, there is no alternative recourse for the complaining party. In the premises the mechanisms in place to check the exercise of judicial power fall short of the requirements of the notions of separation of powers and checks and balances.

1.5 GENERAL OBJECTIVE

This research intends to examine whether the mandate of the Judicial Complaints Authority as set out under the Judicial (Code of Conduct) Act²⁴ and espoused in the *Faustin Kabwe* case clothe it with sufficient power to act as an effective check on the Judicature of Zambia exercise of judicial power.

1.5.1 SPECIFIC OBJECTIVES

1. To clearly set out the mandate and functions of the Judicial Complaints Authority and their nexus with the notion of separation of powers in the light of the principle of independence of the Judiciary.

²⁴ Ibid.

2. To examine the efficacy of the Judicial Complaints Authority in checking the exercise of judicial power and ensuring compliance with the Judicial Code of Conduct.



1.6 RATIONALE AND JUSTIFICATION OF RESEARCH

The purpose of the study herein is to determine whether the Judicial Complaints Authority is vested with sufficient power for it to properly and comprehensively exercise its function as a check on the exercise of judicial power and to ensure compliance with the Judicial Code of Conduct. This research will examine the current functions and mandate of the Judicial Complaints Authority. Also considered will be the connection between the concept of checks and balances with the functions and mandate of the Judicial Complaints Authority. This paper will also engage in a comparative analysis of how judicial power is checked in the commonwealth and also with how other bodies similar in nature and function with the Judicial Complaints Authority exercise their functions and the powers they are vested with.

This research will also examine the effectiveness of the Judicial Complaints Authority as an arbiter of judicial conduct is stifled in light of the principle of independence of the judiciary. Finally, this research will engage in an exposition of whether the Judicial Complaints Authority achieves the desired purpose of its establishment and the role it ought to assume in a democratic society.

This research is justified on the basis that the Judiciary being one of the three arms of Government is not immune to the notion of checks and balances. It will consider whether the existing checks on the judiciary in Zambia meet the standards in a democratic society. This is especially considered in the context of the fact that Zambia has been grappling with the problem of interference with judicial independence by the executive which under the constitution is the arm of government vested with extensive power to act as a check on the

judiciary. It is thus considered whether the Judicial Complaints Authority in this regard requires to be emboldened with more power in order for it to be the independent and autonomous body to exercise this function.



1.7 METHODOLOGY

The research methodology employed is of a qualitative nature. It will include desk research and field investigations in the form of interviews with relevant officials from the Judicial Complaints Authority and other relevant stakeholders.

Secondary data in the form of books, journals, scholarly articles as well as the internet will be consulted with a view to disseminating current information. Reference will also be made to legislation that establishes bodies similar in function and mandate to the Judicial Complaints Authority in order to have a basis of comparison. Additionally, reference will also be made to the jurisprudence set out by decided cases in various jurisdictions.

1.8 CONCLUSION

This chapter has endeavoured to introduce the contents of this research paper. To this effect, this chapter has espoused the importance of the notions of separation of powers and checks and balances that the need for the judiciary to be subject to checks and balances. This chapter also examined the factors necessitated the establishment of the Judicial Complaints Authority. In this vein it was noted that the Authority was established to superintend the Judicial Code of Conduct and ensure that the judicature operate much more effectively, independently and impartially, and with dignity and honour. The decision in the Faustin Kabwe case however is to the effect that the mandate of the Authority is merely investigative and it has no power to enforce its findings. This chapter has illustrated the problem that stems from the fact that the mandate of the Authority is merely investigative, namely that the power

to discipline errant judicial officers is still vested in the President and the Judicial Service Commission and there is thus little shift in power and function as compared to the position before the establishment of the Authority. In the next chapter the research will examine in detail the functions and mandate of the Authority and also the decision of the High Court in the *Faustin Kabwe* case.

CHAPTER 2

2.0 FUNCTIONS AND MANDATE OF THE JUDICIAL COMPLAINTS AUTHORITY

2.1 INTRODUCTION

This chapter examines the functions and mandate of the Judicial Complaints Authority. This will be followed by an exposition of the facts of the case of *Faustin Kabwe and Others v Judicial Complaints Authority and Attorney General*²⁵ and a summary of the issues in contention. The decision of the High Court and its implications will thereafter be set out. A conclusion will then be drawn whether or not the decision in the *Faustin Kabwe* case accords with the provisions of the Act and the intention of Parliament.

2.2 FUNCTIONS AND MANDATE OF THE JUDICIAL COMPLAINTS AUTHORITY

The functions and mandate of the Authority can be gleaned from the provisions of Section 24 of the Judicial (Code of Conduct) Act.²⁶ In this regard, section 24 of the Act provides:

24. The functions of the Authority shall be to-

(a) *receive any complaint or allegation of misconduct and to investigate any complaint or allegation made against a judicial officer:*

Provided that where, in the opinion of the Authority a complaint or allegation of misconduct made against the judicial officer does not disclose any prima facie case, the Authority may dismiss such a complaint or allegation without investigating the complaint or allegation.

(b) *submit its findings and recommendations to-*

(i) *the appropriate authority for disciplinary action or other administrative action; and*

²⁵ 2009/HP/0996

²⁶ Act No. 13 of 1999

(ii) *the Director of Public Prosecution for consideration of possible criminal prosecution.*

(2) In this part, “appropriate authority” means-

(a) in the case of the Chief Justice, the president;

(b) in the case of a judge, the Chief Justice, who may admonish the judge concerned and in the case of a breach requiring removal under subsection (2) of article ninety-eight of the Constitution, the Chief Justice shall inform the President;

(c) in the case of the Registrar, the Chief Administrator, who shall inform the Commission;

(d) in the case of a Magistrate, the Director of Local Courts or any other judicial officer, the Registrar, who shall report to the commission for action; and

(e) in the case of a Local Court officer or justice, the Director of Local Courts, who shall report to the commission for action.

(3) The appropriate authority or the Director of Public Prosecutions shall, where a report is made by the Authority under subsection (1), notify the member against whom the report is made within seven days from the date the report is received and shall thereafter notify the Authority of the action taken, if any, on the Authority’s recommendation.

The functions and mandate of the Authority in light of the foregoing provision is clearly limited by the Act to the receiving of any complaint or allegation of misconduct and to investigate any complaint or allegation made against a judicial officer. Section 24 further provides that once the Authority has received and considered such complaint, it is mandated to submit its findings and recommendations to the appropriate authority for disciplinary action or other administrative action; and the Director of Public Prosecution for consideration of possible criminal prosecution.

The implications of the decision of the High Court in the *Faustin Kabwe* case have reverberated and are noticable in the case of *Nigel Kalonde Mutuna and Charles Kajimanga v*

*The Attorney General*²⁷ in which the High Court therein suggested that there is an interplay between Articles 91 (2) and the Judicial Code of Conduct on one hand as well as Articles 98 (2), (3) and (5) on the other. That in fact, there could be a condition precedent for the President to invoke his power under Article 98 (3) of the Republican Constitution. This decision was however overturned on appeal in *The Attorney General v Nigel Kalonde Mutuna, Charles Kajimanga and Philip Musonda*.²⁸ The Supreme Court on appeal held that Article 91 gave birth to the Judicial Code of Conduct Act and actually to the Judicial Complaints Authority. So the powers vested in His Excellency by virtue of Article 98 cannot be premised on the provisions of Article 91(2) as read with the provisions of Judicial Code of Conduct Act as providing the condition precedence (sine qua) to His Excellency's exercise of his powers under Article 98(3 and 5) as the Judicial Code of Conduct is a subsidiary law.²⁹

2.3 THE FAUSTIN KABWE CASE

This case was commenced by way of petition in line with the provisions of Article 28(1) of the Constitution.³⁰ The facts pleaded before the High Court were that the Petitioners submitted a complaint against Chief Justice Ernest Sakala (as he then was) and Mr. Justice Essau Chulu in line with the provisions of the Judicial (Code of Conduct) Act No. 13 of 1999, as amended by Act No. 13 of 2006, to the Judicial Complaints Authority for misconduct. The complaint was presented to the Judicial Complaints Authority by way of a letter dated 24th June 2009 and on 29th June 2009 the Secretary to the Authority wrote to the Petitioners acknowledging receipt of the complaint and advised that the decision of the Authority on the complaint will be communicated to the Petitioners after consideration of the complaint by the Authority.

²⁷ 2012/HP/0298

²⁸ Appeal No. 088/2012; SCZ/8/185/2012

²⁹ Appeal No. 088/2012; SCZ/8/185/2012 at p. J92

³⁰ Chapter 1 of the Laws of Zambia

complaint was likely to be heard; and thirdly that the Petitioners' right to have their complaint heard and determined by an independent and impartial adjudicating authority in public as provided in Article 18(10) was likely to be violated against them since the Authority acknowledged receipt of the complaint there had been no indication as to when and where the complaint would be heard.

The Petitioners consequently prayed that they be granted an order protecting and furthering their rights under Article 18(9) and (10) requiring the Authority to within seven days from the date of the order to give directions on the period within which the Chief Justice, Mr. Justice Ernest Sakala and Mr. Justice Essau Chulu must deliver their response to the Authority, if any; the period within which the Complainants must deliver their reaction to the response, if any; the period within which the parties will be required to provide lists of documents they intend to rely upon at the hearing of the complaint; the period within which inspection of the documents will take place; the date when the complaint will be heard; the place, open to the public, where the complaint will be heard and determined.

The Respondents in their Answer contended that, firstly, the Authority is a statutory body created under section 20 of the Act but is not a body corporate and therefore can neither sue nor be sued in its own name; secondly that the Authority is not an adjudicative body as provided in Article 18(9) of the Constitution and that its functions as outlined in section 24 of the Act is investigative and not adjudicative; and thirdly that the Authority is bound by the provisions of section 25(8) of the Act which provides that a complaint or allegation lodged against a judicial officer and any investigation carried out into the complaint shall be treated as confidential and shall not be open for public inspection except for the judicial officer concerned or the Petitioners.

The Respondent then raised preliminary issues namely whether Article 18(9) and (10) of the Constitution applies in the matter and whether the Judicial Complaints Authority can be described as a Court or an adjudicating authority. In support of the preliminary issues raised, the learned Attorney General argued that the Authority's functions as set out in Section 24(1) of the Act are limited to the carrying out of investigations into alleged misconduct of judicial officers. The Attorney General in his submission contended that the Authority does not sit to determine the existence or extent of any civil rights.

It was further submitted by the Attorney General that the Authority is not a court or adjudicating authority as contemplated by Article 18(9) of the Constitution and that Article 18(9) of the Constitution specifically applies to a court or other adjudicating authorities. The learned Attorney-General contended that from the provisions of Section 24(1) of the Act that the Authority's mandate is to receive complaints and investigate them. He stated that after investigating the complaints, the Authority is required to submit them to an appropriate authority as per Section 24(1) (c).

In response to the first preliminary issue, the Petitioners submitted that the Authority is subject to the provisions of Article 1(4) of the Constitution. It was the Petitioners' contention that the Authority is a public institution and although it has no power to sue and be sued, it is nonetheless mandated to perform public functions and that it is the performance of those functions which is the subject of this petition. It was argued that as a public institution created by statute, the Authority is bound by the Constitution as stipulated in Article 1(4) and that although it is not a statutory body independent of Government with the right to sue and be sued in its own name, it is still an institution that is part of government and therefore subject to the provisions of the Constitution.

On the Respondents' contention that the Authority is not an adjudicative but an investigative body, the Petitioners contended that the Respondents have only focused on Section 24 of the Act instead of construing all its provisions which have a bearing on this issue. It was submitted that the language of Section 24 is clear in that the role of the Authority is not just to receive complaints or allegations of misconduct or investigate any complaint or allegation made against a judicial officer. It was also their contention that Section 25 of the Act provides an elaborate procedure for lodging a complaint against a judicial officer. The Petitioners submitted that the Authority is both an investigative and adjudicating authority. They wondered who had power or authority to determine whether or not a judicial officer has violated the Code of Conduct or enforce it, if indeed the Authority is not an adjudicative body. They maintained that the determination or adjudication of complaints of violation of the Judicial Code of Conduct is the responsibility of the Authority as evident in Section 24 of the Act. It was also the 1st Respondent's contention that the Authority upon receipt of the complaint presented before it has to make a determination or has to adjudicate whether a prima facie case has been made against a judicial officer.

2.3.2 DECISION OF THE HIGH COURT

The High Court considered the arguments advanced by the parties and on the question whether the Authority is capable of suing and being sued in its own name, the High Court accepted the Petitioners' argument and the court in its judgment stated thus:

I have considered the written submissions filed by the parties and the authorities cited. The first issue for determination is whether the 1st Respondent is capable of suing and being sued in its own name. The learned Attorney-General's position is that it cannot. On the other hand the Petitioners contended that the Court has been moved by way of a petition pursuant to Article 28(1) of the Constitution; and that a petition is not a suit because it falls under the realm of public law, like an application for judicial review

under Order 53 of the Rules of the Supreme Court. I accept the Petitioners' contention as fortified by the authorities they have cited.³¹

The High Court then proceeded to consider the two preliminary issues raised by the Attorney General, the first being whether the provisions of Article 18(9) and (10) of the Constitution were of application to the matter. The High Court held thus:

This Article is not nebulous. It is as clear as crystal and it does not require a purposive interpretation as nothing more can be read in it. Its import is simply that a person who institutes proceedings in any court or adjudicating authority which is mandated to determine the "existence or extent of any civil right or obligation" must be given a fair hearing within a reasonable time. The question, therefore, is whether the 1st Respondent was created to make such a determination as envisaged in Article 18(9). *The functions of the 1st Respondent are clearly stated in Section 24(1) of the Act. These are to receive complaints or allegations of misconduct against judicial officers; to investigate such complaints or allegations; and to submit its findings and recommendations to relevant authorities for further action. It is plain to me that the 1st Respondent does not determine any civil rights or obligations between parties to be amenable to Article 18(9).* I cannot agree more with the Attorney-General that the 1st Respondent's functions are limited to the receipt of complaints or allegations of misconduct made against judicial officers and investigating them. Such functions are not what is envisaged in Article 18(9) of the Constitution.³²

The decision of the High Court was thus that the provisions of Article 18(9) and (10) did not apply to the circumstances of the case at hand as the Authority did not exercise any adjudicative functions. On the second issue as to whether the Authority can be described as a court or adjudicating authority as contemplated by Article 18(9), the High Court in its holding stated that;

³¹ At page J25 of the Judgment of the Court; 2009/HP/996

³² At page J26 of the Judgment of the Court; 2009/HP/996

The Petitioners contended, *inter alia*, that the 1st Respondent is both an investigative and adjudicating authority because it determines or adjudicates, for example, whether a *prima facie* case has been made against a judicial officer. I do not agree. According to Section 24(1) (a) of the Act, the 1st Respondent can make an opinion that a complaint or allegation against a judicial officer does not disclose a *prima facie* case without even investigating such complaint or allegation. From the above definition, it is clear that adjudicating or determining a dispute involves hearing parties where there is a dispute. However, an opinion that the allegation or complaint does not disclose a *prima facie* case is made by the 1st Respondent without such a process as there is no dispute between parties as such. And according to Section 25(8) of the Act a complaint or allegation against a judicial officer and any investigation carried out by the Judicial Complaints Authority is confidential and not open for public inspection. This in my view further buttresses the position that the 1st Respondent is not an adjudicating authority.³³

The High Court also went on to state that:

According to Section 24(1)(c) of the Act the 1st Respondent's function after investigating a complaint is to submit its findings and recommendations to other authorities for further action. I agree with the learned Attorney-General that since the 1st Respondent is not empowered to make decisions which finally determine complaints or allegations, it does not qualify as an adjudicating authority. In my judgment the 1st Respondent is purely an investigating authority and this comes out clearly when one reads its functions stated in Section 24(1) of the Act. Consequently, I conclude on the second preliminary issue that the 1st Respondent cannot be described as either a Court or an adjudicating authority in the context of Article (18(9) of the Constitution.³⁴

In summation therefore, the decision of the High Court was to the effect that the functions of the Judicial Complaints Authority are limited to the receipt of complaints or allegations of

³³ At page J27 of the Judgment of the Court; 2009/HP/996

³⁴ At page J27 to J28 of the Judgment of the Court; 2009/HP/996

misconduct made against judicial officers and investigating them and that it does not qualify as an adjudicating authority.

In reaching its decision, the High Court engaged in a construction of Section 24 and 25 of the Judicial (Code of Conduct) Act. The Court decided that the functions of the Authority are to merely to receive complaints or allegations of misconduct against judicial officers; to investigate such complaints or allegations; and to submit its findings and recommendations to relevant authorities for further action. In coming to this conclusion, the High Court was further persuaded by Section 25(8) of the Act which provides that a complaint or allegation against a judicial officer and any investigation carried out by the Judicial Complaints Authority is confidential and not open for public inspection. This in the Learned Trial Judge's view further buttressed the position that the Judicial Complaints Authority is not an adjudicating authority.

The import of the decision of the High Court is that the Judicial Complaints Authority does not have adjudicative power. This has the consequence of rendering the Authority without any power to enforce its findings as the "adjudicative power" which is necessary for the enforcement of the findings of any investigations is not vested in it but rather in a different authority or body. This in effect renders the Authority powerless to enforce its findings.

2.4 CONCLUSION

This chapter has set out the functions and mandate of the Judicial Complaints Authority as set out under the Judicial (Code of Conduct) Act. It has also espoused the decision of the High Court in the *Faustin Kabwe* case which case was concerned with interpreting the provisions of the Judicial (Code of Conduct) Act *vis-a-vis* the provisions of Article 91 and 98 of the Constitution of Zambia. The decision of the *Faustin Kabwe* case clearly gave a literal interpretation of section 24 of the Act and in this regard keeps with the manner in which the

Act is formulated. The functions and mandate of the Authority as per the Act as well as the decision in the *Faustin Kabwe* case are clearly limited to the receiving of any complaint or allegation of misconduct and investigation any complaint or allegation made against a judicial officer and thereafter to submit its findings and recommendations to the appropriate authority for disciplinary action or other administrative action; and the Director of Public Prosecution for consideration of possible criminal prosecution. In the next chapter, the nexus between the notions of separation of powers and checks and balances with the functions and mandate of the Judicial Complaints Authority will be examined.

CHAPTER 3

3.0 THE NOTIONS OF SEPARATION OF POWERS AND CHECKS AND BALANCES VIS-A-VIS THE INDEPENDENCE OF THE JUDICIARY

3.1 INTRODUCTION

The notion of separation of powers requires that each branch of government ought to be independent of the other branches of government. In this regard therefore, “the judiciary is independent of both Parliament and the executive. It is a feature of judicial independence which is of prime importance both in relation to government according to law and in the protection of liberty of the citizen against the executive.”³⁵ It follows that as the judiciary checks the exercise of executive and legislative power, it too ought to be checked. The former Chief Justice, Ernest Sakala in a paper presented at the Southern Africa Judges Commission Meeting held in Windhoek, Namibia in August 2005 posited that accountability of the judiciary and independence of the judiciary are closely interlinked. Indeed, it is said that accountability is the reverse side of the coin of judicial independence.³⁶

One of the mechanisms by which the accountability of the Judiciary is ensured is through the use and application of Judicial Codes of Conduct.³⁷ The Judicial Complaints Authority as the body vested with the mandate of enforcing the Zambian Judicial Code of Conduct is thus an essential institution in ensuring the accountability of the Judiciary in Zambia. It therefore has a fundamental role to play in the achievement of the rule of law in Zambia. Whether it does so or not remains to be seen.

³⁵ Hilaire Barnett. *Constitutional and Administrative Law*. 3rd Ed. (London. Cavendish Publishing Limited) p. 128

³⁶ Ernest L. Sakala. *The Accountability of the Judiciary – Accountable to Whom? Is There Such A Mechanism*. August 2005

³⁷ Ernest L. Sakala. *The Accountability of the Judiciary – Accountable to Whom? Is There Such A Mechanism*. p. 9

3.2 THE NOTIONS OF CHECKS AND BALANCES AND SEPARATION OF POWERS

3.2.1 SEPARATION OF POWERS



The doctrine of separation of powers divides government between groups of different interests or purposes so that no power centre can act without the co-operation of others and each 'checks and balances' the others.³⁸ Thus the separation is a way of protecting the rule of law.³⁹ In any State, three essential bodies exist: the executive, the legislature and the judiciary. It is the relationship between those bodies which must be evaluated against the background of the principle. The essence of the doctrine is that there should be, ideally a clear demarcation in function between the legislature, executive and the judiciary in order that none should have excessive power and that there should be in place a system of checks and balances between the institutions.⁴⁰ The foregoing clearly espouses that the essence of the notion of separation of powers is the separation of the three fundamental functions of powers; namely the executive function, the law making or legislative function and the judicial function involving interpretation of the law

3.2.2 CHECKS AND BALANCES

Ancillary to the doctrine of separation of powers is the notion of checks and balances. Nwabueze has observed that the idea of checks and balances seeks to make the separation of powers more effective by balancing powers more effective by balancing the powers of one agency against those of another through a system of positive mutual checks exercised by the governmental organs on one another. He postulates that the idea of checks and balances presupposes that a specific function is assigned primarily to a given organ, subject to a power

³⁸ John Alder. *General Principles of Constitutional and Administrative Law*. 4th Ed. (London. Palgrave Macmillan. 1989) p. 104

³⁹ John Alder. *General Principles of Constitutional and Administrative Law*. 4th Edition p. 105

⁴⁰ Hilaire Barnett. *Constitutional and Administrative Law*. 3rd Ed. p. 123

of *limited* interference by another organ within the sphere delimited to it.⁴¹ Without checks and balances, it would be impractical to attain rule of law through separation of powers as each organ would essentially be left to its own devices. It follows thus that the notions of separation of powers and checks and balances go in tandem and one cannot exist without the other.⁴²

3.3 THE CONCEPT OF JUDICIAL INDEPENDENCE VIZ-A-VIZ THE NOTION OF CHECKS AND BALANCES

Another cardinal tenet of the concepts of separation of powers is that each organ of government ought to be independent of the others. It is the independence and separateness of the organs of government that underlines the existence of checks and balances.⁴³ The United Nations Special Rapporteur on the independence of judges and lawyers has underscored the importance of separation of powers and has stated that:

The principle of the separation of powers is the bedrock upon which the requirement of judicial independence and impartiality are founded.⁴⁴

Judicial independence is therefore one of the cornerstones of good governance. The fundamental essence of the independence of the Judiciary has been recognised internationally in many human rights instruments. In 2002, the United Nations adopted the Bangalore Principles of Judicial Conduct. The first principle is espoused as follows:

1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.

⁴¹ B.O Nwabueze. *Constitutionalism in the Emergent States*. (Rutherford. Fairleigh Dickinson University Press. 1973) p. 20

⁴² B.O Nwabueze. *Constitutionalism in the Emergent States*. p. 21

⁴³ John Alder. *General Principles of Constitutional and Administrative Law* 4th Ed. p109

⁴⁴ Quoted in International Commission of Jurists, *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors: A Practitioners' Guide*, (2004). p. 15

Also relevant is the fourth principle which states that:

4. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.

The Constitution of Zambia⁴⁵ recognises and enshrines the principle of judicial independence in Article 91(2) and (3) which provide that:

(2) 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.

(3) **The Judicature shall be autonomous** and shall be administered in accordance with the provisions of an Act of Parliament.

The importance of judicial independence cannot be over-emphasised. It is especially cardinal in light of the functions exercised by the judiciary. This can be gleaned from the observation made by Hon G.G Chidyausiku, the Former Chief Justice of Zimbabwe who observed that the administration of justice requires that the judiciary be given by the Constitution, power to make binding and final decisions in disputed cases as to the facts and law that apply to them, coupled with the power of enforcement. This power is peculiar to the judicial function and is not shared by the other two pillars of government. In performing this function, it is of paramount importance that the court arrives at its decisions in a regular as opposed to an arbitrary manner, that justice must be dispensed even-handedly, and that the general public

⁴⁵ Chapter 1 of the laws of Zambia

must feel confident in the impartiality and integrity of the impartiality and integrity of the Courts.⁴⁶

In order to perform this function judicial independence is essential to ensure the impartiality of the judiciary. The judiciary must this be free from adverse external influence and pressure. An independent judiciary requires both that individual judges are independent in the exercise of their powers, and that the judiciary as a whole is independent from wrongful interference by the other branches of government.⁴⁷ Judicial autonomy and independence does not however mean that the judiciary is immune from checks and balances as this would be contrary to the notions of separation of power and checks and balances from which authority for the notion of judicial independence is derived. Ndulo has observed that accountability and independence are two sides of the same coin: accountability ensures that judges perform their constitutional role, and judicial independence protects judges from pressures that would pull them out of that role and further that true judicial accountability furthers judicial integrity.⁴⁸

An independent and honourable judiciary is therefore indispensable to the rule of law. If judges are to be the independent guarantors of the rule of law values, they must be incorruptible.⁴⁹ A fundamental value of the rule of law is that judicial decisions are not made arbitrarily, but through a process of reasoned decision making.⁵⁰ The rule of law requires that decisions be justified in law, and therefore be reasoned and non-arbitrary with respect to general legal standards. Independence, integrity and competence, then, are the hallmarks of a

⁴⁶ Hon. G. G Chidyausiku. *Modern Challenges to the Independence of the Judiciary*: Presentation by the Hon. G. G Chidyausiku, Chief Justice of Zimbabwe. Conference and Annual General Meeting of the Southern African Chief Justices Forum, Johannesburg, South Africa: 13-14 August 2010

⁴⁷ Muna Ndulo. *Judicial Reform, Constitutionalism, and the Rule of Law in Zambia: From a Justice System to a Just System*: A paper presented at the Law Association of Zambia Annual Meeting; Livingstone, Zambia April 27, 2012. pp. 11-12

⁴⁸ Muna Ndulo. *Judicial Reform, Constitutionalism, and the Rule of Law in Zambia: From a Justice System to a Just System*. p. 13

⁴⁹ Muna Ndulo. *Judicial Reforms, Constitutionalism, and the Rule of Law in Zambia: From a Justice System to a just System*.p.13

⁵⁰ Muna Ndulo, *Judicial Reform, Constitutionalism, and the Rule of Law in Zambia: From a Justice System to a Just System*.p.13

judiciary committed to upholding the rule of law and they are the principles to which a judiciary should be held accountable.⁵¹

3.4 EXISTING CHECKS ON THE EXERCISE OF JUDICIAL POWER IN ZAMBIA

The Constitution of Zambia recognises the independence and autonomy of the judiciary in Articles 91(2) and (3). The Constitution however also recognises that the exercise of judicial power cannot be carried out contrary to the law thereby setting the first “check” on the exercise of judicial power.⁵² Regard must first be had to Article 1(4) of the Constitution of Zambia which provides that:

This Constitution shall bind all persons in the Republic of Zambia and all Legislative, Executive and Judicial organs of the State at all levels.

The Constitution is in this regard therefore the first point of reference to establish the checks in place on the exercise of judicial power. Article 91 and Article 98 are the relevant Articles in the Constitution which touch on checking the judiciary. Article 91 (2) and (3) provides as follows:

(2) 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 members, magistrates and justices.

(3) The Judicature shall be autonomous and shall be administered in accordance with the provisions of an Act of Parliament.

Article 91(3) provides that the judicature shall be autonomous. Further Article 91(2) provides for the independence of the judicial officers. It is pursuant to this provision that the Judicial

⁵¹ Muna Ndulo. *Judicial Reform, Constitutionalism, and the Rule of Law in Zambia: From a Justice System to a Just System*. pp. 13-14

⁵² Article 91 of the Constitution as read with Article 1(3) and (4) of the Constitution

Code of Conduct Act⁵³ was promulgated. This is the first check on judicial power found in the Constitution. We will revert to this piece of legislation a little later. The Constitution provides a further check on judicial power in Article 98. Article 98 provides thus in sub articles (2), (3), (4) and (5)

(2) A Judge of the Supreme Court, High Court, Chairman or Deputy Chairman of the Industrial Relations Court may be removed from office only 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.

(3) 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.

(4) Where a tribunal appointed under clause (3) advises the President that a judge of the Supreme Court or of the High Court ought to be removed from office for inability, or incompetence or for misbehaviour, the President shall remove such judge from office.

(5) If the question of removing a judge of the Supreme Court or of the High Court from office has been referred to a tribunal under clause (3), the President may suspend the judge from performing the functions of his office, and any such suspension may at any time be revoked by the President and shall in any case cease to have effect if the tribunal advises the President that the judge ought to be removed from office.

⁵³ Act No. 13 of 1999

(6) The provisions of this Article shall be without prejudice to the provisions of Article 96.

Article 98 confers Judges with security of tenure but most importantly for the purposes of this research, it provides⁵⁴ the manner in which Judges may be removed from office for misconduct or incompetence among other reasons. The relevant provisions are found in Article 98(2) to (5). It follows thus that in cases of judicial misconduct, the provisions of Article 98 may be invoked to discipline erring judges. This was recognised in the case of *The Attorney General v Nigel Kalonde Mutuna, Charles Kajimanga and Philip Musonda*⁵⁴ in which the Supreme Court stated that:

Against that background, Article 98(3) gives power to the President who may receive reports on the conduct of a Judge, Chairman or Deputy Chairman of the Industrial Relations Court from any other sources which may not be in the public domain, May not even be through the Judicial Complaints Authority, to appoint a tribunal. In this Article, the legislators intended to lay down procedures of making it possible for the President as Head of State to deal with that exclusive class of adjudicators without recourse to the Judicial Complaints Authority.⁵⁵

It follows thus that the first check on the exercise of judicial power is vested in the President by Article 98 which empowers the President to appoint a tribunal to investigate allegations of judicial misconduct. The second avenue provided for checking the exercise of judicial power is contained in the Judicial Code of Conduct Act promulgated pursuant to Article 91.⁵⁶ The preamble of the Judicial Code of Conduct Act provides that it is:

An Act to provide for the code of conduct for officers of the Judicature pursuant to article ninety-one of the constitution and for matters connected with or incidental to the foregoing.

⁵⁴ Appeal No. 088 of 2012

⁵⁵ Appeal No. 088 of 2012, p. J88

⁵⁶ Act No. 13 of 1999

The Act goes on to set out the tenets by which judicial officers must conduct themselves and it also establishes the Judicial Complaints Authority which is the body mandated with the power to enforce the code of conduct. The enforcement mechanism is set out under Section 24. Section 24 provides thus:

24. The functions of the Authority shall be to-

(a) Receive any complaint or allegation of misconduct and to investigate any complaint or allegation made against a judicial officer:

Provided that where, in the opinion of the Authority a complaint or allegation of misconduct made against the judicial officer does not disclose any prima facie case, the Authority may dismiss such a complaint or allegation without investigating the complaint or allegation.

(b) Submit its findings and recommendations to-

(i) The appropriate authority for disciplinary action or other administrative action; and

(ii) The Director of Public Prosecution for consideration of possible criminal prosecution.

(2) In this part, “appropriate authority” means-

(a) In the case of the Chief Justice, the president;

(b) In the case of a judge, the Chief Justice, who may admonish the judge concerned and in the case of a breach requiring removal under subsection (2) of article ninety-eight of the Constitution, the Chief Justice shall inform the President;

(c) In the case of the Registrar, the Chief Administrator, who shall inform the Commission;

(d) In the case of a Magistrate, the Director of Local Courts or any other judicial officer, the Registrar, who shall report to the commission for action; and

(e) In the case of a Local Court officer or justice, the Director of Local Courts, who shall report to the commission for action.

(3) The appropriate authority or the Director of Public Prosecutions shall, where a report is made by the Authority under subsection (1), notify the member against whom the report is made within seven days from the date the report is received and shall thereafter notify the Authority of the action taken, if any, on the Authority's recommendation.

The procedure for laying a complaint is set out in section 25 of the Act. Section 24 therefore provides the avenue for disciplining errant judicial officers. The authority is mandated to receive and investigate complaints. Upon conclusion of such investigation, the authority must submit its findings and recommendations to "the appropriate authority", which in the case of the Chief Justice is the president and in the case of a puisne judge is the Chief Justice, who may admonish the judge concerned and in the case of a breach requiring removal under subsection (2) of article ninety-eight of the Constitution, the Chief Justice shall inform the President.

It is clear therefore that the procedure under Article 24 may lead to either administrative action being taken against the errant judge or to the invoking of Article 98 of the Constitution where the misconduct is such that it warrants removal of the errant judge.

3.5 THE NOTION OF CHECKS AND BALANCES VIZ. THE FUNCTIONS AND MANDATE OF THE JUDICIAL COMPLAINTS AUTHORITY

It has been espoused above that the notion of checks and balances seeks to make the separation of powers more effective by balancing powers more effective by balancing the powers of one agency against those of another through a system of positive mutual checks exercised by the governmental organs on one another. It has also been noted that the functions and mandate of the Judicial Complaints Authority are to receive any complaint or

allegation of misconduct and to investigate any complaint or allegation made against a judicial officer and thereafter to submit its findings and recommendations to the appropriate authority for disciplinary action or other administrative action and the Director of Public Prosecution for consideration of possible criminal prosecution.

What is notable from the foregoing is that the Authority lacks the power to enforce its findings. It is merely mandated to investigate allegations of judicial misconduct against errant judicial officers and thereafter to submit its findings to another authority for further action. It is thus not clothed with the power to enforce its findings or to discipline errant officers. Even with respect to “junior” judicial officers such as the Registrar, the Chief Administrator, Magistrates, the Director of Local Courts or any other judicial officer, the disciplinary power is vested in the Judicial Service Commission. It appears thus that the Authority is itself subject to some rudimentary sort of separation of power as its mandate is merely investigative and it lacks the power to enforce its findings.

This was the holding in the case of *Faustin Kabwe and Others v Judicial Complaints Authority and Attorney General*. This begs the question whether the mandate of the Authority enhances the application of the rule of law and the notion of checks and balances with regard to the exercise of judicial power. It must be pointed out that while this is an improvement upon the position before 1996, when the only check on the exercise of judicial power was that contained in Article 98, to establish an authority with the power to investigate misconduct and yet deprive it of the means to “complete the job” through enforcement of its findings goes against the motivation or factors leading to its establishment.⁵⁷ A notable improvement however, is that through the Judicial Complaints Authority, the general public now have an avenue through which to lay complaints against the judiciary.

⁵⁷ George Kunda. *Justification for the Judicial Code of Conduct*. Zambia Law Journal. Vol. 32 . (Lusaka. University of Zambia Press. 2000) pp. 145 - 154

The notion of checks and balances requires the existence of an independent body or organ to act as a check on the exercise of judicial power.⁵⁸ The lack of enforcement power therefore renders the Judicial Complaints Authority without the bite to effectively carry out this function. It follows thus that the Judicial Complaints Authority falls short of the standard required to effectively ensure adequate checks on the exercise of Judicial Power. In this vein, the fact that the Authority is merely mandated to report its findings to the appointing authorities; namely the President in the case of Judges of the High Court, Supreme Court and the Chairman and Deputy Chairman of the Industrial Relations Court and the Judicial Service Commission in the case of the Registrar, the Chief Administrator, Magistrates, the Director of Local Courts or any other judicial officer. This means that the power to check these judicial officers is vested in the appointing authorities and this can have a negative impact on the independence of the judiciary. This therefore undermines judicial independence by leaving the judiciary open to executive interference. Judges may fear to decide against the executive for fear of losing their positions.

3.6 CONCLUSION

This chapter has examined the link between the notions of separation of powers, checks and balances and independence of the judiciary. It has been shown that these concepts are cardinal to the achievement of the rule of law in a democratic society. Following an exposition of the existing checks and balances on the judiciary in Zambia, the nexus between the notion of checks and balances with the functions and mandate of the Judicial Complaints Authority was examined. It has been established that the judicial Complaints Authority lacks the power to enforce the findings of its inquiries and that this does not change the status quo as regards the power to discipline errant judicial officers. It has been established that the lack of power to enforce the findings of its inquiries severely hampers its efficacy in furthering the

⁵⁸John Alder.General Principles of Constitutional and Administrative Law. p104

achievement of effective checks on the judiciary. The next chapter engages in a comparative analysis with bodies exercising similar functions in Zambia and within the Commonwealth.



CHAPTER 4

4.0 COMPARATIVE ANALYSIS OF FUNCTIONS AND MANDATE OF THE JUDICIAL COMPLAINTS AUTHORITY WITH SIMILAR BODIES IN ZAMBIA AND THE COMMONWEALTH

4.1 INTRODUCTION

Some jurisdictions, including the United States of America, Kenya, Tanzania and Uganda have chosen to provide formal guidance to judicial officers through codes of conduct.⁵⁹ Our own laws also provide for mechanisms to check the exercise of governmental powers. One such example, which will be considered in this chapter, is the Parliamentary and Ministerial Code of Conduct Tribunal. This chapter examines how bodies with similar functions and mandate as the Judicial Complaints Authority in Zambia, specifically the Parliamentary and Ministerial Code of Conduct Tribunal exercises its functions and the extent of its mandate and powers. This chapter also considers how checks on judicial power are achieved and implemented in other countries within the Commonwealth.

4.2 THE PARLIAMENTARY AND MINISTERIAL CODE OF CONDUCT TRIBUNAL

The Parliamentary and Ministerial Code of Conduct Tribunal (the Tribunal) is established pursuant to section 14 of the Parliamentary and Ministerial Code of Conduct Act.⁶⁰ The Parliamentary and Ministerial Code of Conduct Act sets out the Code of Conduct to be adhered to by Ministers and Deputy Ministers for the purposes of Article 52 of the Constitution of Zambia and also Members of the National Assembly for the purposes of Article 71 of the Constitution.⁶¹ The disciplinary mechanisms under the Ministerial Code of Conduct Act are set out in sections 13 and 14 thereof. By section 13, any allegation that a

⁵⁹ George Kunda. *Justification for the Judicial Code of Conduct*. Zambia Law Journal. Vol. 32 . (Lusaka. University of Zambia Press. 2000) pp. 145 – 154 at p. 148

⁶⁰ Chapter 16 of the Laws of Zambia

⁶¹ The Preamble to the Parliamentary and Ministerial Code of Conduct Act, Chapter 16 of the Laws of Zambia

Member of the National Assembly or Minister or Deputy Minister has breached the Code of Conduct is made to the Chief Justice. Upon receipt of such allegation, the Chief Justice is under a mandatory obligation to appoint a tribunal to investigate the allegation. The Tribunal once appointed must conduct its inquiry in public.⁶² The tribunal is required to submit a report on its findings to the President, the Speaker and to the Member concerned within forty five days of its being appointed.⁶³

There are some notable similarities between the functions and mandate of the Ministerial Code of Conduct Tribunal and the Judicial Complaints Commission. The first notable similarity is that both bodies have investigative mandate with each being mandated to investigate allegations of breaches of the respective codes of conduct. The second similarity is that once each body must submit a report of the findings of its inquiry and its recommendations to another “authority” which then has the power to enforce the said findings. Thirdly, neither body has the power to enforce the findings and recommendations which stem from the inquiry undertaken. The power to enforce the findings and recommendations of the inquiry is in each case vested in another authority.

There are however significant differences in the mandate of the two bodies and the manner in which they carry out their functions. The first notable difference is that noted in the *Faustin Kabwe* case, namely that the Judicial Complaints Authority is under no obligation to carry out a public inquiry of the allegations against a judicial officer. The Judicial Complaints Authority therefore carries out its inquiry in private away from public scrutiny. According to Section 25(8) of the Judicial (Code of Conduct) Act,⁶⁴ a complaint or allegation against a judicial officer is confidential and is not open to public inspection. The Tribunal on the other hand is under a mandatory obligation to carry out its inquiry in public. The second difference

⁶² Section 14(5) of the Parliamentary and Ministerial Code of Conduct Act

⁶³ Section 14(4) of the Parliamentary and Ministerial Code of Conduct Act

⁶⁴ Act No. 13 of 1999

persons submitted to it by the Federal Judicial Service Commission, State Judicial Service Commission and the Judicial Service Commission of the Federal Capital Territory persons for appointment to the Federal and State courts of high jurisdiction respectively; persons for removal from the office of judicial officers from the Federal and State courts of high jurisdiction and to exercise disciplinary control over the 756 persons who make up the total number of Federal and State judicial officers in Nigeria; and to deal with such matters relating to broad issues of policy and administration of the Code of conduct for Judicial Officers in the Federal Republic of Nigeria.⁶⁶

The National Judicial Council exercises disciplinary powers over judicial officers. Any aggrieved person may lodge a complaint against any judge either to the chairperson (who is the Chief Justice of Nigeria) or Secretary of the Council.⁶⁷ On receiving such application, a query is issued by the Chief Justice against the particular judge complained of to be sent to him/her with a copy of the complaint which he/she must respond to within two weeks. The Council then sits to determine whether there is a *prima facie* case against the Judge. At this stage, if no *prima facie* case is established, the complaint is thrown out, otherwise a panel is set up to hear the matter. Judges are free to get legal representation and the decision of the panel is presented to the Council for confirmation. If the judge is found guilty, the Council may admonish, or advise a compulsory retirement, or recommend a dismissal to the President or Governor as the case may be. Pending the response of the President or Governor, the Council may indefinitely suspend the judge without salary.⁶⁸ The President and the State

⁶⁶ A. O Alubo. *The National Judicial a Desideratum for Judicial Independence and Public Confidence in the Judiciary*. 2006. p. 22

⁶⁷ R. E. Badejogbin (Mrs) and M. E. Onoriode (Mrs). *Judicial Accountability And Discipline In Nigeria: Imperatives For The New Democratic Order*. 2010. P. 12

⁶⁸ A. O Alubo. *The National Judicial a Desideratum for Judicial Independence and Public Confidence in the Judiciary*. 2006. pp. 22-23

Governors cannot on their own dismiss a judge except as recommended by the Council. This assures the tenure of the judge and enhances the Independence of the Judiciary.⁶⁹

In contrast to the ~~Z~~ambian Judicial Complaints Commission, it is noteworthy that the mandate of the National Judicial Council does not end at merely investigating the matter. The National Judicial Council actually carries out a disciplinary function. It is empowered to admonish an errant judicial officer and it may even suspend an officer indefinitely without pay. In Zambia these are powers which are vested in the “appropriate authority”, namely the President, Chief Justice of Judicial Service Commission as the case may be. The only power taken away from the National Judicial Council is the power to remove a Judge from office. The National Judicial Council however still plays a significant role in the removal of a judge as the President and the State Governors cannot on their own dismiss a judge except as recommended by the Council. This contrasts with the situation in Zambia where the ultimate power of removal is vested in the President who has discretion to either accept or reject the recommendations of the Judicial Complaints Authority and even the tribunal appointed under Article 98. It is therefore noteworthy that the National Judicial Council of Nigeria has significantly more power than the Judicial Complaints Authority of Zambia.

4.3.2 KENYA

The Kenyan Judicial Service Code of Conduct and Ethics was established in 2003 by the Judicial Service Commission in terms of section 5(1) of the Kenyan Public Officer Ethics Act 2003. That section requires each commission responsible for a public service sector to establish a specific code of conduct and ethics for the public officers for which it is

⁶⁹ R. E. Badejogbin (Mrs) and M. E. Onoriode (Mrs). *Judicial Accountability and Discipline in Nigeria: Imperatives for the New Democratic Order*. 2010. p. 12

responsible.⁷⁰ By Article 168(2) of the Constitution of Kenya, 2010, the removal of a judge may be initiated only by the Judicial Service Commission acting on its own motion, or on the petition of any person to the Judicial Service Commission. Article 168(1) of the Kenyan Constitution sets out the grounds upon which a Judge may be removed from office, namely, inability to perform the functions of office arising from mental or physical incapacity, a breach of a code of conduct prescribed for judges of the superior courts by an Act of Parliament, bankruptcy, incompetence and gross misconduct or misbehaviour. It is clear therefore that by virtue of Article 168 of the Kenyan Constitution, the Judicial Service Commission is the body mandated to superintend over the Judicial Service Code of Conduct and Ethics.

Article 168 of the Kenyan Constitution provides that complaints against a judicial officer must be made directly to the Judicial Service Commission and the Commission shall consider the petition and, if it is satisfied that the petition discloses a ground for removal, send the petition to the President.⁷¹ Upon receipt of such petition, the President is under a mandatory obligation to suspend the errant judicial officer from office and appoint a tribunal to inquire into the matter. This must be done within 14 days of receiving the petition from the Commission.⁷² The tribunal appointed by the President then inquires into the matter and makes recommendations to the President. A significant point to note is that the recommendations of the tribunal are binding on the President.⁷³

The Judicial Service Commission is however empowered to exercise disciplinary powers with respect to “judicial officers” and “judicial staff.” Judicial officer is defined in section 2

⁷⁰ Dr Nihal Jayawickrama. *The Kenyan Judicial Service Code of Conduct and Ethics: A review of its compliance with international standards; An outline of implementation modalities; and A performance evaluation mechanism*. July 2011. p. 4

⁷¹ Article 168(3) and (4) of the Constitution of Kenya, 2010

⁷² Article 168(5) of the Constitution of Kenya, 2010

⁷³ Article 168(7)(b) of the Constitution of Kenya, 2010

of the Kenyan Judicial Service Act, 2011⁷⁴ to include the registrar, deputy registrar, magistrate, Kadhi or the presiding officers of any other court or local tribunal. The specific disciplinary powers are set out in the Third Schedule of the Kenyan Judicial Service Act, 2011. Paragraph 15 in the Third Schedule delegates the power to interdict, suspend and reprimand an errant judicial officer to the Chief Justice. The Commission is however empowered under Paragraph 19 to mete out sanctions against errant judicial officers. In this regard, the sanctions the Commission is empowered to impose include dismissal, stoppage of increment of pay, withholding of increment of pay, severe reprimand and reprimand,

The functions and mandate of the Kenyan Judicial Service Commission in relation to the enforcement of the Judicial Service Code of Conduct and Ethics is somewhat similar to that of the Judicial Complaints Authority in Zambia. This is on account of the fact that the chief mandate of the two bodies is mainly investigative. Both are empowered to receive complaints directly from the public. It is also noteworthy that both the Judicial Complaints Authority and the Kenyan Judicial Service Commission do not have the power to enforce the findings of their investigations and the power to remove errant judges remains vested in a secondary authority.

The Kenyan Judicial Service Commission however, in contrast to the Zambian Judicial Complaints Authority does possess limited disciplinary powers. The Judicial Service Commission is empowered to exercise disciplinary functions in respect of the registrar, deputy registrar, magistrate, Kadhi or the presiding officers of any other court or local tribunal and the sanctions it is empowered to impose include dismissal and suspension. This is in contrast to the Judicial Complaints Authority which does not carry out any disciplinary functions whatsoever. A further distinction between the two bodies is that in Kenya, the President is under a mandatory obligation to act on the petition presented by the Judicial

⁷⁴ Act No. 1 of 2011 (Kenya)

Service Commission and suspend the errant judicial officer from office and appoint a tribunal to inquire into the matter. In Zambia, the President has discretion under Article 98 of the Constitution of Zambia as to whether or not to appoint a tribunal. It follows therefore that in Zambia, the enforcement of the recommendations of the Judicial Complaints Authority are completely out of its hands.

4.4 CONCLUSION

This chapter has analysed and compared the functions and mandate the Judicial Complaints Authority with those of the Parliamentary and Ministerial Code of Conduct Tribunal in Zambia as well as the Judicial Complaints Authority with those of the National Judicial Council in Nigeria and the Kenyan Judicial Service Commission. Whereas primary functions and mandate of the Judicial Complaints Authority and that of the Parliamentary and Ministerial Code of Conduct Tribunal are in both cases investigative and both submit their recommendations to a secondary authority for enforcement and further action, the significant disparities between the two bodies are that the Judicial Complaints Authority is under no obligation to carry out a public inquiry of the allegations against a judicial whereas the Tribunal on the other hand is under a mandatory obligation to carry out its inquiry in public. Further, the time within which the Tribunal must conduct and complete its inquiry is expressly provided for whereas there is no such requirement for the Judicial Complaints Authority. As regards the Kenyan Judicial Service Commission and the National Judicial Council in Nigeria it was noted that the mandate of these bodies does not end at merely investigating the matter and both actually carry out some disciplinary functions. In the cases of both the National Judicial Council and the Judicial Service Commission of Kenya the removal of a judge cannot occur without the prior input of the two bodies.

The next chapter will give a conclusion of this research and advance a number of recommendations as to what measures and reforms can be implemented to enhance the role of the Judicial Complaints Authority as an effective check on the exercise of Judicial Power.



CHAPTER FIVE

5.0 CONCLUSION AND RECOMMENDATIONS

5.1 GENERAL CONCLUSION

This research examined the import of the decision in the case of *Faustin Kabwe and Others v Judicial Complaints Authority and Attorney General*⁷⁵ as well as the mandate of the Judicial Complaints Authority as set out under the Act. The ultimate objective of this research has been to establish whether the functions and mandate of the Judicial Complaints Authority as set out under the Judicial (Code of Conduct) Act⁷⁶ and espoused in the *Faustin Kabwe* case clothe it with sufficient power to act as an effective check on the Judicature of Zambia exercise of judicial power in Zambia. It has been noted that it is central to the notions of separation of power and checks and balances that there must be a check on each branch of government in order to curtail arbitrary exercise of power by any organ of government. Further, as espoused in chapter three, the notion of judicial independence is ancillary to the notions of separation of power and checks and balances and exists in tandem with them. Judicial independence however, it was noted, does not mean that the judiciary is immune from checks and balances as this would be contrary to the notions of separation of power and checks and balances. Accountability and independence are two sides of the same coin: accountability ensures that judges perform their constitutional role, and judicial independence protects judges from pressures that would pull them out of that role.... True judicial accountability furthers judicial integrity.⁷⁷

It is in this vein that the existence of a body with adequate mandate to act as a check on the exercise of judicial power is imperative. There must be in place a body to ensure the

⁷⁵ 2009/HP/0996

⁷⁶ Act No. 13 of 1999

⁷⁷ Muna Ndulo. *Judicial Reform, Constitutionalism, and the Rule of Law in Zambia: From a Justice System to a Just System*. p. 13

accountability of the judiciary. One of the mechanisms through which accountability of the judiciary is achieved is through implementation of a code of conduct. The Judicial Complaints Authority being the body vested with the mandate to superintend the Judicial Code of Conduct in Zambia, it follows that it has an important role to play in ensuring the attainment of judicial accountability in Zambia. The lack of enforcement power therefore renders the Judicial Complaints Authority without the bite to effectively carry out this function. It follows thus that the Judicial Complaints Authority falls short of the standard required to effectively ensure adequate checks on the exercise of Judicial Power. In this vein, the fact that the Authority is merely mandated to report its findings to the appointing authorities; namely the President in the case of Judges of the High Court, Supreme Court and the Chairman and Deputy Chairman of the Industrial Relations Court and the Judicial Service Commission in the case of the Registrar, the Chief Administrator, Magistrates, the Director of Local Courts or any other judicial officer. This as it has been maintained in the course of the research herein, renders the Judicial Complaints Authority an ineffective check on the judiciary.

Chapter one introduced the research and concluded by emphasising the importance of the notions of separation of powers and checks and balances that the need for the judiciary to be subject to checks and balances and further by illustrating the problem that stems from the fact that the mandate of the Authority is merely investigative and there is thus little shift in power and function as compared to the position before the establishment of the Authority.

Chapter two set out in detail the functions and mandate of the Judicial Complaints Authority as set out under the Judicial (Code of Conduct) Act. It has also contained a detailed exposition of the decision of the High Court in the *Faustin Kabwe* case. This chapter concluded by noting that the functions and mandate of the Authority as per the Act as well as the decision in the *Faustin Kabwe* case are clearly limited to the receiving of any complaint

or allegation of misconduct and investigation any complaint or allegation made against a judicial officer and thereafter to submit its findings and recommendations to the appropriate authority for disciplinary action or other administrative action.



Chapter three considered the link between the notions of separation of powers, checks and balances and independence of the judiciary as well as an examination the nexus between the notion of checks and balances with the functions and mandate of the Judicial Complaints Authority. It was established that the lack of power on the part of the Judicial Complaints Authority to enforce the findings of its inquiries is a severe encumbrance on the efficacy of the Judicial Complaints Authority in furthering the achievement of effective checks on the judiciary.

Chapter four considered and examined the functions and mandate of bodies carrying out similar functions as the Judicial Complaints Authority in Zambia and within the Commonwealth was undertaken. Comparison was made with the Parliamentary and Ministerial Code of Conduct Tribunal was made and significant differences noted were that the Judicial Complaints Authority is under no obligation to carry out a public inquiry of the allegations against a judicial whereas the Tribunal on the other hand is under a mandatory obligation to carry out its inquiry in public. It was further noted that the time within which the Tribunal must conduct and complete its inquiry is expressly provided for whereas there is no such requirement for the Judicial Complaints Authority.

Further, upon comparison with the National Judicial Council in Nigeria and the Kenyan Judicial Service Commission it was noted that in contrast to the Judicial Complaints Authority, the mandate of the Nigerian and Kenyan bodies and does not end at merely investigating the matter and both actually carry out some disciplinary functions. Further, in the cases of both the National Judicial Council and the Judicial Service Commission of

Kenya the removal of a judge cannot occur minus the prior input of the two bodies. This is unlike the case of the Judicial Complaints Authority whose recommendations may or may not be accepted by the “appropriate authority” which has the final say regarding the action to be taken.

5.2 RECOMMENDATIONS

Having examined the functions and mandate of the Judicial Complaints Authority and its efficacy as a check on the exercise of judicial power, the following proposals are now put forward as measures that can be implemented in order to enhance the efficacy of the Authority as a check on the judicial power and superintendent of the Judicial Code of Conduct. The Judicial Complaints Authority, being a body having its functions and mandate set out by statute, it follows thus that the following recommendations ought to be implemented through legislative reform.

a. Time Frame for Conducting Inquiry

It has been noted in Chapter three above that the Judicial Complaints Authority unlike the Parliamentary and Ministerial Code of Conduct Tribunal is not mandated to come up with its findings and decision within a specified time. In this regard therefore, it is necessary for the time within which the Authority ought to conduct its investigations must be fixed. A period of say, 90 days ought to be sufficient for conducting an inquiry. This will have the effect of speeding up the determination of complaints presented to it and this will in turn enhance public confidence in the Authority.

b. Discipline of Junior Judicial Officers

The chief outcome of the research conducted herein is that the Authority’s lack of enforcement mechanisms for the findings of its inquiries renders it ineffective in providing an

effective check on the exercise of judicial power as noted in chapter three above. The cure for this defect in the mandate of the Judicial Complaints Authority is therefore to vest it with the power to sanction errant judicial officers. This power can be limited to “junior” judicial officers as is the case in Kenya as was noted in chapter four. In this regard, it is recommended that the Judicial Complaints Authority be vested with the power to conduct investigations into complaints in relation to the Registrar, Deputy Registrars, Magistrates, the Director of Local Courts, Local Court officers or justices or any other judicial officer. Following its investigations, if it finds that a *prima facie* case has been made out against such judicial officer, the Authority must then sit in a quasi judicial capacity to hear the accused officer in his defence and render a decision on the matter and sanction the errant officer where necessary. In addition, a right of appeal against the decision of the Authority to the High Court must be provided for.

c. Discipline Removal of Judges

As regards inquiries into complaints against Judges of the High Court, Supreme Court and the Chairman and Deputy Chairman of the Industrial Relations Court, it is recommended that the mechanism in place under Article 98 for the appointment of a tribunal be maintained. However, changes must be made to set a procedure as exists in Kenya and Nigeria whereby these senior judicial officers can only be removed from office on recommendation of the investigative body. Where a case of misconduct is established against a Judge the Authority must be empowered to admonish, suspend, or recommend a removal to the President in order to set the Article 98 mechanisms into place. Where removal is recommended the President must constitute a tribunal to determine the matter.

d. Specified Sanctions

It is also recommended that as with the position in Kenya regarding the Kenyan Judicial Service Commission highlighted in chapter four, the sanctions that can be meted out by the Judicial Complaints Authority must be expressly provided for. This will go to streamlining the powers of the Authority and ensuring that judicial officers have knowledge of what sanction can be meted out in particular instances.

e. Binding Recommendations

It is further recommended that the recommendations made by the Authority to the President to set into motion the setting up of a tribunal under Article 98 must be mandatory on the President. The President ought to be bound to set up the Tribunal to make detailed inquiries into the alleged misconduct of the Judge and make a determination as to whether or not the Judge ought to be removed or other sanctions meted out.

f. Power to Act of its own Motion

It has also been noted in chapter two that the Judicial Complaints Authority can only act upon receipt of a complaint from the public. It is thus recommended that the Authority be empowered where the necessity of the case requires it for cogent reasons to investigate judicial misconduct of its own motion. This will go towards ensuring compliance with the code of conduct as even unreported misconduct can be investigated.

5.3 CONCLUSION

In conclusion, this research set out as its objective to examine whether the mandate of the Judicial Complaints Authority as set out under the Judicial (Code of Conduct) Act and espoused in the *Faustin Kabwe* case clothe it with sufficient power to act as an effective check on the Judicature of Zambia exercise of judicial power. In the premises, this research

has established that the Authority lacks the power to enforce its findings and that in any event its recommendations are not binding on the appropriate authority to which they are submitted. It can thus be concluded that the functions and mandate of the Judicial Complaints Authority as they presently stand render the Judicial Complaints Authority an inefficient and ineffective player in furthering the achievement of effective checks on the judiciary.

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