

THE UNIVERSITY OF ZAMBIA
SCHOOL OF LAW

**JUDICIAL REVIEW: A MECHANISM FOR ATTAINING
CONSTITUTIONALISM, WITH SPECIAL REFERENCE TO
ZAMBIA**

**A dissertation submitted to the University
of Zambia in candidacy for the Degree of
Master of Laws (LLM)**

By

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Lusaka, Zambia

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MUKELABAI LAMASWALA

A DISSERTATION SUBMITTED TO THE UNIVERSITY OF ZAMBIA IN
FULFILMENT OF THE REQUIREMENTS FOR THE AWARD OF THE MASTER OF
LAWS (LLM).

©September, 2015.

DECLARATION

I MUKELABAI LAMASWALA a postgraduate student in the School of Law of the University of Zambia HEREBY DECLARE that this dissertation or any part thereof has not been submitted for an LLM degree at this, or any other University.

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JUDICIAL REVIEW: A MECHANISM FOR ATTAINING
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ABSTRACT

Like many other commonwealth countries, Zambia has a written Constitution to offer guidance on how the country should be governed. Despite the availability of the Constitution, government and public officers in Zambia do not act or make decisions in line with constitutional dictates. For instance, His Excellency Michael Chilufya Sata, the 5th President of the Republic of Zambia, was challenged in court for not following the laid down procedure in suspending judges accused of professional misconduct. Hence, the concern of many Zambians has been to find a mechanism which can lead to a better practice of constitutionalism. In this regard, I am of the view that judicial review is such a mechanism.

The objective of the study is to find out whether there is a link between judicial review and constitutionalism; and if so, whether judicial review is a vehicle or mechanism through which constitutionalism can be attained. Particularly, this study focused on the employment of judicial review as a vehicle for attaining constitutionalism. This notion was necessitated by the fact that the two- constitutionalism and judicial review- have been studied in isolation, as if they do not have an influence on each other. Furthermore, the study provides empirical proof of the linkage and influence judicial review has in attaining constitutionalism.

The research employed the socio-legal method and relied on qualitative data. Both primary and secondary data were used. Desk-based research was the main method of data collection. Data was also collected through key informant interviews. The relevant legislation in Zambia and other jurisdictions were also reviewed.

Generally, the examination has five dimensions to it, before drawing conclusions and recommendations. They comprise: General introduction, the interplay between judicial review and constitutionalism, the number of people who resort to judicial review, judicial attitude towards judicial review, and lessons which Zambia can draw from other jurisdictions on how to utilise judicial review to attain constitutionalism.

The major findings of the research are as follows: firstly, judicial review is a mechanism through which constitutionalism can be attained because it ensures that actions or decisions undertaken by government conform to the Constitution, and other laws of the land. Secondly, the attitude the courts have towards judicial review affects the extent to which constitutionalism can be attained in Zambia. Thirdly, although the common law jurisprudence on *locus standi* has been modified and relaxed with respect to protection of fundamental human rights, it is a hindrance with respect to the utilisation of judicial review to attain constitutionalism. Also, the courts insist too much on the mode of commencement at the expense of the problem a litigant faces, thereby not being helpful to the attainment of constitutionalism through judicial review.

In view of the findings above, the major recommendations of the research are as follows: For the courts to be more responsive to the needs of Zambians, there is need to amend the High Court Act, Cap 27 of the Laws of Zambia, to provide for a "Zambian Order 53," which will allow for "Public Interest Litigation." The Public Interest Litigation will make it possible for any one to bring an action on behalf of those who are socially and or economically incapacitated to commence judicial review proceedings, even though they are legally aggrieved.

DEDICATION

This Study is dedicated to:

My wife “Tomi,” and our boys; Siloka and Choolwe for the time I should have been with them but was unable.

My late Dad for inspiring me with the tale of “Dr Kwegyir Aggrey of Africa”, and my Mother for the Love.

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Carl Maria von Weber, the composer of the classical piece “Invitation to the Dance,” Sebastian Yradier, composer of Spanish serenade “*La Paloma*,” as well as the Composer of the English Military March- “The Grenadiers Slow March,” without whose soothing tones, writing this dissertation would have been a nightmare!

Lastly, but not the least, I thank all those who have contributed directly and indirectly to the completion of this study. Words can express but a fraction of what moves the heart.

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3. Council of Civil Service Unions v Minister for the Civil Service (1984) 3 All ER 935, (1984) 3 W.L.R. 1174.
4. Entick v Carrington (1765) 19 St Tr 1030, Court of Common Pleas
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2. Marbury v Madison 5 US (Cranch) 1803.

Chapter One

Introduction

1.0 Synopsis

In Zambia, the two concepts, judicial review and constitutionalism, although well established, have been looked at or studied as two distinct concepts; without a bearing on each other. This paper will show or demonstrate that the two, judicial review and constitutionalism have a symbiotic relationship and that through judicial review, constitutionalism can be attained. This demonstration will utilise empirical proof of the existence of the linkage between judicial review and constitutionalism and the bearing that the former has on the latter.

1.1 General Background

Government is universally accepted to be a necessity, since man cannot fully realize himself, his creativity, his dignity and his whole personality except within an ordered society.¹ However, the greatest challenge in framing any government is to formulate a government strong enough to preserve order but not too strong to threaten liberty.² History has taught us that people will seek power because they are by nature ambitious, greedy, and easily corrupted.³ Lord Acton would add that 'absolute power corrupts absolutely.'⁴ To cement this notion, James Madison⁵ wrote:

¹ B. O. Nwabuenze, *Constitutionalism in the Emergent States*, (Cranbury: Associated University Press, (1973), 1. Also see John, Sangwa. *'The Making and Remaking of Constitutions in Zambia: The Need for a new Perspective.'* (LLM diss., University of Zambia), 1996, 17.

² James, Q. Wilson. *American Government, Brief Version*, 6th ed. (Boston: Mifflin Company, 2003), 16.

³ Sangwa, *'The making and Remaking of Constitutions in Zambia,'* 17.

⁴ Sangwa. *'The Making and Remaking of Constitutions in Zambia,'* 16.

What is government but the greatest of all reflections of human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.⁶

The Constitution upholds Zambia as a democratic State.⁷ The meaning of democracy is no better understood, in simple language, than what Abraham Lincoln⁸ stated in his speech at Gettysburg;⁹ “A government of the people, by the people, for the people.” The underlying idea here is the popular basis of government, the idea that the government rests upon the consent of the governed, given by means of elections, in which the franchise is universal for both men and women, and that it exists for their benefit.¹⁰ The guideline of how that government of the people by the people for the people will and should be achieved lies in a Constitution. A Constitution articulates the vision of a society. It defines the principles by which the government is organized and distributes power within it and plays an important role in nation building and consolidating the State.¹¹ From the notion of Constitution sprouts the idea of “Constitutional Government or constitutionalism;” meaning that if a government rules in accordance with the Constitution, it is a constitutional government or a government practicing “Constitutionalism.”

⁵ The 4th President of the United States of America from March 4th 1809 to March 4th 1817. He prepared the outline of ‘The Virginia Plan’ that formulated the basis for the deliberation at the 1787 convention. For this, he is credited to be the father of the Constitution. See article on <http://www.lucidcafe.com/library/96mar/madison.html>, accessed 05/2013.

⁶ Wilson, *American Government*, 16.

⁷ Article 1(1) of Cap 1 of the Laws of Zambia.

⁸ February 12th, 1809 to April 15th 1865, Lincoln was the 16th president of the United States of America from March 4th, 1861 until his assassination on April 15th, 1865. <http://www.biography.com/people/abraham-lincoln-9382540#awesm=~oDdGeF60I9PGif>, accessed March 2012.

⁹ Meadowcroft, Enid. ‘Abe Lincoln at Gettysburg,’ *Pathfinders of America* (Publisher, date and place of publication: unknown), 96- 101. Alternatively, see ‘Abe Lincoln and his Times 1809-1865,’ by Enid La Monte Meadowcroft available on <http://www.librarything.com/work/1421540> accessed April 2012.

¹⁰ Nwabueze, *Constitutionalism in the Emergent States*, 1.

¹¹ Philip, Musonda. ‘*Constitutionalism in the Third Republic*,’ (Ph. D Thesis, The University of Zambia, 2010), 78.

The concept of constitutionalism stems from the school of thought much more associated with the political theories of John Locke and the founders of the American State that, 'government can and should be limited in its powers, and that its authority depends on its observing these limitations.'¹² In view of the foregoing, one can deduce what is expected in a constitutional democracy. According to De Smith, the minimum restraints necessary for constitutionalism are as follows:

A contemporary liberal democrat, if asked to lay down a set of minimum standards, may be very willing to concede that constitutionalism is practiced in a country where the government is genuinely accountable to an entity or organ distinct from itself, where elections are held on a wide franchise at frequent intervals, where political groups are free to organize in opposition to the government in office and where there are effective legal guarantees of fundamental civil liberties enforced by an independent judiciary; and he may not easily be persuaded to identify constitutionalism in a country where any of these do not exist.¹³

Ideal though constitutionalism may be, it is not usually attained. In any modern State, there is usually a gap between the theory and the practice of constitutionalism. In Zambia, the situation is not different. Disparities exist between the concept of constitutionalism and the practice of constitutionalism. This disparity is attributable to some impediments in the realization of constitutionalism. The realization of constitutionalism however, is not dependent on the accomplishment of a single factor. There are many factors which have to work in concert for constitutionalism to be attained. These factors range from concepts such as separation of powers, the rule of law, conduct of genuine elections at regular intervals, constitutional guarantee of human rights, to perceptions like the way legislation is formulated, enacted, interpreted, enforced as well as amended and or repealed.

¹² [http://www. Stanford Encyclopaedia of Philosophy. plato. Stanford.edu/entries/constitutionalism](http://www.StanfordEncyclopediaOfPhilosophy.plato.stanford.edu/entries/constitutionalism). Accessed November 2011.

¹³ Ben, Nwabueze. *Constitutional Democracy in Africa*, Vol 5 (Lagos: Spectrum Books Ltd, 2004), 151.

As stated earlier, the dilemma of any government is to strike a balance between the government retaining the necessary authority to govern, whilst according enough liberties to the citizenry.¹⁴ In the communion between the State and its citizens, this fragile line is often straddled in many ways. It is either one organ of government will usurp the powers of another¹⁵ or a decision or omission by one arm of government may constitute a violation of fundamental rights of a citizen(s).¹⁶ In the event of such a conflict, the remedy lies in reviewing the impugned act, decision, or omission by the courts under a process called judicial review.

Judicial review is therefore a process by which ordinary courts review the constitutionality or legality of legislative and executive acts, and of the propriety of administrative acts of a quasi-judicial nature which is the main bulwark of constitutionalism in the Commonwealth and the United States.¹⁷ It is argued that *ultra vires* is the central theme of judicial review.¹⁸ However, this argument obscures judicial review's constitutional justification. Zambia is no exception. For instance, Zambia's constitutional supremacy which is manifest in Articles 1(3) and 1(4)¹⁹ of the Constitution would be difficult to enforce if it was not for the availability of the process of judicial review. In view of the foregoing, there appears to be a link between constitutionalism and judicial review. It appears that through judicial review actions,

¹⁴ Wilson, *American Government*, 16.

¹⁵ See the case of Attorney General & Movement for Multi Party Democracy v Lewanika & Others [1994] Z.R. 7. In this case, the Court inserted the words "and vice versa" in article 71(2)(c) of the Constitution. In my view, the judiciary usurped the role and function of the legislature.

¹⁶ Chitala (Secretary of the Zambia Democratic Congress) v Attorney General (1995) Z.R. 91.(S.C.)

¹⁷ Nwabueze, *Constitutionalism in The Emergent States*, 36.

¹⁸ Harry Woolf, Jeffrey Jowell and Andrew Le Sueur. *De Smith's Judicial Review*, 6th ed. (London: Sweet and Maxwell, 2007), 8.

¹⁹ See the case of *Mumba v The People* (1984) Z.R. 38 (H.C.). In this case, a provision in a statute which mandated an accused person in a criminal case to give a sworn statement was held to be inconsistent with the Constitution and was subsequently quashed by the court. However, this is not a judicial review case but is cited for its accuracy on the concept of 'constitutional supremacy.'

constitutionalism is promoted. This research will prove that judicial review is a mechanism or means through which constitutionalism can be attained.

1.2 Statement of the Problem

An ideal government is one that strikes a balance between retaining the requisite authority to govern, whilst granting the citizenry civil liberties. This is because there is potential for conflict between the government on the one hand and the citizens on the other. Of the two, government has better leverage as it has more resources, machinery, power and authority than any single citizen. Thus, in the event of a conflict actually taking place, a citizen is left to the mercy of the government. To address and redress such potential conflicts, the doctrine of separation of powers which posits the notable concept of 'checks and balances;' dictate that no organ of government shall usurp the powers of another and that each organ shall act as a check on the other.

In view of the foregoing, in the event of any decision action or omission by a public officer violating the rights of a citizen, the courts, through judicial review, have power to validate or annul the impugned action or omission. De Smith argues that because judicial review promotes compliance with the law, it is expected that the quality of decisions and decision making process on the part of public officers will be improved.²⁰ The challenge therefore is to determine whether through judicial review, constitutionalism can be attained.

1.3 Purpose of the Study

The purpose of this study is to find out whether there is a link between judicial review and constitutionalism, and if so, whether judicial review is a vehicle or mechanism

²⁰ Woolf, Jowell and Le Sueur. *De Smith's Judicial Review*, 6th ed, 3.

through which constitutionalism can be attained. Secondly, to furnish empirical proof of the said linkage and influence between judicial review and constitutionalism in Zambia. It is hoped that if the linkage between judicial review and constitutionalism is established, the body of knowledge in this field will be enriched. Further, such knowledge will help improve governance not only in Zambia, but the world at large.

1.4 Scope of Study

Constitutionalism is a wide topical subject. It encompasses every aspect of governance including substantive and procedural law. This study however, is not suited nor aimed at a fully fledged exploration of all aspects of constitutionalism. For purposes of this study, the research will be limited to inquiring into the link between judicial review and constitutionalism, and if so, whether judicial review is a mechanism through which constitutionalism can be attained.

1.5 Research Questions

The research seeks in the main to answer a broad question: What are the means through which constitutionalism can be attained in Zambia? In answering this question, the paper will focus on more specific questions:

1. The key questions that will be considered are: Is judicial review key in enhancing the attainment of constitutionalism in Zambia?
2. To what extent is judicial review resorted to in Zambia?
3. Have the courts assisted or hindered the process of attaining constitutionalism through judicial review?
4. As far as attaining constitutionalism is concerned, are there lessons from other jurisdictions which Zambia can learn and utilise?

1.6 Rationale

Attaining constitutionalism is dependent upon many factors occurring in concert. Judicial review is one such factor. However, the crucial question is whether there is a link between constitutionalism and judicial review, and if so, whether the latter can be said to be the means of attaining the former? This study is meant to address these questions and further suggest reforms.

1.7 Literature Review.

There is a dearth of literature on this subject. Mwela's²¹ approach was largely a restatement of what judicial review is. There was no attempt to link judicial review to constitutionalism. On the other hand, Kapilima²² only focused on employing judicial review to protect human rights. Other authors like Sangwa²³ and Justice Musonda²⁴ did not look at judicial review as a means through which constitutionalism can be attained.

Prempeh²⁵ and *Marbury*²⁶ are the closest there is on the subject, with respect to the literature so far reviewed. Although Prempeh points out the link between judicial review and constitutionalism, his work falls short of stating whether judicial review can be used to attain constitutionalism. Furthermore, Prempeh's work is limited to the challenges of employing judicial review in contemporary Africa. Additionally, Prempeh did not use Zambia but Ghana for illustrative purposes.²⁷ I intend to localize this

²¹ Moses, Mwela. *Judicial Review, The Legal Fiction: A Critique*. The University of Zambia, LLB Directed Research, (unpublished), 2003.

²² Simon, Mulenga Kapilima. *"Judicial Review and Protection of Human Rights in Zambia: A Critical Evaluation of Order 53 in the Protection of Human Rights"*, The University of Zambia. LLB Directed Research, (unpublished), 2003.

²³ Sangwa, 'The Making and Remaking of Constitutions in Zambia.'

²⁴ Philip, 'Musonda. *Constitutionalism in the Third Republic*.'

²⁵ H. Kwasi Prempeh. *Marbury in Africa: Judicial Review and the Challenge of Constitutionalism in Contemporary Africa*. 2 Tulane Law Review [Vol.80:1].

²⁶ 5 U.S. (1 Cranch) 137 (1803).

²⁷ Prempeh. *Marbury in Africa*; 10.

research and to specifically look at the questions from a Zambian perspective. *Marbury* is the land mark case on the subject under discussion. However, it was passed not in Zambia, but the United States of America, in 1803. Be that as it may, this research intends to employ the principle in *Marbury* and answer the questions: 'Is judicial review a mechanism through which constitutionalism can be attained?' which question was not addressed by the literature referred to above.

A notable contribution on the topic under discussion comes from Woolf.²⁸ Their work is concerned with judicial review. It examines the lawfulness of the powers and duties of those exercising public functions in England and Wales.²⁹ In carrying out this task, one of the issues they underscore is the constitutional justification of judicial review. However, their main preoccupation is an analysis of what judicial review is and how it operates against the backdrop of the Constitution. A similar approach is adopted by Fordham's³⁰ "*Judicial Review Handbook*." This research's point of departure is that it explores the question, whether judicial review is a vehicle through which constitutionalism can be attained? Further, it is a research which focuses on Zambia and not England or Wales.

1.8 Hypothesis

There is a notion that judicial review and constitutionalism have a symbiotic relationship or existence. It is contended that through judicial review actions, constitutionalism is promoted. This work therefore, will explore the extent to which it is true to say that 'Judicial review is a mechanism through which constitutionalism can be attained.'

²⁸ Harry Woolf, Jeffrey Jowell & Andrew Le Sueur. *De Smith's Judicial Review* (6th Ed). London: Sweet and Maxwell.

²⁹ Woolf, Jowell and Le Sueur. *De Smith's Judicial Review*, 3.

³⁰ Michael Fordham. *Judicial Review Handbook* (3rd Ed). Oxford: Portland Oregon, (2001).

1.9 Methodology

In a quest to accomplish this task, the writer engaged in a socio-legal research and relied on qualitative data. The research relied on both primary and secondary sources of data. In particular, the following approach was adopted:

- i) Desk Research: undertook review of the relevant literature.
- ii) Interviews: conducted face to face semi -structured interviews with notable scholars, lawyers, consultants and judges on the subject.
- iii) Secondary data collection: undertook the collection of data from symposium debates on the subject. The *Hansard*³¹ was consulted with respect to parliamentary debates on the subject, even though the returns were insignificant.
- iv) Internet: recourse was sought from authentic sources on the internet.

1.10 Outline of Chapters

Chapter one comprises a general introduction of the research. Further, the chapter outlines the hypothesis, rationale, scope of the research and methodology adopted in the research. Chapter Two examines the doctrine of judicial review and also traces its origins. This examination restates the nature and scope of judicial review as well as grounds upon which judicial review proceedings can be commenced. The chapter also focuses on the arguments for and against judicial review as a mechanism for attaining constitutionalism. Lastly, the chapter traces the origins of judicial review and concludes that in Zambia, judicial review is a colonial legacy.

³¹ *Hansard* is the traditional name of the transcripts of Parliamentary Debates in Britain and many Commonwealth countries. It is named after Thomas Curson Hansard (1776–1833), a London printer and publisher, who was the first official printer to the parliament at Westminster. <http://www.parliament.uk/business/publications/hansard/> accessed on 13/08/2015.

Chapter Three endeavours to show the interplay between judicial review and constitutionalism with the view to establish whether judicial review can be employed as a vehicle for attaining Constitutionalism.

Chapter Four; since judicial review is dependent on the courts, this chapter gauges the courts' attitude towards judicial review. To accomplish this task, the chapter is divided into two segments. The first part considers the extent to which the judicial review has been resorted to in Zambia. The second part seeks to gauge courts' attitude towards judicial review, and thereby determine whether the courts have assisted or hindered resort to judicial review?

Chapter Five examines the lesson which Zambia can possibly draw from other jurisdictions in the employment of judicial review as a mechanism of attaining constitutionalism. In particular, three jurisdictions are specifically examined: Uganda particularly for the judiciary's treating the State and citizens equally on matters of protection of fundamental human rights. India is examined for promoting judicial review through public interest litigation, especially when indigent citizens are affected by actions or decisions of public officers. Lastly, the United States is examined from the perspective of the judiciary passing well grounded decisions in judicial review cases that have stood the test of time.

Chapter Six draws conclusions of this research and makes recommendations for reform.

Chapter Two

The Concept of Judicial Review

2.0 Introduction

Judicial review denotes the power of the courts of a country to examine the actions of the legislative, executive, and administrative arms of the government and to determine whether such actions are consistent with the Constitution. Actions judged inconsistent are declared unconstitutional and, therefore, null and void.¹ The institution of judicial review in this sense depends upon the existence of a written or codified Constitution. In a broader sense however, judicial review cannot and should not be confined to written Constitutions only. The United Kingdom and New Zealand for instance, do not have written Constitutions, but judicial review is an integral part of their legal systems. In Zambia too, judicial review is a pillar of the legal system.² Judicial review should also be understood from two distinct legal systems, the common law and the civil law jurisdictions. In civil law jurisdictions, judges can only apply the law; they have no capacity to create or annul legal rules. In common law jurisdictions on the other hand, judges are seen as sources of law with a capacity of creating legal rules as well as annulling those that are invalid.³ This study focuses on common law judicial review. Common law jurisdictions can further be divided into two distinct categories. Firstly,

¹See <http://www.britannica.com/EBchecked/topic/307542/judicial-review>, accessed on 4/02/13.

² From independence, Zambian case law shows that judicial review is an integral part of the legal system. See a detailed analysis and empirical data in chapter four of this research.

³ Brian, J Preston. '*Judicial Review of Illegality and Irrationality of Administrative Decisions in Australia*' A paper presented to the Joint Seminar on Legality of Administrative Behaviours and Types of Adjudication, Organised by the National Judges College and the Administrative Trial Division of the Supreme People's Court at Xian, People's Republic of China, 11-13 April 2006, p 2. Available on www.lec.lawlink.nsw.gov.au/.../preston., accessed on 2/03/13. Also, refer to *Mumba v the People* [1984] Z.R. 38, where the Court annulled part of an Act of Parliament for being inconsistent with the Constitution. The resultant law became the law of the land.

there are common law jurisdictions, where judicial review is practiced from a context of constitutional supremacy, as well as jurisdictions which practice judicial review from a parliamentary supremacy sphere. In Zambia, a constitutional supremacy jurisdiction (also called constitutional democracy); the courts have power to declare as unconstitutional, and therefore, null and void, laws lawfully enacted by Parliament.⁴ However, in the United Kingdom, the courts do not have the power to review primary legislation. Judicial review is restricted to actions of public officers, agencies as well as bodies and persons who exercise governmental power. Thus in 1610, Sir Edward Coke, Chief Justice of the Court of Common Pleas, was greatly criticised for advocating constitutional supremacy when he held in *Bonham's case* that:⁵

...and it appears in our books, that in many cases, the common law will control Acts of Parliament, and sometime adjudge them to be utterly void; for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such an Act to be void;... some statutes are made against law and right, which those who made them perceiving would not put them in execution.⁶

The view of the court in this case is that laws against the constitution should be annulled. This opinion is contrary to the prevailing and long standing principle of the English law that a law whose meaning has been agreed upon becomes the supreme law.⁷

Judicial review should also be viewed from the theory of separation of powers. This was a theory that was postulated by Montesquieu,⁸ and embraced by Justice Marshall⁹ in

⁴ See Doyle (1974) Z.R. 1 (C.A).

⁵ *Bonham v College of Physicians & Co. Rep. 114.*

⁶ The implication of this ruling is that it advocated constitutional supremacy as opposed to the established principle of English law of parliamentary supremacy.

⁷ Charles M, Gray. *Bonham's Case Reviewed*. University of Chicago, Department of History. Available on http://www.jstor.org/stable/985705?seq=1#page_scan_tab_contents, accessed on 30/07/2015.

⁸ Montesquieu, in full Charles-Louis de Secondat, baron de La Brède et de Montesquieu, born January 18, 1689, Château La Brède, near Bordeaux, France and Died on February 10th, 1755, Paris. Was a French political philosopher whose major work, *The Spirit of Laws*, was a major contribution to political theory. See article on

Marbury v Madison.¹⁰ The doctrine of separation of powers is based on the idea that no branch of government should be more powerful than any other; each branch of government should act as a check on the powers of the other branches of government, thus creating a balance of power among all branches of government. In this way, judicial review comes in to maintain this balance of power by reviewing acts, omissions, and decisions that are *ultra vires* a government branch's powers.

Lastly, judicial review revolves around a theme that since the Constitution is the supreme law of the land; where a rule of statutory law conflicts with a rule of the Constitution, then the law of the Constitution must prevail. In this way, judicial review is being employed to steer the actions, omissions, and or decisions of public officers and agencies back to the dictates of the Constitution.

2.1 Scope and Purpose of Judicial Review

The scope of judicial review must be defined not in terms of the protection of individual interests, but in terms of the extent of power and the legality of its exercise.¹¹ This is because there is a lurking temptation to focus more on the protection of individual interests brought about by judicial review litigation, than the limit on the exercise of power which judicial review proceedings equally brings forth. In Zambia, this confusion becomes more pronounced when a comparison is made between cases commenced by way of petition through Article 28 of the Constitution, and those which are commenced by way of Order 53 of the White Book. For instance, although the cases of *Resident*

Encyclopaedia Britannica available on <http://www.britannica.com/biography/Montesquieu>, accessed on 30/07/2015.

⁹ Fourth chief justice of the United States of America and principal founder of the U.S. system of constitutional law. As perhaps the Supreme Court's most influential chief justice, Marshall was responsible for constructing and defending both the foundation of judicial power and the principles of American federalism. The first of his great cases in more than 30 years of service was *Marbury v. Madison* (1803), which established the Supreme Court's right to expound constitutional law and exercise judicial review by declaring laws unconstitutional. Encyclopaedia Britannica, accessed on 30/07/2015.

¹⁰ *Marbury v Madison* 3 US (Cranch) 1803.

¹¹ Preston, 'Judicial Review of Illegality and Irrationality of Administrative Decisions in Australia', 2.

*Doctors*¹² and *Mulundika*¹³ were commenced by way of petition, their effect, legally, are not different from that of *Clarke*,¹⁴ which was commenced by way of Order 53 of the White Book (judicial review). Despite the difference in terms of procedural law, the end result is the same. *Mulundika*,¹⁵ *Resident Doctors*,¹⁶ and *Clarke*¹⁷ protected Individual interests, at the same time they helped limit the exercise of power on the part of the State. Despite this reality, judicial review is accorded a narrow definition, thereby confining it to Order 53 of the White Book. In this regard, cases that were commenced by way of petition are rarely and cautiously used.

The fundamental purpose of judicial review is to ensure that powers are exercised for the purpose they were conferred, and in the manner in which they were intended to be exercised.¹⁸ The foregoing connotes that the exercise of power should and ought to be controlled. The control of power can be achieved either through political or legal mechanisms. Legal control may be achieved through private law remedies, statutory appeal or through judicial review and tribunals. The political control of power is not the concern of this research.

Judicial review upholds and enhances constitutional sovereignty. Therefore, any law that violates the dictates of the Constitution is to the extent of the violation, null and void. Further, judicial review is key in the protection of human rights. The more a decision affects the enjoyment of human rights, the more likely it is to be judicially reviewed. Judicial review enhances the doctrine of separation of powers. Emanating from this, the difference between judicial review and appeal should be clearly explained.

¹² (2003) Z.R. 88.

¹³ (1995-97) Z.R. 20.

¹⁴ (2008) Vol 1. Z.R. 38.(S.C).

¹⁵ (1995-97) Z.R. 20.

¹⁶ (2003) Z.R. 88.

¹⁷ (2008) Vol 1. Z.R. 38.(S.C).

¹⁸ Preston. '*Judicial Review of Illegality and Irrationality of Administrative Decisions in Australia*', 2.

In a judicial review case proper, the court confines itself to reviewing the decision-making process, and not the decision itself. This way, the courts avoid usurping the constitutional mandate of the executive to make decisions. The Supreme Court held in the *Chiluba*¹⁹ case at page 153 that:

The court will not on judicial review application act as a “court of appeal,” from the body concerned, nor will the court interfere in any way with the exercise of any power or discretion which has been conferred on that body, unless it has been exercised in a way which is not within that body’s jurisdiction or the decision is Wednesbury unreasonable.

2.2 Substantive and Procedural Dimensions of Judicial review

Judicial review has two aspects to it; substantive and procedural law.²⁰ In terms of substantive law, judicial review is not expressly provided for in the Zambian Constitution. However, as in the United States,²¹ it can nevertheless be implied from the structure of government as well as such constitutional provisions like Articles 1(3) and 1(4). With respect to procedural law, judicial review has its genesis in the provisions of section 10 of the High Court Act,²² as read together with the High Court (Amendment) Act.²³ The effect of section 10 of The High Court Act is that, where there is a *lacuna* in the High Court rules, the law and practice for the time being observed in England in the High Court of Justice shall be applicable to Zambia. It is noteworthy that following the High Court (Amendment) Act²⁴ it was held in *Kumbi v Zulu*,²⁵ by the Supreme Court that by the amendment, the White Book and all decided cases in England had become part of Zambian Law. However, by Act No. 7 of 2011, the position was restored whereby the

¹⁹ *Chiluba v Attorney General* (2003) Z.R. 153. (S.C).

²⁰ This study is not suitable for a full fledged examination of the substantive or procedural law pertaining to judicial review.

²¹ See ‘*Marbury v Madison Case*’ Brief Summary, available on www.lawmix.com accessed on 08/08/2012.

²² Cap 27 of the laws of Zambia.

²³ Section 2(1) of the High Court (Amendment) Act, Act No.7 of 2011.

²⁵ (2009) Z.R. 183.

White Book applied in default. That position was aptly stated in *Mung'omba*, as follows:²⁶

There is no rule under the High Court Act under which judicial review proceedings can be instituted and conducted. Thus, by virtue of section 10 of the High Court Act chapter 27 of the laws of Zambia, the High Court is guided as to the procedure and practice to be adopted. The practice and procedure in England is provided for in Order 53 of the Rules of the Supreme Court (RSC).

The Rules of the Supreme Court, also popularly known as the White Book, contains the most comprehensive and authoritative works on civil procedure in England.²⁷ It does more than merely set out the rules, it has everything that is required to understand and apply the rules of civil litigation.

Procedurally in judicial review, there are two controlling concepts or mechanisms; *locus standi*, and leave to commence judicial review proceedings. The insistence is that, a plaintiff must have *locus standi* to commence judicial review proceedings and must first seek the approval of the High Court to commence such proceedings. This way, the leave stage may also be referred to as a sieve stage. It was held in *R. v Inland Revenue Commissioners, ex parte National Federation of Self-employed and Small Business Ltd*²⁸ that:

...the purpose of applying for leave is to prevent the time of the court being wasted by busybodies with misguided or trivial complaints of administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action, while proceedings for judicial review of it were actually pending even though misconceived.

Locus standi is concerned with whether this particular plaintiff is entitled to invoke the jurisdiction of the court. It should not be confused with justiciability which poses the question; whether the judicial process is suitable for the resolution of this type of

²⁶ *Mun'gomba & Another v Machungwa and Others* (2003) Z.R. 17. (S.C).

²⁷ Also called the Supreme Court Practice Rules. The current version in use is the 1999 Edition, volumes 1 & 2.

²⁸ Also called the IRC case, (1982). A.C. 617, p.642. (1981)2All E.R. 93. The same principle was echoed in *Chitala v Attorney General* (1995) Z.R. 91, 94.

dispute at all.²⁹ Thus, to have *locus standi*, a plaintiff has to be legally aggrieved. In the case of *Chiluba*,³⁰ the Supreme Court held at page 95 that:

To be 'legally aggrieved,' a person must be not merely dissatisfied with or even prejudiced by an action or decision. He must also have been deprived of or refused something to which he was legally entitled. . . . He must be able to point to some 'encroachment or vested right'. . . .

2.3 Grounds and Remedies for Judicial Review

There are basically four grounds upon which judicial review may be based. These are illegality, irrationality, procedural impropriety and proportionality.

2.3.1 Illegality

Illegality connotes that the decision, omission, or action is in itself against the law. Further, an illegality is committed where a decision:³¹

1. Contravenes or exceeds the terms of power which authorizes the making of the decision; or
2. It pursues an objective other than for which the power to make the decision was conferred.

Therefore, any lawful action must be based on the law, even where the authorities have a measure of discretion. Lord Halsbury in *Sharp v Wakefield*,³² held at page 61 that:

...When it is said that something is to be done within the discretion of the authorities, that something is to be done according to the rules of reason and justice, not according to the private opinion, according to law not humour. It is not to be arbitrary, vague, or fanciful but legal and regular.

The court of Common Pleas through Lord Camden C.J. in invalidating the actions of King George III's³³ messengers stated that:

²⁹ P.P. Graig. *Administrative Law* (4th Ed. London: Sweet & Maxwell, 2001) reprint, 685.

³⁰ *Chiluba & Others v Attorney General* (1990 – 1992) Z.R. 95 (H.C.)

³¹ *Attorney General v Clarke* (2008) Vol. 1 Z.R. 38. (SC).

³² *Sharpe v Wakefield* (1891) A.C. 173, cited in *Attorney General v Clarke* (2008) Z.R. Vol 1. 38. (SC), 61.

...This power claimed by the Secretary of State, is not supported by one single citation from any law book extant... if it is law, it will be found in our books. If it is not found there, it is not law... We are all of the opinion, that the warrant to seize and carry away the party's papers in the case of a seditious libel, is illegal and void.³⁴

2.3.2 Irrationality (Wednesbury unreasonableness)

The most celebrated case on irrationality is *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation*.³⁵ It is an English decision which set down the standard of unreasonableness of public body decisions which render them liable to be quashed on judicial review. This special sense is accordingly known as *Wednesbury* unreasonableness. What amounts to unreasonableness was explained by Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service*,³⁶ that a decision is considered unreasonable if it is so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.

2.3.3 Procedural impropriety

On procedural impropriety, there is an insistence that prescribed procedure be followed unless compelling reasons exist which makes it necessary to dispense with the procedure. In this vein, the Supreme Court held in *Clarke* at page 53 that:

There is a presumption that procedural fairness is required whenever the exercise of a power which adversely affects an individual's rights protected by common law or created by statute.³⁷

³³ King of England from 1760-1820. See history of the British Monarch on <http://www.royal.gov.uk/HistoryoftheMonarchy/KingsandQueensoftheUnitedKingdom/TheHanoverians/Georgell.aspx>, accessed on 30/07/2015.

³⁴ Entick v Carrington (1765) 19 St Tr 1030, Court of Common Pleas.

³⁵ (1948) 1 KB 223.

³⁶ (1984) 3 All ER 935, [1984] 3 WLR 1174.

³⁷ See Attorney General v Clarke (2008) Vol. 1. Z.R. 38. (S.C), 53.

2.3.4 Proportionality

Proportionality demands a reasonable relation between a decision, its objectives, and the circumstances of the case. It requires the pursuit of legitimate ends by means that are not oppressively excessive. It looks, therefore, to the substance of decisions rather than the way they are reached, but it also requires the decision-maker not to manifestly ignore significant alternatives or interests.³⁸ The test for proportionality takes the following into account:³⁹

1. Whether the measure was suitable to achieve the desired objective;
2. Whether the measure was necessary for achieving the desired objective; and
3. Whether, the measure imposed excessive burden(s) on the individual affected.

Furthermore, In *Council of Civil Service Unions v Minister for the Civil Service*⁴⁰, Lord Diplock foreshadowed that the principle of proportionality might emerge as an independent ground for judicial review. At present, there is no doubt that proportionality has established itself as an independent ground. For instance, Clarke⁴¹ was saved from deportation from Zambia on the basis that the punishment was not proportionate to the wrongs committed.⁴² The Supreme Court held in *Attorney General v Clarke*, at page 67 that,

At the expense of being repetitive, we have found that, on the facts of this case and the authorities we have cited, the deportation of the respondent was disproportionate, and it is for this reason that we dismiss the appeal.

³⁸ Theo Barclay, "The Proportionality Test In UK Administrative Law - A New Ground of Review, or A Fading Exception?" The Student Law Journal. Available on www.sjol.co.uk/issue-3/proportionality , accessed on 02/04/2013

³⁹ Theo Barclay, "The Proportionality Test In UK Administrative Law-"

⁴⁰ (1984) 1 ALL. ER. 42

⁴¹ The respondent in the case; *Attorney General v Clarke* (2008) Vol. 1. Z.R. 38. (S.C)

⁴² *Attorney General v Clarke* (2003) Vol. 1. Z.R. 38. (S.C).

2.4 Judicial Review Remedies

Judicial review offers a number of remedies which are either interlocutory or final. The Zambian courts recognise this principle as evidenced by the Supreme Court in *Machungwa*⁴³ at page 19 when the court held that:

An interlocutory injunction can be obtained in judicial review proceedings pending the determination of the substantive judicial review application...

Judicial review reliefs include damages, *certiorari*, prohibition, *mandamus*, declaration, and injunctions.⁴⁴ It suffices to say Order 53, rule.1 of the White Book clearly spells out these remedies.

2.5 Controversies Surrounding Judicial Review

Although judicial review is considered one of the cornerstones of administrative law, there are certain controversies that surround it. The first controversy is the ironical nature of judicial review itself. Both the American and Zambian Constitutions have no single provision in which judicial review is provided. Yet, it was in America where judicial review was institutionalised through *Marbury v Madison*.⁴⁵ On the other hand, judicial review is a process upon which the Zambian Constitution heavily relies for the retention of its supremacy.⁴⁶ Secondly, judicial review has led to irregular changes in the Constitution by a politically irresponsible agency, the courts themselves.⁴⁷ The deepest, most far reaching, and most dangerous change introduced is the displacement of the Constitution from its ostensible position as the supreme law of the land, and the introduction of various ideas of justice, natural rights, and common law concepts as

⁴³ *Mung'omba & Others v Machungwa & Others* (2003) Z.R. 17.

⁴⁴ *Kabimba v Attorney General & Another* (1995-1997) Z.R. 152. It should be mentioned that in this case, what was granted was a stay of proceedings, which technically, acts as an injunction.

⁴⁵ 3 US (Cranch) 1803.

⁴⁶ See article 1(3) of the Zambian Constitution.

⁴⁷ Fredrick F. Blackly and Mirriam E. Oatman. '*Some Consequences of Judicial Review*.' Brookings Institution, Washington D.C , 500. Available on http://www.zaoerv.de/01_1929/1_1929_1_a_500_511.pdfShare, accessed on 01/04/13.

superior to the written word.⁴⁸ Not only has the Constitution been displaced as the fundamental law in favour of what judges themselves believe to be more fundamental, thus substituting government by law for government by judges, but many fundamental changes have been brought to the Constitution.⁴⁹ This was the case in the *Lewanika*⁵⁰ case where the court, in the guise and dispensation of justice but contrary to the Constitution, usurped the role of the legislator.

Additionally, through judicial review, public policy has on numerous occasions been determined by the courts instead of the Legislature. By virtue of invalidating legislation lawfully enacted by Parliament, the courts largely determine public policy. For instance, in “*Murbury*”⁵¹ and *Clarke*,⁵² the courts and not Parliament, determined public policy. Parliament comprises people legitimately elected by the people to represent them. As a result, what parliamentarians do in the house is done on behalf of the people, and therefore directly by the people themselves. Therefore, to annul legislation that the people have legislated is to usurp the power of the people especially that the judges who actually invalidate the legislation are not themselves elected. Even if they were elected, it is not for the purpose of determining public policy as law makers are mandated.

Lastly, judicial review is not a court initiated process. Even where it is apparent that a decision is irrational, the court cannot initiate judicial review proceedings. The court has to wait for a plaintiff to invoke the court’s power. This means if the affected person does not have the capacity to commence judicial review proceedings, the chances of the

⁴⁸ Fredrick and Oatman. ‘*Some Consequences of judicial review*’.

⁴⁹ Fredrick and Oatman. ‘*Some Consequences of judicial review*’.

⁵⁰ Attorney General & Movement for Multi Party Democracy v *Lewanika & Others* [1993-1994] Z.R. 7. In this case, the Court inserted the words “and vice versa” in article 71(2)(c) of the Constitution. I hold the view that by inserting the words “and vice versa”, the judiciary usurped the role of the legislature.

⁵¹ *Murbury v Madison* 5 U.S Cranch (1803)

⁵² *Attorney General v Clarke* (2008) Vol.1 Z.R. 38. (S.C).

wrong being addressed are minor because courts cannot institute judicial review proceedings on such person's behalf.

2.6 Brief History of Judicial Review

There is a school of thought that holds that with *Marbury*, judicial review was born to the world.⁵³ However, judicial review is not an American invention nor was *Marbury* the first time the American Supreme Court exercised judicial review. The first time the United States Supreme Court exercised judicial review was in the case of *Hylton*.⁵⁴ In 1803, Justice Marshall merely acknowledged, and reaffirmed the long and well established principles by answering the question: Whether an act repugnant to the Constitution, can become the law of the land. He concluded that a law repugnant to the Constitution is void; and that courts are bound by that instrument.⁵⁵ Furthermore, judicial review is not an American invention because the American Constitution does not expressly provide for judicial review. The framers of the American Constitution merely took it for granted and presumed that courts would void legislation that was repugnant to or contrary to the Constitution.⁵⁶ However, the preceding analysis does not answer this question: From where did the framers of the American Constitution presume judicial review? It is argued that judicial review was a standard part of British Common law that became part of the legal process in the United States of America.⁵⁷ Because Britain colonized America, it is plausible to argue that through colonization, judicial review migrated to America too. In England, the case of *Bonham*⁵⁸ is one of the earliest promulgations that judicial review is part of English judicial system. A

⁵³ Mary Sara Bilder, *The Corporate Origins of Judicial Review*, 116 Yale L.J 602 (2006). Available on <http://www.yalelawjournal.org/pdf/116-3/Bilder.pdf> accessed on 22/04/13.

⁵⁴ *Hylton v US*, 3 U.S 171 (1796)

⁵⁵ Bilder, *The Corporate Origins of Judicial Review*.

⁵⁶ Bilder, *The Corporate Origins of Judicial Review*.

⁵⁷ Bilder, *The Corporate Origins of Judicial Review*.

⁵⁸ *Bonham v College of Physicians* 8 Co.Rep.114.

confirmation of the promulgation in *Bonham's*⁵⁹ case was in the case of *Entick*,⁶⁰ a judgment passed 150 years after *Bonham* was decided. It would appear that in passing the said judgments, the courts were consolidating a principle upon which British Common law thrived: 'Any act repugnant to common law was void.' So paramount was this principle in Britain that even corporations were not allowed to have laws which were repugnant to common law. It is from this perspective that Bilder argues that judicial review has its origins in corporate law.⁶¹ She draws her inference on the fact that many of the American colonies were first governed by corporations, such as the Massachusetts Bay Company,⁶² which operated on a Royal Charter granted by the British crown. By virtue of being British, such corporations were not allowed to have legislation which violated common law. Therefore, *Marbury* was merely a confirmation of an enduring British principle that a repugnant law cannot be the law of the land. Emanating from the foregoing, it is also plausible to argue that judicial review is part of Zambian jurisprudence because it is a colonial legacy.

2.7 Conclusion

Judicial review was not an invention of Justice Marshall. It was a practice that had been in existence for ages before *Marbury*.⁶³ In fact, the term 'judicial review' became prominent around 1910.⁶⁴ Earlier, it was known as a standard practice that a repugnant law could not be the law of the land. The migration of the English to the Americas, and

⁵⁹ *Bonham v College of Physicians* 8 Co.Rep.114.

⁶⁰ *Entick v Carrington* (1765) 19 St Tr 1030, Court of Common Pleas.

⁶¹ Bilder, *The Corporate Origins of Judicial Review*.

⁶² The Massachusetts Bay Company was an English Chartered Company that established the Massachusetts Bay Colony in New England. Refer to www.scholastic.com/teachers/article/massachusetts-bay-company, accessed on 12/02/13.

⁶³ *Murbury v Madison* 5 U.S Cranch (1803).

⁶⁴ Bilder, *The Corporate Origins of Judicial Review*.

other parts of the current day commonwealth, like Zambia, sowed the seed of judicial review through corporations⁶⁵. As a result, the framers of the Zambian Constitution, like their American counterparts did not expressly provide for judicial review, because judicial review was already part of their custom. Hence, *Marbury*⁶⁶ was merely a reinstatement of that enduring vision that a repugnant law could not be part of the national law. Despite the controversies that surround it, judicial review has grown to be a cornerstone of governance. It focuses on placing limitations on the exercise of power by ensuring that powers are exercised for the purpose for which they were conferred, and in the manner in which they were intended to be exercised.

There are several grounds upon which judicial review proceedings can be commenced; irrationality, impropriety, illegality and proportionality. The remedies range from interim, to substantive ones like *mandamus* and *certiorari*.

⁶⁵ In Zambia, colonisation was realised through the British South African Company (B.S.A Co.) British South Africa Company (BSAC, BSACO, or BSA Company), mercantile company based in London that was incorporated in October 1889 under a royal charter at the instigation of [Cecil Rhodes](#), with the object of acquiring and exercising commercial and administrative rights in south-central Africa. See www.britannica.com/.../British-South-Africa-Company-BSAC-BSAC. accessed on 3/3/2013.

⁶⁶ *Murphy v Madison* 5 U.S Cranch (1803).

Chapter Three

Interplay of Judicial Review and Constitutionalism

3.0 Introduction

On April 30th, 2012, His Excellency Micheal Chilufya Sata, the 5th President of the Republic of Zambia suspended three judges for alleged professional misconduct and appointed a tribunal to inquire into the alleged misconduct.¹ However, the affected judges questioned why the allegation levelled against them had not been referred to the Judicial Complaints Authority before convening the tribunal. In view of this, two of the affected judges sought judicial review on the matter on the basis that the President had overstepped his powers and acted unreasonably.

On June 6th, 2012, police in Lusaka dispersed demonstrators² in a way that was widely condemned on grounds that the police used excessive force on unarmed citizens.³ The alleged police brutality was practised in the face of Article 11⁴ which reads in part that; every person in Zambia shall be entitled to the fundamental rights and freedoms of the individual, whatever his race, place of origin, political opinions, colour or creed. Some of the rights and freedoms provided for in Article 11⁵ include freedom of conscience, expression, assembly, movement, and association.⁶

From the scenarios outlined above, it is clear that there is some substantial degree of impunity on the part of government and public officers in Zambia.

¹ See, '*Sata Suspends Three Judges for Alleged Misconduct.*' available <http://www.postzam.com> accessed 17/12/12. Micheal Chilufya Sata was the fourth President of Zambia from November 2011 to October 2014.

² See, '*Police Break-up UPND Demonstration*' available on <http://m.lusakatimes.com> accessed on 3/12/12.

³ See, '*MMD joins in Condemning Police Brutality Against UPND Youths*', available on <http://m.lusakatimes.com> Accessed on 3/12/12.

⁴ The Constitution, Cap 1 of the laws of Zambia.

⁵ The *Constitution*, Cap 1.

⁶ Article 11(b) of the Constitution of Zambia.

It is also noteworthy that Article 1(3) of the Constitution provides that, ‘...if a law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void.’⁷ Additionally, Article 1(4)⁸ asserts the constitutional supremacy over all persons in the Republic as well as all Legislative, Executive and Judicial organs. In view of the foregoing, it has been imperative to investigate the nexus between judicial review on one hand and constitutionalism on the other. Such an investigation is key in determining whether through judicial review, constitutionalism can be attained.

3.1 Interplay of Judicial Review and Constitutionalism examined

Judicial review is a process by which ordinary courts review the constitutionality or legality of legislative and executive acts and of the propriety of administrative acts of a quasi-judicial nature.⁹ It aims at ensuring that legislative enactments or executive actions which contravene the Constitution are checked. In the Zambian Constitution, this concept is as pointed above, reflected in Article 1(3) when it provides that any law inconsistent with the Constitution is, to the extent of the inconsistency declared null and void and may thereby be struck down. It should be understood that Government is universally accepted to be a necessity, since man cannot fully realize himself, his creativity, his dignity, and his whole personality except within an ordered society.¹⁰ In

⁷ This process is called constitutionalism. Barnett says, ‘Constitutionalism is the doctrine which governs the legitimacy of government action... Constitutionalism implies something far more important than the idea of ‘legality, which requires official conduct to be in accordance with pre-fixed legal rules. A power may be exercised on legal authority; however, that fact alone is not necessarily determinative of whether or not the act was ‘constitutional. Barnett Hilaire, *Constitutional and Administrative Law*, 2nd ed. (London: Cavendish Publishing Limited, 1998), 5.

⁸ The Constitution, Cap 1 of the Laws of Zambia.

⁹ B. O. Nwabueze, *Constitutionalism in The Emergent States*, (New Jersey: Associated University Press, 1973), 36.

¹⁰ Nwabueze, *Constitutionalism in The Emergent States*, 1.

Zambia, this principle was recognised in *Kachasu v The Attorney General*,¹¹ where the High Court observed at page 163 as follows:

...the right to enjoy freedom of conscience, and all the other rights and freedoms guaranteed by the Constitution, depend for their very existence and implementation upon the continuance of the organised political society - that is the ordered society - established by the Constitution...

Yet, the greatest challenge in framing any government is to formulate a government strong enough to preserve order, but not too strong to threaten liberty.¹² To curb this dilemma of excesses on both the people and the State, nations all over the world have enacted for themselves Constitutions; written or not.¹³

A Constitution articulates the vision of a society, defines the principles by which the government is organized and distributes power within it.¹⁴ It also plays an important role in nation building and consolidating the State. Besides enacting Constitutions, nations have endeavoured to uphold and practice the will; or to live in accordance with their Constitutions. The process of governing in accordance with the will of a Constitution is called constitutionalism. Constitutionalism revolves around one fundamental principle: 'Government can and should be limited in its powers, and that its authority depends on its observing these limitations.'¹⁵ An African proverb states; 'Two trees growing close and next to each other cannot avoid rubbing against each other.' Likewise, in the communion between the State and its citizens, conflicts do occur. For instance, one organ of the State may usurp the powers or functions of another

¹¹ (1967) Z.R. 145.

¹² James Q. Wilson, *American Government*, Brief Version, 6th ed. (New York: Houghton Mifflin Company, 2003), 16.

¹³ The U.K and New Zealand have unwritten Constitutions.

¹⁴ Philip, Musonda. '*Constitutionalism in the Third Republic*.' Ph. D Thesis, The University of Zambia (unpublished), 2010, 78.

¹⁵ Stanford Encyclopedia of Philosophy. plato. Stanford.edu/entries/constitutionalism. Accessed, November 2013.

organ.¹⁶ Sometimes, a public body may commit an act, omit to act or decide to act contrary to the provisions of the Constitution.¹⁷ In the event of such conflicts, constitutionalism is at stake because the balance of power between the State and citizens is not at equilibrium. As a result, there is need for a mechanism to restore the balance or keep the power of the State under check. Such a mechanism exists in the form of judicial review. Hence, where the State exceeds its powers, its actions can be reviewed by the courts through judicial review.

As discerned in the cases of *Clarke*¹⁸ and *Chirwa*¹⁹, the State exercised excessive power to the detriment of the liberty of citizens. However, through judicial review, the excesses of government were reviewed by the courts. When faced with a similar situation, Justice Marshal²⁰ reasoned that: “since it is the duty of a court in a lawsuit to declare the law, and since the Constitution is the supreme law of the land; where a rule of statutory law conflicts with a rule of the Constitution, then the law of the Constitution must prevail.” Marshal asserted that it is “emphatically the duty of the judicial department to say what the law is.”²¹ It is from the foregoing premises, that the interplay between judicial review and constitutionalism is considered. The central theme being: If there is a violation of the Constitution by either a public officer or organ of State, judicial review is employed to restate or re-assert the supremacy of the

¹⁶ See the case of *Attorney General & Movement for Multi Party Democracy v Lewanika & Others (1993-1994)* ZR 7. In this case, the Court inserted the words “and vice versa” in Article 71(2)(c) of the Constitution. In my view, the judiciary usurped the role of the Legislature.

¹⁷ *Chitala (Secretary General of the Zambia Democratic Congress) v Attorney General (1995)* Z.R. 91. (S.C).

¹⁸ (2008) Vol. 1. Z.R. 38 (S.C).

¹⁹ *In Re Chirwa* (1974) Z.R. 14.(H.C).

²⁰ Chief Justice of the United States Supreme Court from 1801-1835. See article on <http://www.britannica.com/EBchecked/topic/366573/John-Marshall/4643/Chief-justice-of-the-United-States> accessed March, 2013.

²¹ See *Marbury v Madison* 3 US (Cranch) 1803.

Constitution as provided for in Articles 1(3) and (4), culminating in the realisation of constitutionalism.

3.2 A Case for Judicial Review

There are many factors that have to work in concert for constitutionalism to be attained. These comprise political, social, legal, judicial and economic factors. For instance, although an educated population is more aware of its civil liberties and rights than an illiterate one, this social factor alone is not enough to attain constitutionalism. Recourse will have to be sought from legal factors where rights and liberties are expressly pronounced in statutes. Yet, even substantive law on its own is inadequate. Judicial factors, like the courts have to be relied upon in the enforcement and enjoyment of the rights and liberties provided for by substantive law. Yet still, for the courts to accord the protection of such liberties and rights, they have to be independent from the influence of the executive. Hence, without a symbiotic co-existence of the aforesaid factors, constitutionalism is impossible to attain.

Despite the foregoing, judicial review, appears to be a better suited tool or mechanism through which constitutionalism can be attained in Zambia. This is because being a judicial process, it has many advantages compared to the other factors that contribute to the attainment of constitutionalism. For instance, economic, social, legal, and political factors all depend on the courts for the interpretation, and enhancement of their rights. Arguing from the 'Realist' perspective, '*law is what the judge say it is.*'²² Therefore, until the court has made a pronouncement on the law, there are no tangible legal rights

²² Legal Realists argue that judges were forced to decide cases on the basis of their subjective feelings of what was "fair" and then turn to the applicable part of the case law to furnish legal fig leaves to hide what they had actually done. Available at [www.http://legal-dictionary.thefreedictionary.com/Roscoe+Pound](http://legal-dictionary.thefreedictionary.com/Roscoe+Pound). Accessed on 13/11/12.

which social or political factors can rely on. Some of the pronouncements on the law are made through judicial review.

Through judicial review, constitutional supremacy enshrined in Articles 1(3) and 1(4) of the Constitution become tenable. This was illustrated in the case of “*Murby*” where the Supreme and High Courts of the United States, declined to assume powers which were not granted to it by the Constitution.

Madison wrote; “If a majority be united by a common interest, the rights of the minority will be insecure.”²³ In this vein, the advantage of judicial review is that it acts as a constraint on the tyrannies of the majority. In the United States today, a widely held view among legal scholars is that the judiciary is (or at least should be) a critical bulwark against tyrannizing majorities.²⁴ The only way the judiciary can serve this purpose is through legal proceedings such as judicial review. It can be argued that judicial review is a weak constitutionalism factor in that the court cannot initiate judicial review proceedings. However, failure by the court to initiate judicial review provides checks and balances on both the judiciary and the citizenry, against arbitrariness aimed at the executive and or Parliament. The perceived weakness becomes a strength, as it acts as a constraint on the tyrannies of the majority.

The effect of judicial review promotes the attainment of constitutionalism more. For instance, although judicial review has such remedies as damages or injunctions, these are not the ultimate. The ultimate is to annul or validate the decision, omission, or action of a public body. This is because judicial review, is concerned not with the merits

²³ James Madison, Federalist 10. See summary on http://www.teaparty911.com/info/federalist-papers-summaries/summary_10.htm accessed on 3/02/13.

²⁴ Robert K. Fleck and Andrew F. Hanssen, “*Judicial Review as a Constraint on Tyranny of the Majority*,” Montana State University, March 2003, p1. Available on www.montana.edu/robffleckjudicialreview.pdf. Accessed on 27/12/12.

of a decision, but the decision making process. For instance, in the case of *Kabimba*,²⁵ the ultimate was not the stay of proceedings, but the actual reversal of the decision to transfer the applicant.

3.3 Conclusion

Judicial review and constitutionalism are concepts that have been propounded for a long time. In Zambia particularly, scholars have looked at these concepts in isolation, even though their position in influencing positive governance is unquestionable. This chapter has not only pointed out the link between the two concepts, but has also shown that judicial review is a vehicle through which constitutionalism can be attained.

This chapter appreciated the fact that there are many factors which work in concert to attain constitutionalism. However, out of the many factors, judicial review is a better vehicle. This is because judicial review is a court dependant mechanism, and it is through the courts that rights of citizens (corporate and natural) are pronounced. Through such judicial pronouncements, the quality of decisions, omissions and actions of public officers is improved. Furthermore, it is only through judicial review that the judicial supremacy as provided for in article 1(3) and article 1(4) is possible. In view of the foregoing, there is more than a nexus between judicial review and constitutionalism; judicial review is a mechanism through which constitutionalism can be attained.

²⁵ *Kabimba v Attorney General and Another* (1995-1997) Z.R 152. (S.C).

Chapter Four

Judicial Attitude on Judicial Review in Zambia

4.0 Introduction

In Zambia, judicial review is a concept that has been resorted to from pre-independence to the Third Republic. Yet, however important judicial review is, it is a process which is solely dependent on the courts in two ways. Firstly, the courts will have to be invoked by a legally aggrieved person, and secondly, the legally aggrieved person's relief depends on what the courts, once invoked, will eventually decide on the matter. Therefore, the impact that judicial review has on the attainment of constitutionalism should equally be weighed from two dimensions: The number of people, legal or natural, who resort to judicial review on one hand, and the attitude of the courts, when faced with judicial review proceedings. The aim of this chapter, therefore is to determine whether the courts' attitude, once proven, foster or hinder the attainment of constitutionalism through judicial review. It is in view of the foregoing that this chapter is divided into two segments. The first segment will examine the resort to judicial review in Zambia, while the second segment will examine the attitude of courts in judicial review proceedings.

4.1 Resort to Judicial Review in Zambia

Examining resort to judicial review in Zambia, calls for probing many segments relating to the Zambian history. Hence, the examination should have been extended to the eras from pre-independence to the Third Republic. However, this examination will be

confined to the period between the 1st and 3rd Republics.¹ The reason is that; up to independence, only a small portion of the population had the formal education to make them appreciate that there existed a legal process called judicial review.² As a result, there was no significant recourse to judicial review, upon which the courts' attitude can be gauged.

4.1.1 Resort to judicial review in the First Republic

As noted earlier, the First Republic spanned from 1964 to 1972.³ This was an era between the commencement of Zambia as an independent and sovereign State, and the commencement of a One Party State in the independent and sovereign Zambia. During the First Republic, Zambia practiced a multi-party participatory democracy. During this period, the citizens were entitled to their democratic rights and freedoms. Surprisingly, however, between 1964 and 1972, only four judicial review cases are reported in the Zambia Law Reports.⁴ The low returns may be attributed to the low levels of formal education in the country at that time. As a result, many people may not have appreciated or were aware of their constitutional entitlements.⁵

¹ The First Republic started from independence; 1964 to the commencement of the One Party State Zambia in 1972. The Second Republic commenced in 1972 until November 1990 when the One Party Constitution was amended to allow for multi-party participatory democracy. The Third Republic began in 1990, when multi party participatory democracy was reintroduced, to date.

² Before independence, two distinct education systems existed in Northern Rhodesia; one for Europeans and the other for the Natives. The one for natives had a number of challenges which made it unpopular with the class it was created for, resulting in high illiteracy levels. See Paron Mweetwa, '*Education system in Zambia*' available on http://www.sambia.uni-wuppertal.de/fileadmin/didaktik/sambia/Mweetwa_-_Education_in_Zambia.pdf, accessed on 24/03/13.

³ The First Republic commenced at Independence in 1964 and ended in 1972 when Zambia assumed a One – Party rule. See *Nkumbula v Attorney General* (1972) Z.R 204 (C.A).

⁴ *R v Allen* (1963-164) Z & N.R.L.R 26, *Thixton* (1967) Z.R 10 (C.A), *Nkumbula* (1970) Z.R. 97 (H.C), and *Radebe* (1972) Z.R 216 (H.C).

⁵ Mweetwa, '*Education system in Zambia*'.

4.1.2 Resort to Judicial review in the 2nd Republic

The 2nd Republic⁶ represents the era of the One Party Participatory Democracy in Zambia on the one part and a semi state of emergency on the other. During this time, discrimination on political lines was the order of the day.⁷ Due to the lack of tolerance of divergent views, the government was not truly accountable to the electorate, and the citizens were not free to implore the government to practice good governance. What was common were presidential decrees to detain citizens under the Preservation of State Security Regulations.⁸ Despite the rampant violation of human rights, there was little or no increase in the number of judicial review cases. Most of the cases that were brought before the courts bordered more on securing the liberty of the detained than challenging the constitutionality of the law under which the detentions were made. There was insignificant resort to judicial review with a view to enforcing good governance and attaining constitutionalism. Furthermore, there was no active civil society to enlighten the populace on their entitlements. The only civil societies which were allowed to operate in the country were those concerned with humanitarian activities. However, the concept and practice of judicial review was not entirely lost as seen from the cases of *Chirwa*⁹ and *Doyle*.¹⁰

The facts of the *Chirwa* case were that he entered Zambia in 1964 as a refugee from Malawi and was treated "a refugee in law" from 30th June, 1971. On 15th October, 1972,

⁶ The First Republic started from independence; 1964 to the commencement of the One Party State Zambia in 1972. The Second Republic commenced in 1972 until November 1990 when the One Party Constitution was amended to allow for multi-party participatory democracy. The Third Republic began in 1990, when multi party participatory democracy was reintroduced, to date.

⁷ See Articles 107 and 109 of the One Party Constitution of Zambia. Also, in accordance with Articles 38(2)(b) & 67(c) of the One Party Constitution, only UNIP members could contest Presidential, Parliamentary, as well as District Council elections.

⁸ In 1974 alone, 8 cases bordering on detentions by order of the president are recorded. These cases are found at pages 1, 14, 71, 156, 168, 177, 220 and 244 of the 1974 edition of Zambia Law Reports.

⁹ In *Re Chirwa* (1974) Z.R. 14 (H.C).

¹⁰ *Sinkamba v Doyle* (1974) Z.R. 1. (C.A).

the Minister of Home Affairs invoked the provisions of section 22 (2) of the Immigration and Deportation Act,¹¹ and declared Chirwa's presence to be inimical to public interest, and served him with notice to leave Zambia. Chirwa made representation under section 24 (1) of the Act,¹² but was not successful. Having failed, Chirwa was ordered to be detained under the provisions of section 26 (3) of the Act.¹³ On a further representation he was released, but again detained after some time. Chirwa then applied to the High Court and sought an order of *certiorari* against the Minister's declaration of 15th October, 1972. The court held at page 14 that:

It was ultra vires the powers of the Minister to invoke his powers under the Immigration and Deportation Act, and declare prohibited immigrant a refugee under the provisions of the Refugees (Control) Act, 1970.

In the case of *Doyle*,¹⁴ The appellant was detained on the 20th September, 1971, pursuant to an order made on the 19th September, 1971, by the President under regulation 31A of the Preservation of Public Security Regulations. The appellant then applied to the High Court for an order of *mandamus*, directing the respondent in his capacity as Chief Justice to appoint a chairman of a tribunal under regulation 31A of the Preservation of Public Security Regulations to review his case. The application was dismissed. An appeal was made on behalf of the appellant (subject to a concession as to the partial repeal of sub-regulation (7) that section 26A and sub-regulations (7) and (8) can co-exist and that, therefore, no repeal of the sub-regulations may be implied. The court held at page 2 that:¹⁵

Section 26A (1) (c) 'of the Constitution' is in conflict with sub-regulations (8) and (7) (ii) (a) of regulation 31A of the Preservation of Public Security Regulations, both of which provisions must therefore be held to have been impliedly repealed.

¹¹Then, Cap 122, of the Laws of Zambia.

¹² Then, Cap 122, of the Laws of Zambia.

¹³ Then, Cap 122, of the Laws of Zambia.

¹⁴ (1974) Z.R. 1. (C.A).

¹⁵ Emphasis is mine.

The ability of the court in *Chirwa* to declare as *ultra vires* the decision by the Minister, as well the declaration in *Doyle* that sub-regulations (8) and (7) (ii) (a) of regulation 31A of the Preservation of Public Security Regulations, contravened the Constitution is the indicator that judicial review was not at all lost during the Second Republic. Additionally, in each of the cases, the courts placed a check on *ultra vires* governmental actions, and decisions.

4.1.3 Resort to judicial review in the Third Republic

In the Third Republic¹⁶, judicial review took a different dimension in two ways: firstly, there was an overwhelming resort to judicial review on the part of the citizenry. Secondly, corporations, organisations, and associations began to resort to judicial review.¹⁷ It is in the Third Republic that leading cases on judicial review, such as *Chitala*,¹⁸ and *Chiluba*¹⁹ were adjudicated. In the *Chitala* case, he challenged the decision by the President and his Cabinet to amend the Constitution in form of the Constitution of Zambia (Amendment) Bill Number 17 of 1996. His contention was that the amendment sought to alter or destroy the basic structure or framework of the Constitution. In this regard, he had sought an order of *certiorari* to remove into the High Court for the purpose of quashing the decision by the President, and his Cabinet to have the next Constitution enacted by the National Assembly; an order of *mandamus* directed to and compelling the President and the Cabinet to take such measures as may be necessary to ensure that the Constitution was debated and finally determined by a Constituent Assembly, and subjected to a referendum.

¹⁶ The Third Republic began in 1990, when multi party participatory democracy was reintroduced, to date.

¹⁷ See, “Court Grants Contractor Leave to Commence Judicial Review Over UNZA Hostels Rehab,” by Perpetual Sichikwenkwe, available on [www.http://allafrica.com/stories/201211050176.html](http://allafrica.com/stories/201211050176.html), accessed on 26/11/12. Also refer to, “Zambia Federation of Employers ‘scores first goal’ in court on minimum wage battle.” Available on [www.http://m.lusakatimes.com/](http://m.lusakatimes.com/) accessed on 26/11/12.

¹⁸ *Chitala* (Secretary of the Zambia Democratic Congress) v Attorney General (1995-1997) Z.R. 91

¹⁹ *Chiluba v Attorney General* (2003) Z.R. 153 (S.C).

Although the court did not decide in *Chitala's* favour, the case raised important constitutional issues.²⁰ The case reflected a desire that future Constitutions in Zambia will be enacted via a Constituent Assembly subject to a referendum. It is thus plausible to argue that the Technical Committee Drafting the Zambian Constitution (T.C.D.Z.C)²¹ was following the footsteps of *Chitala*. In this regard, *Chitala* has positively contributed to the growth of constitutionalism in Zambia. Furthermore, this growth was attained through using judicial review.

In the case of *Chiluba*,²² on 11th of July, 2002, the 3rd President of the Republic of Zambia, Levy Patrick Mwanawasa addressed the National Assembly. In that address, allegations were made against the appellant, Fredrick Jacob Titus Chiluba as former President.²³ The President also discussed, in his address, the issue of the National Assembly lifting the immunity of the appellant. On 16th of July, 2002, the National Assembly met, and considered the removal of the former President's immunity. After a lengthy and spirited debate, the National Assembly passed a resolution, in exercise of its powers under Article 43(3) of the Constitution, removing the appellant's immunity. Subsequently, Chiluba applied to the High Court for judicial review on the following grounds;

1. An order of *certiorari* to remove into the High Court for the purpose of quashing the said decision of the National Assembly;
2. An order of *mandamus* to oblige the National Assembly to reconsider the decision to sanction the prosecution of the applicant as former President

²⁰ The Court held at page 98 that "For the reasons we have explained, the appeal is unsuccessful. However, since it raised for the first time a matter of general public importance of this nature, each side will bear its own costs."

²¹ On November 16th, 2011, President Sata appointed a 20 member Technical Committee to Draft the Zambian Constitution. See article on www.lusakatimes.com/2011/11/16/president-sata-names-committee-experts-review-zambia-s-constitution/ accessed on 20/08/2015.

²² *Chiluba v Attorney General* (2003) Z.R. 153 (S.C).

²³ Fredrick J.T Chiluba, Second Republican President from 1991 to 2001. The allegations bordered on Theft by Public Servant, an offence under section 272 and 277 of the Penal Code Act, Cap 87 of the Laws of Zambia.

of the Republic of Zambia in line with the provisions of Article 43(3) of the Constitution, and the rules of natural justice;

3. A declaration that the resolution of the National Assembly to sanction the criminal prosecution of the applicant was *ultra-vires* Article 43(3) of the Constitution, hence null and void;
4. A declaration that the respondent was obliged under the rules of natural justice to act fairly and afford the applicant an opportunity to be heard in person on the motion to remove his immunity under Article 43(3) of the Constitution; and
5. A declaration that the procedure adopted by the National Assembly to table the motion for the removal of the applicant's immunity was irregular.

The application was dismissed, and Chiluba appealed to the Supreme Court, where the appeal was again dismissed. The Supreme Court, in dismissing the appeal amongst other reasons, held that:

It was never the intention of the framers of the Constitution that when the issue of removal of immunity of a former President arises, the former President would have the right to be heard.

From the holding of the *Chiluba* case, the Supreme Court interpreted the Constitution in a way that is at variance with the rules of natural justice. It is settled law, as seen in the case of *Ridge v Baldwin*,²⁴ that where a decision will adversely affect the rights of a person, there is a duty to act fairly, and accord the person an opportunity to be heard. The decision to strip Chiluba of presidential immunity was going to affect him adversely. This is because it could be reasonably be foreseen that Chiluba would be arrested and subsequently detained. Thus, it was better that he was accorded a chance to be heard. In this case, however, the Supreme Court did not seize the opportunity to use judicial review to promote constitutionalism.

²⁴ *Ridge v Baldwin* (1964) A.C. 40. This case has been cited in prominent Zambian cases like *Clarke v Attorney General* (2008) Vol 1. Z.R. 38, (S.C).

In the Third Republic, corporations and organisations also resorted to judicial review.²⁵ For instance, a corporation commenced judicial review proceedings against the Council of the University of Zambia over the manner in which it had awarded contracts pertaining to the renovation of hostels at the institution in readiness for the 2012 Zone 6 games.²⁶ Furthermore, another corporation, Zambezi Airline challenged government's decision to suspend the company's air transport permit.²⁷ The increase in resort to judicial review can be attributed to the higher literate and educational levels obtaining in the country than the case was in the First and Second Republics. Another cause for the increase in the resort to judicial review may be attributed to the presence of an active and robust civil society. Even where a citizen is not aware of his entitlements, there are Non-Governmental Organisations (NGOs), which are willing to assist litigants.²⁸ NGOs do not only offer direct representation, but also carry out awareness campaigns. Through such campaigns, the citizenry has been enlightened, not only in terms of their rights, but also in terms of where to find assistance.²⁹

4.2 Judicial attitude on judicial review

The attitude of the courts towards judicial review will be examined from two perspectives. Firstly, the procedural requirements which the courts insist on, and secondly, the actual decisions which courts pass in judicial review proceedings.

²⁵ See 'Court Grants Contractor Leave to Commence Judicial Review Over UNZA Hostels Rehab' by Perpetual Sichikwenkwe, available on [www.http://allafrica.com/stories/201211050176.html](http://allafrica.com/stories/201211050176.html), accessed on 26/11/12. Also refer to Zambia Federation of Employers 'scores first goal' in court on minimum wage battle.' Available on [www.http://m.lusakatimes.com/](http://m.lusakatimes.com/) accessed on 26/11/12.

²⁶ The Supreme Council for Sport in Africa (SCSA) Zone Six Under-20 Games were held in Lusaka, Zambia from 7th December to 20th December, 2012. <https://www.lusakatimes.com/2012/12/17/zambia-medals-table-zone-games/> accessed on 28/08/2015.

²⁷ www.lusakatimes.com › [2011](#) › [November](#) › [16Share](#) . Accessed on 10/01/13.

²⁸ Consider the activities of the Zambian Non Governmental Organisation (NGO), The Legal Resource Chambers, formerly Legal resource Foundation which offers both Legal and Para-legal representation to ordinary citizens at no or minimal cost.

²⁹ See, 'How Civil Society Promotes Good Governance,' available on <http://edmondsoko.blogspot> accessed 22/08/2015.

4.2.1 Procedural requirements- “Leave”

As earlier noted, judicial review proceedings are guided by the provisions of Order 53 of the Rules of the Supreme Court (White Book).³⁰ When faced with arbitrariness by a government, a citizen’s last resort lies in judicial review. However, judicial review is not available to a claimant as of right.³¹ The permission of the court or “leave” must first be sought in order for a litigant to commence judicial review proceedings. It is in this regard that the Supreme Court held in the *Chiluba*³² case at page 153 that:

The hearing of an application for judicial review does not start from the day set for the motion. The application starts with notice of application for leave to apply for judicial review.

The requirement that leave must be sought distinguishes judicial review from other civil proceedings. Additionally, since a litigant is asking the court for permission to commence judicial review proceedings, the court may or may not grant the permission sought. Hence, it is the responsibility of the litigant to show cause why the court should grant the permission sought. What determines whether or not the court will grant the permission sought is explained in the following terms:

The precise test as to when permission should be granted has been variously stated but there is no doubt the bottom question is as to whether there is an arguable case, which merits full consideration at a substantive hearing.³³

In the *IRC*³⁴ case, referred to in *Chitala*,³⁵ Lord Diplock held that;

³⁰ In the case of *New Plast (2001)Z.R. 51 (S.C)*, the Court held that “*It is not entirely correct that the mode of commencement of any action largely depends on the reliefs sought. The correct position is that the mode of commencement of any action is generally provided by the relevant statute....*” In passing this decision, the Court upheld its earlier decision in *Chikuta [1974]Z.R. 241(S.C)*

³¹ Mark Ryan, *Unlocking Constitutional & Administrative Law*, (2nd ed, London: Hodder Education, 2011), 451.

³² *Chiluba v Attorney General (2003)Z.R. 153 (S.C)*, p 153.

³³ Theo Barclay, “*The Proportionality Test In UK Administrative Law - A New Ground of Review, or A Fading Exception?*” The Student Law Journal, Issue 3. Available on www.sjol.co.uk/issue-3/proportionality , accessed on 02/04/2013, p 541.

Leave should be granted, if on the material facts then available, the court thinks, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant. The test to be applied in deciding whether to grant leave to move for judicial review is whether the judge is satisfied that there is a case fit for further investigation at a full inter-partes hearing of a substantive application for judicial review.

The justification for the requirement that leave must be obtained for a litigant to commence judicial review proceedings is that it acts as a sieve against unfounded claims by *busy-bodies*. In this regard, it was held in the case of *Chitala*,³⁶ that: The requirement that leave must be obtained is designed to “prevent the time of the court being wasted by *busy-bodies* with misguided or trivial complaints of administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action, while proceedings for judicial review of it were actually pending even though misconceived

4.2.2 Procedural requirements-“*Locus Standi*”

The second requirement in judicial review proceedings is *locus standi*. For the court to grant leave, it has to be satisfied that the applicant is indeed not only legally aggrieved, but also has the requisite standing. With respect to what constitutes standing, the court observed in the *Machungwa*³⁷ case at page 19 that:

The party must himself show sufficient interest in the matter to which the application relates; it is not for other people to show or generate interest for the party.

It also follows that even where a person feels that an administrative act or omission affects him, does not initiate the judicial proceedings, he may apply to the court to be heard on the hearing of the motion or summons as provided for under Order 53, rule 9

³⁴ R. v Inland Revenue Commissioners, Ex Parte National Federation of Self-employed and Small Business Ltd (1982). A.C. 617, p.642. (1981)2All E.R. 93, P.105.

³⁵ Chitala v The Attorney General (1995 – 1997) Z.R. 91.

³⁶ Chitala v The Attorney General (1995 – 1997) Z.R. 91.

³⁷ Mun’gomba & Others v Machungwa & Others [2003] Z.R. 17 (S.C).

of the Rules of the Supreme Court. Here again it is the person who feels may be affected by the decision that moves the court, and shows sufficient interest in the matter. It is not for the generous busy body philanthropist to feel the interest of the third party and apply on behalf of the third party to be joined.

In view of the foregoing, to be affected by an act or omission, the affected party must be legally aggrieved. What constitutes a legal grievance was stated in the *Chiluba*³⁸ case at page 94 as follows:

To be 'legally aggrieved' a person must be not merely be dissatisfied with or even prejudiced by an action or decision. He must also have been deprived of or refused something to which he was legally entitled. . . . He must be able to point to some 'encroachment or vested right'

On the other hand, the court has adopted a more flexible approach to *locus standi* when it comes to fundamental rights. In the case of *Attorney General v The Law Association of Zambia*,³⁹ the court held that Article 28 of the Constitution does not need a party to demonstrate that the matter complained of affects him directly. By these pronouncements, the Supreme Court adopted a flexible approach to *locus standi* in cases of fundamental rights. This is obviously a departure from the common law jurisprudence on *locus standi*.

4.3 Judicial attitude from decision's perspective

The second aspect in the examination of the judicial attitude towards judicial review, will involve a review of the actual decisions by the courts. To appreciate this, a comparison will be made amongst cases from the 1st, 2nd and 3rd Republics. In this analysis, the following cases will be considered:

³⁸ *Chiluba & Others v Attorney General* [1990 – 1992] Z.R. 91 (H.C.), p94.

³⁹ *Attorney General v the Law Association of Zambia* [2008] Vol.1. Z.R. 21 (S.C).

1. From the First republic, the cases of *Allen*⁴⁰ and *Nkumbula*;⁴¹
2. Second Republic is represented by the cases of *Chirwa*,⁴² and *Mundia*⁴³; and
3. In the Third Republic, *Clarke*,⁴⁴ *Kabimba*⁴⁵ and *Machungwa*.⁴⁶

4.3.1 The First Republic

During the First Republic, there were very few judicial review cases reported. The first is that of *Allen*,⁴⁷ a Senior Superintendent of Prisons who was alleged to have committed certain irregularities in 1963. No criminal charges were laid against him, but charges were laid under the Federal Prisons Act.⁴⁸ A tribunal found Allen guilty on four of the allegations. Allen appealed to the Federal Ministry of Law who upheld the decision of the tribunal. It is at this stage that an application was made to the High Court for an order of *certiorari*. The High Court held that the tribunal had no jurisdiction to enter upon the inquiry. The court concluded that, the findings of the tribunal were a nullity.

Notable also is the case of *Nkumbula*.⁴⁹ The applicant applied to the High Court for an order of *mandamus* directed at the Speaker of the National Assembly ordering him to comply with the provisions of section 65 (4)⁵⁰ of the Constitution on the latter's failure

⁴⁰ R v *Allen*[1963-164] Z & N.R.L.R 26.

⁴¹ [1970] Z.R. 97 (H.C.).

⁴² [1974] Z.R. 14 (H.C.).

⁴³ [1986] Z.R. 37 (S.C.).

⁴⁴ (2008) Z.R 38 Vol. 1 (S.C.).

⁴⁵ (1995-1997)Z.R 152. (S.C).

⁴⁶ (2003) Z.R. 17.(S.C).

⁴⁷ R v The Attorney General of Northern Rhodesia and Minister for Labour and Mines for Northern Rhodesia, Ex Parte Kenneth Allen (1963-1964) Z. And N.R.L.R.26.

⁴⁸ Federal Act No. 9 of 1955.

⁴⁹ (1970) Z.R. 97(H.C). The People v The Speaker Of The National Assembly Ex Parte: Nkumbula (1970) Z.R. 97 (H.C.)

⁵⁰ Section 3 of the Constitution (Amendment) (No. 2) Act, 1966 (No. 47 of 1966). In subsection (4) in Provides part that:

(4) If notice in writing is given to the Speaker of the National Assembly, signed by a member of the Assembly who is recognised by the Speaker as being the leader in the Assembly of a particular political party, alleging that an elected member of the Assembly -

- (a) conducted his campaign for election to the Assembly as a member of such political party; and
- (b) has, since his election to the Assembly, ceased to be a member of such political party,

to take action on his allegation that two members of his party had ceased to be members of the party. The Speaker refused to recognise Nkumbula as the leader of a political party in the National Assembly, and therefore stated that he was under no constitutional obligation to comply with the provisions of section 65 (4) of the Constitution. Nkumbula then applied to the High Court for an order of *mandamus* to the Speaker of the National Assembly ordering him to comply with the provisions of subsection (4) of section 65 of the Constitution as amended by section 3 of the Constitution.⁵¹

The court held at page 100 that:

The remedy of mandamus is available against the Speaker of the National Assembly in case of his failure to discharge his statutory obligation under s. 65 (4) of the Constitution.

The implication of this pronouncement is that the court ordered the Speaker of the National Assembly to discharge his statutory obligation. In this case; to recognise Nkumbula as leader of a political party in the National Assembly and take action on the allegations made by Nkumbula.

4.3.2. The Second Republic

As earlier stated, the Second Republic started in 1972, and ended in 1990. In examining judicial attitude towards judicial review during the Second Republic, there are certain factors which need to be taken into account. First, Zambia had assumed One-Party status. Second, there was a semi-state of emergency. Simply stated, during the Second Republic, Zambia had a One Party State and a semi- state of emergency co-existing. It will be recalled that just before independence, on 24th July, 1963, the British Governor

the Speaker shall inform the Assembly of such allegations and shall furnish the Chief Justice with a copy of the notice given to him.

⁵¹ Constitution (Amendment) (No. 2) Act, 1966 (No. 47 of 1966).

declared a semi-state of emergency in response to the uprising by the Lumpa church led by Alice Lenshina.⁵² In the Lenshina uprising, over 700 people died, and 19000 Lumpas fled to Zaire⁵³. Lenshina and other leaders were detained under the Preservation of Public Security Regulations. The semi- state of emergency remained in force until November 1991.

In due course, on 25th February, 1972, Kenneth Kaunda⁵⁴ announced that the Cabinet had taken a decision that the future Constitution of Zambia should provide for a One Party Participatory Democracy.⁵⁵ By virtue of the semi-state of emergency, and the One Party state policy co-existing, civil liberties were constantly violated.⁵⁶

An example of violation of civil rights during the Second Republic is the case of Lenshina.⁵⁷ Lenshina was detained on 15th May, 1970, under regulation 31A of the Preservation of Public Security Regulations by the decree of the President. On 28th May, 1970, she was served with the grounds of detention. In 1973, whilst in detention,⁵⁸ she challenged her detention on several grounds, among which included the following:

(1) Whilst she had made a request for the review of her case on 15th May, 1973, pursuant to the provisions of section 26A (1) (c) of the Constitution, the same had not been reviewed for over three months;

(2) She had been denied the constitutional right of review of her case after one year's detention by "a tribunal established by law." Although the Chairperson

⁵² Christof Heyns. *Human Rights Law in Africa (ed)* Volume 2, 1997:, p 257. Christof Heyns is *Professor of Human Rights Law; Co-director, Institute for International and Comparative Law in Africa at the University of Pretoria; United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions*.

⁵³ Zaire is now called Democratic Republic of Congo.

⁵⁴ Zambia's first Republican President from 1964 to 1991.

⁵⁵ See the case of *Nkumbula v Attorney General* [1972] Z.R 204. (C.A).

⁵⁶ In 1974 alone, eight cases bordering on detentions by order of the president are recorded. These cases are found at pages 1, 14, 71, 156, 168, 177, 220 and 244 of the 1974 edition of Zambia Law Reports.

⁵⁷ [1973] Z.R 243 (H.C).

⁵⁸ The same detention effected in 1970 lasted until 1975, see case above.

had been appointed, the tribunal was not properly constituted as the other members of the tribunal had not been named; and

(3) Her detention was illegal in so far as she was being detained in a place not authorised by the President under regulation 31A (5) of the Preservation of Public Security Regulations.

The court held among other matters that:

It is a detainee's constitutional right to apply for a review of the case at any time after one year's detention, and it is the duty of the executive to put the case immediately before the review tribunal.

Furthermore, in ordering Lenshina's release, the court observed at page 255 that:

I appreciate that the detention order was effected in the interests of the preservation of public security. The bona fides of such order has not in any way been impugned. The detaining authority is always free to make another detention order should it be considered necessary. Meanwhile, the applicant has not been in lawful custody and accordingly I order her release.

The case of *Lenshina*⁵⁹ highlights the rampant detentions effected by presidential decree during the second republic. A detainee's remedy under such circumstances lay in applying for a review of their case after a year's detention without trial. Furthermore, the same detentions could be effected in undesignated places as the case was with Lenshina. Surprisingly, amid such arbitrariness, the constitutionalities of such detentions were not usually challenged, because the *bona fides* of such orders were not impugned.

Despite the foregoing, judicial review was not at all lost during the Second Republic, as the cases of *Mundia*,⁶⁰ and *Doyle*⁶¹ correctly demonstrate.

⁵⁹ (1973) Z.R. 243 (H.C).

⁶⁰ *Mundia v Attorney General* (1986) Z.R. 37 (S.C.)

⁶¹ (1974) Z.R. 1.

In the case of *Mundia*,⁶² the facts were that Mundia was an advocate of the High Court, and Board Secretary to the Zambia National Provident Fund (ZNPF). Following a series of strikes at Z.N.P.F, the President established a Commission of Inquiry under the Inquiries Act,⁶³ to look into *inter alia*, the call for the removal of the appellant from office. When the Commission started to gather evidence, Mundia sought legal representation, and argued that he had a right to cross-examine witnesses. This argument was rejected. He then moved the High Court for the following orders of *mandamus*, prohibition, or *certiorari (sic)*.⁶⁴ This too was denied on the basis that the matter was an administrative inquiry, and the Commission was not bound by the rules of evidence and procedure. Mundia was not satisfied with the decision of the trial judge, and therefore appealed to the Supreme Court. The Supreme Court, in reversing the decision of the trial judge held at page 39 that:

In a public inquiry under the Inquiries Act, in order for it to be meaningful, legal representation carries with it the right to cross-examination of witnesses.

The case of *Doyle*⁶⁵ on the other hand, upholds the same principle as “*Marbury*.” Namely, a law that contravenes the Constitution cannot be the law of the land. In this case, the court invalidated provisions of the Preservation of Public Security Regulations because they were in conflict with the Constitution. The court held at page 13 that:

S. 26A (1) (c) is in conflict with sub-regulations (8) and (7) (ii) (a) of regulation 31A of the Preservation of Public Security Regulations, both of which provisions must therefore be held to have been impliedly repealed.

⁶² *Mundia v Attorney General* (1986) Z.R. 37 (S.C.)

⁶³ Then Cap. 181 of the Laws of Zambia.

⁶⁴ The law report does not explain what exactly the applicant was claiming in the orders.

⁶⁵ (1974) Z.R. 1 (C.A). discussed under 3.1.2.

4.3.3 The Third Republic

The Third Republic started from 1990 to date. It has yielded more cases on judicial review than any other era in the Zambian history. As noted earlier, even corporations are also resorting to judicial review. As a result, there are many cases of interest but only three; *Machungwa*,⁶⁶ *Kabimba*⁶⁷ and *Clarke*,⁶⁸ will be considered in gauging judicial attitude towards judicial review during this era. In the case of *Machungwa*,⁶⁹ the appellants initiated complaints which led to the Chief Justice appointing a Tribunal under the Parliamentary and Ministerial Code of Conduct Act.⁷⁰ The Tribunal was to inquire into the alleged complaints. Arising from the Tribunal, judicial review proceedings were instituted in the course of the inquiry. At that time, the appellants applied to the High Court to be joined to the proceedings as interested parties. The High Court rightly joined them to the judicial review proceedings as 2nd, 3rd and 4th respondents. During the course of the judicial review proceedings, the appellants again applied to the High Court seeking to join Dr Kalumba to those proceedings contending that the proceedings or results of the judicial proceedings were likely to affect him. Therefore, it was necessary that he be joined so that he is afforded an opportunity to be heard. This application was dismissed. The appellants then appealed to the Supreme Court against the decision not to join Dr Kalumba to the proceedings.

In passing judgment, the Supreme Court did not only dismiss the appeal, but also seized the opportunity to articulate the position regarding judicial review in Zambia. The court observed as follows:

⁶⁶ (1995-1997) Z.R. 20. (S.C).

⁶⁷ (1995-1997) Z.R. 152.(S.C).

⁶⁸ (2008) Vol.1 Z.R. 38. (S.C).

⁶⁹ *Mungomba & Others v Machungwa & Others* (2003) Z.R. 17.

⁷⁰ Act No. 35 of 1994.

...As Order 53 says that any person can challenge an administrative act or omission, the people who can apply are those who feel they are affected by the administrative act or omission. If they are not originators of the process, the Order provides that they may apply for leave to join. The party must himself show sufficient interest in the matter to which the application relates; it is not for other people to show or generate interest for the party...

In the case of *Kabimba*,⁷¹ the applicant was employed as a Town Clerk by Lusaka City Council. On 17th February, 1995, the Minister of Local Government and Housing wrote to the applicant informing him that in exercise of powers vested in the Minister under Regulation 21 Proviso (ii) of the Local Government Regulation 1993, the applicant was transferred to Kitwe City Council with immediate effect. The applicant wrote to the Minister appealing against that decision, but the appeal was refused.

The applicant instituted proceedings in the Industrial Relations Court, but discontinued the proceedings and opted for judicial review proceedings in the High Court. The High Court granted the applicant leave to commence judicial review proceedings. At the same time, the applicant was granted a stay of the order of the transfer pending the hearing. The applicant also applied for and was granted, *ex parte*, an injunction against the second respondent preventing the second respondent from transferring the applicant and ordering that the second respondent should not interfere with the applicant's performance of his duties as Town Clerk for Lusaka City Council. The court held at page 156 that:

In the circumstances of this case, the applicant is entitled to protection from interference with his present position as Town Clerk in Lusaka, and for this reason the injunction is necessary.

The most significant part of the *Kabimba*⁷² case is that it set a precedent that a stay of proceedings can lie against the State. This precedent is significant because a stay of proceedings technically amounts to an injunction, even though the State Proceedings

⁷¹ *Kabimba v Attorney General & Another* (1995 -1997) Z.R. 152. (S.C).

⁷² *Kabimba v Attorney General & Another* (1995 -1997) Z.R. 152. (S.C).

Act⁷³ precludes the granting of injunctions against the State. The court stated at page 152 as follows:

...Thus the distinction between an injunction and a stay arises out of the difference between the positions of the persons or bodies concerned. An order that a decision of a person or body whose decisions are open to challenge by judicial review shall not take effect until the challenge has finally been determined is, in my view, correctly described as a stay. For these reasons I am of the opinion that an officer or Minister of the Crown, in principle, may be stayed by an order of the court.⁷⁴

In *Clarke*⁷⁵ On 1st January, 2004, the respondent authored a satirical article entitled “*Mfuwe*”. As a result of this satirical article, the Permanent Secretary in the Ministry of Home Affairs issued a statement that he had recommended to the Minister that the respondent be deported. This statement appeared in the *Daily Mail* and the *Post Newspaper* of 5th January, 2004. On the same day, while addressing Movement for Multi-party Democracy (M.M.D) cadres, the Minister of Home Affairs said that the respondent would not have more than 24 hours in the country. Curiously, a warrant for the deportation of the respondent had already been signed by the Minister on 3rd January, 2004. Clarke applied to the High Court seeking among other reliefs; an order of *certiorari* to quash the decision of the Minister of Home Affairs to deport him. The trial judge granted the relief sought by Clarke on the ground of procedural impropriety and that the deportation was unlawful and an excessive measure. The Attorney General appealed against the decision. In dismissing the appeal, the Supreme Court held that the deportation of the respondent was disproportionate.

⁷³ Section 16 of Cap 71 of the Laws of Zambia

⁷⁴ *Kabimba v Attorney-General and Another* (1995-1997) Z.R. 152. at page 154.

⁷⁵ [2008] Vol.1 Z.R 38. (S.C).

4.4 Conclusion

In Zambia, judicial review is a process that has been resorted to, from pre-independence to the Third Republic. In the First Republic, there was limited resort to judicial review due to the low levels of awareness amongst the citizens. In the Second Republic, there was also limited resort to judicial review inspite a lot of civil rights violations by the State. Although judicial review was available, the courts lacked independence. Therefore, judicial review was not widely used in the promotion of constitutionalism. In the third Republic, there has been a significant rise in resort to judicial review. Besides natural persons; associations, organisations, and corporations are also resorting to judicial review. Further, in the Third Republic, judicial attitude towards judicial review has promoted constitutionalism.

Despite the foregoing, the procedural requirements of Order 53 of the Rules of the Supreme Court (White Book) still pose some challenges in the utilisation of judicial review to attain constitutionalism. These challenges are presented by the common law jurisprudence on leave, and *locus standi*. As much as *locus standi*, and “leave” are important in judicial review proceedings, they should not act as bottlenecks in the course of attaining constitutionalism. The courts should modify the common law jurisprudence on *locus standi* and “leave” to enable third parties to commence proceedings on behalf of those who although legally aggrieved, lack the economic or social capacity to seek legal redress. Until the common law jurisprudence on *locus standi* and “leave” is modified, and the courts exhibit and practice more independence, judicial review will not or actualise its full potential of fostering constitutionalism in Zambia.

Chapter Five

Lessons from Other Jurisdictions

5.0 Introduction

Judicial review has undeniably been used by many jurisdictions, civil and common law alike, in fostering good governance and constitutionalism.¹ However, some jurisdictions have been more successful than others in the employment of judicial review as a mechanism for attaining constitutionalism. The reason for the disparities is the differences in approach. For instance, India does not insist on the issue of *locus standi* in the way Zambia does.² This way, India has allowed important issues to be judicially reviewed even where the litigant is not directly and legally aggrieved himself. The result is that Indian courts are more responsive to the citizenry's needs. It is therefore safe to conclude that resort to judicial review in India is common. Zambia on the other hand has low statistics on judicial review cases in spite of a lot of events which merit judicial review.³ The fact that the courts insist on strict procedure at the expense of justice, has deterred many potential litigants. The question then is; whether there are lessons which Zambia can learn from other jurisdictions, whose approaches to judicial review are probably more flexible and successful in promoting constitutionalism? This chapter will therefore consider lessons from India, Uganda, and the United States of America. The Republic of India will be examined for its modification of the commonwealth jurisprudence on *locus standi*, and mode of commencement of judicial proceedings. The

¹ Judicial review is practiced in common law jurisdictions like the United States of America and Zambia, as well as in France, a civil law jurisdiction. See F.L. Morton, 'Judicial Review in France: A Comparative Analysis.' The American Journal of Comparative Law, Vol. 36, No.1, (winter, 1988), 89-110.

² See Kwasi H. Prempeh. *Marbury in Africa: Judicial Review and the Challenge of Constitutionalism in Contemporary Africa*. Tulane Law Review 2006, [Vol. 80:1], 62.

³ Paron Mweetwa, '*Education system in Zambia*'

United States will be examined or considered because of its outstanding decision in *Marbury*, which decision has endured for more than 200 years. Lastly, the Republic of Uganda will be considered because of its ability to accord equal treatment to both citizenry and the State as far as the remedy of injunction is concerned. Thereafter, suggestions will be made as to what Zambia should do in order to attain similar successes with regard to using judicial review as a mechanism for attaining constitutionalism.

5.1 India- Modification for Social Legitimacy

5.1.1 Background

Due to colonisation, Africa has diverse legal systems. Some countries practice civil jurisdictions, while others are common law countries. Zambia, by virtue of having been colonised by Britain, is a common law jurisdiction. Hence, only a legally aggrieved party can commence judicial review proceedings. This in fact was the ruling in *Machungwa*.⁴ Namely, that only the party concerned should commence proceedings. And if a matter is not commenced in the prescribed way, it can be dismissed. In the *New Plast Industries*⁵ case, the court dismissed the application for Judicial Review on the ground that the application was irregular. Although it can be argued that the court correctly interpreted the law, the effect is that the procedural requirements the court upheld, disadvantaged the applicants. It seems that in Zambia, procedure takes precedence over justice. There is need for the courts of law to adopt a more flexible approach to procedural requirements when faced with judicial review proceedings. This way, courts will be more helpful to litigants. The Republic of India has developed such flexible approaches.

⁴ Mungomba & Others v Machungwa & Others [2003] Z.R. 17. (S.C).

⁵ New Plast Industries Limited v The Commissioner of Lands and Another (2001) Z.R. 58 (S.C).

5.1.2 India on Social legitimacy

India's courts, like any other commonwealth jurisdiction, were faced with a problem of lack of social legitimacy because traditional common law doctrine and procedure were woefully unresponsive to the needs and circumstances of a majority of the population.⁶ The challenge then was how the courts would meet the social demands of justice, while remaining popular with the rest of the populace. The solution lay in pioneering "public interest litigation" (also called "social action litigation") through innovation in the courts' procedural and substantive jurisprudence. On the procedural level, the Supreme Court of India modified the common law rule on *locus standi* so that:

Where a legal wrong is done or a legal injury is caused to a person or to class of persons by violation of their constitutional or legal rights and such person or class of persons is, by reason of poverty or disability or socially or economically disadvantaged position, unable to approach the court for relief, any member of the public or social action group acting bona fide can maintain an application in the High Court or the Supreme Court seeking judicial redress for the legal wrong or injury caused to such person or class of person[s].⁷

To make the process easier and attain the intended objectives, the Indian Supreme Court has allowed its jurisdiction, under the aegis of public interest litigation, to be invoked merely by writing a letter to it. Further, the Indian Supreme Court has extended judicial protection to interests, rights, and remedies that common law doctrine could not reach or would not recognize.⁸ It is for this reason that the Supreme Court of India has been hailed to be a Supreme Court *for* Indians.⁹

The lesson Zambia draws from India is that, if courts develop a flexible approach towards judicial review, constitutionalism would be promoted. India understood early on that one of the qualities of a good legal system is that it should adapt to the changing

⁶ Prempeh. "Marbury in Africa," 62

⁷ Prempeh. "Marbury in Africa," 62

⁸ Prempeh. "Marbury in Africa," 62

⁹ Prempeh. "Marbury in Africa," 62

needs of society. Furthermore, India realised that the common law jurisprudence of standing was rigid in matters of judicial review. Hence, India changed the legal approach. Prempeh observed that:

For Africa's judiciaries, situated (like India's) in societies where vast socio-economic inequality produces severe disparities in access to justice and alienates a majority of the citizenry from the courts, the Indian Supreme Court's "access to justice" initiatives provide a blueprint of how courts themselves might address the social legitimacy deficit they face. In a number of Africa's reforming States, notably Ghana and Malawi, the post-authoritarian Constitutions have advanced this cause by expressly modifying the common law standing rule in constitutional cases, allowing plaintiffs to bring challenges without a showing of personal "injury-in-fact."¹⁰

The result of India's ingenious approach has been a relaxed mode of commencement, leave, and standing requirements. This way, justice has prevailed over procedure. And constitutionalism is promoted through judicial review. In view of the above, there is need for Zambia to draw the lesson from India if the courts are to be more responsive to the needs of society.

5.2 The United States of America- Judicial Decisions that Stand the Test of Time

5.2.1 "*Marbury*" in Context

Eleven years before Chief Justice Marshall's decision in "*Marbury*",¹¹ the Supreme Court clarified that it possessed the right of judicial review when it held that:

...neither the legislative nor the executive can constitutionally assign to the judiciary any duties but as such are properly judicial and to be performed in a judicial manner.¹²

¹⁰ H. Kwasi Prempeh, "*Marbury in Africa*," 63.

¹¹ *Marbury v. Madison*, 3 US 137 (1803)

¹² Megan Nichols, "*Marbury v Madison and the Establishment of Judicial Review.*" Available on <http://www.ucumberlands.edu/academics/history/files/vol9/MeganNichols97.html> last accessed on 21/04/13.

However, before the issue had a chance to reach the Supreme Court for decision, Congress had changed the procedure for the pension claims. The case was not brought before the Supreme Court, and the Supreme Court did not have the opportunity to rule the act of Congress invalid. Thus, judicial review was strong at the State level, while it was only developing at the federal level.¹³ “*Marbury*” offered the opportunity for the Supreme Court of the United States of America to expressly pronounce that it had power of judicial review. However, this was a doctrine that already existed from the standard practice of English common law.¹⁴

Despite the fact that “*Marbury*”¹⁵ arose out of the most of petty partisan squabbles, more than two hundred years later, the case is still acclaimed as the leading case in judicial review, whose importance needs not only remembrance, but also reinstatement.¹⁶ The reason is; the case advances three issues. Firstly, the purpose of the Constitution is to enforce limits of popular sovereignty on government. Secondly, to serve as an effective limit on the power of government; the Constitution must be supreme, paramount, and controlling as law. Thirdly, the judiciary cannot ignore the Constitution when performing its duty of saying what the law is.¹⁷ Furthermore, “*Marbury*” illustrates how the power of the Supreme Court, or the Federal Courts, depends not only on its constitutional authority, but on how the Constitution is interpreted, how the judicial branch avoids a confrontation with the other branches of government, and how the members of the court go about making a decision.¹⁸ The decision in the case established the right of judicial review for the Federal Courts. According to historian Leonard

¹³ Nichols. “*Marbury v Madison*.”

¹⁴ Mary Sara Bilder, *The Corporate Origins of Judicial Review*. 116 Yale L.J 602 (2006).

¹⁵ Nichols. “*Marbury V. Madison*.”

¹⁶ Harry F. Tepker Jr, “*Marbury 's Legacy of Judicial Review after Two Centuries*,” 57 Okla. L. Rev. 127 2004, 127-128. Available at: http://works.bepress.com/harry_f_tepker/5, accessed 07/2012.

¹⁷ Tepker Jr, “*Marbury 's Legacy*, 134-135.

¹⁸ Tepker Jr, “*Marbury 's Legacy*, 134-135.

Baker,¹⁹ the decision must be "admired" for various reasons: it's definition of the role of civil liberties and of government in implementing that definition, its restraint in not going beyond the powers of the judiciary, it's using those powers to their utmost, and primarily, establishing a rule of law, a procedure for settling disputes without the sword. If civilization is a state in which people can settle their conflicts fairly and without force, Chief Justice John Marshall's decision was one of civilization's finest hours, and one of mankind's greatest accomplishments.²⁰

Despite the praises accorded to justice Marshall in *Marbury*, the case does not go without criticism. Firstly, it has been argued by many that Justice Marshall should never have presided over that case as he was heavily involved in the "midnight judges"²¹ himself. Secondly, Heamish argues that:

Roman Emperor Julius Caesar is well known for his love of power; power frequently gained as much through cunning and deceit, as through the strength of his armies. Caesar used his armies to expand his empire externally, but internally, Caesar rose to power mischievously, seemingly unnoticed. Like Caesar, Chief Justice John Marshall also apparently loved power. Marshall created his power out of the broad language of the Constitution. Unlike Caesar, however, Marshall never utilized the power he created to build his own empire. Rather, Marshall would use legal cunning and deceit to alter the balance of power between competitors.²²

Despite the criticism, *Marbury* is a formidable decision which Zambia cannot afford to ignore. The Zambian judiciary should emulate the approach the Supreme Court of the United States accomplished in *Marbury*. If the Zambian judiciary could utilise judicial review as a golden chance of putting legal matters straight once and for all,

¹⁹ John Marshall, "*Marbury v. Madison*," *Domestic Expansion and Foreign Entanglement*," vol. 4, 1797-1820, *The Annals of America Series* (Chicago: Encyclopedia Britannica, Inc., 1968), 170.

²⁰ Marshall, "*Marbury v. Madison*," 170.

²¹ Judges appointed under the Judiciary Act of 1801, were infamously referred to as Midnight Judges because John Adams was said to be signing the appointments at night. www.awesomestories.com accessed on September 8th, 2012.

²² Masi, Heamish. "*Marbury v. Madison: A Progressive Critique.*" Available on <http://gladstone.uoregon.edu/~uofla/Spring00/Heamish.html> accessed 5/05/2013.

constitutionalism could have been highly developed by now. However, many of the Zambian judicial decisions, are renowned not for promoting constitutionalism, but for its hindrance.²³ Even though Justice Marshall whilst serving as Secretary of State was the one who was supposed to deliver the letter of appointment to Marbury but had failed,²⁴ the court was not in any way compromised. The court stood on the principle that a repugnant law could never be the law of the land. It is for that reason that to date, *Marbury* is still renowned.

In Zambia, judicial review has been resorted to from pre-independence to the Third Republic. As a result, the Zambian Law Reports are endowed with a lot of judicial review cases. However, none of the cases adjudicated upon has stimulated sufficient debate, and authority as justice Marshall's *Marbury*. Although *Marbury* has been criticised as much as it has been praised, the Zambian Courts cannot ignore its legacy. *Marbury* expressly pronounced the Court's power of judicial review. This power has been granted to the Supreme Court of the United States of America as well as the courts of other jurisdictions. Furthermore, although the power of judicial review was granted more than 200 years ago, it is still available in this generation, and will still be available in future generations.

²³ The case of *Nkumbula v Attorney General* (1972) Z.R. 241 (C.A) and *Law Association of Zambia v Attorney General* (2008) Vol. 1 Z.R. 21. (S.C).

²⁴ The Secretary of state John Marshall should have delivered the letter of appointment to William Marbury but failed, giving rise to the *Marbury v Madison* case. By the time the case came up for hearing, John Marshall was the Chief justice of the United States of America Supreme Court and presided over the case. www.awesomestories.com accessed on September 8th, 2012.

5.3 Uganda – Equal treatment of both the State and citizens

5.3.1 Background

Injunctions, whether interim or permanent, are integral reliefs of judicial review cases.²⁵ However, State Proceedings Acts in most jurisdictions prohibit the granting of injunctions against the State. Zambia too has such an Act; the State Proceedings Act which prohibits the granting of injunctions against the State.²⁶ Hence, the use of judicial review to attain constitutionalism in Zambia is still hampered by the fact that one of the key remedies of judicial review cannot be granted against the State, even where the State seriously violates citizen's rights.²⁷ However, in some jurisdictions like Uganda, the court has found ways of overcoming this impediment.

5.3.2 Uganda on Equal Treatment

In the Ugandan case of *Osatraco (U) Limited v The Attorney General HCCS*,²⁸ the plaintiff sought orders to evict and a permanent injunction to restrain the State from the contested premises. The High Court having found that the plaintiff was the duly registered owner of the disputed premises, was faced with a question as to whether, in the face of section 15 of the Government Proceedings Act,²⁹ it could grant an injunction against the State. The trial judge observed that:

If government is in wrongful occupation of the property, substantive justice demands that it be ordered to vacate. A declaratory order still leaves a successful party at the mercy of government functionaries as to when he is to enjoy the

²⁵ Order 53 r. 1(b) and r. 2(a).

²⁶ Section 16 of Cap 71, of the Laws of Zambia.

²⁷ *Stickrose (Pty) Limited v The Permanent Secretary Ministry of Finance* (1999) Z.R 155, held that the trial court had no jurisdiction to make an order for *mandamus* in judicial review proceedings as a means of enforcing a judgment against the State.

²⁸ (2003) 2EA. 654 (ACU).

²⁹ Section 15 of the Government Proceedings Act (Uganda) is couched in the same terms as section 16 of the State Proceedings Act, Cap 91 of the Laws of Zambia.

fruits of a successful action against government. For the declaratory order cannot be enforced. In the present action, the plaintiff is seeking to enforce his rights to suit property against wrongful infringement by government. Right to property is a right protected by the Constitution in Article 26. Article 50(1) of the Constitution assures such persons redress before the courts. Redress, in my view, refers to effective redress and nothing short of this. A less than appropriate redress is not effective redress.

The court concluded that:

In the circumstances of the case, a declaratory order is less than appropriate relief. It is not effective redress. And the provisions of existing law, that is, the proviso (b) of section 15(1) of the Government Proceedings Act that would compel this court to avail only such relief is not in conformity with the Constitution.

In yet another Ugandan case,³⁰ the Constitutional Court rejected objections by the State against being injuncted on the grounds that the State has immunity against such orders.

The court held that:

...there is no sound reason under the Constitution why Government should be given preferential treatment at the expense of ordinary citizens. That provision of the Government Proceedings Act is an existing law which under Article 273 (1) of the Constitution, should be construed with such modifications and adaptations as may be necessary to bring it into conformity with the Constitution.

On the other hand, the Zambian position on granting injunctions against the State is different. In the case of *Zambia National Holdings and Another v The Attorney General*,³¹ the appellants brought a petition before the High Court to challenge the decision of the State to acquire compulsorily, under the Lands Acquisition Act³² the appellant's land, Stand No. 10934, Lusaka which was also popularly known as the "New UNIP Headquarters." The President resolved that it was desirable or expedient in the interest of the Republic to acquire the property. Notice was then given to the appellants, of the

³⁰ *Rwanyarare & Others v The Attorney General* [2003] 2 E.A. 664 (CAU).

³¹ [1993-1994] Z.R. 115. (S.C).

³² Cap 189, of the Laws of Zambia.

Government's intention, and the steps and formalities under the Act³³ for such acquisition were commenced. The appellants challenged the constitutionality and legality of the compulsory acquisition. The appellants also sought an interlocutory injunction, to restrain the State from possessing, occupying, or entering upon the said land until the matter was finally determined. The High Court rejected the application on the basis that the State Proceedings Act precludes the granting of injunctions against the State. In the course of passing judgment, the court struck down section 16 of the State Proceedings Act because, in the court's opinion, it violated Article 28 of the Constitution. On appeal, the Supreme Court upheld the decision of the High Court that an injunction cannot be granted against the State. Further, the Supreme Court restored section 16 of the State Proceedings Act on the basis that it does not violate Article 28 of the Constitution.

The interplay between section 16 of the State Proceedings Act and Article 28 of the Constitution was, in my view, correctly argued by the respondent in the *Attorney General v Law Association of Zambia*.³⁴ It was argued that a proper construction of the interface between section 16 of the State Proceedings Act, and Article 28 of the Constitution is that, in relation to part III of the Constitution,³⁵ the High Court has jurisdiction to grant, *inter alia*, an injunctive relief even against public officials, including the President, and the State.³⁶ The Law Association of Zambia further argued that the immunity provided by section 16 of the State proceedings Act is not absolute, but qualified by Article 28 of the Constitution. In response to this argument, the court observed at page 35 to 36 that:

³³ Cap 189, of the Laws of Zambia

³⁴ (2008) Vol 1. Z.R. 21. (S.C).

³⁵ Part III of the Constitution protects fundamental human rights and freedoms.

³⁶ *The Law Association of Zambia v Attorney General* (2008) Vol 1. Z.R. 21 (S.C), p 35. Also refer to the respondent's 'Heads of Arguments' in the same case (SCZ/8/215/2006), page 17.

...But we want to acknowledge that there is great force in the arguments on the cross appeal, but in our view, the issues raised cannot be decided on preliminary issue or a preliminary hearing....

Despite the above observation, the court still upheld the decision of the High Court that, an injunction cannot lie against the State. To this extent, the court held at page 37 that:

We agree with the trial judge in his analysis of the wording of Article 28 that it makes no provision for interim orders, and that the application must first be determined before an order, writ, or direction are issued “for purpose of enforcing or securing the enforcement of any provision under Articles 11 to 26 inclusive.

In the case of *Mahtani*,³⁷ the petitioners sought various interim orders to restrain the respondents from interfering with the petitioners’ rights. There were many questions addressed by the High Court in this case but one that is paramount here is; Whether the State proceedings Act applies to constitutional matters. The court held that Zambia is a constitutional democracy. In this regard, the Constitution is supreme.³⁸ The supremacy of the Constitution is reflected in Articles 1(2), 1(3), and 1(4) of the Constitution.³⁹ In the *Mahtani* case, the court held that the powers given to courts under Article 28 of the Constitution are so broad that they include monetary compensation, or more precisely- constitutional damages.⁴⁰ The court went on to observe at page 458 that:

“Article 28(1) of the Constitution is in my opinion broadly and generously formulated, in order to enhance the protection of fundamental human rights and freedoms. The broad limits of Article 28(1) further, in my opinion, allow for the grant of just, appropriate, and effective remedies to secure the protection of these rights and freedoms. Article 28(1) is therefore not only the entry point for the protection of fundamental rights and freedoms, but also the bedrock for these rights and freedoms.”

The court further observed that:

³⁷ *Mahtani & Others v Attorney General & Others* (2010) Vol 3. Z.R . 377. (H.C).

³⁸ At page 470 -472.

³⁹ This supremacy was upheld in *Miyanda v Attorney General* (2009) Z.R . 76 (S.C), where the court observed that “Strictly speaking, the President is not above the law.”

⁴⁰ At page 458. Note that in the Case of Resident Doctors Association of Zambia & Others V Attorney General (2003) Z.R .88, the appellants were paid constitutional damages.

The breadth of Article 28(1) is in my view, demonstrated by the meaning of the word “order” itself.

The court then went on to consider the word “order” by referring to various sources as follows:

(a) According to D Greenberg, Strouds Judicial Dictionary of Words and Phrases, Seventh Edition, Volume 2, F-O (London, Sweet and Maxwell 2006) at p 1885:

- (i) “An order contrasted with a judgment or a final judgment is a judicial or ministerial direction or conclusion on matters outside the record.”*
- (ii) “A judgment is a decision obtained in an action, and every other decision is an order.” Per Esther M.R. in *Onslow v Inland Revenue Commissioners* Q.B.D. 556.”*

(b) H. C. Black, A Treatise on the Law of Judgments, defines the word “order” as: “the mandate or determination of the court upon some subsidiary or collateral matter arising in any action not disposing of the merits, but adjudicating a preliminary point, or directing some step in the proceedings.”

(c) B. A. Garner (Ed) Black’s law Dictionary, defines the word “order” as;

- 1. “A command, direction, or instruction;*
- 2. A written direction, or command delivered by a court or judge. The word generally embraces final decrees, as well as interlocutory directions, or commands.”*

The court concluded at page 458 that:

“Thus in my opinion an order contrasted with a judgment, is a judicial or ministerial direction, command, instruction, or determination, and generally embraces both final decrees, and interlocutory directions or commands.

The court went on to hold that due to the constitutional supremacy, the State proceedings Act should be construed in such a way that it conforms with the fundamental constitutional principles outlined in Articles 1(2),(3), and (4) of the Constitution; especially, the power of the courts under Article 28(1).⁴¹

Having made the foregoing observations, the court was nevertheless unable to grant the interim reliefs sought by the petitioners. This is because it was bound by the Supreme

⁴¹ At page 472.

Court decision in the *Law Association of Zambia* case which still upholds the principle that injunctions do not lie against the State. The Court observed that:

Be that as it may, the Supreme Court categorically agreed with Banda, J, that the wording of Article 28(1) of the Constitution, does not provide for interim orders. The Supreme Court further agreed with Banda, J, that any order, writ, or direction issued under Article 28(1) of the Constitution is to be made or issued after determination of the application. Thus the ruling in Banda, J, received the imprimatur of the Supreme Court. Clearly, that the Supreme Court interpreted Article 28(1) of the Constitution, does not require judicial ingenuity to discern. The interpretation of Article 28(1) of the Constitution by the Supreme Court is binding on me. In view of the foregoing, I therefore refuse to grant the various orders requested for pursuant to Article 28(1) of the Constitution.

In my opinion, under Article 28(1) of the Constitution, the court has jurisdiction to grant any order, writ, or direction. Interim orders are also included, because they are orders as well. Therefore, if justice dictates that an interim order be granted against the State, it should be granted. The current state of the law means an interim order will not be granted against the State even where irreparable damage will be suffered by a citizen. The case has to first of all undergo a full hearing before such order can be granted. By the time such an order may be awarded, it may have culminated in an academic exercise. This disposition by the courts accords the State preferential treatment over citizens. In addition, by according Article 28(1) of the Constitution a narrow and retrogressive interpretation, the benefit of attaining constitutionalism has been minimised. On the other hand, Uganda has accorded this subject a progressive approach. The State is not in cases of fundamental rights accorded preferential treatment.

There is a disparity in the interpretation of Article 28(1) exhibited in the cases of *Attorney General v The Law Association of Zambia*,⁴² on one hand, and that of *Mahtani*

⁴² (2008) Vol 1. Z.R. 21. (S.C).

*and Others v Attorney General & Others*⁴³ on the other hand. In the former, the Supreme Court accorded Article 28(1) a narrow interpretation and held that Article 28(1) does not provide for issuance of an interim injunction. In the *Mahtani* case, on the other hand, the High Court accorded Article 28(1) a broad interpretation. Despite according Article 28(1) a broad, progressive and socially legitimate interpretation, the doctrine of *stare decisis*⁴⁴ prevented the High Court, in *Mahtani*, from granting an interim injunction. My conviction is that the disparity in the interpretation of Article 28(1) is an indicator of the changing paradigms with respect to protection of fundamental rights and freedoms. It is hoped that in future, injunctions may lie against the State, arising from interpretation of Article 28(1) of the Constitution. This way, constitutionalism will be attained more effectively as the State will not be accorded preferential treatment over citizens. In any case, by ruling that an injunction is not available, the Supreme Court contradicted itself because in *Machungwa*,⁴⁵ it was held that; an interlocutory injunction can be obtained in judicial review proceedings pending the determination of the substantive judicial review application, especially where a very important public interest is concerned.

Most cases discussed above are not judicial review cases, nevertheless, they are ideal in discussing judicial review. The principle they bring forth is of utmost importance and has a positive bearing on constitutionalism. Uganda has demonstrated that legislation such as the State Proceedings Act were enacted not as tools of injustice towards citizens, but merely to save government machinery from grinding to a halt. Even though the relief of injunction may not be available in each and every case, the fact that it is

⁴³ (2010) Vol.3. Z.R. 377. (H.C).

⁴⁴ By this doctrine, decisions of higher courts are binding on lower courts. This means a lower court, even though it may hold a different opinion, is nevertheless prevented from passing a judgment outside what the higher court held on the same principle.

⁴⁵ *Mungo'mba and Others v Machungwa and Others* (2003) Z.R. 17.

available where fundamental human rights are concerned, it is on its own, a positive contribution to constitutionalism. Furthermore, Uganda has accorded similar constitutional provisions like Article 28 wider interpretations than the Zambian Courts have. It is therefore ideal to emulate Uganda which does not accord preferential treatment to the State at the expense of its citizens' rights. It is for this reason that Henry Onoria argues that:

An enduring facet of the remedial recourse before the courts has been that the procedural protection afforded to the government in form of immunities against injunctions, evictions, execution, and specific performance. Such procedural protection or immunities have traditionally been afforded under the Government Proceedings Act. The rationale for the protection of immunity, as was explained, was to ensure that government machinery is not brought to a halt and not subjected to embarrassment.⁴⁶

5.4 Conclusion

A good legal system should address new trends and needs in society. Whilst Order 53 of the Rules of the Supreme Court (White Book) is comprehensive as far as judicial review proceedings are concerned, there exist challenges nevertheless, which need to be addressed. For instance, the lack of "public interest litigation" in the context of Order 53 of the Rules of the Supreme Court, has made Zambian courts to lose social legitimacy. In addition, the need for strict adherence to mode of commencement, as well as the remedy of injunction not being available against the State pose challenges too. Therefore, the Zambian legal system should address the challenges that exist in judicial review proceedings. Once the challenges are addressed, judicial review will be a more productive and effective tool for attaining constitutionalism.

⁴⁶ Henry Onari, "Review of Major Decisions on Fundamental Rights and Freedoms in Uganda in 2001 and 2002." East African Journal of Peace and Human Rights. Vol.9, No.2, 2003, 33.

In addressing the stated challenges, Zambia can draw lessons from other common law jurisdictions on how they have managed to overcome similar challenges. The Republic of India for instance, has relaxed the common law jurisprudence on *locus standi* by promoting public interest litigation. The mode of commencement in this kind of litigation is simply by writing a letter to the High Court. On the other hand, the Republic of Uganda has made the remedy of injunction available against the State, when fundamental rights are threatened. The Zambian judiciary on the other hand has made the remedy of injunction unavailable against the State, in all cases.

The net effect of the challenges faced by judicial review proceedings in Zambia is that judicial review has not been very productive as a tool for attaining constitutionalism. There is need to accord this effective tool for attaining constitutionalism the position and attention it deserves.

Chapter Six

Conclusions and Recommendations

6.0 Summary

The primary goal of this paper, *'Judicial Review, a Mechanism for Attaining Constitutionalism; with Special Reference to Zambia,'* has been to investigate whether or not judicial review is a mechanism through which constitutionalism can be attained in Zambia. Hence, factors that enhance or inhibit, as the case may be, the attainment of constitutionalism through judicial review were examined. However, in order to answer the question referred to above, other questions had to be answered too. These questions include:

- 1) To what extent is judicial review resorted to in Zambia;
- 2) Do the Zambian courts assist or hinder the process of attaining constitutionalism through judicial review; and
- 3) Are there lessons from other jurisdictions which Zambia can utilise.

To answer the preceding questions, the study was arranged in six chapters. The first chapter offered an overview of the research. The second chapter dealt with judicial review as a concept. The aim of the chapter was to examine the concept of judicial review and trace its origins. Chapter three examined the nexus of judicial review and constitutionalism. The aim was to determine two things. Firstly, whether there is interplay between judicial review and constitutionalism. Secondly, having established the interplay, to determine whether judicial review can or cannot be used as a mechanism through which constitutionalism can be attained. Having established that

judicial review is a mechanism through which constitutionalism can be attained; the next step was twofold: first, to examine the extent to which judicial review is resorted to in Zambia, and second, to examine whether the judiciary, being the institution upon which judicial review solely depends, assists or hinders the attainment of constitutionalism through judicial review. As a result, chapter four was divided into two segments. The first segment examined resort to judicial review in Zambia. While the second segment examined the judicial attitude towards judicial review, with a view to determine whether the judiciary assists or hinders the attainment of constitutionalism through judicial review. In chapter five, the thrust was to establish whether there are lessons from other jurisdictions, in so far as using judicial review to attain constitutionalism is concerned, which Zambia can learn and utilise. In this case, approaches to judicial review from the United States of America, Uganda, and India, were considered, and lessons drawn from these jurisdictions. This chapter draws conclusions of the research, and further makes recommendations.

6.1 Conclusions

Arising from the study, the following conclusions have been reached.

- 1) Judicial review is a mechanism through which constitutionalism can be attained. This is because judicial review steers government from *ultra vires* actions, and decisions. In this regard, judicial review ensures that actions or decisions undertaken by government conform to the Constitution, and other laws of the land.
- 2) The attitude the courts have towards judicial review affects the extent to which constitutionalism can be attained in Zambia.

- 3) The effectiveness of judicial review in attaining constitutionalism corresponds with the exercise of power by the executive branch of government. In a government where the executive is very strong, for instance in the Second Republic, the judicial branch of government tended to be overwhelmed in the promotion of constitutionalism. However, in a regime where the executive does not overwhelm the judicial branch of government, judicial review is usually very effective. Therefore, the stronger the executive, the weaker judicial review is as a mechanism for attaining constitutionalism.
- 4) Common law jurisprudence on *locus standi* is a hindrance to attaining constitutionalism through judicial review. The requirement by Order 53 of the Rules of the Supreme Court that only a party with the requisite standing can commence judicial review proceedings often disadvantages those who, although legally aggrieved, are socially and economically disadvantaged to commence judicial review proceedings.
- 5) The common law jurisprudence on *locus standi* has been modified and relaxed with respect to protection of fundamental human rights. With respect to Article 28(1) of the Constitution, a petitioner does not need to demonstrate that the violations complained of directly affect him or her.
- 6) Strict insistence by the courts on the mode of commencement of judicial review proceedings is also a hindrance as far as attaining constitutionalism through judicial review is concerned. Instead of checking governmental power, the courts take procedure to be paramount, thereby defeating the use of judicial review as a mechanism for attaining constitutionalism.

6.2 Recommendations

In view of the conclusions arrived at in this study, the following recommendations are made:

1. It is recommended that Parliament should enact a law that will govern the substantive and procedural aspects of judicial review in Zambia. Such law should allow for, "Public Interest Litigation." The best approach would be an amendment to the High Court Act,¹ to provide for a "Zambian Order 53."
2. It is further recommended that section 10 of the High Court Act² should be amended, so that recourse to judicial review will no longer be sought from the law and practice as maybe existing in the High Court of Judicature of England. The benefit of such law is that judicial review will be tailor made to suit the social-economic challenges of Zambia. Therefore, judicial review will be more productive as a tool for attaining constitutionalism.

¹ Cap 27 of the Laws of Zambia.

² Cap 27 of the Laws of Zambia.

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