

**The Independence of the Judiciary in the Multy Party Democratic Era:**

**1991 – 2008**

**BY  
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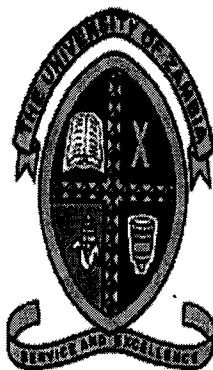
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The Independence of the Judiciary in the Multy Party Democratic Era: 1991 – 2009

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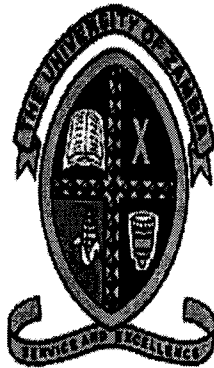
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**DATE**

**The Independence of the Judiciary in the Multy Party Democratic Era: 1991 – 2009**

**BEING A DIRECTED RESEARCH SUBMITTED IN PARTIAL FULFILMENT FOR  
THE AWARD OF A BACHELORS OF LAWS DEGREE (LLB)**

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**I, Chitabo Changa, do hereby declare that I am the author of this Directed Research, and that it is a creation of my own ingenuity. I therefore, remain accountable for the contents, error and omissions herein. Further I depose with veracity verily to the best of my Knowledge, that this work has not previously been presented in any University for academic purposes.**

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**30<sup>th</sup> January, 2009**

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### DEDICATION

To my Dad and Mum; Mr Mwila Chitabo and Mrs Pauline Kunkuta Chitabo for all the support and encouragement. To my brother Chileshe and especially my youngest sisters Mubanga and Chanda who kept me busy and on schedule by their un-ending phone calls to find out how I was and when I would be going home I say thanks. To the Kunkuta's I am grateful for the accommodation they provided. To my elder brothers Martin and Justin, I am deeply indebted for all their help especially the free transport and secretarial services provided.

To my class mates Ansberto, David, Faanaka, Jay, Lupiya, Michael, Thabo, Wallace, you were a force to reckon with. I will miss you.

I shall forever remain grateful to you.

May Almighty GOD bless you all abundantly. I love you.

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I thank ALMIGHTY GOD for being with me and seeing me through my years at University of Zambia. I also thank my supervisor Mr John P Sangwa, for all the guidance and corrections which gave this paper life and direction. I also thank my friends Mwanda, Muyumbwa & Reuben without whose interruption I would have finished earlier, but nonetheless they provided useful comments. The errors however are entirely mine

## ABSTRACT

It has been argued that mankind cannot fully realise his dignity and self-worth except in an orderly society. For order and peace to subsist, certain individuals need to be clothed with power and authority to ensure compliance with regulations which are meant to maintain order. These individuals manifests as government. The problem however is that power tends to be abused by those in whom it is vested. It therefore becomes imperative that a means of checking abuse of power be available and ways of remedying it.

In our modern society, governmental powers are divided into three among the Legislature which makes laws, the Executive enforces laws and initiates policy and the Judiciary which interprets the law and is the custodian of fundamental human rights. This division of labour is to ensure checks and balances and prevent abuse which is as already pointed out is inevitable. Thus each organ checks and balances the other ensuring accountability.

Of the three organs however, it is well accepted that the Executive branch is the most powerful and thus most likely potential violator of fundamental rights due to the peculiar position it fills, that of enforcing the law. Due to the complexity of the law, the officers vested with power may abuse it not necessarily as a result of malice. As such, there should be a means to check this abuse and remedy it. This remedy takes the form of the courts. The officers of the courts however unlike the Legislative or Executive officers do not get their mandate direct from the people but are instead appointed by the Exective. Though they are appointed by the Executive, they are not part of it but indeed expected to be independent and check its actions.

However, for the courts to effectively check the activities of the other two organs and protect fundamental human rights especially when the violations of these guaranteed rights are at the

instance of the Executive branch, they must be assured of not getting dismissed easily by the Executive branch.

Notwithstanding this cumbersome situation, it is accepted the world over that politicians, that is the Executive branch appoint judges.

The objective of this paper is to discuss the independence of the judiciary in a multy party era. It will discuss the concept of judicial independence and what factors should exist for one to assert that it exists. The paper will then outline the judiciary's role in a democracy which is very different from its role in a one party state when they interpreted party policy and just an organ of the party since government was. A discussion of separation of power and the rule of law will also follow. The research paper will investigate the structure of the judiciary and the mode of appointment of judges and whether the mode has an effect on their independence.

The paper will then delve into the weaknesses of judicial independence in our system which presents a danger to democracy and fundamental human rights. Finally, suggestions of improving judicial independence will be forwarded in the last chapter.

**LIST OF AUTHORITIES**  
**TABLE OF STATUTES REFERRED TO.**

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

Zambia Independence Act of 1964

The Constitution of Zambia of 1972

The Service Commissions Act Cap 259 of the Laws of Zambia

The Judges (Conditions of Service) Act Cap 277 of the Laws of Zambia.

The Service Commissions Act, Chapter 259 of the Laws of Zambia

The State Proceedings Act, Chapter 72 of the Laws of Zambia

Statutory Instrument No. 64 of 2002

Statutory Instrument SI No 6 of 2003

Statutory Instrument No. 58 of 2007

**TABLE OF CASES CITED.**

Barrington's Case (1830) 103.

Chitala v Attorney General [1995-97] ZR,91(SC)

Fray v Blackburn 3B &S

Lord Abinger's Case (1843)

Miranda v Mathew Chaila (Judge of the High Court) (1985) Z.R, 193,HC

Kilbourn v Thompson (103, US, 168,21 L.E.D,377 (1881)

Mulundika v The People [1995-97] ZR,20,SC

Liversidge v Anderson [1942] AC,206



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## **CHAPTER ONE**

### **INDEPENDENCE OF THE JUDICIARY**

#### **1.0 GENERAL INTRODUCTION**

The main object of this research is to discuss the independence of the Judiciary in a democratic era from 1991 to 2008. This Chapter outlines the basic aspects of the research, these being, the introduction, statement of the problem, objectives of study, rationale and justification, research questions and methodology.

#### **1.01 Introduction**

The objective of the essay is to discuss the concept of judicial independence with particular reference to the democratic era from 1991 to 2008. To achieve this, it has been systematically split into five chapters. In chapter one the essay will identify the pillars that should exist for one to assert that judicial independence exists and then compare them with the Zambian situation. In chapter two, the paper will investigate the role of the judiciary in a democratic era and see whether it takes on a different role from the one it had in a One Party State.

The third chapter will venture into the structure of the judiciary and the mode of appointment of judicial officers and will identify certain aspects of the process which may expose judges to political pressure. The fourth chapter will point out features in our judicial system which weakens the concept of judicial independence and lastly chapter five will forward recommendations on how Judicial Independence can be strengthened.

## 1.1 Statement of the Problem

Since the advent of the democratic era, the judiciary's role is no longer that of interpreting party policy as the case was in the one party state when the ruling party controlled government and was superior to it and was even referred to as the party and its organ's. In this democratic dispensation, the ruling party is just like any other party and only involved in politics while government through its three classical organs runs the affairs of the state and the judiciary in particular interprets the law comprising the Constitution and other laws made by Parliament.

As such, the judiciary is no longer an organ of the party and thus above partisan lines but an autonomous body and not only an arm of government also but an important one in that it is also a custodian of the people's right, rights potentially violatable by the legislature and executive as they make statutes which may abrogate against constitutionally guaranteed rights and enforce laws respectively. The judiciary in this era is seen in a different light as it is viewed more independently and thus expected to be more partial and effective as it carries out its duties. The situation on the ground is however not what is expected as certain cases have shown.

Thus in **Attorney General v The Law Association of Zambia**<sup>1</sup> for instance where the constitutionality of section 16 of the State Proceedings Act was being challenged in relation to fundamental human rights. The respondent had argued that though ordinarily an injunction

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<sup>1</sup>SCZ NO. 3 of 2008

cannot be given against the state, when it concerned fundamental human rights, it could be and two authorities from the Ugandan High Court and the Constitutional Court which had granted injunctions as it concerned human rights violations were cited. The Supreme Court did not follow them and ruled that the cause was academic given the fact that the same issues were being discussed by the National Constitutional Conference (NCC). Being an arbiter, the court was expected to rule on the issues raised not refer the matter to the NCC. Here, the Judiciary acted as though they were the Executive.

Given the fact that judges are appointed by the very institution they are supposed to check, in performing their duties, they may feel they are under some obligation or that they owe their allegiance or support to the appointing authority. Thus in cases that are sensitive to the Executive, the judiciary's partiality may be tilted towards the appointing authority so as to be in good books with them and thus ultimately avoid confrontation.

It must however be pointed out that they are certain judges who decide cases as though they are the executive themselves but are clothed in judicial wear and by all means try to find for the executive not because they are afraid of confrontation but simply because they are supporters of that government in power and would be very glad to do so. That is why Lord Atkin in **Liversidge v Anderson**<sup>2</sup> said: *'some judges show themselves more executive minded than the Executive itself'*

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<sup>2</sup> (1942) AC,206

As pointed already out, the judiciary has as the custodian of the people must check the Legislature and the Executive. To perform this mammoth task, it must act without fear of favour as it applies the law such that even if a decision is against the executive, the appointing authority as it is the one that 'choose' the judges though subject of course to parliamentary ratification which has been pointed out to be a mere formality usually as the party in power controls national assembly.

Going by the doctrine of Separation of Powers which means that one organ of the government; Firstly, not interfering with another organ, Secondly, not doing the others work and Thirdly that a person not forming part of more than one organ, all in all means one organ must check the other to prevent abuse.

This check is necessary because experience has shown that every institution vested with power is liable to abuse it<sup>3</sup>. Governmental power must thus be kept in its legal bounds. Their powerful engines must not be kept running amok which results in abuse. Abuse however does not mean bad faith or malice. Governmental Departments may simply misunderstand their legal position or the law they are administering due to its complexity thus ending in mistakes been made. Abuse is therefore inevitable and that is why the law should provide a means of checking it<sup>4</sup>.

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<sup>3</sup>O. H. Philip ,Constitutional and Administrative Law.(London: Sweet & Maxwell,1978) 14

<sup>4</sup> R .Wade, Administrative Law. (London: Sweet & Maxwell, 1998) P.341

As the Judiciary performs its duty of guarding against abuse of people's rights and preventing unconstitutional laws and unreasonable orders and actions which emanate from the Executive, the judiciary inevitably comes into conflict with it. The judiciary may try by all means to avoid confrontation with the appointing authority which is the executive. They feel they owe their allegiance to the appointing authority and thus by all means possible may try to please the executive by finding in their favour.

## **1.2 Objectives**

The aim of this essay is to identify weaknesses in the current operations of the judiciary and suggest how they can be improved upon and thus enhance accountability through checks and balances.

## **1.3 Research Questions**

1. Does the Judiciary effectively check and balance the executive and legislature?
2. if so, to what extent does the judiciary check and balance?
3. Does the appointing procedure affect how judges check the executive?
4. Are judges insulated from political interference?
5. What steps have been taken to ensure the judiciary acts independently and effectively human rights violations without fear and favour even if a decision is against the executive.

#### **1.4 Rationale**

Given the fact that the Judiciary is a very important organ of government in that it performs two roles; being an arm of government and also as a custodian of people's rights, it should be empowered to effectively check the other two arms of government especially the Executive because it is the most potential violator of guaranteed rights due to its task as enforcer of the law. As such, the judiciary must be independent and freed from external influence and ensured of not being dismissed if they rule against the Executive which is the appointing authority.

#### **1.5 Study Purpose**

This research seeks to investigate the duty of the judiciary as an independent organ and ultimately a custodian of people's rights and the reality when a case is one which involves the executive arm and the ultimate decision is one which will not augur down well with the government in power. The paper thus seeks to interrogate and investigate the independence of the judiciary in the new deal government so far and submit remedial active steps to ensure an independent and effective judiciary.

#### **1.6 Methodology**

This research is a qualitative one though it will only involve desk research and some field investigations if possible by the essay will therefore try to involve primary and secondary data. Primary data will involve books, journals, newspapers and other relevant material.



## 1.7. The Concept of Judicial Independence

Though the chapter discusses the independence of the judiciary, it will only refer to judges of the High and Supreme Court who handle the bulk of politically sensitive cases which bring them in direct contact with the Executive and Legislative arms of government. Mention must however be made of the fact that even Magistrates preside over politically sensitive cases like the current plunder cases. This paper however will focus only on the officers of the higher echelons of the judiciary.

Judicial independence basically means the absence of domination or the freedom from interference by the Executive and Legislature in the judiciary's execution of their judicial functions<sup>5</sup>. Concerning independence of the Judiciary, the **Constitution by Article 91(3)** provides that:

*the Judges, members, magistrates and justices of the courts shall be independent, impartial and subject only to this Constitution and the law and shall conduct themselves in accordance with a code of conduct promulgated by Parliament<sup>6</sup> and that 'they should be autonomous..<sup>7</sup>*

The whole tenet of independence of the judiciary basically boils down to two essential points.

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<sup>5</sup> Shimba.L, 'The Status & Rights of Judges in Common Wealth Africa' (International Commission of Jurists) 1987) 68 -77

<sup>6</sup> Constitution of Zambia, Cap Art 91(2).

<sup>7</sup> Constitution of Zambia, Cap 1, Art 91 (3) .

**Firstly**, that in making judicial decisions they are subject to no authority but the law, and

**Secondly** that their terms of office and tenure are adequately secured<sup>8</sup>.

### **1.8 They are subject to no authority but the law in their exercise of Judicial Power**

The independence of the judiciary has normally been thought of as freedom from interference by legislative and executive activities in the exercise of their judicial functions. It arises from the fact that historically this independence was endangered by parliament and the executive<sup>9</sup>.

This independence implies not only that a judge should be free from government and political pressure but also from unofficial bodies within society. He must not be influenced by his own church or tribal group. As Shimba<sup>10</sup> points out he should not even be influenced by his own fellow judge, not even his wife. Added to the list is freedom from financial or business entanglements<sup>11</sup> and immunity from such system of distorting justice as bribery or approaches by litigants, friends or counsel<sup>12</sup>.

Since a judge is not supposed to be subject to any person save for the law, he is not expected to apologise to the appointing authority when a decision is against it, even if he is wrong in law in that decision. In 2003 Judge Nyangulu<sup>13</sup> after having granted the opposition an injunction to stop President Mwanawasa from appointing opposition Members of Parliament apologised to the President saying he had malaria when he delivered his judgement. Though

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<sup>8</sup>S. Shetreet, *Judges on Trial*, (New York: Wath – Holland, 1960), 1

<sup>9</sup>*Ibid.*,

<sup>10</sup> L. Shimba, "The Status and Rights of Judges in Common wealth Africa" (Lusaka and Banjul: African Jurists, 1986), 3

<sup>11</sup> *Ibid.*, 7.

<sup>12</sup> *Ibid.*, 6.

<sup>13</sup> The Post News Paper, 17 February, 2003, p1.

the judge was wrong to have issued an injunction against the President because of **Section 16 of The State Proceedings Act**<sup>14</sup> which prohibits such actions, the apology rendered should have been to his supervisor, the Chief Justice.

The independence of the judiciary however should not be misunderstood to mean judges should be independent of their surroundings and essentially divorced from society. They are part and parcel of their communities. As Harvey<sup>15</sup> puts it, they do not '*reside alone on a small island or an estate surrounded by an electric fence and then pass judgments from there*'

### 1.9 **That their tenure and terms of office are adequately secured**

As Shetreet points out, another aspect of judicial independence is about ensuring that a judge is not easily laid off.<sup>16</sup> On the removal of a judge, our Constitution provides that:

*If the President considers that the question of removing a judge of the Supreme Court or of the High Court ought to be investigated, then-he shall appoint a tribunal which shall consist of a Chairman and not less than two other members, who hold or have held high judicial office; the tribunal shall inquire into the matter and report on the facts thereof to the President and advise the President whether the judge ought to be removed from office for inability or for misbehaviour. Where a tribunal advises the President that a judge of the Supreme Court or of the High Court ought to be removed from office for*

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<sup>14</sup> Cap 71 of the Laws of Zambia.

<sup>15</sup> B.Harvey ,The Lawyer and Justice.(London: Sweet and Maxwell,1978) , 2

<sup>16</sup> Ibid.,8.

*inability, or incompetence or for misbehaviour, the President shall remove such judge from office.....<sup>17</sup>.*

As seen above, the president cannot easily fire a judge when he wants to. If he considers removing a judge, he first has to appoint a tribunal which will investigate and then advise the President whether to remove that judge or not. If they advise that he should remove, only then will the President do so. All these procedures are there to reinforce judicial independence and ensure judges are not easily removed when the appointing authority is not happy with decisions being rendered.

From the above it is clear judges must not be removed from office except for inability to perform the functions of office whether arising from infirmity of body or mind, incompetence or misbehaviour or and most importantly following laid down procedure. Thus in

**Barrington's Case**<sup>18</sup>Denman CJ said:

*it has now become a constitutional principle that no judge should be removed from his situation unless a clear charge of maladministration could be made out against him.*

Kunda<sup>19</sup>points out that it is universally accepted that to be independent of the Executive, a judge must be secure from the risk of dismissal by the government of the day. This concept of Judicial Independence ensures a judge is only removed for specific grounds and by means of an adequate procedure. The mechanism for removal and discipline of judges are of vital

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<sup>17</sup> Art 98 (3-5) Para (a-b)

<sup>18</sup> [1830] 103,965,

<sup>19</sup> G.Kunda , "The Zambian Judiciary in the 21<sup>st</sup> Century", 30 Zambia Law Journal (1998) :29-50.

importance to the independence of the judiciary. It follows that the removal and discipline of judges if not subject to proper safe guards is likely to result in greater mischief and abuse<sup>20</sup>.

The Chiluba government by the Constitution of Zambia (Amendment) Bill<sup>21</sup> attempted to empower the President to dismiss judges for gross misconduct without setting up a judicial tribunal. The Law Association of Zambia, the Labour Movement and other interest groups vigorously protested until the Bill was withdrawn. Nwabueze<sup>22</sup> points out that:

*it seems an Act which is directed solely and exclusively towards the court like reducing their powers or reversing a specific judgement and an order made thereon is an inference with judicial power and thus void.*

In order that judges may effectively assert themselves as ultimate guarantors of individuals' rights, they need to be assured of their security in their job. They must not only be entitled to enjoy certain rights and safeguards while holding office, these safeguards if possible must be constitutionally enshrined.<sup>23</sup> It must be pointed out that discipline and removal of judges is one of the most cardinal elements in preserving the independence of the Judiciary. If politician's are without legal fetters in removing judges they may do so for whatever reason they deem fit as the situation was under the Ghanaian Constitution of 1964 where judges

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<sup>20</sup> S.Shetreet, Judges on Trial.(New York: Wath – Holland,1960) ,5

<sup>21</sup> No.17 of 1996

<sup>22</sup> B.O.Nwabueze , Judicialism in Commonwealth Africa.(London: Hurst & Co,1978) , 225

<sup>23</sup> L.Shimba , "The Status and Rights of Judges in Common wealth Africa"(Lusaka and Banjul:African Jurists,1986) ,7

could be removed at the president's discretion, then as Shimba<sup>24</sup> asserts “*everything the rule of law stands and seeks to preserve is thrown abroad almost overnight*”.

Though the long standing democratic traditions in nations like Britain and United States of America plus the force of political conventions prevent any government to arbitrarily dismisses a judge in these developed democracies, in the newer states of Africa however which obviously lack a democratic tradition as to the respect for independence of the judiciary, it is submitted they require express constitutional provisional safeguards against removal<sup>25</sup>.

Another safeguard is that a judge's office cannot be dissolved while he is still occupying that office. This is because another way of getting rid of judge's is simply to make them redundant by dissolving their office.

Thus **Article 94 (5)** provides that “*the office of Chief Justice, Deputy Chief Justice or of Supreme Court Judge or puisne judge shall not be abolished while there is a substantive holder thereof*”<sup>26</sup>. Judges also have statutory ages of retirement and can only retire then.

Judges in Zambia whether High Court or Supreme Court vacate that office on attaining the age of sixty-five years<sup>27</sup>.

Notwithstanding, the President “*may permit a judge of the High Court in accordance with the advice of the Judicial Service Commission, or a judge of the Supreme Court, who has*

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<sup>24</sup>Ibid.,11.

<sup>25</sup> Ibid.,13.

<sup>26</sup> Art(s) 92(3) and 94(5)

<sup>27</sup> Art 98 (1)

*attained that age to continue in office for such period as may be necessary to enable him to deliver judgement or to do any other thing in relation to proceedings that were commenced before him before he attained that age' and 'may appoint a judge of the High Court in accordance with the advice of the Judicial Service Commission or a judge of the Supreme Court, who has attained the age of sixty-five years, for such further period, not exceeding seven years, as the President may determine'<sup>28</sup>*

Though the first provision permitting a judge to conclude a matter is normally expected, the second one allowing the President to appoint for not more than 7 years can prove to be a recipe for disaster in that a judge appointed during this period may lose his independence and possibly think he owes the appointing authority a favour and thus act in a manner that pleases them even if it means sacrificing justice.

Another safeguard is that judge's salaries must be secured by an Act of made a direct charge upon the general revenue of the state and not made dependent on the Executive arm<sup>29</sup>.

Kunda<sup>30</sup> too suggests that the judge's should be charged upon a separate fund which should not require annual parliamentary discussion and approval and that it should be separated from the one providing for the payment of salaries of civil servants and members of the armed forces. Their salaries and conditions of service should not be altered to their detriment. In this way the Legislature or Executive cannot therefore bring pressure to bear on the judges by

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<sup>28</sup> Art 98 (1) (a and b)

<sup>29</sup> B.ONwabueze , *Judicialism in Commonwealth Africa*.(London: Hurst & Co,1978] ,268

<sup>30</sup> G.Kunda , 'The Zambian Judiciary in the 21<sup>st</sup> Century'', 30 *Zambia Law Journal* (1998) :29-50

threatening to reduce their salaries. Judicial remuneration should be adequately safe guarded against been used as a means of asserting control over judges.

Upon appointment, a judge should receive adequate remuneration. This not only means a sufficient sum of money to provide for a responsible living but that the that sum should be received without involving in practices which might give to improprieties<sup>31</sup>.

In Zambia however, Judge's emoluments which comprises salaries and allowances are determined and can be increased by the President who is empowered by **The Judges (Conditions of Service) Act**<sup>32</sup> to issue a Statutory Instrument (SI) to that effect. Currently, the monthly salaries for the Supreme and High Court judges stands as follows: the Chief Justice gets K141,402,252, the Deputy Chief Justice K138,557,352, Supreme Court Judges K117,493,680, High Court Judge K113,196,336<sup>33</sup>.

To top it all, judges are immune from all legal proceedings in respect of discharge of their duties. This gives them the impetus to administer the law freely and without favour. Thus in **Miyanda v Mathew Chaila (Judge of the High Court)**<sup>34</sup> it was held inter alia that *'that the public have a right to have the independence of the judiciary preserved... thus no action will lie against a judge of one of the superior courts for a judicial act, though, it be alleged to have been done maliciously and corruptly'*.

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<sup>31</sup> L. Shimba, „ ‘The Status and Rights of Judges in Common wealth Africa’”(Lusaka and Banjul: African Jurists, 1986), 14

<sup>32</sup> Section 2 and 3 of Cap 277 of the Laws of Zambia.

<sup>33</sup> S.I No. 58 of 2007

<sup>34</sup> (1985) Z.R. 193, HC



Though it is accepted that judges like other officers of the state can be transferred from one jurisdiction to another, what is unacceptable and dangerous is to transfer a judge to take up an entirely different function in government for instance taking up the appointing authority Ministerial position<sup>35</sup>. At times, a sitting judge is appointed to an executive position like Chairperson of the Electoral Commission of Zambia as Justices Florence Mambilima and Florence Mumba have been in the last two Presidential elections. Though these can be genuine cases of affording judges an opportunity to enrich their professional experience by working in a different environment, it presents itself with an inherent danger namely that unscrupulous future politicians may abuse this practice as a way of punishing an independent and courageous judge<sup>36</sup>. Kunda<sup>37</sup> adds his voice saying ‘ *this places the judge in the political spotlight and so threatens judges* ’’

It is stressed that the safeguards for the judiciary through written law if are not supported by the community and constitutional practice can be changed to meet political needs or can be flagrantly disregarded. Thus Professor De Smith writes that

*“the independence of the judiciary rests not on the formal constitutional arrangements and prohibitions but on an admixture of statutory and common law rights, public opinion, courtesy, traditions and other factors”*<sup>38</sup>.

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<sup>35</sup>L. Shimba, “The Status and Rights of Judges in Commonwealth Africa” (Lusaka and Banjul: African Jurists, 1986), 14

<sup>36</sup>Ibid., 15.

<sup>37</sup>G. Kunda, “The Zambian Judiciary in the 21<sup>st</sup> Century”, 30 Zambia Law Journal (1998): 29-50

<sup>38</sup>S. Shetreet, Judges on Trial. (New York: At Wath – Holland, 1960) 392

In like manner, Shimba<sup>39</sup> in asserting that judge's independence have to be more than just constitutional safeguards points out that:

*Constitutional provisions no matter how decorative they may appear to be are not enough. They need to be complimentated by other controlling democratic mechanisms such as the existence of an alert public opinion, an independent and vocal press, a watchful legal profession determined to confront the executive where inroad of independence of the judiciary is eminent.*

### **1.10 Analysis**

For one to assert that judicial independence exists, two question must be answered in the affirmative. Firstly does the judiciary operate freely without any outside interference from government organs or other unofficial bodies and secondly are the terms and tenure of office of judges secured? If judges operate without interference and their tenure of office is secure, one can assert that the judges are independent.

In the Zambian situation. **Article 91(3)** which charges the judicature and its officers to be independent and impartial and to be subject only to the Constitution and the law. As

Nmwabueze has pointed out, the Zambian courts were independent except in a few cases which had political intonations. Interference though difficult to detect has been nonexistent.

As to the terms of office the only hindrance is the fact that the judges' salaries are determined

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<sup>39</sup>L. Shimba, *The Status and Rights of Judges in Common wealth Africa*) 12

by the President. This it is submitted undermines the judges' independence as they have to look to the President for an increment and which he might do when he wants a particular judgment in his favour.

As to the tenure of office, it is submitted that they are adequate. To a larger extent then, it can comfortably be said that the Zambian Judges are independent and cannot easily be controlled but certain concerns like salary increments should not be handled by President alone.

### **1.12 Conclusion**

This chapter discussed the independence of the judiciary. It began by defining judicial independence and then moved to point out the threshold needed for this concept. The paper demonstrated that for the judiciary to give effect to the guaranteed rights, it has to be independent so that it can freely and without fear hold the executive and legislative arms accountable. The paper has shown that the Zambian system has loopholes in terms of guarantying judge's independence which can be improved upon.

Chapter two will discuss the impact of democracy on the judiciary, chapter three the structure and mode of appointment of the judges, chapter four will identify some of the weaknesses in our judicial system and chapter five will forward recommendations.

## CHAPTER TWO

### The Impact of Democracy on the Judiciary

#### 2.0 Introduction

This chapter will discuss the impact of democracy on the judiciary. It will begin defining democracy and then move on to show the different attitude expected of a judiciary in a democratic dispensation. It will show that the judiciary in such a period is expected to act with more vigour, independently and fairly and not have any special regard for the ruling party. It will also show that in democratic dispensations, governments usually pursue laissez faire policies and thus only play a regulatory role in economic affairs through its officers who may abuse their powers and thus have to be checked by the courts. The chapter will also discuss the rule of law and separation of powers in relation to a democratic dispensation.

Democracy simply put is the rule by the majority through their chosen representatives<sup>40</sup>. Thus through elections at regular and periodic intervals; citizens choose leaders to represent them like the President and Members of Parliament. It is these elected officials who appoint the judiciary. It is the judiciary that checks the activities the elected and holds them accountable.

Though it is said to be antithetical to the democratic theory of majority rule that an elected body should be able to frustrate the will of an elected body of men in matters of politics, and that accordingly the checking function being a countermajoritarian force is undemocratic.

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<sup>40</sup> B.O.Nwabueze, *Judicialism in Common Wealth Africa*. (London Hurst & Co, 1978) 230

This according to Nwabueze<sup>41</sup> clearly misrepresents the meaning and process of a democratic government. Democracy as he points out connotes government conducted by people as a collectivity and as individuals

Since the advent of the democratic era, the judiciary's role is no longer that of interpreting party policy as the case was in the One Party State when the ruling party controlled government and was superior to it and thus referred to government as one of its Organ's. In this democratic dispensation, the ruling party is just like any other party and only involved in politics while government through its three classical organs runs the affairs of the state. The judiciary's role is thus limited to its traditional role of interpreting the Constitution and other laws made by Parliament. That is why Shetreet<sup>42</sup> rightly observes that:

*the concept of judicial independence carries with it different meanings in different periods... The standards prevailing in society at large and the social and political environment change with the times. Therefore, the meaning given to the term judicial independence at any period must be seen within the context of the political philosophy of that time.*

The judiciary in this era is seen in a different light as it is viewed more independently and thus expected to be more partial as it carries out its duties since it does not owe its allegiance to any one party. In this era, it is expected to facilitate and harmonise a neutral

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<sup>41</sup> Ibid.,

<sup>42</sup> S.Shetreet, Judges on Trial. (New York: At the Wath Holland Publishing Co, 1960) 3

playing field for the different and many political parties. It must ensure the government and the party in power does not use its power to stifle the activities of opposition parties and thus make their operations difficult if not impossible to carry out.

This is usually done by denying them the right to assemble and express themselves freely and criticise the government in its policies and actions. At the same time, the court must also ensure the opposition does not make the governments work difficult by unduly hampering or frustrating government's efforts. The opposition may do this by dragging government to court even on non legitimate issues and thus abuse the court process.

Nwabueze<sup>43</sup> asserts that:

*the courts do not generally have a power to entertain at the instance of anyone, any matter raising a constitutional issue. Its role is not that of standing as an ever-open forum for the ventilation of all grievances that draw upon the constitution for support. Most causes lack legitimacy as they are solely aimed at wearing out the government in power.*

The court's must strike a balance and therefore allow healthy competition among the political parties by not entertaining any actions of the government and the ruling party to restrict rights like freedom of association and Assembly unjustifiably and also not to countenance opposition parties to use court process to commence frivolous actions against the

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<sup>43</sup> B.O.Nwabueze, *Judicialism in Commonwealth Africa*.(London: C Hurst & Co,1977) 50

government. The Supreme Court in **Mulundika v The People**<sup>44</sup> recognised what multi-party democracy meant and thus held that guaranteed rights should not be reduced to a mere licence by refusing citizens the right to assemble and express themselves. In a democratic society, the many political parties vying to form government must assemble and tell people what they would like to do for them.

Also, since most democracies are characterised by free market economies, government merely plays a regulatory role. The officers entrusted with these powers may abuse their powers and inevitably injure citizens. Thus every power must be checked. This check is necessary because experience has shown that every institution vested with power is liable to abuse it<sup>45</sup>. Governmental power must therefore be kept in its legal bounds. Their powerful engines must be kept from running amok<sup>46</sup>.

Abuse however does not necessarily mean bad faith or malice. Governmental Departments may simply misunderstand their legal position or the law they are administering due to its sheer complexity incurring liability and harming the public consequently. Abuse is therefore inevitable and that is why the law should provide a means of checking it<sup>47</sup>. This check assumes the form of the courts.

As such, the judiciary is no longer an organ of the party but autonomous and subject only to the constitution and other laws and thus above partisan lines. Though it is one of the arms of

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<sup>44</sup> [1995-97] ZR,20,SC

<sup>45</sup> O.H.Philip, *Constitutional and Administrative Law*.(London: Sweet & Maxwell,1978) 14

<sup>46</sup> *Ibid*

<sup>47</sup> R.Wade, *Administrative Law*. (London: Clarendon Press,1998) 341

government, it is a special and important one in that while it is part of the government, it at times appears to be a totally different body from the government especially when it is redressing human rights violations against individuals by the executive branch, usually the police service. Thus Kunda<sup>48</sup> in discussing the judiciary's '*dual nature*' quotes Lord Hailsham who points out that the judiciary is '*at one and the same time 'neutral' and as champions of the individual against the state also*'

Therefore, it is part of government but most importantly that arm of government that checks other government organs to ensure there is no abuse. Ultimately therefore, the judiciary is the sentinel, the appointed custodian of people's rights which ensures that the legislature does not make laws which derogate from the constitutionally guaranteed rights or that the executive does not violate any of guaranteed rights. In such circumstances, Shimba points out '*the court is the only bulwark in guarding against arbitrary intrusions of individuals' rights and freedoms*'<sup>49</sup>.

It is important to note that Zambia like most African nations is young in terms of democracies and are developing nations. Thus the executive arm is mostly concerned with development issues and economic growth. As such, their judiciary have inevitably found themselves operating in a very difficult situation and thus reminded to modernise as quick as possible. As

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<sup>48</sup> G.Kunda.'The Judiciary in The 21<sup>st</sup> Century' Zambia Law Journal, (1998) , 29-50

<sup>49</sup> L.Shimba .'The Status & Rights of Judges in Common Wealth Africa' (International Commission of Jurists) 1987) ,68-77.



such, the court is drawn in the forbidden arena of politics as it is expected to reflect

government policy as well in its duties. Nwabueze<sup>50</sup> thus points out that:

*in these new states there is perhaps a greater need and necessity for the court to assume a policy making role. That the task of development in which these new states are is one that requires the combined resources of both the legislature and the courts. It calls for heavy amount of legislation and for an interpretation of it that is sympathetic with its policy and objectives.*

The Executive arm of government in trying to bring about economic growth might be more than willing to trample on fundamental rights and sacrifice them at the expense of economic growth and development as they 'hurry to develop and modernise a backward society laid waste by years of colonial exploitation and neglect'<sup>51</sup>. Shimba<sup>52</sup> asserts that:

*an African government is inclined to defend its measure or action in the name of promoting national security or unity or to induce greater economic prosperity even though the measure is clearly violative of guaranteed rights and freedoms.*

Though it is clearly demonstrated that an African judiciary may be expected to be more sympathetic and thus support government policy concerning development and economic growth due to the peculiar conditions most African states are which are characterised high

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<sup>50</sup> Ibid., 1

<sup>51</sup> B.O. Nwabueze, *Judicialism in Commonwealth Africa*.(London Hurst & Co,1978) 34

<sup>52</sup> L.Shimba . 'The Status & Rights of Judges in Common Wealth Africa' (International Commission of Jurists) 1987) ,68

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poverty levels among other ills that must never be the case. Fundamental human right must never be sacrificed even for development. As such the African judiciary must nevertheless remain alert and assertive when fundamental rights are at stake.

The courts stand as the last defence and hope for the ordinary citizen when their essential rights which define them as human are threatened.

## **2.1 Rule of Law**

This means everything must be done according to the law. This therefore emphasises the supremacy of the law as opposed to the individual's own desires. A public officer must not simply do as he pleases but should be guided by the law. Even when he has discretion to act, there is nothing like unfettered discretion, no matter how wide the statute's language is framed, it has to be within the bounds of reasonableness and he must act in good faith<sup>53</sup>. More importantly, even before a public officer can exercise any power he claims to be vested with, he must point to the source of his power or authority which is sanctioned by the law. Thus it is insisted that every executive function must be backed by some force of law. A public officer must point to some legal pedigree allowing him to pursue a particular course of action<sup>54</sup>.

The Rule of Law asserts that conflicts should be resolved through law and that the courts should be the final arbiters. Government must be conducted according to law and there must

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<sup>53</sup> R.Wade, Administrative Law. (London:Clarendon Press, 1998) 210

<sup>54</sup> B.O.Nwabueze, Constitutionalism in the Emergent States.(London: Butterworths ,1973) 12

be equality before the law<sup>55</sup>. The rule of law also entails that making the executive accountable. Kunda thus says that

*‘if the rule of law is about ensuring that government keeps its promises, there must be an independent arbiter to check that promises have been kept’<sup>56</sup>.*

Since the rule of law is supreme, every person within its province must bow down to its orders. As such, even the law makers must follow what they have laid down. **Articles 1 (3) and (4)** make the constitution the supreme law of the land and nullify any law inconsistent with it binds all persons and governmental organs respectively. Thus no one arm can assert itself to be above the law and act as it pleases. Davis<sup>57</sup> asserts that ‘

*the rule of law is that principle that teaches that governments are of laws and not of men.... that not even a king is above the law, that there is a higher law against which laws and ordinances must be measured if they are to be treated as legitimate. It is the law that governs the Governor’*

President Mwanawasa during his inauguration ceremony said *‘my government will be a government of laws rather than men’<sup>58</sup>*. Mention must be made of the fact that not even the judiciary is above the law, it too must follow the law it interprets. Thus the constitution provides that ‘the Judges, members, magistrates and justices, as the case may be, of the courts

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<sup>55</sup> Inter African Network for Human Rights and Development. Zambia Human Rights Reports.(Lusaka:Afronet Publishers,2002) 6

<sup>56</sup> G.Kunda,. ‘‘The Zambian Judiciary in the 21<sup>st</sup> Century’’, 30 Zambia Law Journal (1998) :29-50

<sup>57</sup> K.Davis,Administrative Law and Government.(Chicago:West Publishing Co,1960) 14

<sup>58</sup> Inter African Network for Human Rights and Development. Zambia Human Rights Reports.(Lusaka:Afronet Publishers,2002) 15

... shall be independent, impartial and subject only to this Constitution and the law and shall conduct themselves in accordance with a code of conduct promulgated by Parliament<sup>59</sup>. Therefore in **Zambia National Holdings & UNIP v Attorney General**<sup>60</sup> the court in interpreting the powers of the High Court held that while its jurisdiction is unlimited it is not limitless since it must exercise it in accordance with the law.

No wonder Shetreet<sup>61</sup> quoting Sir Bacon writes that '*judges are lions, but yet lions under the throne being circumspect that they do not ... oppose points of sovereignty*'. Also, the maintenance of the rule of law and the preservation of the fundamental rights and freedoms of individuals is not possible unless the judge himself being the guardian of these democratic values is independent of these external pressures in their dispensation of justice. To do all this, the sentinels must be independent<sup>62</sup>.

## **2.2 Separation of Powers**

Like any democratic state its government is divided into the three traditional organs; the Executive, Legislature and the Judiciary. The Legislature is the organ that makes laws which are interpreted by the Judiciary but enforced by the Executive which also initiates policies<sup>63</sup>. The essence of the separation is to prevent any one of these organ abusing its

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<sup>59</sup> Article 91 (2)

<sup>60</sup> (1993-94) ZR, 115, SC.

<sup>61</sup> S. Shetreet, *Judges on Trial*. (New York: Wath Holland Publishing Co, 1960) 5

<sup>62</sup> L. Shimba, 'The Status & Rights of Judges in Common Wealth Africa' (International Commission of Jurists, 1987) 68 - 77.

<sup>63</sup> B.O. Nwabueze, *Constitutionalism in the Emergent States*. (London: Butterworths, 1973) 12

powers. Thus each organ checks and balances the other. Montesquieu in *the spirit of the law*<sup>64</sup> wrote that:

*Political liberty is to be found only when there is no abuse of power. But constant experience shows us that every man vested with power is liable to abuse it. To prevent this abuse, it is necessary from the nature of things that one power should be a check on another. When the legislature and executive powers are united in the same person or body, there can be no liberty, Again, there can be no liberty if the judicial power is not separated from the legislature and executive...There would be an end of everything if the same body or persons whether of the nobles or people's were to exercise all three powers.*

The doctrine of Separation of Powers entails that one organ of the government; *firstly*, not interfering with another organ, *secondly*, not doing the others work and *thirdly* that a person not forming part of more than one organ. Thus in **Kilbourn v Thompson**<sup>65</sup> it was said that:

*all powers of the government are divided into executive, legislative and judicial and it is essential to the successful working of this system that persons instructed with power in any one of the three branches shall not permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other.*

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<sup>64</sup>O.H. Phillips, *Constitutional & Administrative Law*. (London: Sweet & Maxwell, 1979)

<sup>65</sup> 103, US, 168, 21 L.E.D, 377 (1881)

Mention must however be made of the fact that insistence on a total separation of powers would bring the operations of government to a halt. Even the American system which boasts of being an example of the separated powers has its organs too interlinked at some point. The vice President sits in congress as the leader of government business. It is now accepted that the meaning of this doctrine is simply that each organ must be a watchdog over the other's activities ensuring it does not do any acts it is not authorised and thus injure the public<sup>66</sup>. Thus due to the technical character of legislation, Parliament's lack of time, **Article 80**<sup>67</sup> expressly allows delegation of parliament's law making powers to Ministers through legislation styled as statutory instruments<sup>68</sup>.

Checks and balances are therefore necessary because experience has shown that every institution vested with power is liable to abuse it<sup>69</sup>. Governmental power must thus be kept in its legal bounds. Their powerful engines must not be kept running amok which results in abuse. Abuse however does not mean bad faith or malice. Governmental Departments may simply misunderstand their legal position or the law they are administering due to its complexity thus ending in mistakes been made. Abuse is therefore inevitable and that is why the law should provide a means of checking it<sup>70</sup>.

The aspect of governmental maintenance of peace ,order,security,execution of social services that brings the executive into the closest contact with the individual. This executive or police

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<sup>66</sup> R.Wade, Administrative Law.( London :Clarendon Press, 1998) 267

<sup>67</sup> Constitution of Zambia, Cap 1

<sup>68</sup> Constitution of Zambia, Chapter 1

<sup>69</sup> O. H.Philip, Constitutional and Administrative Law.(London: Sweet & Maxwell,1978) 14

<sup>70</sup> R.Wade, Administrative Law. (London:Clarendon Press, 1998) 341

function is one facet of government that stands in most need of restraint as its exercise inevitably results in individuals rights being trampled upon. There must therefore be an independent body to check any abuse, whether intended or incidental to the exercise of that power<sup>71</sup>. This body shows itself in form of the judiciary.

The judiciary's duty is to check these two arms of government to ensure they operate within the law and also guard against abuse of people's rights and preventing unconstitutional laws and unreasonable orders being enforced and implemented.

### **2.3 Conclusion**

This chapter has looked at the changes the multi-party era brought with it and the effect it has had on the judiciary, if any. It has demonstrated that the courts have a new appearance and mandate which multi-party systems bring with them. They have recognised that the many political parties around must be allowed to talk to the electorate without interference by the government. The government must also follow the law in all it does and not just do things because it has the power to do so. Each of its three arms must check and balance the other for transparency and effective.

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<sup>71</sup> Zambia Independence Act of 1964

## CHAPTER THREE

### STRUCTURE OF THE JUDICIARY AND THE MODE OF APPOINTMENT

#### 3.0 Introduction

This chapter will deal with the structure of the judiciary and the appointment of its officers. It will focus more on the mode of appointment and whether the mode may affect the performance of their judicial duties with an interest in the role of the Judicial Service Commission. It will also consider whether the effect politicians have on the selection process of judges if any and whether they should be involved.

#### 3.1 Structure of the Judiciary

The judiciary is also addressed as the judicature<sup>72</sup>. It is provided for under **Article 91** of the Constitution and comprises the Supreme Court, the High Court, the Industrial Relations Court; the Subordinate Courts; the Local Courts; and such lower Courts as may be prescribed by an Act of Parliament<sup>73</sup>.

The Constitution further stipulates that;

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

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<sup>72</sup> Part 6 of the Constitution of Zambia.

<sup>73</sup> The Constitution of Zambia, Art 91, Paragraphs (a – f)



It does not end here but further provides that

*'the Judicature shall be autonomous and shall be administered in accordance with the provisions of an Act of Parliament'<sup>74</sup>.*

The above provisions are there to ensure that the judicial officers must be independent so that they may decide cases according to the facts before them and not be influenced by anyone.

They must also be impartial as they are umpires and should thus hear both sides and only rule in favour of the party stating the right position of the law or those adducing enough evidence.

They should not favour any party even if it is the executive or legislative arm of government of which they too are part of.

The judiciary should be reminded that it is a special organ in that it performs dual roles as an arm of government and also as a sentinel of people's rights. It is also clear that they should only be limited by the Constitution and other laws in their performance of duties.

### **3.2 Mode of Appointment of Judges**

Judges are generally appointed by the President but subject to ratification by the National Assembly. For the Supreme Court, **Article 92** provides that

*'the Chief Justice and the Deputy Chief Justice shall, subject to ratification by the National Assembly, be appointed by the President.* It further says that *'the judges of the*

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<sup>74</sup> Art 91 (2 & 3)

*Supreme Court shall, subject to ratification by the National Assembly, be appointed by the President*<sup>75</sup>.

For the High Court judges also called puisne judges, **Article 95** instructs that

*the puisne judges shall, subject to ratification by the National Assembly, be appointed by the President on the advice of the Judicial Service Commission*<sup>76</sup>.

Though the President appoints, and National Assembly ratifies, the Judicial Service Commission advises. This enormous task is thus shared among three entities which ensures accountability.

Strange as it might be that the President, who heads of one arm of government, appoints senior officers of another organ, it is now universally accepted that the task of appointing judges is performed by politicians. Even the world's oldest democracy with the strictest adherence to the separation of powers the United States of America (USA), judges of superior courts like the USA Supreme Court are appointed by the President but subject to ratification by senate<sup>77</sup>. Though there is nothing wrong, with such appointments if the particular individuals are able body lawyers, what is objectionable is appointment on political grounds<sup>78</sup>.

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<sup>75</sup> Art 93 (1 & 2)

<sup>76</sup> Art 95 (1)

<sup>77</sup> O. H Phillips, Constitutional and Administrative Law.(London: Sweet and Maxwell,1973) ,19

<sup>78</sup> B. O. Nwabueze, Judicialism in Commonwealth Africa.(London: Hurst & Co,1978) ,264

The predominant practice that cuts across Africa is that the Chief Justice is appointed by the President in his entire discretion<sup>79</sup>. This used to be the case for Zambia as well before the 1991 constitution when the One Party Constitution was in place<sup>80</sup>.

### 3.3 The Judicial Service Commission

For the High Court judges, the President appoints them but on the advice of the judicial service Commission and subject to ratification by the National Assembly. The Judicial Service Commission's existence is provided for by **The Service Commissions Act**<sup>81</sup> whose objective is '*to provide ...for the functions and powers of the Judicial Service Commission*'.

For the Supreme Court judges including the Chief Justice and his deputy, the President in his sole discretion appoints them subject of course to ratification by the National Assembly but with no input from the Judicial Service Commission. The Commission is omitted from the process of selecting Supreme Court judges unlike the High Court procedure. The Judicial Service Commission's absence exposes the judges to political pressure in that the President appoints without the Commissions' advice as to who might be a suitable candidate. The President might appoint those who might be sympathetic or easy to control. Worse, some judges are full time politicians and but in judicial clothing and as such are more executive

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<sup>79</sup> B.O.Nwabueze, *The Role of The Court in Government*. (London: at the C Hurst & Co, 1978) 13

<sup>80</sup> Art 108(1) of the 1972 Constitution

<sup>81</sup> Chapter 259 of the Laws of Zambia

minded than the Executive itself. Lord Atkin in **Liversidge v Anderson**<sup>82</sup> said '*Some judges show themselves more executive minded than the executive itself*'.

Efforts to insulate judges from political pressure resulted in the creation of the Judicial Service Commission to ensure this important task of selecting judges was not left completely in the hands of politicians<sup>83</sup>. The Judicial Service Commission is the body which scrutinises persons to be appointed to ensure the most qualified person is given the mammoth task of interpreting the law and being the sentinel of people's guaranteed rights.

The Judicial Service Commission comprises;

*the Chief Justice who is the Chairman, the Attorney-General, the Chairman of the Public Service Commission or such other member of that Commission as may, for the time being, be designated in that behalf by the Chairman of that Commission, the Secretary to the Cabinet, a judge nominated by the Chief Justice, the Solicitor-General; a member of the National Assembly appointed by the Speaker of the National Assembly, a member nominated by the Law Association of Zambia, the Dean of the Law School of the University of Zambia, and, one member appointed by the President*<sup>84</sup>.

Of its nine members, three can be said to be neutral. The remaining seven can be said to be politically inclined. It is submitted that in its current form, the Commission cannot be said to

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<sup>82</sup> (1942) AC,206

<sup>83</sup> L.Shimba 'The Status & Rights of Judges in Common Wealth Africa' (International Commission of Jurists) 1987) 68 - 77.

<sup>84</sup> Sect 3 (1) (a - J)

be politically insulated. Thus if the President really insist on appointing an individual as a nine judge, he is assured of seven votes out of nine and therefore can have his way. This is because the majority of the members are political appointees who most likely will take political considerations into account rather than the integrity and qualification of the individuals. In its current state, the requirement of advice can be said to be reduced to a mere formality with no actual significance in the selection process<sup>85</sup>.

In 2002 five judges of the high Court were appointed: Anderson Zikonda, Phillip Musonda, Charles Kajimanga, Catherine Kafunda and Royda Kaoma. The Law Association of Zambia which is represented in the Commission objected to the last three being appointed on the grounds of inexperience but the National Assembly still went ahead and ratified<sup>86</sup>. This just underscores the point that the Commission in its current form cannot adequately safeguard judges from political pressure and thus the appointing authority will appoint a person wants without much trouble.

As such, it is asserted that the effectiveness of the Judicial Service Commission lies in its composition not in its mere existence. If the majority of the members are from the executive, then the justification for its existence disappears. If the majority of the members are from the executive, it is clear such a body cannot be blind to politics<sup>87</sup>. This is not however be taken to mean that politicians should be exclude from this selection process, the politicians are the

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<sup>85</sup> Nwabueze B.O. *The Role of The Court in Government*.(London: C Hurst & Co.1978) 26

<sup>86</sup> Inter African Network for Human Rights and Development. *Zambia Human Rights Report 2002*.(Lusaka:Afronet,2002) 3

<sup>87</sup>.B.O.Nwabueze, *The Role of The Court in Government*.(London Hurst & Co,1978) 25

ones with a mandate from the people and should thus be involved as they represent the people who gave them power. It should not be understood to mean all political members should be excluded but simply that politicians must be in the minority<sup>88</sup>.

The safeguard of the Judicial Service Commission and indeed its effectiveness can only materialise when it comprises the majority of members who are neutral politically.

One can go further and argue that to entirely remove politicians from the process of appointing judges would have the effect of undermining the standing of the judges in the state and may even result in subverting the authority of judges. It is important that the judiciary wins and commands to itself the confidence of the executive arm of government because quite evidently the support of the latter is indispensable in the operation of the courts in any country. The administration of justice would adversely be affected except under conditions of mutual trust between the judiciary and other arms of government.

Political confidence in the judiciary and support can adequately be secured if politicians themselves participate in the selection of the judges. The politicians would feel the need to trust people whom they themselves selected to administer justice. The executive would psychologically be prepared to work and co-operate with the judiciary whose personnel it feels it appointed<sup>89</sup>.

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<sup>88</sup> Ibid

<sup>89</sup> L.Shimba, 'The Status & Rights of Judges in Common Wealth Africa' (International Commission of Jurists) 1987) 68 - 77.

Concerning political considerations and involvement, James<sup>90</sup> quotes a former Chief Justice of Tanzania Telford George who writes that:

*What is important is not necessarily the complete absence of any political considerations but a positive commitment to the choice of professionally competent persons of proven identity. No one should be appointed a judge for purely political reasons when he is not otherwise fitted for the office.*

The fact that judges are initially appointed by the President is not a big problem since they do not continue anymore under his authority. Once appointed; the judicial officer's stay in office is protected in that he cannot easily lose his job as he does not serve at the pleasure of the president.. Shetreet<sup>91</sup> thus asserts that:

*the way judges are appointed may affect how they perform their duties. Once appointed, it is desirable that they maintain their integrity and independence. They must be freed from all political entanglements. One characteristic required in any judiciary is 'inflexible integrity and high standards of conduct.*

The insulation from politics is even more for the judges of the High Court than the Supreme Court judges in that the President must seek the service of the judicial service commission before appointment and ratification by the National Assembly. The judges of the Supreme Court are simply appointed by the president in his sole discretion inhibited only by

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<sup>90</sup> R.James, Law & Administration in a One Part State. (Nairobi: East African Publishing., 1976) 32

<sup>91</sup> S.Shetreet. Judges on Trial. (New York: Wath Holland Publishing Co, 1960) 3

ratification by the National Assembly which the party in power controls usually like our case.

Nwabueze<sup>92</sup> points out that:

*in practice, the executive controls the legislature, that Ministers are members of the legislature and thus in a position to lead and control it giving the executive the dominance and primacy it enjoys under the system.*

Shetreet<sup>93</sup> points out that the method of appointment has a direct bearing on both the integrity and independence of the judges. He also adds that it is very difficult to predict what sort of judge a person will be. This imposes an obligation on the appointing authority to exercise a high degree of caution in the process of selection<sup>94</sup>. It is no secret that the task of being judge is not an easy one. It requires hard work. One has to read huge volumes of statutes, law reports and various literatures on the subject at hand when deciding cases. Added to this already voluminous list are the counsel's reading lists also.

Apart from this, a judge must decide very complicated and difficult cases some which test the judges' emotions and ethics. Judge must neutral politically and free from any financial problem. It is desirable though not mandatory that he leaves an upright life, preferably free from 'bad habits' like gambling or heavy drinking.

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<sup>92</sup> B.O.Nwabueze, *The Role of The Court in Government*. (London: At the C Hurst & Co, 1978) 226

<sup>93</sup> S.Shetreet, *Judges on Trial*. (New York: :Wath Holland Publishing Co, 1960) 5

<sup>94</sup>.Ibid 46



The autonomy of the judiciary as Kunda points out is supposed to strengthen its independence<sup>95</sup>. He adds that:

*in an ideal situation, the independence of the judiciary can also be encouraged by ensuring that judges are only appointed from legal practitioners of integrity and good character who have distinguished themselves in practice. That the impartial approach to cases required of a judge means that not all legal practitioners would be suitable for appointment as judges. Legal practitioners with prejudices be they political or individual cannot make good judges. Although judicial appointments are political in these once that they are made by the government of the day, every attempt should be made to maintain the independence of the judges after that appointment<sup>96</sup>.*

Thus although judges are appointed by politicians, once the appointment is made, the judges should not be seen to be corporating or pledging their allegiance to the appointing authority but must be independent from that day.

### **3.4 Conclusion**

This chapter first outlined the structure of the judiciary then moved on to discuss the mode of appointment. It was pointed out with emphasis that the mode of appointment may be a factor in the independent discharge of duties by the judiciary. The paper has stressed that the composition of the Judicial Service commission is more political than judicial and thus may

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<sup>95</sup> G .Kunda,. "The Zambian Judiciary in the 21<sup>st</sup> Century", 30 Zambia Law Journal (1998) :29-50

<sup>96</sup> G. Kunda,. "The Zambian Judiciary in the 21<sup>st</sup> Century", 30 Zambia Law Journal (1998) :29-50

render its input a mere formality as the majority of the members have serious political connections. It has shown that the Commissions' absence in the scrutinising of Judges of the Supreme Court judges is regrettable. Further, it was also asserted that once appointed, judges carry out their duties without fear of loss of jobs by constitutional safe guards as long as they conduct themselves according to the law.

## CHAPTER FOUR

### WEAKNESSES IN THE CONCEPT OF JUDICIAL INDEPENDENCE

#### 4.0 Introduction

This chapter will identify and discuss weaknesses in our judicial setup. Having identified elements which should exist for one to assert that judicial independence exists in the last chapter; this chapter will point out certain elements which weaken this concept.

#### 4.1 Weaknesses of Judicial Independence in the Zambian System

As already pointed out, judicial independence basically means non interference with the work of the judiciary. It essentially entails two things; *firstly* that there should be no interference with the work of the judiciary by other organs of government and *secondly* that judges should have a secure tenure of office and not be easily dismissed.

In our system, the President appoints both High Court and Supreme Court judges. For the Supreme Court justices including the Chief Justice and Deputy Chief Justice, the President appoints in his sole discretion but subject to ratification by the National Assembly<sup>97</sup>. Unlike the High Court process where the Judicial Service Commission advises the President on the best person, the Presidents only inhibiting factor is the National Assembly. With the National Assembly as the only check on the President, Supreme Court justices may be exposed to

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<sup>97</sup> Constitution of Zambia, Art 93 (1) & (2)

political considerations as the Executive arm of government controls the legislature as will be shown later.

National Assembly through the ratification process checks the President and ensures that only qualified judges are chosen like. This measure does not however effectively check the President. This is because the President controls the legislative arm as well. Nwabueze<sup>98</sup> points out that '*in practice, the Executive controls the Legislature in most African countries*' since Ministers are also members of the legislature and thus in a position to lead and control it<sup>99</sup>.

In Zambia this can be said to be true. This is because Ministers are held together by the principle of collective responsibility which compels them to support government policy in National Assembly or resign if they are unable to. They will thus support a Presidential appointee to be and ensure ratification. Even if by a stroke of luck it so happened that the National Assembly refused to ratify a Presidential appointee, they can only block the President twice, and the third appointee will be effective even if ratification is refused or unreasonably withheld by the National Assembly<sup>100</sup>.

A further grip which the President exercises over the National Assembly is that he nominates eight ( 8) members of parliament [MPs] to the National Assembly whose nomination he can

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<sup>98</sup> B.O.Nwabueze, *The Role of The Court in Government* (London: At the C Hurst & Co, 1978) 49

<sup>99</sup> Art 46 (2)

<sup>100</sup> Art 44 (4) (a-c)

easily revoke<sup>101</sup>, As such, these nominated MPs may by all means try to please the President and thus may do as he asks in fear of losing their jobs.

For the High Court judges, the President appoints on the advice of the Judicial Service Commission and subject to ratification by the National Assembly<sup>102</sup>. The device of instituting the Judicial Service Commission in Africa was resorted to as a way of removing purely political considerations in the appointment of judge. It was designed to ensure the responsibility of appointing judges was not totally left in the hands of the politicians but that this power be shared with experienced serving judges of the superior courts<sup>103</sup>. The involvement of the Judicial Service Commission and National Assembly is meant to be a safe guard and thus insulate judges from political pressure.

Though in theory this procedure sounds effective, in practice it is not. This is because firstly, although the Judicial Service Commission acts as a safeguard in advising the President on suitable candidates, its advice is expected to exclude political consideration when doing so. As such, it is expected *to* be a neutral and professional body. Infact, as the name suggests, the Judicial Service Commission created by **The Service Commissions Act**<sup>104</sup> is supposed to be a body that is judicial in nature. As such, the majority of its members must be judges.

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<sup>101</sup> Art 68 & Art 74 respectively

<sup>102</sup> Article 95 (1) of the Constitution

<sup>103</sup> L. Shimba, 'The Status & Rights of Judges in Common Wealth Africa' (International Commission of Jurists) 1987) 68 - 77

<sup>104</sup> Chapter 259 of the Laws of Zambia

At independence, the judicial Service Commission met this test as it was largely a judicial body comprising the Chief Justice as the chairman, a judge of the Court of Appeal then or the High Court chosen by the Chief Justice and the Chairman of the Public Service Commission as the only non judicial personnel<sup>105</sup>. However a glimpse of the current composition of the Commission shows otherwise. Our Judicial Service Commission comprises nine members<sup>106</sup> and of these nine (9), only two are judges, the Chief Justice and another judge he himself nominates.

The effectiveness of the Judicial Service Commission as Shimba<sup>107</sup> points out lies not its mere existence but in its composition. If the Commission is packed with politicians, such a body as Shimba<sup>108</sup> asserts cannot be blind to politics. If the majority are from the executive, then their justification for their existence disappears. Therefore the judicial personnel must be in the majority. The rest are politicians like the Attorney General, Solicitor General, the chairman of the Public Service Commission, the Secretary to the Cabinet, a Member of National Assembly nominated by the speaker, and one person appointed by the President himself may have political intonations may be more inclined to support the President. Even the Member of National Assembly nominated by the speaker, it has already been stressed that the President can control National Assembly. Five members who are also the majority are non judicial

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<sup>105</sup> L. Shimba, 'The Status & Rights of Judges in Common Wealth Africa' (International Commission of Jurists) 1987) 68 - 77

<sup>106</sup> Sect 3(1) (a-j)

<sup>107</sup> L. Shimba, 'The Status & Rights of Judges in Common Wealth Africa' (International Commission of Jurists) 1987) 68 - 77

<sup>108</sup> *Ibid.*

personnel but instead have links to the politics. Should a vote be carried out, the five who are in the majority may carry the day.

Its effectiveness is thus called in question. It is thus asserted that if politicians are in the majority, such a body is reduced to a rubber stamp mere formality<sup>109</sup>. The President can have little trouble getting past the Commission. To be effective, a Judicial Service Commission should have more judicial personnel and fewer personnel with political inclinations. In its current state where the majority of the members are not judicial persons, but political instead, it is submitted it is not an effective body. This may weaken the independence of the puisne judges.

Another worry is that judges after reaching retirement age of 65 years can continue on the bench on contract<sup>110</sup>. Though there is nothing wrong with the President permitting a puisne or Supreme Court judge to continue in office for such a period as may be necessary to enable him deliver a judgment or do something in relation to proceedings that were commenced before he reached retirement age as **article 98 (1)(a)** provides, trouble is sensed with **article 98 (1) (b)** which empowers the President to appoint a puisne judge or Supreme Court judge for such a further period though not exceeding seven years as determines.

Unlike paragraph a of article 98 which gives a reason why the judge is continuing despite having reached retirement age, which is that he delivers judgment or finishes any proceedings

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<sup>109</sup> B.O.Nwabueze, *The Role of The Court in Government*.(London: At the C Hurst & Co,1978) 49

<sup>110</sup> Art 98 (1)

he commenced very good reason for that matter, paragraph b of article 98 is silent and can lead to abuse and end up undermining judicial independence in that the judge, possibly think he owes the appointing authority a favour and thus act in a manner that pleases them even if it means sacrificing justice.

Another aspect of interest to the independence of the judiciary are salaries. Judge's salary increments are dependent on the good will of the president who is empowered to issue a statutory instrument to that effect by **The Judges (Conditions of Service) Act<sup>111</sup>**. This too undermines judicial independence as a President can use it as a way of controlling judges or persuading them to think they owe the appointing authority a favour.

## **4.2 Conclusion**

This chapter's aim was to identify weaknesses of judicial independence in our system. It began by stating the tenets which should be present for one to assert that judicial independence exists and then compared them with our *Zambian* set up. It has pointed certain elements that weaken the concept of judicial independence like the legislative arm of government which the Executive controls and the Judicial Service Commission whose composition favours politics.

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<sup>111</sup> Cap 277



## CHAPTER FIVE

### CONCLUSION AND RECOMMENDATIONS

#### 5.0 Introduction

This chapter will make recommendations on how the independence of the Judiciary can be enhanced..

After a discussion of the concept of judicial independence in Zambia, the following are the recommendations.

- (1). The Judicial Service Commission should have more members who are judges and fewer from the executive branch so that it is truly a judicial body. When it has more judicial personnel, it will not take into account political considerations when advising the [President on who should be appointed puisne judges. In this way it will be effective in its work since due to its professional composition.
- (2). The National Assembly should also be involved in the ratification of Supreme Court Judges to insulate them from political pressure.
- (3.) Ministers should be appointed from outside National Assembly and thus ratification should be by the law makers only.

(4.) The salaries for judges should be determined by National Assembly not the President and they should be increased whenever other constitutional office holders' salaries are being increased.

(5.) Salaries must be paid out of the consolidated fund. This means that their salaries are not subject to annual approval by the legislature must be paid as a matter of law.

(6.) Further, salary increments for judges should also include Subordinate and Local Court justices.

(7.) Public awareness on the importance of judicial independence should be carried out to educate the judicial officers themselves and the public. This is because their independence rests not only on the formal guarantees but more on accepted constitutional practices.

## **5.1 Conclusion**

This paper has delved into the concept of judicial independence. In chapter one it identified the pillars that should exist for one to assert that judicial independence exists and then compared them with the Zambian situation. It pointed out that there are some loopholes in our system. In chapter two, the paper investigated the role of the judiciary in a democratic era and pointed out that it becomes more involved in public activities and attempts to strike a balance between the competing interests of opposition political parties to hold meetings and express opinions different from the government as long as they do not call for violence.

The third chapter ventured into the structure of the judiciary and the mode of appointment of judicial officers and identified certain aspects of the process which may expose judges to political pressure. The fourth chapter identified features in our judicial system which weakens the concept of judicial independence and lastly chapter five forwarded recommendations of improving upon it.

This chapter has forwarded some recommendations which in the writers view might improve the independence of the judiciary. It has shown that this independence does not only depend on the formal safeguards but also on the accepted constitutional practices and willingness of politicians and other stakeholders.

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