



**THE INDEPENDENCE OF THE JUDICIARY AND THE CHALLENGE OF  
POLITICAL INTERFERENCE: A ZAMBIAN PERSPECTIVE**

**THE UNIVERSITY OF ZAMBIA**  
**SCHOOL OF LAW**

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**THE INDEPENDENCE OF THE JUDICIARY AND THE CHALLENGE OF  
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**An obligatory Essay submitted to the School of Law of the University of Zambia in  
partial fulfillment of the requirements for the award of the Degree of Bachelor of  
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## **DEDICATION**

To my late parents, Hon. Amos I. Linyama and Mrs. Akende I. Linyama, I owe it all to you.

## **ACKNOWLEDGEMENTS**

I wish to acknowledge my debt to all those who helped in various and varied ways in my research for and writing of this essay.

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Milingo Lungu, Benson Siame, Steven Simwanza and my room mate O'brien Mashinkila.

Lastly I wish to salute the members of the Zambian Judiciary and the people of Zambia both past and present for preserving the peace we have and continue to enjoy in this Country.

**LUBINDA LINYAMA**

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## ABSTRACT

In the years after Independence the Republic of Zambia was vibrant with politicians that had successfully liberated the nation of foreign domination. The Overzealous spirit inherent in the politicians has up to today resulted in them attempting to undermine the independence of the Judiciary. This very cardinal feature of the Rule of Law has in certain instances been sidelined in preference to political beliefs and party ideologies since independence.

The undermining of the concept of independence of the Judiciary is the focal point of this essay and it shall trace it from independence through to the era of the New Deal Administration. It is however pointed out that the type of infringement on the concept of independence of the judiciary with respect to this paper shall be biased towards political interference or that influence that is not backed by law but traces its origins from the political arena. If left unchecked, political interference in the operations of the judiciary may result in anarchy being entrenched as the dominant order of life in Zambia and the legitimacy the public have in the judiciary shall be diminished to worrying levels posing a threat to the peace that has characterized the Country since independence.

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## CHAPTER ONE

### 1.0 INTRODUCTION

*“The public have the right to have independence of the Judiciary preserved; the absolute freedom and independence of judges is imperative and necessary for the better administration of Justice”.*<sup>1</sup>

Democracy demands that the judiciary has the crucial role of being sentinels or protectors of the law amidst the various power struggles that arise in the area of governance. It is submitted that pursuant to the above assertion, the Judiciary must be free from influences that are not supported by any provision of the law. In 1937 former American President Roosevelt was termed a “Hitler” and condemned strongly for a proposal he submitted to congress for altering the size of the federal supreme court by appointing new judges on a temporal basis before the ones aged over seventy years retired. His proposal was condemned by a cross – section of the American society as they termed this as an act to “tamper” with the Judiciary clearly premised on ideas to destroy the great American tradition of Judicial independence.<sup>2</sup> The example highlighted above illustrates how important the doctrine of independence of the Judiciary is held in democratic societies. The proposal by Roosevelt was met by animosity as it was seen as a deliberate move of the executive interfering in the structure of the Judiciary.<sup>3</sup>

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<sup>1</sup> . As held by Sakala, J. in Miyanda v. Chaila (1985) ZR 193

<sup>2</sup> . Roche, J.P. (1966) Courts and Rights p. 111

<sup>3</sup> . ibid

The doctrine of judicial independence is one that has gained center stage in modern democracies and many nations world over seek to implement it. It has also become common for politicians to seek votes by stating at different fora that once elected they shall promote the independence of the Judiciary, but once elected they abandon their promises and are first to compromise the operations of the Judiciary.<sup>4</sup> The independence of Judiciary faces many challenges and this thesis shall discuss the concept with a bias towards political interference as a challenge to this very important tool towards the achievement of the rule of law.<sup>5</sup>

## 1.1 THE CONCEPT

In discussing the doctrine of independence of the Judiciary, it is important to venture into an exercise of understanding the actual meaning of this concept. Many meanings have been associated with this concept and most countries with written constitutions have a provision that seeks to give a *de jure* guarantee of the independence of the Judiciary.<sup>6</sup>

At the most basic level, Judicial independence is related to the notion of conflict resolution by a neutral third party; in other words by someone or body of persons that can be trusted to settle disputes after putting into consideration the facts and the relevant law.<sup>7</sup>

A further description of the concept is provided by the international commission of Jurists as being:

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<sup>4</sup> . Nwabueze, B.O. (1977) Judicialism in Commonwealth Africa P. 275

<sup>5</sup> . Ndhlovu, H. "The Judiciary and the Protection of Human Rights in Southern Africa." In Southern African Human Rights Review. Sept. 2002 AFRONET

<sup>6</sup> . In Zambia Article 91 of the Constitution Performs this task.

*“That every Judge is free to decide matters before him on accordance with his assessment of the facts and his understanding without any improper influence, inducements or pressures, direct or indirect from any quarter or for whatever reason.”*<sup>8</sup>

It can be seen that these two approaches to the concept of judicial independence are related in that they are both hinged on the role of a judge as a source of remedy in the event of a dispute.

However, Sir Ninan Stephen defines independence of the Judiciary by way of making reference to the state by explaining it in terms of;

*“What its precise meaning must always include is a state of affair in which Judges are free to do justice in their communities, protected from the power and influence of the state and also made as immune as possible from all other influences that may affect their impartiality.”*<sup>9</sup>

The above captioned definition provides itself as a way of explaining the doctrine of judicial independence in relation to those that wield power in a given state. It is submitted that when Sir Stephen mentions “other influences”, he is actually making himself alive to the fact that influences may originate not only from members of a

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<sup>7</sup> . Larkins C. C. “Judicial Independence and Democratizations: A theoretical and conceptual analysis.” The American Journal of Comparative Law Vol 44, 1996. P 605 – 626.

<sup>8</sup> . Sakala E. (2000) Independence of the Judiciary: Unpublished.

particular government but may arise from the public, the opposition or any interest group in society. As Professor Nwabueze emphasizes that independence of the Judiciary should not be looked at as freedom from the pressures by the legislature and the Executive but should encompass Political interference whether exerted by the Political organs of government or by the public or arising out of a judge's inclination towards a political grouping in society.<sup>10</sup> For the purpose of this work the above view held by Nwabueze shall be employed in discussing political interference. It is important to state however, that what exactly constitutes political interference with respect to the work of the Judiciary is not easily defined as it will vary from situation to situation.

## 1.2 THEORITICAL BASIS

Like any concept of law Judicial independence has developed as a result of theories expounded by Jurists whose task has included the provision of Justifications for the existence of this concept in modern day modes of governance. In his address to the law society of Zambia, in 1970, Zambia's first President Dr. Kenneth Kaunda emphasized that for a country to preserve the rule of law, Judicial Independence was a crucial element for the same.<sup>11</sup> In the USA, it is believed that judicial independence emanated from Montesquieu's theory of Separation of Powers.<sup>12</sup> From the above it is clear that scholars have forwarded a number of schools of thought that seek to provide themselves as foundations for this doctrine, it is crucial at this stage to analyze some of the theoretical justifications of the doctrine of independence of the Judiciary.

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<sup>9</sup> . Stephen N. "Judicial Independence", The Innangural Oration in Judicial Administration. The Australian Institute of Judicial Administration 21<sup>st</sup> July 1989/

<sup>10</sup> . Supra note 4 at p.280

<sup>11</sup> . Kaunda, K.D. "The Functions of the Lawyer in Zambia today" In Zambia Law Journal 1971/2 Vols

## **1.2 (1) THE RULE OF LAW**

The Rule of law is one theory of law that has received a lot of attention from various spheres of society and has led to it being identified as forming part of the political rhetoric that is prominent among African leaders. The Meaning of the phrase “rule of law” was elucidated by Professor Dicey<sup>13</sup> who provided three meanings to the term but this work shall only focus on two of these which are:-

- a. The absence of arbitrary power; No man being above the law;
- b. Equality before the law, everyman whatever his rank is subject to the ordinary law.<sup>14</sup>

It can be observed from the view held by Professor Dicey that the rule of law can only be guaranteed by way of a good court system that is free from any improper influences of any description. The status of the Judiciary is therefore a unique one and it is submitted that to avoid anarchy and ensure a proper exercise of power by those vested with the same, it is imperative that the sacredness of the judiciary be insulated from these influences.

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3 and 4. P. 3.

<sup>12</sup> . Supra note 8 at p.123

<sup>13</sup> . O’Hood Philips’ Constitutional and Administrative Law (1987) P. 36

<sup>14</sup> . Ibid

In addition, it is submitted that the independence of the judiciary is central to the effective administration of fair and Equal Justice in a democratic society and as for the rule of law, an independent Judiciary is an essential pillar for its support.<sup>15</sup> The status of the independence of the Judiciary with respect to the rule of law is one that is crucial in a democratic society evidenced by the Declaration of Delhi of 1959 which defined the rule of law as being *inter alia*, the independence of the Judiciary.<sup>16</sup> It is also contended that a judicial system infiltrated by any improper influences can not in itself be legitimate and therefore will not uphold the rights of the individual in an equitable manner. Furthermore after a look at the rule of law as expounded by Dicey, it is observed that if a Judiciary is not protected by way of insulating it from improper influences, it is very difficult for it to perform the cardinal responsibility of enforcement, promotion and protection of human rights<sup>17</sup> and it will lead to a situation of abuse as those who wield power end up influencing the outcomes of judicial decisions resulting in the break up of the very fabric of a democratic society leading to a social order dominated by anarchy.<sup>18</sup> It is regrettably an incident common in Africa to see Judges being “bought off” by dictators and the hope people had in the system providing justice is therefore abandoned.<sup>19</sup> This results in the legitimacy of the courts being brought into doubt and the only remedies open to aggrieved individuals are self-help for example violence.

## 1.2(2) SEPERATION OF POWERS

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<sup>15</sup> . Supra note 5 at p.15

<sup>16</sup> . Op cit p. 35

<sup>17</sup> . Supra note 5at p.14

<sup>18</sup> . In Nigeria in the 1960s lack of faith in the court resulted in violence being the only option open to an aggrieved person.

<sup>19</sup> . Opcit p. 13

The Doctrine of Separation of Powers is usually understood from the view propounded by Montesquieu, whose core argument was that political liberty can only be achieved where there is no abuse of power.<sup>20</sup> It follows therefore that to combat abuse of power in the governance triangle<sup>21</sup> it is necessary that one arm of government should be checked by another, leading to a separation on the exercise of power by the traditional organs of government, which are the judiciary, the Executive and the legislature. It is also contended by Philips that there can be no liberty if any two or all three of these powers are vested in one person or body.<sup>22</sup> The doctrine of separation of powers basically advocates for the prevention of tyranny caused by the conferment of too much power on any one person or body. The doctrine has received recognition in most democratic societies and bases its primary on the principle of independence of the judiciary. It is submitted that the role of the courts in interpretation of the law is cardinal towards avoiding tyranny because if the legislature or any other arm of government was to enact and have the right to interpret the same law, it would result in tyranny of the worst kind which would be equated to the experience in Nazi Germany.<sup>23</sup> In the ultimate analysis it would result in making nonsense of the whole purpose of constitutional limitation of government.<sup>24</sup> The role of the courts in this theory of law is that it is there to interpret the laws that are enacted by the legislature and enforced by the executive and

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<sup>20</sup> . O'Hood Philips P. 13

<sup>21</sup> . The triangle of governance is that which involves the three arms of government i.e. the Executive, the Legislature and the Judiciary.

<sup>22</sup> . *Opcit.*

<sup>23</sup> . Hitler's Nazi Germany led to him enacting and advising on the interpretation of laws. As per Jarman J.L. in his book, *The Rise and Fall of Nazi Germany* (1955). Pelican.

<sup>24</sup> . Nwabueze (1973). *Constitutionalism in the Emergent states*. P.15

this power lies in the ability of the courts to review acts done by the other organs of government.<sup>25</sup>

### 1.3 THE LEGAL JUSTIFICATIONS FOR INDEPENDENCE OF THE JUDICIARY

The concept of independence of the Judiciary would have no effect if it was merely based on theories raised above because it would then lack binding legal character. Most countries with written constitutions seek to insulate their Judiciaries from improper influences by designing a provision to achieve that set goal. For example, in Zambia Article 91 of the Republican constitution acknowledges that the courts outlined therein shall exercise their power in an impartial way while enjoying independence from other interferences.<sup>26</sup> In addition to the above captioned provision of the law in the case of Zambia, there is a security of tenure provided to Judges pursuant to Article 98 of the constitution.

On the international level the concept of an independent Judiciary has received recognition as evidenced by the International Covenant on Civil and Political Rights. (ICCPR) Article 14, providing for the necessity for equal treatment before the law and also advocates for the determination of matters by an independent and impartial court

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<sup>25</sup> . Ibid p. 17

<sup>26</sup> . Article 91 of the Republican Constitution, Cap 1 of the Laws.

system.<sup>27</sup> This provision illustrates how the doctrine of independence of the Judiciary has come to be accepted as a standard in all legal systems as it is suggested that if a concept or theory of law receives international recognition then it follows that members of the community of nations have accepted it as a standard for the exercise of power. Such provisions that seek to promote the existence of an independent court system are provided for in various international conventions as evidence of the importance of the concept.<sup>28</sup> It is submitted that a research on the legal validity of independence of the Judiciary will without doubt reveal that it is justified by almost all domestic systems especially those with written constitution and also by international law and it follows that it has developed from being a mere theory of law to a standard that is democratically desired.

#### 1.4 POLITICAL INTERFERENCE

What exactly constitutes political interference is not easily defined, as it will vary from scholar to scholar and also depends on the subject or topic under consideration. According to the Oxford English Dictionary, interference is to meddle with something or somebody without possessing a right to do so.<sup>29</sup>

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<sup>27</sup> . See Article 14 of the ICCPR

<sup>28</sup> . For example, Article 10 of the Universal Declaration of Human Rights, Article 17 of the African Charter on Human and People's Rights.

<sup>29</sup> Oxford English Dictionary (1979) J.A. Simpson (ed) p. 1102

On the other hand Politics is held to be the process by which authoritative decision about who gets what in society are made.<sup>30</sup> Ultimately these decisions involve government because it is through the participation of government that they are made authoritative and binding on society. Furthermore this process of decision-making involves a complex of interactions between a variety of participants, which are the civil society, the political parties, the government, the public or any interest group in society.

Having attempted to define the phrase political interference based on an understanding of the two words separately, it is observed that political interference can be understood as the meddling in the functions of a Judicial system by any of the participants that are involved in the decision making process of a society and such meddling being done outside the confines of the law. Furthermore, Professor Nwabueze asserts that independence of the judiciary should not only be confined to independence from the legislature or executive branches of government but must be extended to independence from political influence of organs of the government or the public or from a Judge's inclination towards a particular political party or interest group in society.<sup>31</sup>

The political interference alluded to above will manifest itself in various ways but prominent is the question a court is faced with which will attract such interference. Prominent on the surface of any case held to involve a political question is found when there exists no judicially discoverable standards of resolving it, the impossibility of a court system resolving it without expressing lack of the respect due to the coordinate branches of government and a textually *demons ratable* constitutional commitment of the

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<sup>30</sup> . Eisenstem James (1973) Politics and the Legal Process new York. Harper and Row p 79

<sup>31</sup> . Nwabueze (1977) P. 280

issue to a co-ordinate political development.<sup>32</sup> Furthermore, election petitions, questions of constitutional reform, party expulsions, deportations and questions that involve abuse of human rights by the state will normally attract some form of political interference on the courts determination of that particular question.

This paper is divided into four parts. The preceding Chapter has attempted to forward a legal justification for independence of the judiciary and explanation of concepts. Secondly, Chapter two focuses on the first and second Republics of Zambia, while Chapter three will analyze the performance of the 'New Deal' Administration so far and will carry out a comparison of the past experiences. Lastly, Chapter four will attempt to present solutions to the challenges identified in the Zambian experience while concluding the work.

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<sup>32</sup> . Barker V. Carr US 186 at 217 1962

## **CHAPTER TWO**

### **2.0 INTRODUCTION**

Zambia gained its independence in 1964 and in almost thirty nine years of independence has in a sense been subjected to four major constitutional changes,<sup>33</sup> but has basically maintained one institutional and organizational framework of the Judiciary. The first Republic's government maintained the court structure as left by the colonial administration but the dawn of the second republic saw some changes that this chapter will attempt to expose in summary. The third Republic saw minimal changes, which entails that the structure of the Zambian Judiciary has pleased the governments of the past two administrations and at this stage there is no clear indication that government seeks to re-structure the framework under the New Deal Administration. This part of the research will mainly focus on instances that present themselves as clear illustrations of clash of power between the judiciary and the politicians in the first, second and third Republic.

## 2.1 THE ZAMBIAN COURT STRUCTURE

When one is faced with the term “Judiciary” in the case of Zambia, he is actually being referred to the courts of the Republic of Zambia, which are at four levels , that is, the Supreme Court, the High Court, the Subordinate Courts and the Local Courts. There is however the fifth court which is a specialized court for labour and Industrial matters called the Industrial Relations Court which is at the level of the High Court as will be seen below.

The Supreme Court is at the apex of the structure of the Judiciary if presented in a pyramidal form. It is created by Article 92 of the Constitution and the Supreme Court Act, Chapter 26 of the Laws of Zambia. The Court of Appeal that existed after independence was abolished and replaced with the Supreme Court. The Supreme Court is the highest court of appeal and exercise an appellate jurisdiction except in the case of hearing petitions against the eligibility and qualification of presidential candidates in the Presidential elections where it exercises original jurisdiction. In addition the Supreme Court enjoys supervisory power over all the courts in Zambia.<sup>34</sup> At this level of the Judiciary the judges are appointed by the President in his capacity using his sole discretion only subject to parliamentary ratification.<sup>35</sup> However, it is submitted that

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<sup>33</sup> . As per Carlson Anyangwe in “The Zambian Constitutions and the Principles of Constitutional Autochthony and Supremacy”, in Zambia Law Journal, vol. 29 1997. He maintains that the change of the constitution pursuant to Act No. 18 of 1996 as being the ushering in of a new constitution.

<sup>34</sup> . Zambia Human Rights Report 1999. AFRONET P. 65.

<sup>35</sup> . Article 93 of the constitution of Zambia is elaborate in the procedure of appointment, deliberately removing or excluding other bodies from being involved in the appointments.

judges must meet the necessary qualifications and for a Supreme Court judge, *inter alia*, one must have practiced law for a minimum of fifteen years after admission to the Bar.<sup>36</sup>

Next to the Supreme Court in the hierarchy is the High Court, and, to make it efficient, the Constitution has vested this court with unlimited and original Jurisdiction except for matters where the same provisions grants exclusive jurisdiction to the Industrial Relations Court,<sup>37</sup> this same provision of the law empowers the Chief Justice of Zambia to enjoy *ex officio* status in the High Court. Judges of the High Court are appointed by the President on the advice of the Judicial Service Commission, entailing that at this level the President does not enjoy as much discretion as he does when appointing Supreme Court Judges.<sup>38</sup>

The third level of the court structure is occupied by the Subordinate Courts also known as the Magistrates Court derived from the umpires at this level who are known as magistrates. This Court is administered in accordance with the Subordinate Courts Act, Chapter 28 of the Laws of Zambia. According to the Human Rights Report for Zambia in 1999 the Subordinate Courts were labeled the busiest courts in the country.<sup>39</sup> The Magistrates of these Courts are appointed by Judicial Service Commission. The Magistrates Court hears appeals from the Local Courts and also enjoys the status of court of first instance in most matters. This aspect is necessitated by the low level degree of jurisdiction that has been left to the local courts, which are restricted to cases of African Customary Law pursuant to Local Court Act, Chapter 29 of the Laws. The Local courts

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<sup>36</sup> . Refer to article 97 of the Constitution and Chanda W. Alfred 2002 National Integrity Systems Country Study Report Zambia 2002. Transparency International P.22.

<sup>37</sup> See Article 94 of the Constitution of Zambia

<sup>38</sup> Supra note 36 at p.23

are manned by Local Court Justices who are appointed by the Judicial Service Commission.

The fifth court in Zambia, which is at the level of the High Court<sup>40</sup> is the Industrial Relations which is more of a specialized court designed to hear labour related disputes. The Industrial Relations Court was intended to be a tribunal but pursuant to changes in 1991, it was granted the status of a court.

### **2.1 (i) Removal of Judges**

A properly defined mode of removal of judges and judicial officers at the level of magistrate and local court is imperative to the preservation of their independence. If these officers are easily removed it results in them being vulnerable to compromise by the appointing authority which may also exercise the powers of removal. It is submitted that for the Local Justices and Magistrates there is no elaborate system designed to protect their tenure as opposed to High Court and Supreme Court Judges whose tenure is protected by the Constitution.

Article 98(2) of the Republican Constitution provides that a Superior Judge may be dismissed only for inability to perform the functions of office, whether arising from infirmity of body or mind, incompetence or misbehavior. Additionally such dismissal can only be effected after a judicial tribunal is established as required by this provision.

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<sup>39</sup>. Zambia Human Rights Report, 1999 by AFRONET.

## 2.2 THE FIRST REPUBLIC: THE EARLY CONFRONTATIONS

Upon ascending to power in 1964, Dr Kaunda President of Zambia gave an elaborate account of his intentions with respect to the Judiciary by saying;

*“The Independence of the Judiciary is something which we ourselves need no one to remind us of. We respect this. We also intend to use in this country an independent Judiciary as a mirror from which government will be able to find out whether or not itself is behaving properly. This is being said with all sincerity which one can command.”<sup>41</sup>*

This statement clearly summarized the concept of independence of the Judiciary and it was well spoken, coming from a politician it is important to check the practicality of the statement.

One of the first confrontations between executive and Judicial powers arose in the case of Banda v. Ottino (1967),<sup>42</sup> where a member of the then ruling United National Independence Party (UNIP) had been sentenced to one year imprisonment for contempt of court. The President in exercising his prerogative powers pardoned the convict whilst making utterances that undermined the rule of law. This attracted resentment of the whole act from the High Court judges who termed it as political interference. The

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<sup>40</sup> . Pursuant to the 1991 Constitution the IRC and the High Court are placed at the same level in the hierarchy of the court system in Zambia and this has continued in the current legal regime.

<sup>41</sup> In his speech to the nation on the role of the Judiciary in November 1964. National Archives of Zambia.

<sup>42</sup> . (1967) High Court. Unreported.

president quickly responded by issuing a statement that contained a form of assurance that he was in favour of the independence of the Judiciary. It is however submitted that the action of pardoning the convict was done within the confines of the law. What should be condemned is the fact that an offence of contempt should not be undermined because it has the effect of ensuring that the public respect the courts and matters therein. Furthermore, the role taken by the judges in the matter exhibited some form of dedication to the very important concept of independence of the Judiciary and it showed that they were not ready to be interfered with. The Constitution does not have a criterion for presidential pardons, so that any offence can be pardoned by the President in exercise of his prerogative powers.<sup>43</sup>

The assurances made by Dr. Kaunda as a result of the case of Banda v. Ottino came to be tested in the case of Silva and Freitas v. The People (1969)<sup>44</sup> where two Portuguese soldiers illegally entered Zambia and were arrested and charged. They were convicted by a Zambian African Magistrate to two years imprisonment (in default) of a K200 fine each for illegal entry into Zambia. In exercising the High Court's power to review, Justice Evans expressed shock at the severity of the sentence and took the view that it was a manifestly excessive sentence in respect to the triviality of the case. He quashed the decision and public indignation followed this especially from the party ranks.<sup>45</sup> Dr. Kaunda called the decision a "political" decision, suggesting that the judge a European had deliberately set free his fellow Europeans. The President requested an explanation

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<sup>43</sup> Article 59 of the Republican Constitution.

<sup>44</sup> (1969) ZR 121

<sup>45</sup> Nwabueze, B. O (1977) *Judicialism in Commonwealth Africa* P. 278

from the Chief Justice.<sup>46</sup> However, then Chief Justice Skinner supported the judge and ruled out in his explanation the presence of political interference. The crisis was worsened by UNIP members demonstrating at the High Court building carrying placards which were cursing Skinner, calling him a racist and judges had to barricade themselves in chambers.

Soon after the incident Skinner left the country ostensibly on leave. A week later President Kaunda issued “a mild” apology for the incident and reiterated his commitment to the independence of the Judiciary.<sup>47</sup> The apology notwithstanding, other judges accelerated their retirements. It can be seen here that the judges stood together to fight the interference brought about by the public’s notion that because the judges were European that decision was based on political grounds (motivated by the concept of racial domination). It was a clear assault on the judiciary and a case of lack of appreciation of expatriate judges at a time when the nation was merely “tired” of the presence of the whites. According to Nwabueze Chief Justice Skinner issued a resignation notice three months later and actually never came back to Zambia. The President ordered a censure of the demonstration and announced the government’s intention to Zambianise the Judiciary.<sup>48</sup> To this effect steps were taken to achieve this goal and later in the year the constitution was amended, reducing from seven to five years the qualifying period of post call experience necessary for appointment to the High Court bench.<sup>49</sup> In 1970 the first Zambian judge was appointed.

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<sup>46</sup> . Ibid

<sup>47</sup> . Ibid

<sup>48</sup> . Ibid

<sup>49</sup> . Ibid

### **2.3 A TEST FOR THE JUDICIARY: THE INTRODUCTION OF THE ONE PARTY SYSTEM IN ZAMBIA**

Kaunda and UNIP enjoyed a firm grip on the politics of the nation at least until the general election of 1968 when African National Congress (ANC) led by Nkumbula was becoming a dominant opposition with its leader assuming the role of leader of the opposition in the House.<sup>50</sup>

Additionally Simon Mwansa Kapwepwe broke away to form the United Progressive Party (UPP) leaving UNIP exposed as he took with him some veteran Politicians.<sup>51</sup> Initially Kaunda spoke of introducing a one party system of course with the full consent of all parties concerned but this democratic spirit was diminished by the vibrant opposition UNIP was facing leading to the president opting to introduce the one party state in Zambia unilaterally.<sup>52</sup> Upon his announcement on 25<sup>th</sup> February 1972 that the future constitution was to be based on a one party system and further appointing of a commission of inquiry to set out modalities of the same, Kaunda was not going to bow down to any pressure to reverse this decision. However, Nkumbula petitioned seeking a declaration from the High Court to the effect that the introduction of a one party state was “likely” to infringe some fundamental rights guaranteed to the petitioner by the constitution as it existed at the time, that is, the rights to assemble freely and associate

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<sup>50</sup> . Lawrence Zambia, “Two Test Cases as to the Constitutionality of the Introduction of a One Party State Contrasted” in Zambia Law Journal Vol. 13 1981 Pp 45 – 46.

<sup>51</sup> . Ibid P. 55

<sup>52</sup> . Ibid P. 46

with other persons as a leader of the opposition, *inter alia*, were threatened.<sup>53</sup> The court was faced with a lengthy argument for the petitioner but ultimately the court held that the petitioner was not at liberty to oppose the introduction of the one party state by submitting to the commission of inquiry because it was not within the scope of its mandate to establish whether or not to introduce the system but that the petitioner was free to put forward his opposition to setting up a one party state in public if he so desired.<sup>54</sup> Based on the Judgment of the High Court the petitioner appealed to the court of Appeal where arguments were more forceful for the petitioner but most important to this essay is the argument that the proposed dispensation would result in the infringement of fundamental freedoms of the petitioner. The court of Appeal held that no application could be brought under the enforcement provision (Article 28(5)) on the grounds that a right was likely to be contravened by reason of proposals.

It was very interesting to note that Baron J.P. remarked that;

*“....it is unthinkable to suggest that the government of a country elected to run an ordered society is not permitted to impose whatever constitutional restriction on individual liberties it regards as necessary to enable it to govern to the best advantage for the benefit of the society as a whole”.*<sup>55</sup>

It can be deduced from the above captioned thought of the court that they were not ready to rule against the government. The court had no choice except to find some way out of the controversy by putting up some learned arguments and rationalizations to justify its

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<sup>53</sup> Op Cit

<sup>54</sup> . Ibid

<sup>55</sup> . (1978) Z.L.R. 204

findings in favour of the government.<sup>56</sup> Zimba terms this as “constructive bias” by the judiciary in favour of the government.

*The decision the courts look in the Nkumbula case was a mere legitimization of a pure political but yet arbitrary act because they merely put a legal stamp on a unilateral decision made by UNIP. This is a dangerous way a court system can pursue as it is evident from the cases of Nigeria where between 1960 and 1965 all cases that went up for judicial review in Nigeria were decided in favour of the government and naturally created the impression of political bias notwithstanding their status in law.<sup>57</sup> What resulted in the Nigerian case was that people began to feel, rightly or wrongly, that justice administered by the courts was based on extra legal consideration, particularly political interests and instead of taking their grievances to courts they began to resort to violence as a way of settling their disputes.<sup>58</sup> It is however important to mention that the maturity and docile nature of the Zambian people has for many years saved the country from violent uprising as the ones experienced else where on the continent and it is submitted that the fact that after independence the masses had great respect and trust for the leadership, they did not read through lines to gather the fact that Kaunda and UNIP had used the back door by eroding the principles of popular participation to introduce the one party state in Zambia.<sup>59</sup>*

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<sup>56</sup> . Zimba Lawrence “one Party states in Commonwealth Africa” in Muna Ndulo (ed) Law in Zambia. Nairobi. East African Publishing House P. 126.

<sup>57</sup> . Nwabueze, B.O (1984) Justification for Judicial Review of Legislation. AFRICA REGIONAL REPORT. PRESENTATION PAPER P. 2

<sup>58</sup> . In Western Nigeria in 1965 lives were lost after a court decision was thought to be based on Political Inclination of the judge. Ibid

<sup>59</sup> Supra note 55 at p.126

## 2.4 THE SECOND REPUBLIC: THE ERA OF THE PARTY

The introduction of the one party state in Zambia had its own new effects on the mode of governance but paramount was the rise of UNIP to become an institution with a concentration of power. According to Zimba the dominant role of UNIP was actually affirmed by the passing of the constitution of Zambia (Amendments) Act, No. 22 of 1975 which gave UNIP a *de jure* status as being the supreme institution in the land.<sup>60</sup> This meant that even the Judiciary and all other institutions of governance were subordinate to UNIP.

It is however submitted that the introduction of the one party state did not erode principles of dissent in the country because in 1974, the government sought to enact a bill to limit the powers of the courts but surprisingly it was met with the utmost opposition by members of parliament who were actually UNIP members.<sup>61</sup> This bill arose out of the many detentions that characterized the second Republic as a result of the prolonged state of emergency. Following a series of cases in which the court awarded heavy damages for detentions, government sought to pass the Constitution of Zambia (Amendment) Act No. 18 of 1974, which proposed to amend the enforcement provisions to provide that “no court of law shall make an order for damages or compensation against the republic in respect of any application for redress arising from anything done under or in the execution of any restriction or detention order signed by the president”.<sup>62</sup> This proposal

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<sup>60</sup> . L.S. Zimba “The Constitution of Zambia (Amendment) Act No. 22 of 1975: The Legal Recognition of the Principle of party Supremacy’ in Zambia law journal, Vol. 12 980 P. 67

<sup>61</sup> Nwabueze B. O P 121

<sup>62</sup> . Ibid

was a result of a resolution of the party's national council of which all M.P.s were members. The party and its government" were confident that the bill would be passed but it appears that the time between the National Council meeting and the parliamentary debates gave M.P.s a sudden moment of realization as to the danger of passing such legislation and M.P.s submitted that the proposed bill was an erosion of the rule of law and it purported to strip the courts of its power to provide remedies for aggrieved persons.<sup>63</sup> The Bill was as a result withdrawn and amended to have a proviso giving the court power to award damages for claims arising from physical or mental ill-treatment during such detentions.

Furthermore, it is important to note that the Zambian judiciary should be saluted for standing up to provide remedies during the second Republic because the courts were working under a difficult environment characterized by a state of emergency dominated by detentions of all kinds and a political party that was more supreme than any other organ and was from a *de facto* point of view at the same level as the Republican constitution.<sup>64</sup>

Among the many detentions of the Kaunda Era the author submits the case of Chipango and Others v. The People,<sup>65</sup> as it gives both sides of the coin with respect to the

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<sup>63</sup> . Parliamentary Debates, Hansard No. 36 of 23<sup>rd</sup> July – 2 August 1974, Column 467.

<sup>64</sup> . The UNIP Constitution was appended to the Republican Constitution to give it a Supreme touch but this idea had no legal implication on the law. Refer to Supra note 58 for the Act giving UNIP it's supremacy

<sup>65</sup> . (1978) Z.R. 304

Independence of the courts. Chipango happened to be an opponent of UNIP<sup>66</sup> and in this case the accused persons were charged with treason on grounds that they were preparing to overthrow the government by unlawful means. The High Court Convicted them and sentenced them to death. Despite the political overtones of the case in form of pressure from cadres,<sup>67</sup> the supreme court unanimously quashed the convictions and set aside the death sentences while stressing that the decision of the lower court was based on unsatisfactory evidence and the enthusiasm of the police shown by their use of violence revealed that the conviction was based on superior orders and not the law.<sup>68</sup>

In another case the government sought to be immune from the orders of the courts by submitting that for political reasons they were immune.<sup>69</sup> This argument was struck out by the Supreme Court with Impunity and the order stood. How the practical application of the order of the court proved a futile exercise as the government did not abide.<sup>70</sup>

Politics of the Second Republic in Zambia was dominated by UNIP whose officials were gaining dominion over institutes designed to govern the country. A clear illustration can be seen in the case of Bweupe v. The Attorney General (1984),<sup>71</sup> where politics attempted to undermine the role of the Judiciary but the resultant holding asserted the position of

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<sup>66</sup> . William Chipango's problem with the government started early in 1970 when he was unlawfully detained under the preservation of public security regulations but the court nullified his detention order. See Chipango v. The A.G 1971 SCZ (CA)

<sup>67</sup> . Sakala E. (2000) P

<sup>68</sup> . The Police had no case but resorted to violent means of proving Guilt. As per Sakala (2000)

<sup>69</sup> . This submissions was made by a Permanent Secretary in the case of Shipanga v. The A.G. (1977) ZR 53.

<sup>70</sup> . The Case involved a detained SWAPO freedom fighter who was sent to Tanzania but the International Politics came into play and the Tanzanian government did not release him. As per Parker Collins. "control of Executive Discretion under Preventive Detention Law in Zambia, UN Institute for Namibia, 1980. Seminar paper. National archives of Zambia.

<sup>71</sup> . (1984) ZR 21

the Judiciary. In that case the plaintiff was a High Court Judge who delivered a ruling in open court that the UNIP special constables did not exist in law. Reacting to the ruling the Minister in charge of the special constables demanded an apology from the judge. The plaintiff brought an action for defamation and the defendant sought to rely on fair comment. It is submitted that even if fair comment was to stand, it should not be used to bring judgments of the courts into ridicule. The Chief Justice delivered the Judgment as an Ex officio and stated that a demand for an apology from a judge goes beyond the defence of fair comment and it was not feasible and trite that a member of the public could demand such an apology and the ruling was in favour of the plaintiff.<sup>72</sup> This judgment provided UNIP with a clarification on its status as a mere political party subject to the ordinary law of the land.

The idea of dragging the judiciary unnecessarily into politics was given a further illustration in the case of Miyanda v. Chaila (1985), where the applicant sought an order of mandamus to compel the judge hearing his case to expediate the matter.<sup>73</sup> It is however submitted that the Applicant felt it was an infringement on his liberties and therefore incumbent on a judge to expediate a matter to protect liberties of prisoners. This application was rejected rightly so because if granted what would have resulted is a floodgate of cases of this nature and the freedom of judges to carefully consider matters would be diminished if not completely eroded. That case clearly asserted the principle of

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<sup>72</sup> . Ibid

<sup>73</sup> . (1985) ZR 193

independence of the judiciary and to date is an authority that a judge is immune to actions based on his exercise of judicial functions.<sup>74</sup>

## **2.5 THE 1990 WINDS OF CHANGE: THE ERA OF THE 'LIBERAL DEMOCRATS'**

Towards the end of the 1980's, UNIP began to face a lot of opposition from a cross-section of Zambians. The number of discontent people country wide seriously threatened the hold that former President Kaunda and his party enjoyed and monopolized since 1973.<sup>75</sup> This was illustrated by a failed coup by Mwamba Luchembe a junior Army Officer, which despite its failure revealed that many Zambians wanted a change of government<sup>76</sup>

A series of events followed<sup>77</sup> and what resulted was a change in the political dispensation reverting the state back to a multi-party system. A strong opposition was formed and the most forceful competition for UNIP was the Movement for Multi-party Democracy (MMD) which was quite representative of people from different walks of life.

Kaunda had problems in the political arena but the situation was further worsened by the arrest of one of his sons, Kambarange, on a charge of murder. The High court convicted

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<sup>74</sup> . Sakala, J. clearly stated that Judges are deliberately made immune because they need to give judgments free from fear of being sued.

<sup>75</sup> . Mwanakatwe, John. M. (1993) End of Kaunda Era P. 193

<sup>76</sup> . Ibid Many Zambians celebrated this development and ran to the streets to show their happiness but this was shortlived

<sup>77</sup> . There were food riots, students demonstrations, strikes by workers forcing Kaunda to even abandon the referendum to determine the re-introduction as of 17<sup>th</sup> December 1990. (Mwanakatwe Pp.172 and 200).

and sentenced Kambarange to death for the offence of murder.<sup>78</sup> To this, many Zambians had felt like the Judiciary was implementing the principles of Equality before the Law.<sup>79</sup> However following an appeal by the convict, the Supreme Court acquitted Kambarange based on an amendment of the law on murder to include a provision of reduction in the sentence on the strength that there were extenuating circumstances.<sup>80</sup> By the time this acquittal was being granted by the Supreme Court, Kaunda and his party had lost the 1991 General Elections to the ruling MMD and Fredrick Chiluba had assumed the position of Head of State.

The case of Kambarange Kaunda clearly brought out the view that the position of Chief Justice in Zambia depends on how well one pleases the political cadres.<sup>81</sup> After Kambarange's release, MMD cadres staged a demonstration at state house in protest against the Supreme Court's acquittal<sup>82</sup> The cadres strongly demanded for the removal of the Chief Justice, and the Minister of Legal affairs stated that the acquittal was "rubbish."<sup>83</sup> It is not surprising that a few months later Chief Justice Silungwe left office on the very suspicious grounds that he was retiring. What should be noted here is that the Supreme Court basically interpreted the law rightly so but to the dislike of party cadres it follows that the position and fate of Chief Justice Silungwe was decided by unruly groups of party officials. It is submitted that once again politics had encroached on the Judiciary which was particularly surprising as it reveals that nothing was learned from the case of Chief Justice Skinner.

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<sup>78</sup> . See the Supreme Court decision of *Kaunda v. The People* (1990/2) ZR

<sup>79</sup> . Sakala P. 218

<sup>80</sup> . See The Penal code, Sections 200 - 204

<sup>81</sup> . The events of Skinner's removal were generally engineered by party cadres

The MMD Government was formed on the strength that the policies of UNIP which were socialist oriented were oppressive<sup>84</sup> therefore the Fredrick Chiluba led government brought a culture of capitalism and emphasized that they were going to respect principles of democracy. In his address to party cadres who staged a demonstration against the Supreme Court's decision in the Kambarange Kaunda case, Chiluba stressed the importance of an independent Judiciary<sup>85</sup> as a key feature in democratic societies but surprisingly Chief Justice Ngulube was removed and the reasons for his removal do not need an expert to know as it is clearly political.

Despite the assurances by the MMD in the Pre-election period of 1991 which among other things included the promotion of transparency and the need for an independent judiciary, the first Judicial appointments by the government are believed to have been made by the executive without consulting the Judicial Service Commission,<sup>86</sup> a clear indication that the tool of selection was political machinery. These appointments resulted in Mathew Ngulube becoming the fourth Chief Justice of Zambia.<sup>87</sup>

## **2.5 (i) THE PUBLIC ORDER ACT; THE CHRISTINE MULUNDIKA CASE**

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<sup>82</sup> . Sakala P. 289

<sup>83</sup> . Ibid

<sup>84</sup> . Mwanakatwe P. 193

<sup>85</sup> . The Weekly Post March 21, 1992

<sup>86</sup> . Sakala p. 184

<sup>87</sup> . . First it was Skinner, Doyle, Silungwe and Ngulube a clear indication that Silungwe served the longest period from about 1974 up to 1992

One of the highest profile cases of the MMD government under the Chiluba administration was the case of The People v. Christine Mulundika<sup>88</sup> which resulted in a serious shift from the government's early undertakings to respect the independence of the Judiciary. It arose out of former President Kaunda's arrest in 1995 while in the company of other UNIP officials which included Christine Mulundika hence the name of the Court case. These people were arrested and charged with the offence of unlawful assembly. They were accused of breaching the public order Act.<sup>89</sup> The case was allowed to be heard by the High Court because the accused raised constitutional issues.<sup>90</sup> The defence challenged the constitutionality of the certain sections of the Public Order Act. The High Court however, ruled that the Public Order Act was perfectly constitutional.<sup>91</sup> Kaunda however after a series of arrests of Civil rights activists was arrested on a similar offence and he appealed against the High Court's Judgment in the Mulundika case.<sup>92</sup> The Supreme Court on hearing the appeal declared the Public Order Act unconstitutional, striking out certain parts. This decision resulted in a swift response from the Legislature who passed an Amendment a few weeks later.<sup>93</sup> Chief Justice Ngulube received brutal attacks from politicians among which included the then Vice President, Brigadier – General Miyanda who described the decision of the Court as “ridiculous” and gave a statement suggestive to the notion that the Supreme Court was biased towards Kaunda.<sup>94</sup>

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<sup>88</sup> . The High Court case was HPR/11/95 (1995). Kaunda was challenging sections 5(4) and 7 for their restrictions on the enjoyment of fundamental freedoms.

<sup>89</sup> . Cap 104 of the Laws

<sup>90</sup> . Ruedisili Steve. “Zambia’s Elusive Search for a Valid Public order Act: An Appraisal “. In Zambia Law Journal. Vol. 25-28 1993-1996. Lusaka. UNZA Press P. 1

<sup>91</sup> . Times of Zambia, 9 March 1995, P3

<sup>92</sup> . Zambia Daily Mail, 19 August 1996, P. 5

<sup>93</sup> . Which was dominated by MMD M.Ps who had majority of the seats in parliament following the 1991 landslide victory in the general elections.

<sup>94</sup> . Chanda Alfred. “Zambia’s Fledgling Democracy: Prospects for the future.” In Zambia Law Journal vol. 25 – 28 – 1993 – 1996. P. 140 Ernest Mwansa even went to the extreme to suggest that Ngulube must go and so must the bench of the Supreme Court.

As if it was not enough the legislature in a maneuver to limit the powers of the courts, in 1996 included provisions in the Constitution of Zambia (Amendment) Bill which would have allowed the President to dismiss judges for “gross misconduct” without going through a Judicial tribunal.<sup>95</sup> This proposal would have precluded the courts into inquiring into the constitutionality of Acts of Parliament. However, this attempted hindrance on the principle of independence of the Judiciary failed terribly after a strong opposition from civil society, the Law Association of Zambia, the labour movement and other interest groups in society.<sup>96</sup>

The political attacks on the Judiciary persisted and can be illustrated by the case of Remmy Mushota who was Minister of Legal Affairs in 1996 and was found guilty of corruption contrary to the ministerial and parliamentary code of conduct by a tribunal composed of the chief justice and three judges. Mushota at a press conference accused the tribunal of campaigning against the MMD government.<sup>97</sup> No one responded to protect the credibility of the Judiciary which was being ridiculed by senior government officials but events that followed suggest that the president supported the attacks because, Mushota after being dropped as minister pursuant to findings of the tribunal was given another government portfolio.<sup>98</sup>

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<sup>95</sup> . Constitution of Zambia (Amendment) Act, 1996, No. 17 of 1996, Article 98 (3)

<sup>96</sup> . Oc pit. Article 91(4) of this proposed bill was to have, a limiting effect on the power of the courts in con.....the constitutionality of Acts of Parliament. This bill was similar to the proposal of 1974 which sought to limit the powers of the courts with respect to award of damages for illegal detentions. (above, footnote 61)

<sup>97</sup> . He was appointed to sit on the citizenship Board

<sup>98</sup> . He was appointed to sit on the Citizenship Board

Furthermore, in September 1996 *The Confidential*, a newspaper sympathetic to the Ruling Party and State House, published a spurious story accusing the Chief Justice of having raped a cleaner at the Supreme Court. This was designed to force the then Chief Justice Mathew Ngulube to resign from office. However, these attacks on the Chief Justice were linked to state house as the “victim” told journalists that she was “coached” to label the Chief Justice a rapist and it was alleged she actually met the president but surprising this lady did not even know the geography of the Supreme Court.<sup>99</sup> These allegations were not denied nor confirmed by the state. The government once again was mute in this issue and the Chief Justice could only be defended by the Law Association of Zambia, Magistrates and Judges and some NGOs.<sup>100</sup> The honour of the Chief Justice was brought into ridicule once again and according to Muna Ndulo, these attacks were calculated at achieving two things, firstly to intimidate the judiciary to give up its independence and not to decide according to the law and give favourable Judgments to the government. Secondly, to pressure Judges who were perceived in MMD circles as anti-Government to resign from the bench.<sup>101</sup>

As if the allegation of rape by the Chief Justice was not enough, the government unceremoniously relieved the Chief Justice Mathew Ngulube, the author of the decision in the Mulundika case, of the position of head of the Law Practice Institute.<sup>102</sup> It is submitted that the Christine Mulundika case really stirred a wave of intimidation and truly reflected the lack of respect for the principle of independence of the judiciary by the

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<sup>99</sup> . *The Post*, 20 September 1996

<sup>100</sup> . *Ibid*

<sup>101</sup> . In a letter to President Chiluba the Lavender Africa Forum, a Group of African scholars, condemned the government for harassment of Judges in Zambia. See *The Post*, 20 September, 1996.

MMD government despite their rhetoric of democracy and respect for ideal like the rule of law.

## 2.6 REMUNERATION OF JUDGES

The Judiciary has been operating under very difficult conditions, particularly with regard to funding.<sup>103</sup> The President sets salaries for High Court and Supreme Court judges, thereby enabling him to influence superior court judges.<sup>104</sup> In 1996 for example, when former president Chiluba's election as president was being challenged by the opposition, he awarded supreme court Judges two salaries increments exceeding 320 per cent within a period of nine months.<sup>105</sup> At the same time, magistrates and local court justices were denied an increment which led to a strike by magistrates and to this effect it is submitted that as outlined above the judiciary in Zambia is composed of all the courts but because the High Court and the Supreme Court handle high profile political cases, the government abuses the power to alter the remuneration of judges to gain favour. It is from such acts that a nation can lose the faith they have in a judicial system and only anarchy can manifest itself as the legal order of such a nation.

Related to the aspect of remuneration and poor conditions of service for judicial officers is their vulnerability to corruption. For example magistrates and local court justices are poorly remunerated leading to some magistrates being investigated over the years for

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<sup>102</sup> . The Post 21 March 1996. This Institution is responsible for training lawyers in the country for the purposes of practicing.

<sup>103</sup> . This is pursuant to the Judges Conditions of Service Act No. 14 of 1996.

<sup>104</sup> See Chanda Alfred (2002) National Integrity Systems Country Study Report Zambia 2002. Lusaka. Transparency International Zambia. P. 24. It is contended that the judiciary receives only 0.4 percent of the National Budget.

<sup>105</sup> . Ibid

corruption.<sup>106</sup> In addition since the end of the Chiluba Era which saw the beginning of the Levy Mwanawasa government commonly known as the “New Deal” government, it has been revealed that corruption across the country was very rampant.<sup>107</sup> Of relevance to this paper is the press report that former Chief Justice Mathew Ngulube received US\$168,000 in bribes from Chiluba over a period of three years.<sup>108</sup> This leads one to question the legitimacy and Genuiness of the decisions, that were given by the supreme court. It is quite predictable that if the Chief Justice is compromised by corruption, the resulting effect is that the whole fabric of the Judiciary is torn. An illustration of this assertion can be found in the case of William Banda v. The Chief Immigration Office and The Attorney General,<sup>109</sup> where the Supreme Court declared the applicant as a non-Zambian on the strength that he had not regularized his stay in Zambia. It is however, submitted that the applicant was a known critic of the Chiluba government and considering the New Deal administration’s move to call back Mr. Banda<sup>110</sup> who had relocated to Malawi is evidence that the supreme court’s decision was nothing more than a political manoeuvre that Chiluba’s government embarked on. However, it is a pity that the Judiciary, an institution designed to protect rights of individuals ended up as a tool to harass innocent people merely because they were political opponents of those in power.

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<sup>106</sup> . Ibid

<sup>107</sup> . A number of former top ranking government officials have been arrested and are facing charges of corruption which have been extended to the former president Chiluba.

<sup>108</sup> . The Post, June 24 2002

## CHAPTER THREE

### THE NEW DEAL ADMINISTRATION: THE ERA OF PROMISE

#### 3.0 INTRODUCTION

On 27<sup>th</sup> December 2001, Zambia held tripartite elections that saw Levy Mwanawasa being ushered into the position of President.<sup>111</sup> However, these elections were characterized by allegations of corruption, vote buying and outright confusion resulting in the legitimacy of President Mwanawasa and his new government being questioned.<sup>112</sup> The judiciary was again brought into the lime light during the 2001 tripartite elections as will be seen below.<sup>113</sup>

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<sup>109</sup> . SCZ. Judgment No. 16 of 1994

<sup>110</sup> . The Post, June 2, 2002 Front Page

<sup>111</sup> . Chanda (2002) P. 18

<sup>112</sup> . There is a presidential petition currently which was commenced by three losing candidates and at this stage i.e. almost two years the matter has not been determined.

<sup>113</sup> . There was a pre-inauguration application for an injunction to restrain the chief justice from carrying out the inauguration.

It is however important to note that despite the court case questioning his legitimacy in progress Mr. Mwanawasa has brought in a breath of new life in the area of good governance and the rule of law with his policies.<sup>114</sup> The New Deal government has a bigger task than any of the two past regimes as Chiluba's Era is coined to be one of the most heartlessly corrupt regimes in Africa.<sup>115</sup> The president's radical stance on corruption has revealed disturbing instances of abuse of office and grand corruption that saw the Chief Justice being implicated in such issues of misconduct.<sup>116</sup>

The New Deals Administration's stress on issues such as the rule of law, Zero Tolerance for corruption and other aspects of Good Governance is seen as an Era full of promise and it can only be hoped that power will not corrupt the Governors so that a complete repeat if not the worse characterizes Mwanawasa's Era.

### **3.1 THE ROLE OF THE JUDICIARY IN THE 2001 ELECTIONS.**

The courts have to inevitably be dragged on politics as they are the custodians of the law and are burdened with the role of resolving disputes of different character, inclusive of political disputes.

The fiasco in the 2001 elections resulted in the courts being involved and Chanda holds that as usual the courts took a timid role and based their findings with a clear bias towards the state and therefore was cardinal in the betrayal of the Zambian people by

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<sup>114</sup> . Chanda P. 4

<sup>115</sup> . Chanda Kabazo "The conduct of the Judiciary in the 27<sup>th</sup> December, 2001 General Elections " in Southern African Human Rights Review (2002). Lusaka Afronet P. 5

legitimizing what he terms fraudulent elections.<sup>117</sup> An illustration of the involvement of the courts in the recent tripartite elections is the instance when the results of the same were being announced and the Country was clearly convinced that there were irregularities. Aggrieved opposition leaders went to complain to the Chief Justice in his capacity as returning officer of those elections.<sup>118</sup> The Chief Justice assured the complainants that he would not declare a winner before addressing their complaint and to this Chanda asserts that this was false hope as the courts were “working” with government officials<sup>119</sup> and it is interesting that a few days later an inauguration ceremony was held without addressing these issues.<sup>120</sup>

The holding of the inauguration of President Mwanawasa basically entails that the custodian of the law (the courts) have realized that such an individual is a legitimate winner regardless of the flaws in the elections, and it is submitted by Chongwe that this is an anomaly of the law as it is difficult for the courts to declare a president who they have clothed, as being an illegitimate leader.<sup>121</sup> He further cites the example of the confusion in the counting of votes in Florida in the USA Presidential elections, as a perfect example of what the judiciary should do when there are allegations of malpractice. In this case the USA federal Supreme Court put aside its business to address the confusion in the state of Florida. This is a better way of ensuring that a candidate once declared winner and

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<sup>116</sup> . Opcit P. 24. The former Chief Justice has been replaced by Ernest Sakala to be the fifth Chief Justice of Zambia.

<sup>117</sup> . Opcit

<sup>118</sup> . Ibid

<sup>119</sup> . Ibid

<sup>120</sup> . . The inauguration went ahead after an injunction was thrown out by the High Court in the strength that the law only allowed petitions after 14 days of a winner being declared. The action of the chief justice was legally founded as an inauguration can not be stopped by a petition.

<sup>121</sup> . Roger Chongwe in an interview on Radio Phoenix on 9<sup>th</sup> April 2003. [www.rphoenix.com.20.30](http://www.rphoenix.com.20.30) hrs

president by the Chief Justice will be legitimate and will receive the full cooperation of all stakeholders in a nation.<sup>122</sup>

### **3.2 A TEST FOR THE NEW DEAL; THE CASE OF JUDGE NYANGULU**

In its quest to gain the much desired legitimacy, President Mwanawasa's government hatched a plan to involve the opposition in cabinet by appointing opposition party MPs as Ministers and Deputy Ministers, a thing which has never been experienced in the country.<sup>123</sup> Whether this is legal is subject to interpretation but Articles 47 and 49 of the Constitution do not impose restrictions on the President not to appoint opposition members. It is submitted that the action taken by the government was also designed to weaken the very vocal and firm opposition dominated by United Party for National Development which claimed victory over the alleged rigged elections of 27<sup>th</sup> December 2001.<sup>124</sup>

While the government was consulting on the mode of appointing these opposition M.Ps one of the leaders of the opposition, Godfrey Miyanda of the Heritage Party was granted an injunction by a High Court Judge a day before the president was to announce these appointments. Pursuant to this injunction Judge Nyangulu was given media coverage for such an act and it stirred a hornet's nest because despite the injunction being served on

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<sup>122</sup> . After the revelations of the ZAMTROP account payments, it is questionable as to whether Ngulube was acting legitimately or was being pushed by the pressures of the powers that be.

<sup>123</sup> . The Post, February 9 2002, front page.

<sup>124</sup> . Simuchoba Arthur "Zambia Elections: A repudiation of the ruling MMD" in Southern Africa Human Rights Review (2002) issue No. 9. Lusaka Afronet p. 11

the Attorney General, the President disregarded its existence and went ahead to appoint the opposition M.Ps to cabinet portfolios.<sup>125</sup>

It is however submitted that the injunction granted in this case was given per incurium because the State Proceedings Act in Section 16, makes the state immune from the remedy of injunction.<sup>126</sup> Despite the State Proceedings Act giving the President immunity from injunctions (prohibitive orders), the President ought to have known that the rule of law demands that the court orders ought to be abided by regardless of their validity in law. Mwanawasa ought to have halted his appointments pending the outcome of a hearing that Judge Nyangulu had set for a later date.<sup>127</sup> Mwanawasa's behaviour in the matter was an unprecedented occurrence as none of the past two Presidents had ever undermined the power of the courts in this manner. It was an act of the utmost stubbornness by the head of the state and to add on, the President attacked the judiciary at a press conference and the danger is that the masses may lose confidence in the courts, if the Head of State does not have confidence in the judges he appoints to the bench. It is submitted that after this fiasco one actually believe the assertion forwarded by the opposition that Mwanawasa has the character of a dictator who has no respect for established principles of good governance.<sup>128</sup>

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<sup>125</sup> . Opcit

<sup>126</sup> . Section 16 of the State Proceedings Act, Cap 71 of the Laws protects government from injunctions

<sup>127</sup> . Mwanawasa who is a senior Lawyer himself was alive to the operation of law but surprisingly his knowledge of the law that he used in his successful practice diminished upon being President. He even went ahead to brag that he is not amendable to court orders.

<sup>128</sup> . At an inter-party meeting, Godfrey Miyanda asserted this view and also Michael Sata was of the same view. See the Post of Friday August 1, 2003. P1.

President Mwanawasa received condemnation from a cross section of society because to add salt to injury Judge Nyangulu apologized to the president, an act that categorically undermined the aspect of independence of the Judiciary and against the oath of Judges to protect the law. Judge Nyangulu owed an apology to the Chief Justice and not to Mwanawasa. To this, the opposition in parliament questioned the competence and the general calibre of judges and further condemned the President for interfering with the operations of the judiciary while warning that reoccurrence of the same may result in anarchy.<sup>129</sup>

### 3.3 THE FUNDING TO THE JUDICIARY

The lack of adequate funds highlighted above with respect to the Judiciary is an area that continues to undermine the independence of the Judiciary in the sense that the judges or magistrates of the various courts country wide are subjected to poor conditions of service making them vulnerable to corruption or any form of bribery.<sup>130</sup>

It is submitted that in this area of the law history is repeating itself as the habit that former President Chiluba had adopted where High Court and Supreme Court judges were awarded hefty increments only when there was a crucial and highly sensitive case has continued under the New Deal Administration. In 2002 President Mwanawasa, who is facing three petitions challenging his election as president in the supreme court, awarded

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<sup>129</sup> . The Post February 20, 2003. p7 Levy Ngoma led the debate on the Judiciary without any M.P from the ruling MMD defending Mwanawasa's action.

a big salary increment to judges of the two superior courts leaving out magistrates and local court Justice together with the support staff.<sup>131</sup> What resulted in 2003 is a long strike by magistrates and workers leading to the crippling of operations of the courts.<sup>132</sup> While lamenting the effects of the strike by the workers, the Chief Justice Ernest Sakala rightly noted that innocent Zambians' rights were being negatively affected by the strike action but was quick to defend the discriminatory pay rise and relied on the fact that judges' conditions of service are fixed by the constitution hence their increments.<sup>133</sup> This is a regrettable development because the chief justice as the number one judicial officer should at least sympathize with the workers especially magistrates to ensure that vulnerability to corruption is checked.

If this issue is not addressed effectively by the government, it is submitted that the implication of former Chief Justice Ngulube in grand corruption maybe a situation we will see in the Era of the New Deal government. When this paper was establishing the importance of the concept of the independence of the Judiciary,<sup>134</sup> it was contended that if a society undermines the same, the courts will lose its legitimacy resulting in individuals taking the law into their hands. A survey conducted by AFRONET that covered the whole country revealed that a majority of Zambians (72.4 percent) are of the view that the courts do not act independently in matters relating to corruption because of political interference as the major factor that has eroded judicial independence.<sup>135</sup> It can be seen

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<sup>130</sup> . Chanda (2002) P. 24

<sup>131</sup> . Ibid

<sup>132</sup> . The Post July 13, 2003. Front page column

<sup>133</sup> . Ibid

<sup>134</sup> . See above pp. 4-6.

<sup>135</sup> . AFRONET (2003). Anti – Corruption Commission (ACC) Act 1996 Reform Study Report 2003. AFRONET P. 14

that at this stage Zambians are losing faith in the courts because of corruption but still hold that political interference is still a big challenge to the courts' independence and this view may develop to encourage citizens not to resort to legal action because the political masters have a hand in the decisions being reached by the courts.

### **3.4 PUBLIC INTERFERENCE IN THE JUDICIARY: LACK OF RESPECT FOR THE COURTS**

During the second and third Republics of Kaunda and Chiluba respectively, it was not uncommon to find politicians uttering statements on issues which were before the courts and utterly showing disrespect for the Judiciary. The example of parliamentarians labeling a Supreme Court judgment as rubbish<sup>136</sup> is a clear illustration of this tendency. It is submitted that under the current New Deal Administration, the judiciary is rarely brought into disrepute by politicians and government officials. It is actually encouraging that top government officials are taking the leading role in educating the citizens on the importance of respecting the courts. For example the Republican Vice President, Nevers Mumba stressed the fact that disrespect for the courts will and can not sustain peace in Zambia.<sup>137</sup> Furthermore, the Minister of Legal Affairs and Attorney General, George Kunda has been reported urging Zambians to respect the courts and the decisions reached therein because this is a mere requirement of the rule of law and democracy.<sup>138</sup>

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<sup>136</sup> . After the Judgment in the Christine Mulundika case, a lot of M.P's including Ministers publicly condemned the judiciary and in particular the Chief Justice.

<sup>137</sup> . This was when he was asked to comment on a matter before the courts. The post, August 1 2003, front page.

<sup>138</sup> . The post, July 31, 2003 p. 3

It is however too early to tell as to how long these leaders will continue to urge and encourage the masses to respect the courts. It is submitted that so far the judiciary has not reached a decision which would raise the tempers of the powers that be. For example in the case of the Chiluba regime, it was not after the Christine Mulundika case that attacks on the judiciary became a priority for MMD leaders. In addition, in the years after independence Kaunda looked set to respect the independence of the judiciary but the case of The People v. Silva and Freitas (1968) revealed quite an opposite side of the man who seemed dedicated to respect the courts' independence. It is suggested that a clear test for the New government of Levy Mwanawasa would be tested adequately if the courts begin to acquit some of the former leaders suspected of grand corruption.<sup>139</sup> An additional test is the current Presidential Petition, which would test government's dedication to the principles of the rule of law which entail *inter alia*, respect for the decision of the courts, of course this test only to be seen if the courts rule that Mwanawasa was not legitimately elected.<sup>140</sup>

There is however, one weakness that the author has identified with the current regime. President Mwanawasa appears not to have regard for the principle of respect for the courts. He actually speaks at different fora on issues that are before the courts, which has resulted in former President Chiluba's Lawyer applying to the courts to order President to refrain from commenting on the case of the former President as such utterances are

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<sup>139</sup> . These include the former President Chiluba whose trials are actually running currently since a year and a half ago.

<sup>140</sup> . The course of action to be taken by the government will show his true stance on the principle of independence of the judiciary.

hinged on undermining the principles of fair trial.<sup>141</sup> This tendency Mwanawasa has seems to suggest that he has a very live potential to interfere in the operations of the courts. This was the case in the era of Chiluba<sup>142</sup> where the judges received attacks from politicians while he supported these acts designed to undermine the independence of the Judiciary.

### 3.5 STRENGTHENING OF WATCHDOG INSTITUTIONS

As has been highlighted above the ‘New Deal’ Administration has embarked on a cleansing mission designed to rid the country of vices like corruption and other aspects of maladministration. It is submitted that under the Kaunda era, instances of high placed corruption was not rampant and the author suggests that the implementation of the leadership code was a vital check on activities of politicians and the civil service in general.<sup>143</sup> However the trend was reversed in the Chiluba era because upon attaining power in 1992 the leadership code was scrapped and leaders were free to engage in business while holding public office.<sup>144</sup>

In the Chiluba era, the role of the Anti-Corruption Commission (ACC) was undermined evidenced by the meager funds allocated to this very important instruments in the good governance process.<sup>145</sup> However, the operations of the ACC have been improved substantially by the New Deal Administration, providing a window of hope for the future

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<sup>141</sup> . The Post, October 14, 2003. “CHILUBA ASKS COURT TO WARN MWANAWASA”.

<sup>142</sup> . The same individual who allowed his ministers and fellow politicians to comment on matters before the courts has become a victim.

<sup>143</sup> . Chanda (2002) p. 57. Chanda agrees with this notion fully.

prospects of the country and the judiciary stands to benefit because corruption is a very critical challenge to the independence of the judiciary. The case of former Chief Justice Ngulube is an event that should not repeat itself and it is hoped that the promise that the current regime has kicked off on will hold. This is a sign of the presence of political will that lacked in the Chiluba regime as Chanda asserts, the rule of law can only hold where the watchdog institutions<sup>146</sup> are adequately funded and are left to operate without undue influence from the powers that be.<sup>147</sup>

## CHAPTER FOUR

### 4.0 CONCLUSION

The picture that emerges from the findings in the preceding chapters is one that borders on the assertion that politics will always have a place in the operations of the Judiciary of Zambia but what should be considered as a crucial factor in this relationship of politics and the judiciary is the extent to which politicians influence the law being made by the

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<sup>144</sup> . Ibid

<sup>145</sup> Ibid

<sup>146</sup> . These are the ACC, the Drug enforcement Commission, The office of the Auditor General etc.

<sup>147</sup> . Chanda (2002) P. 38

courts. To support this view it is important to give the illustration of appointment of judges, which is done by the president, a pure political decision.<sup>148</sup>

Furthermore, the concentration of power in the executive in the Zambian system gives the Executive an opportunity to dominate the governing structure leading to this body having a hand in the operations of the Judiciary and the legislature. It is submitted that the executive (the President) has at its disposal the tools of oppression that can enable it to undermine the rule of law and hinder the attainment of an independent judiciary. Prominent among these tools of oppression is the President's control of the fees of the superior judges<sup>149</sup> which may be used to affect the outcomes of decisions, of course, bearing in mind that this may depend on the character of the Judge in question. However, the case of former Chief Justice Ngulube reveals that despite having a very strong immunity towards corruption, it is just about the price being offered pointing to the fact that when it comes to corruption, every man has a price. It is conceded however that the corruption being experienced currently in the country is unprecedented as in the first and second Republics, it was unheard of for a top official in government to be involved in grand corruption. It seems like the coming of the liberal democrats has brought about a new way of undermining the independence of the Judiciary. However, the consented

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<sup>148</sup> . The recommendation of the Judicial service commission are not binding on the president, therefore he can choose to ignore it. This discretion led to one eminent Lawyer in Zambia being rejected upon his application to be a judge on the strength of his association with the opposition. Mr. Lisimba left Zambia and became a judge in Botswana after the Chiluba government denied his appointment. He has since been appointed judge of the High Court by the New Deal Government. As per Judge Phillip Musonda, interview held on 10<sup>th</sup> November, 2003 at the High Court. He is past Chief Administrator of the Judiciary and is currently reading for a PhD in Law.

<sup>149</sup> . Ibid. The President controls the rate of the emoluments of judges leading to unprecedented pay increments to judges when there is a very crucial political case .e.g a presidential petition.

efforts towards the eradication of corruption embarked on by the New Deal Administration provides a glitter of hope for the future of the Judiciary in Zambia.

The role of the cadre in the decision making process in Zambia should not be underscored. It is revealed by this work that the position of Chief Justice in Zambia will to a larger extent depend on making decisions that please the party cadres,<sup>150</sup> because if the “public” as they are sometimes referred to, do not agree with a particular decision of the courts, subsequent events can lead to the “retirement” of a Chief Justice. In addition, the Zambian courts have been subject to attacks by leaders both in government and the opposition and to this, the Judiciary has been reluctant to invoke the tool of contempt proceedings against such attacks, which may undermine the principles of a free and fair trial. In addition, it is important to salute the Zambian Judiciary for its resistance to political interference and for being dedicated to the protection of the rule of law under very difficult circumstances characterized by many other challenges.

In the final analysis the solution to the problem of political interference posing a threat to the concept of independence of the Judiciary will lie in the will of individuals forming government, the will of individuals being appointed to the bench and the will of the public at large to ensure that the rule of law is preserved. As a famous American Jurist, Judge Learned Hand put it;

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<sup>150</sup> . The cadres made it a point that Skinner leaves, made sure that Silungwe is fired (“retired”) and the same calibre of people made it easy that former Chief Justice Ngulube to be retired i.e. pressure from Parliament and public indignations for the same.

*“I often wonder whether we do not rest hopes too much upon the constitution, upon laws and upon courts. These are false hopes, liberty lies in the hearts of men and women, when it dies there, no constitution, no law, no courts can save it. No constitution no law nor court can even do much to help it.”<sup>151</sup>*

In Zambia the above captioned assertion is normally referred to as “political will” and as a High Court Judge in Zambia put it, the culture of constitutionalism has not yet been embedded in the ruling elite evidenced by acts to undermine the judiciary which originate from the highest level of government and in some instances from the republican President.<sup>152</sup>

#### **4.1 RECOMMENDATION**

It is observed that the future needs of Zambia with respect to the Judiciary is a court system that is fearless, Jealously and Judiciously Guarded from interference.<sup>153</sup> To achieve this target some form of reform is required in the legal framework but Kunda holds that the country has adequate provisions in the constitution and Acts of Parliament which ensure independence of the Judiciary.<sup>154</sup> However, it is submitted that the findings of this work reveal that there are certain changes that are required if the independence of

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<sup>151</sup> . Francis Venter, Quoting Judge Learned Hand in *Constitutional Comparison, Japan, Germany, Canada and South Africa as Constitutional States* (2002). London. McMillan.

<sup>152</sup> . As per Judge Philip Musonda interview held on 10<sup>th</sup> November 2003 at the High Court. He is former Chief Administrator of the Judiciary and currently reading for a Ph.D in law.

<sup>153</sup> . Kunda George “The Zambian Judiciary in the 21<sup>st</sup> Century” in *Zambia law Journal* (1998) vol. 30 Lusaka. UNZA Press. P. 48

<sup>154</sup> . Ibid

the judiciary is to be achieved and in this regard independence from the interference of politics.

#### **4.1 (1) REMUNERATION**

As was stated above, the provision of the law that gives the president power to increase the perks of judges should be re-visited as it has in certain instances been abused to fit the desires of the ruling elite.<sup>155</sup> Zambia can borrow from the experience of India where the salaries of judges of the supreme and High Courts are determined by Parliament.<sup>156</sup> This ensures that the president does not use his control over the award of pay increments to manipulate the Judiciary as has been seen in Zambia.

Furthermore, corruption by politicians of the Judiciary has been seen as a major threat to the preservation of the independence of the Judiciary evidenced by the case of former chief Justice Ngulube's experience. It is submitted however that this seems to be a new phenomenon in the country as it was not rampant in the second Republic. It is suggested that this is necessitated by the fact that under the Kaunda Era, the government had enacted the leadership code to ensure that civil servants especially those holding high positions were kept in check by this restrictive law<sup>157</sup> which among others restricted the leadership from running businesses and also outlawed the receipt of money except their

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<sup>155</sup> . The Presidents in the Third Republic have a tendency of increasing emoluments when there is a critical political question before the courts.

<sup>156</sup> . See The constitution of India in Article 125

<sup>157</sup> . Mwanakatwe. 1994 P. 261

entitlements from the government.<sup>158</sup> It is however conceded that such a law would not be in tune with the current political and economic thought being sought by the government, but it is imperative that a mechanism be put in place to ensure that judges are monitored in their activities.<sup>159</sup> To achieve this, it is important that the watch dog institutions like the Anti-corruption commission (ACC) be well-funded and given autonomy to pursue investigations without political interference. It is further noted that to this end the 'New Deal' Administration of Levy Mwanawasa must be encouraged in the fight against corruption that has seen an increase in the funding to the A.C.C<sup>160</sup>

It is also cardinal that if the independence of the judiciary is to be achieved the conditions of service for support staff in the judiciary be improved this category of staff have the ability to affect the proper functioning of the Judiciary as they deal with court documents and the like.

#### **4.1 (2) THE CONSTITUTIONAL COURT**

As has been seen from the onset of this work, cases that raise issues of political interference are those that affect civil and political rights,<sup>161</sup> suggesting that the courts are kept busy by constitutional law cases. This assertion was recently echoed by Heritage party M.P Nedson Nzowa who observed that politicians have turned the judiciary into a

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<sup>158</sup> . see statutory instrument No. 108 of 1974, the Leadership code in section 3. (Repealed)

<sup>159</sup> . It was only after three years that Ngulube was found to be leaving beyond his means leading to his resignation.

playing field where political cases have taken center stage.<sup>162</sup> He further suggests that political parties should find avenues within their party structures to resolve disputes without involving the courts.

This paper proposes that the law must embark on reform that will see political cases being heard by a specialized court to be termed a constitutional court like in the case of South Africa, India and Madagascar.<sup>163</sup> This can also lead to the reduction in the number of cases crowding the Zambian courts resulting in the quick disposal of important cases like, the current presidential petition commenced in 2002 but is still running. A case of this magnitude, questioning the legitimacy of a president must be given priority<sup>164</sup> by a court equipped to do as in the case of Madagascar. In this case there was a dispute as to who had won the presidential elections and the constitutional court expediently heard the matter and Marc Ravalomanana was declared winner at the expense of avoiding a revolution.<sup>165</sup> It is seen that delays in the highly politicized cases raises question as to the genuineness of the outcome.

#### **4.1 (3) THE LAW OF CONTEMPT**

It has been observed in these preceding chapters that the law of contempt of court has not been used by the judiciary as a measure to deter attacks on the judiciary. The origins of

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<sup>160</sup> . The New Deal Government has lobbied for funds from donors e.g. FINNIDA recently donated US\$150,000= to fight money laundering. As per Chanda (2002) P. 60

<sup>161</sup> . This can be seen from the case of Nkumbula, the Christine Mulundika case and petitions for Elections.

<sup>162</sup> . The Post, 31 July 2003

<sup>163</sup> . These countries, constitutions provide for a constitutional court for cases arising from the constitution.

<sup>164</sup> . The case of America where the federal courts halted business to attend to an issue of malpractice in Florida is an example.

this law is hinged on strengthening the independence of the Judiciary and to ensure that court orders are obeyed and that court proceedings are not disrupted. In addition, it is an important tool to ensure that Justice is not impeded by improper comment upon litigation in process on criticism of individual judges. It is however conceded that criticism of judicial decision is lawful provided that it falls short of scurrilous abuse.

In the case in which a losing parliamentary election candidate successfully petitioned the election of the winner, Livingstone High Court Judge Munyinda Wanki<sup>166</sup> bemoaned the practice of the police of intimidating witnesses in a case that was before the courts. Judge Wanki stated that he would not hesitate to deal with anyone even the most senior law enforcement officers as he had at his disposal the law of contempt.<sup>167</sup> It is proposed at this stage that the law of contempt should be invoked as a measure to deter the public from giving statements that may undermine the principles of a free and fair trial.

#### **4.1. (4) REMOVAL OF JUDGES**

As has been highlighted above magistrates and local courts judges can be removed from office by the judicial service commission without any elaborate procedures laid down for this. It is generally easier to dismiss them than superior judges. On the contrary the Tenure of Superior Judges is protected by the constitution. Retirement age being fixed at sixty-five but the president can extend the tenure notwithstanding the fact that the Judge

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<sup>165</sup> . The Post May 7, 2002

<sup>166</sup> In the case where Sikota Wina challenged the election of Michael Mabenga in the Mulobezi Constituency

<sup>167</sup> The Post, April 26, 2002

has reached retirement age. This may compromise Judicial independence as a judge nearing retirement may wish to please the executive branch with a view of extending his tenure.

It is proposed that this particular provision of the constitution should be changed so that the president's powers to extend the tenure of a Judge are curtailed, for example, such an act to be made subject to the approval of the Judicial service commission with some input from bodies like the Law Association of Zambia (LAZ).

It is a view held by the author that Zambia has various and adequate laws that meet international standards with respect to the independence of the Judiciary and it is pointed out that reform to enhance the same would not require substantial changes except those alluded to above to achieve the Rule of law and ensure that the past instances when the Judiciary was undermined or when attempts to undermine the judiciary arose do not appear in the future.

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