

**MECHANISMS OF LAW REFORM IN A  
DEMOCRATIC SOCIETY: AN ANALYSIS OF THE  
ZAMBIAN SITUATION**

By

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## **DEDICATION**

This Obligatory Essay is dedicated to my family whose attention and guidance has enabled me to reach this far in life. In particular, it honours the memory of my late mother, Mrs. Beatrice Kwenda.

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## QUOTATION

*“...The law is like a traveller; like the traveller, it must be ready for the morrow; it must have the principle of growth...”*

Benjamin Cardozo, a former United States of America Supreme Court Judge.

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# CHAPTER ONE

## INTRODUCTION

### Definitions

In societies the world over, growth and change is a continuous never-ending process. The law, undoubtedly, is at the heart of such social change. This paper is mainly focused on the analysis of the law reform mechanism in Zambia as a country that aspires to be a democratic society. In order to appreciate the connection between law reform and democracy, it is perhaps best to first define both the concepts of law and democracy.

Various jurists, philosophers and social scientists at different stages of history have tried to define what the law is. Among the prominent of these are Thomas Hobbes, John Austin, Salmond, Savigny, Ihering and Vinogradoff. 'A law, according to **Thomas Hobbes**, is an obligatory rule of conduct, the commands of him or them that have coercive power. Similarly for **John Austin**, a law is a rule of conduct imposed and enforced by the Sovereign. But according to **Salmond**, the law is the body of principles recognised and applied by the State in the administration of justice. **Savigny** regarded law as itself subject to evolution and as no arbitrary expression of the will of the law giver. **Ihering** found the end of law in the delimitation of social interests and **Vinogradoff** saw law as a set of rules imposed and enforced by a society with regard to the attribution and exercise of power over persons and things'.<sup>i</sup>

From the above definitions of law, it can be said that although there is no precise universal definition of law, the generally accepted characteristics of law are that first and foremost; law is a political tool or technique used by a sovereign to instil compliance with the sovereign's policies; law also regulates the relationship between men and between these men and the sovereign. Disobedience of law normally leads to sanction. Highlighting the relevance of law in the day to day lives of human beings, Dr. Kaunda, former President of Zambia, once said:

*"I consider law to be perhaps the most important of all instruments of social order because without it, the whole structure of society can collapse. It determines the rights and duties of the individual in relation to other individuals and to society as a whole. It is the means by which order within society is maintained and society itself preserved".<sup>ii</sup>*

A society is a system whereby people live together in organised communities. There are different kinds of societies. As earlier mentioned, this paper is focused on a democratic society. What then exactly is a democratic society?

The genesis of literature on democracy can be traced to ancient Greece. In their literature, the Greeks of the old City States explained that for any government to be democratic, it must be represented by the people who must be responsible to the electors. Further, the writers saw democracy as being a vital way of reasoning as a society to promote the common good. Similarly, in the middle ages, the social contract philosopher

Rousseau in his book, 'The Social Contract', placed emphasis on the representative government which he referred to as elective aristocracy where the people elect those they think are most suited to run the affairs of government. It is not surprising therefore that America's fifteenth president, Abraham Lincoln, 's definition of democracy as a government of the people by the people and for the people has been universally accepted as a basic definition of this concept.

Although democracy has no rigid definition, it is clear from the above that its common features are representative government, separation of powers, universal adult suffrage, respect for human rights, free and fair elections, to mention only a few. At this point, for the purposes of this paper, it is important to discuss the relationship between law and democracy. A society will normally have laws that aspire to its ideals and beliefs. Therefore the existence of and governance by law in any society is not prima facie evidence of a democratic society. For instance, although Adolf Hitler's Reich and the former South African Apartheid government had and were governed by law, most of the laws were not democratic and thus these societies could not be referred to as democratic.

A democratic society must have democratic laws that are in line with universally accepted principles of democracy taking into account the needs of the people being governed. People's needs vary and constantly change with technological, political, economical, cultural, spiritual and other developments. Therefore, the law must also keep pace with such changes to meet people's needs at any point in time. **Benjamin Cardozo**, once a Supreme Court Judge in the United States of America, aptly stated that:

*“The law, like the traveller, must be ready for the morrow. It must have the principle of growth.”*

Zambian Legal Affairs Minister, Vincent Malambo, made a further elaboration by saying that:

*“Indeed, like a traveller, the law must have a direction, a destination, the reason for undertaking the journey and the incentive to continue what quite often is a hazardous task. In its growth, the law must simultaneously give the impression of rock solidarity and constant adaptability.”<sup>iii</sup>*

In addition, the law must also be a step ahead of society to act as a guide in social development. Further, various groups in a democratic society must be part of the law reform mechanism for it to be effective. This stems from the fact that different groups in society have different needs which keep changing and thus they must be able to contribute to law reform to ensure that the law meets their needs. Obviously then, Government’s law reform efforts must be supplemented by those of other interest groups like professional or semi-professional associations, Non-Governmental Organisations, and individuals in their individual capacity. Clearly, law reform in a democratic society is a complex process mainly because of the diversity of groups that participate in the various stages of reform.

Zambia, by virtue of declaration, as opposed to deed (which is quite contentious) is a democratic nation. The preamble of the Zambian Constitution declares that Zambia is a Sovereign Democratic Republic;

*'...that resolves to uphold the values of democracy, transparency, accountability and good governance... and to preserve, develop and utilise its resources for this and future generations.'*<sup>iv</sup>

Evidently, the people's needs are supposed to be at the core of government policy. From the writer's wide research, it is clear that in detail, **factors** that must be taken into account in law reform in Zambia include the following:

**a. Public Perception**

There is no doubt that a large segment of the Zambian population is losing confidence in the law, legal procedures and legal institutions. Many people question the way the law works. They feel uncomfortable in a legal system that is overly adversarial and that, at times, appears inaccessible, arbitrary and unfair. They do not see their concerns about justice reflected in existing principles of law. The different socio-economic circumstances of Zambians and the country's multicultural social fabric highlight the need for new understandings of law.

**b. Conflict Resolution**

Zambians, generally, are looking for alternative ways to recognise, shape and resolve conflict. Many question whether the inevitable conflicts in social living, in matters of family, consumer relations, employment and the environment need always be addressed

by going to court. They are also seeking different options in the administration of criminal justice, and ask whether addressing socio-economic conditions would not be a better policy. They wonder if the criminal law is effective in preventing people who have been convicted from becoming repeat offenders.

**c. Governance**

The judicial and administrative systems are pressured to provide expedient, accessible and equal justice attuned to current social needs and are stretched to respond. But increased recourse to adversarial processes to solve interpersonal conflict and larger issues of social justice has contributed to a crisis of legitimacy. The framework of regulations and administrative agencies, the use of commissions of inquiry and the methods of appointing judges and other officials need to be assessed. Some Zambians hope that the law can be adjusted to give better expression to their aspirations for greater control over governance.

**d. Economy**

The changing character of the workplace, the evolution of Zambian industry, the creation of new forms of property and wealth, the recognition of the significance of both paid and unpaid work, new methods of doing business, and the emergence of a knowledge-based economy have important consequences both for those entering the labour market, and for those whose current employment is threatened. The globalisation of trade and developing arrangements of international commerce and finance have affected many of Zambia's basic economic and social arrangements. Few legal institutions and regulatory practices are insulated from these currents.

**e. Social Fabric**

Many of the basic building blocks of the law are institutions that regulate close and intimate personal relationships. Zambian law now rests on a number of assumptions about how people organise their personal lives, and how they relate to their partners, parents and children. These assumptions are frequently out of touch with the facts. Consequently, the legal policies and procedures derived from them tend to be obsolete or counter-productive. Zambian society is becoming more diverse in every socio-demographic dimension. Increasingly, Zambians are identifying themselves as members of multiple groups. The way the law addresses social relationships and organises relationships between groups deserves close consideration. Many of these relationships have been influenced by a widening gap between the rich and poor. Not all Zambians have equal access to knowledge about the law or equal opportunity to benefit from its application. The conditions that have enabled certain persons and groups to succeed are not well understood. Some laws and institutions rest on values that are no longer widely shared.

In summary, laws in Zambia, especially statutory laws for the purposes of this paper, must be relevant to people's needs in the current economic and political climate. The question is, is this the reality?

One only needs to open the first few Chapters of the laws of Zambia to discover that a good number of laws are quite inconsistent with the current democratic climate. Examples include the Public Order Act which despite recent amendment still remains an

enemy of freedom of association; the State Security Act, Chapter 111 which although enacted to serve legitimate security purposes, nevertheless has provisions which seriously undermine freedom of expression, transparency and accountability of government; this is just to mention but a few.

The bad state of most of these laws can arguably be attributed to the ineffectiveness of Zambia's law reform mechanism. Most laws are quite archaic and a discussion on law reform in Zambia must necessarily begin with an overview of law and democracy at the different stages of the history of Zambia, to date.

## **ENDNOTES**

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<sup>i</sup> Osborne's Concise Law Dictionary

<sup>ii</sup> In his address to the Law Society of Zambia – 1970

<sup>iii</sup> In his speech at the Law Association of Zambia Annual General Meeting in Livingstone, 1998 : As reported in *The Post Newspaper*, Wednesday April 1 1998.

<sup>iv</sup> Constitution of Zambia, Chapter One of the Laws of Zambia, Preamble

# **CHAPTER TWO**

## **HISTORICAL OVERVIEW OF LAW AND DEMOCRACY IN ZAMBIA**

### **Introduction**

This Chapter presents a brief historical overview of the relationship between law and democracy in Zambia. This overview starts from the colonial era, through to the First and Second Republic, and to the current Third Republic. One will find that the common feature of the various governments at the different stages of the history of Zambia is the reluctance to reform oppressive laws mainly due to political considerations.

### **1. Colonial Period.**

In order to understand the impact of colonialism on law in Zambia, it is important at the outset to first define what a colony is. A colony may be defined as 'a settlement abroad, founded and controlled by the founding country; the settlers living there; or the territory they occupy.'<sup>i</sup> Colonialism, therefore, is 'the policy of acquiring colonies, especially as a source of profit.'<sup>iii</sup>

The pre-colonial law in most African countries, including modern day Zambia, was essentially customary in character, having its source in the practices and customs of the indigenous people. However, after these countries got colonised, the colonisers introduced statutory law to their legal systems. In present day Zambia, British colonial rule was imposed in the 1890s through the agency of the British South Africa (BSA) Company led by John Cecil Rhodes. Thus the earliest statute law in this territory was

the statute of NorthWestern Rhodesia, 1899 to 1909, this being the orders-in-council, High Commissioners' Proclamations and Notices, government notices affecting the territory, and also the charter of the BSA Company.<sup>iii</sup>

Initially, the territory was divided into two parts: NorthEastern Rhodesia and NorthWestern Rhodesia, both of which were administered by the Company. The two territories were amalgamated to form Northern Rhodesia in 1911.<sup>iv</sup> The British government took over administration of the territory from the company in 1924. The territory was ruled by an all-powerful governor who was assisted by an executive council and a legislative council.<sup>v</sup> For most of the period of colonial rule, basic rights were but a dream to Africans. For instance, they were excluded from participating in government and full franchise was only extended to them on the eve of independence<sup>vi</sup>.

Further during the colonial period, laws were transplanted in their entirety to Zambia. The entire English set up, therefore, was normally transferred to Zambia by virtue of the reception statute, namely, The English Statutes (Extent of Application) Chapter 4, 1911. These rules were meant to operate in an environment alien to the rules themselves. While in England those laws emanated from a system of government normally based on the consent of the governed with liberal democratic constitutionalism, in Zambia, then Northern Rhodesia, the colonial rule was an autocratic method of government which took the form of an authoritarian structure.

The outcome in Zambia was that the law became static. The norms as they were received failed to adapt satisfactorily to the society as a whole. They were thus applied as standardized prescriptions of law occasionally responding to changes in

England but otherwise remained static. No considerations of local circumstances and the civil and political liberties of Africans were ever taken into account.

A good illustration of this point is the Northern Rhodesia Police Ordinance (NRPO) of 1953<sup>vii</sup>. This was the first colonial legislation to regulate assemblies and processions of any type. This, according to the British colonialists, was meant to govern public order. However, the original British Public Order Act, first enacted in England in 1936, was developed as a response to battling with entirely different political, social and legal problems. This Act, in England, was directed to prevent the activities of the Fascists in England who were becoming intimidatory and violent.<sup>viii</sup>

In fact, during the second reading of the Public Order Bill on 2 August 1955, an African representative to the council, Mr. Sokoto, expressed the view that;

*"The African people are saying that this measure taken by the government is to try and combat the political views of Africans in the country...This measure to my mind, is to try and frighten the African people." He further warned that; "The democracy in this country will not be applicable because what will follow up is that you will have more and more laws according to what the government sees the people doing in the country. The more you have numerous laws of this kind...the stage will be reached when the country will be a police state."<sup>ix</sup>*

Despite such valid objections, a white legislative council dominated by the United Federal Party (UFP) passed the Bill on 18 August 1955.

The colonisers had established a repressive system of governance which created an enabling condition to plunder the resources of the colony. They used the repressive laws to achieve this objective. At the time, democratic practices were already flourishing in the countries of the colonising powers, but unfortunately, the same practices were not extended to the colonies. The colonisers had no regard for human rights as far as the indigenous people were concerned. The government was not a representative government and racial discrimination was institutionalised. Therefore, reforming the law to promote rights of Africans was never a priority for the colonialists. This set the background for the beginning of the struggle for independence by the Africans.

## **2. First and Second Republic**

Two African political parties, the United National Independence Party (UNIP) and the African National Congress (ANC), led the struggle for independence in Northern Rhodesia. The party leaders were Kenneth Kaunda and Harry Mwaanga Nkumbula, respectively. After a lot of bloodshed in the clashes between the British colonialists and the Africans, Independence was finally granted in 1964. In the elections that were held in early 1964, UNIP won most of the seats in the National Assembly and named its leader, Kaunda, as Zambia's first President.

At independence, all the laws enacted during the colonial period were, save for some changes in names, continued into force by virtue of the Zambia Independence Act, 1964 and the Zambia Independence Order, 1964.<sup>x</sup> This meant that most of laws were

still oppressive and an affront to the realisation of democracy. Further, taking into account the greed that usually comes with power, it was possible for these same laws to be manipulated, in the same way the colonialists did, by the Africans in power to suppress opposition.

However, Kenneth Kaunda as President of Zambia, at least initially, seemed to be an exception in this regard. He publicly called himself a democrat committed to democratic principles. In fact, six chapters of his book titled, '**Kaunda of Zambia: Selections from His Writings,**' are devoted, in his own words, to '*a platform of freedom for Zambia.*'<sup>xi</sup> Therefore, during the first republic, although Kaunda believed from the very beginning that a one-party state was desirable and inevitable, he did not believe in eliminating opposition by legislation. This he confirmed in March 1964, when he assured the nation that;

*"...Any disappearance of the opposition in this country and the introduction of the one-party system would not be, and I emphasise, would not be an act of the government, but would only be according to the wishes of the people of this country...as expressed at the polls in any future elections."*<sup>xii</sup>

However, as history would have it, this was not to be. The opposition was increasingly gaining popularity as could be seen from the results of the 1968 elections where the ANC increased the number of seats it held in the National Assembly from eight in 1964 to twenty-three.<sup>xiii</sup> It was not surprising, therefore, that on 25 February 1972, President Kaunda announced that the Cabinet had decided that Zambia should

become a one-party State<sup>xiv</sup> and proceeded then to amend the constitution to provide for single-party rule in December 1972, despite much opposition.

This signified the beginning of what may be termed 'legislated suppression of opposition.' Kaunda's one-party government slowly but increasingly, started following the colonial trend of using legislation to strengthen its power over the masses especially those who were opposed to it. Under the one-party constitution, the President's position was further strengthened by the continuation of the state of emergency which had been declared by the last British Governor of Northern Rhodesia on 28 July 1964.<sup>xv</sup> Under this state of emergency, the President could, for instance, detain people without trial, declare curfews and control assemblies. The use of such powers was, of course, usually not justified. It is not surprising, therefore, that the UNIP government did not, even carry out any serious reform of the inherited colonial legislation. Inevitably, Zambian people began to realise that the oppressive state of affairs during colonialism was back with a new master; their own African leaders.

With the prevailing derogative state of the law, Civil and political liberties again became but a mere dream for most Zambians, especially those who were not UNIP members or sympathisers. For instance, in a bid to consolidate its control over the recruitment and rise of political leaders, the government, in 1980, despite strong protests from the trade unions especially, enacted legislation restricting voting in local government elections to UNIP members only, thereby further eroding the political rights of Zambian citizens.<sup>xvi</sup>

The Movement for Multi-party Democracy (MMD) was born with Frederick Chiluba as its president. He became President of Zambia with a staggering 76% of the vote, while MMD candidates won 125 out of 150 National Assembly seats.<sup>xviii</sup>

### **3. Third Republic**

When Chiluba won the elections, there was a lot of hope in as far as good governance and human rights were concerned. The MMD government professed commitment to reverse the oppressiveness of the UNIP one-party system of government. Thus, having inherited all the structures and laws of the Second Republic, the ruling MMD acknowledged, in its 1996 Manifesto, as follows:

*"The MMD government inherited a backward and archaic system of laws that had not been reviewed during the UNIP Regime's term of office...Beyond 1996, the MMD government will continue to review current legislation so that it facilitates the development of a harmonious social, political, economic and cultural environment in Zambia."<sup>xix</sup>*

However, despite such acknowledgement, there has been no serious attempt by the MMD government to transform institutions and reform laws in order to bring them in line with the requirements of multi-party democracy. Almost all oppressive legislation dating back to the colonial days, through to the First and Second Republic is still in existence. One of the main hindrances it seems, is the fact that the MMD government places a higher value on political considerations than actual reform of the law itself.

Therefore, it is not surprising that, at the 1998 Law Association (LAZ) Annual Ball, where he was officiating, Legal Affairs Minister, Vincent Malambo, outraged some lawyers when he suggested that political considerations must be made in law reform. This was reflected by the then LAZ chairman, Mr. Sakwiba Sikota, who, while giving a vote of thanks, informed Mr. Malambo that;

*"Honourable minister, you stated that in examining these issues you shall wear your political and not legal hat; our suggestion is that when it comes to law reform, you must never ever forget that you are a lawyer."<sup>xx</sup>*

Indeed, government's influence on the key law reform body, the Zambia Law Development Commission (ZLDC) has also been criticised. Therefore, the following chapter discusses the effectiveness of the ZLDC in the law reform process.

## CHAPTER THREE

### THE ZAMBIA LAW DEVELOPMENT COMMISSION

#### Introduction

The Zambia Law Development Commission (ZLDC) is the primary law reform body in Zambia. Before analysing the role and actual effectiveness of the ZLDC in law reform in Zambia, a brief history of this body is called for.

A paper prepared by Professor Robert Kent and Judge Leo Baron in 1972<sup>i</sup> provides an indication of the early stages of an active awareness of the need for a law reform body in Zambia. Dr. Kaunda, then President of the Republic of Zambia, agreed with the above authors that in principle, there was need for some law reform agency to keep under scrutiny the laws and legal system of Zambia ‘to the end that the law be in harmony with the aims and objectives of the contemporary society.’<sup>ii</sup>

At that time, the newly independent Zambia was still grappling with the residue effects of colonialism on its institutions. One of such effects was the fact that Laws which had been transplanted straight from English legal rules were causing contradictions and anomalies when applied to Zambians who had a totally different culture from the English.

Therefore, it was recognised in practical terms that this impasse warranted solutions that can only come from many years of extensive expert research by a law reform body.

However, it was further realised that the apparent consensus in international opinion on the need for law reform bodies did not mean that the mechanics adopted for the implementation of the idea were or should have been necessarily uniform. As of necessity, each institution had to be tailored to suit the needs of the particular legal system concerned. With this in mind, the initiators of the Zambian Law Reform body did not only suggest what they thought was a suitable institution in terms of mechanics and composition, but also warned against the adoption of untested foreign institutional or legal arrangements. They urged that ‘the structure of such a commission need not and should not be simply a slightly modified version of what has been done elsewhere, valuable though the experience of others can be.’<sup>iii</sup>

Professor Kent and Judge Baron’s paper of 1972 proposed the establishment, by statute, of a permanent body to be styled the Law Development Commission. This was to be headed by commissioners who hold important positions in relation to law and development. It was also to be staffed by highly skilled full-time personnel, augmented from time to time by consultants expert in various fields of law and in related disciplines.

It may be argued that the word ‘development’ in the title of ‘Law Development Commission’ connotes a deeper functional involvement in the complexities and shaping of the legal system. It conveys the idea that the commission is not to sit on the side lines

and confine its efforts to the examination and keeping in good repair the existing body of law. The Commission in some cases would have to dig up a completely new policy angle necessitating the passing of a new law. The paper of 1972 alluded to this point when they said the commission would have to ‘assist policy makers in formulating their proposals with a view to making them more effective and integrating them harmoniously with the rest of the legal system’<sup>iv</sup>

The initiators also sought to promote and ensure the idea of creating a commission which would have an independent and corporate existence. The reason for such an approach is simple enough. Although the Commission was born after the introduction of the one-party government system, the idea was conceived under a multiparty political system, and hence the initial idea was to create an institution isolated from partisan political influence as much as possible. The commission was not meant to serve the views of any one political party, as its responsibility was to be to the community generally. Indeed, ‘the advantage of having the maximum degree of independence was that government received views which were not necessarily the party’s views and they also received a wide spectrum of views from the profession as a whole.’<sup>v</sup>

### **The Bill in Parliament**

It is a reflection on the importance of the subject matter that the Bill passed through parliament within two weeks of its introduction.<sup>vi</sup> It sought to ‘provide for the

establishment of a Law Development Commission for the reform of the law, and to provide for matters connected with or incidental to the foregoing.<sup>vii</sup>

Under the Act, the commission was to be set up and function as part of the government structure and not as a corporate body. In fact, it would ‘constitute an extension of the Attorney General’s Chambers.’<sup>viii</sup> This was a fundamental change from the approach advocated in the paper of 1972 mainly because the original concept and the final implementation of the commission lay in two different political settings as stated above. The one-party system under which the idea was implemented sought to strengthen the relative position of government by politicising the administration of many functional institutions like the Law Development Commission.

Therefore, making the commission an adjunct of the Attorney-General’s chambers undermined its independence because government ministries and departments have some inherent bias, subjectivity and politicisation which could be damaging to the proper and desirable functioning of a body like the commission.

The Act became law with the appendage of the Presidential signature on 19<sup>th</sup> February 1974.<sup>ix</sup> Therefore, in spite of the end of plural politics in 1972, law reform was given an institutional framework through the establishment of the Law Development Commission by Act Number 5 of 1974. The Act had two main aims. Firstly, to establish a law commission, and secondly, to establish a legislative drafting institute. The Act created two separate bodies but did not elaborate on their organisational relationship. There was

a functional power given by section 12 which required the staff of the Institute to assist the Commission in the preparation of draft bills.

The functions of the Commission were the usual ones found in most of the Commonwealth law reform commissions. These were spelt out under section 7 as follows:

“(1) It shall be the duty of the Commission to take and keep under review all the law with a view to its systematic development and reform, including in particular, the codification of such law, the elimination of anomalies, the repeal of obsolete and unnecessary enactments, the reduction of the number of separate enactments and generally the simplification and organisation of the law.

(2) For the purpose of carrying out the functions stated in subsection (1), the Commission may,

(a). prepare and submit to the Minister from time to time programmes for the examination of different branches of the law with a view to reform;

(b). undertake, pursuant to any such recommendations approved by the Minister, the examination of particular branches of the law and the formulation, by means of draft Bills or otherwise, of proposals for reform therein;

- (c). undertake from time to time with the approval of the Minister comprehensive programmes of consolidation and statute law revision, and the preparation of draft Bills pursuant to any such programme;
- (d). provide advice and information to Government departments and other authorities or bodies concerned at the instance of the Government with proposals for the reform or amendment of any branch of the law;
- (e). receive and consider any proposals for the reform of the law which may be made or referred to them;
- (f). hold seminars and conferences on legal problems;
- (g). obtain such information as to the legal systems of other countries as appears to the Commission likely to facilitate the performance of any of its functions;
- (h). with the approval of the Minister, do all such other things as are incidental or conducive to the attainment of the foregoing objects or any of them;

### **Shortcomings of the Law Development Commission**

Firstly, the Act gave powers of appointing the policy making body (the council) entirely in the hands of the Minister. There were ten commissioners, including the Director (s.4(1)). Secondly, the staff of the Commission comprised civil servants. (s.5(1)). Thirdly, all programmes had to be approved by the Minister. (s.7(2)(b)).

A combination of all these factors resulted in poor performance. Civil service conditions proved a big drawback in attracting the right caliber. The wide discretionary powers given to the Minister in the appointment of Commissioners and the choice of subjects for law reform greatly reduced public influence in the organisation. Further, the Institute of Legislative Drafting proved to be still-born. The Institute never took off the ground.

However, the most devastating factor in the failure of the Commission was the lack of an enabling environment. The Commission was established in 1974, just under two years of the advent of one-party rule. The Bill received the assent on 16th January 1976. Its operations began in 1978. The one-party period paid little regard to the concept of democracy and the Rule of Law. In due course, the operations of the Commission were eclipsed by the UNIP Central Committee's political, Ideological and Legal sub-committee.

Furthermore, a practice arose where the office of Director was used by President Kaunda as a temporary resting place for retired Judges of the Supreme Court. Calls to review and revamp the operations of the Commission were made from time to time. However, no steps were ever taken. This would only be realised in the Third Republic.

The MMD clearly acknowledged the unsatisfactory state of Zambian laws and the lack of meaningful steps by the UNIP regime to rectify the position in all their years in power. In their 1996 Manifesto at p.24, they note that:

“The MMD government inherited a backward and archaic system of laws that had not been reviewed during the UNIP Regime’s term of office...The Law Development Commission though established was insufficiently staffed, unmotivated, poorly equipped, inadequately funded and subsequently was greatly impaired in the performance of its duties...”

### **The Zambia Law Development Commission, Act No. 11 of 1996**

#### **Rationale for repealing the Law Development Commission and Institute of Legislative Practicing Act**

The new Government seemed to be genuinely disappointed by the dismal performance of the Law Development Commission. On 29th February 1995, the then Minister of Legal Affairs, Dr. Remmy Mushota had this to say in the National Assembly:

“...The age of democracy needs the people’s participation in the formulation of appropriate legislation for the legislature to debate and approve. I present this Bill in order to ensure an institutional mechanism, for effective and cost efficient law reform agency. The Law Development Commission and Institute of Legislative Practicing Act which the present Bill intends to repeal had serious shortcomings. Its structures could not allow to discharge effectively its statutory functions. Although it was headed by Zambia’s top brains, the way it was constituted made

it peripheral, and ultimately marginal in scope... From its operations in 1976, there were agreements that the Law Reform Agency could not perform well if it was wedded to the Civil Service structure. However, under the UNIP regime, there was more time devoted to restructuring the political machinery and very little time for legal institutions...Given the correct remedies, the institution's potential were infinite and were proved to be handmaiden to our cherished ideals of democracy...The main objective of the Bill is to establish a law commission which will deliver the goods...From a close examination of the Law Development Commission, I came to the conclusion that so long as it remained a government department within the Ministry of Legal Affairs, no change in the Directors of the Commission will create any impact...As a former teacher of law and researcher, I know how it feels when you cannot plan your programme in the set time because someone else thinks otherwise. With these considerations, the Bill seeks to create the Zambia Law Development Commission as a body corporate. This approach is good as well as cost effective. Where the commission may not have the expertise in a particular field of law, it will be free to sub-contract, perhaps from the universities or from the private legal sector. This is not easy to achieve when the commission operates under the Civil Service machinery...The Law Development Commission Bill also departs from the present Act which had the institute of the legislative drafting appended to it, leading not only to legal anomalies, but to operational difficulties...Apart from sharpening the instruments for law reform itself, the proposed Bill is in line with the Government's overall policy of public reforms harnessed on responsive structures, self managing manned by skilled

professionals who ought to be well remunerated. This is a Bill of utmost national interest. It has no partisan agenda and I urge all honorable members to support it.”<sup>x</sup>

At this parliamentary debate, Professor Mvunga, a member of the opposition, also had this to say about the problems faced by the Law Development Commission:

“Frustration of the Law Development Commission though has been that a lot of their work does not reach this House and for a researcher, that is very frustrating..”<sup>xi</sup>

## New Features

### **1. Statutory corporation**

The ZLDC, Act No. 11 of 1996 creates the ZLDC as a body corporate (s.3) and repeals the Law Development Commission and Institute of Legislative Drafting Act (s.22). Staff of the Commission are no longer members of the Civil Service (s.12, 13). The Institute of Legislative Drafting will now fall under the Zambia Institute of Advanced Legal Education.

## **2. Institutional Representation on the Commission**

Under s.5 of the Act, the Commission comprises the following:

- a. a Judge nominated by the Judiciary;
- b. a representative of any School of Law in a public university;
- c. a representative of the Institute of African Studies of the University of Zambia;
- d. the Chief Parliamentary Draftsman;
- e. a representative of the Law Association of Zambia;
- f. the Director of the Institute of Advanced Legal Education; and
- g. not more than four persons appointed by the Minister.

Members are appointed by the Minister. Further, the Chairperson and by implication the Vice-Chairperson, are persons qualified to be judges of the High Court with a bias in research.

## **3. Financial Matters**

The Commission now receives a grant appropriated by the National Assembly.

#### **4. Law Reform Initiative**

Under section 4 (2) the Commission shall ‘review and consider proposals for Law reform referred to the Commission by the Minister or the members of the public.’ Interested stakeholders for the reform of any branch of law are therefore given the power to engage the Commission. It is expected that stakeholders will assist the Commission in terms of resources.

#### **5. Mission statement**

The Mission of the ZLDC is contained in s.4 and mandates the Commission to make recommendations on:

- a. the socio-political values of the Zambian people that should be incorporated into legislation.
- b. the anomalies that should be eliminated in the statute book
- c. new and more effective methods of administration of the law and the dispensation of justice that should be adopted and legislated
- d. new area of the law that should be developed which are responsive to the changing needs of Zambian society; and
- e. the removal of archaic pieces of legislation from the statute book.

Further, the Commission is required to:

- a. revise and reform the law in Zambia;
- b. codify unwritten laws in Zambia;
- c. review and consider proposals for law reform referred to the Commission by the Minister or the members of the public;
- d. hold seminars and conferences on legal issues;
- e. translate any piece of legislation into local languages;
- f. encourage international co-operation in the performance its functions under this Act; and
- g. do all such things incidental or conducive to the attainment of the functions of the Commission.

With the passing of the ZLDC, Act No.11 of 1996, there was hope that the law reform process would undergo a qualitative transformation. Firstly, as a statutory corporation there was to be the obvious reduction in red tape thus promoting efficiency; management of resources directly by the Commission; ability to recruit suitable manpower; and a wider latitude in delivering better conditions of service.

The argument for the independence of the commission really lies in the need to dispense with any form of obstruction so as to give the commission the latitude it needs in its advisory, scholarly legal research functions. Arguably, though, the argument for total independence is undermined by the fact that law reform initiative, especially in emergent states like Zambia, should not be completely taken out of government hands. Indeed as

Cameron points out, the level of independence of Law reform agencies, especially in the third world is a question of how best limited resources might be most usefully deployed.<sup>xii</sup> For this reason, it is the government which must set priorities, but the professional task of making recommendations and proposals should be exclusively the work of the Commission and should be based solely on a professional assessment of the results of empirical research.

It is also vital that the commissioners should be detached from the pre-occupations which burden lawyers who work for the government on a day to day basis. To use the words of Marsh, 'its possible for a commission or commissioners to lose their independence of attitude by becoming overburdened with the pressures of small day to day administrative reforms, whereas it was important that they be free to tackle substantive matters of reform.'<sup>xiii</sup>

This type on independence, however, should not, and must not necessarily be equated with indifference to political issues. There is merit in the argument that all areas of national activity, and the institutions created to further these interests can contribute more and function best if they are in the main stream of social and political developments.

Currently, the Commission is embarking on some law reform projects including; a review of child legislation; and consumer protection legislation. However, these and other projects of the Commission are hampered by the following shortcomings, most of which are similar to those faced by the former Law Development Commission.

## Shortcomings of the Zambia Law Development Commission

Ironically, the MMD which, as shown above, on coming into power promised to make the law reform body effective, was among the first groups in Zambia to acknowledge the persistent shortcomings of the ZLDC. The Minister of Legal Affairs, Mr. Vincent Malambo summarised them as follows;

“...one can count on one’s hand, with many fingers to spare the number of Acts brought into being as a result of the efforts of the Commission. The reasons are many, but in summary, the Commission has continued to be insufficiently staffed, unmotivated, poorly equipped, inadequately funded and consequently fundamentally impaired in the performance of its duties...”<sup>xiv</sup>

Sources at the Commission itself explained the current problems faced by this body further. First, the staffing situation as at end of the year 1999 was such that, apart from the usual support staff like secretaries, there was only one Lawyer working full-time in the Commission instead of the required seven. This is attributed to the poor working conditions. Second, the fate of the Commission currently seems uncertain for despite its statutory autonomy, the general complaint is that the Ministry of Legal Affairs still interferes with the Commission outside the limits imposed by statute. It is feared that the Ministry still looks at the Commission as a Government department. This fear is further justified by the fact that the Director of Public Prosecution’s Chambers has now taken up

residence in the Commission's offices. This has led to inadequate office space due to unnecessary squeezing. This move also raises the important question of whether or not government is really interested in the law reform effort of the ZLDC.

### **Recommendations**

The creation of an autonomous commission is not enough, although a minimum condition for genuine law reform. Unless there is a serious commitment to democracy and the abandonment of the one-party mentality and style of doing things, nothing much will be achieved at the end of the day. In addition, the following issues need to be addressed to make the Commission a viable and effective law reform agency:

1. Government has given the Commission the necessary institutional framework which ought to be supported by the local and international forces interested in advancing the cause of law reform in an open society. It is time not only government, but the legal fraternity in general, interested Non Governmental Organisations and other donors started making serious commitments to support the Commission financially. This does not mean that the Commission should seat back and relax waiting for money to come in; the Commissioners should go out their and actively lobby for financial assistance considering that the Commission is an autonomous body. The Commission should work on a comprehensive and progressive fundraising programmed. More funds for the Commission will mean lesser problems in terms of staffing because then people will have an incentive either to remain in or join the

Commission. Further, the Commission can get more equipment like computers and office furniture with the extra financial assistance to enable it carry out its duties effectively. The extra funding will also help the Commission to produce and publish its Newsletter on Law Reform whose aim is to sensitize people on law reform issues and also to organise workshops on various law reform topics.

2. In addition, a web page on the internet must be developed for the Commission so that any interested party can be made aware of the functioning of this body. In this way, the Commission will also be 'selling' itself to the world such that even when it is asking for financial assistance, especially from outside the country, its existence and functions will already be known. A web page can also be used by the Commission to get suggestions and contributions on particular law reform subjects and proposed legislation from a wide range of people and institutions. This is the practice of most of the effective law reform bodies in the world including Africa itself. For instance, the South African Law Commission has a web page where it states as follows on page 6:

"The Commission seeks support throughout South African society and its institutions. It is also concerned to liaise with similar law reform bodies elsewhere in the world, and agencies and diplomatic representatives in South Africa. We ask for your help in this regard. If there are persons or bodies also able to assist the Commission in its work, please forward their particulars. If you know of persons or bodies connected with law reform who should be on the Commission's distribution

list, in relation to particular topics, you are asked to forward details too, specifying the nature of the interest. And if you know of agencies able to assist the Commission – through offering the assistance of persons, data bases, venues for workshops, research facilities, or financial support – please help us too by providing details, or putting us in touch with them.”

3. That aside, the Zambia Law Development Commission’s envisaged project management scheme requires a modern office support system with desktop publishing facilities. All Commission papers and reports ought to be published at the Commission offices. This will save on both time and scarce financial resources. The computer network will allow quick access to judgements of the Supreme Court in Zambia and other common law jurisdictions. Every research lawyer should be connected to a work-station. This is the surest way for increasing productivity.
4. The commission as a public institution is supposed to serve no partisan or sectional interests. Its aims should be the realisation of its statutory functions in order to help government create a viable and working democracy through law reform. Government must not unnecessarily interfere with the law reform effort of this body beyond statutory limits.
5. It would be a good idea for representation of the Commission if the following were added to its composition:

- (a). the Inspector-General of Police;
- (b). the Commissioner of Prisons; and
- (c). the Clerk of the National Assembly.

‘The Inspector-General of Police and the Commissioner of Prisons would use their influence to redefine the human rights attitude of their institutions. If the cause of human rights is to make headway, these agents of State whose work has a direct bearing on the observance of human rights ought to be integrated in the law reform process. On the other hand, the Clerk of the National Assembly as a Member of the Commission would be instrumental in monitoring the fate of the final product of the Commission i.e. legislative action. In addition, the Clerk as an Official who interacts widely with all the branches of government, would use his good offices to help the Commission get the required financial support’<sup>xv</sup>.

## **CONCLUSION**

There is no doubt that the full impact of the Commission is yet to be realised. However, it is wise to remind ourselves that some of the key players in the long years of one-party rule have and still enjoy considerable influence in the affairs of the State. Social Institutions may be changed at the stroke of the pen by the legislature. However, it takes a much longer period for people’s psychology to be tuned to the new social order. Good laws are primarily there to ensure that institutions are not swayed by individual caprice and ambition. Therefore, the autonomy of the ZLDC as a body that seeks to research into

and come up with proposals for good laws must be respected. Parliament itself must make it a policy to pass into legislation all recommendations of the ZLDC unless there is a clear consensus not to. In fact, it must be understood that most of rationale for the existence of a body like the ZLDC in the law making process is that it enables the legislature to focus on the technical issues which can be resolved in the process of preparing background studies, working out intricate legal problems and drafting implementing legislation. It further helps the legislature accomplish needed reforms that otherwise might not be made because of the heavy demands on legislative time, and sometimes, the commission's report may demonstrate that no new legislation on a particular topic is needed, this relieving the legislature of the need to study the topic.

The efforts of the ZLDC in law reform must necessarily be supplemented not only by the legislature, but also by the judicial branch of government whose decisions in numerous cases normally create new law which must be in line with the socio-economic and political values of the Zambian people. Therefore, it is the main focus of the following Chapter to discuss the role of the Judiciary in effective law reform in Zambia.

## ENDNOTES

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<sup>i</sup> Robert Kent, 'A Law Development Commission for Zambia', reproduced in W. L. Church, 'Introduction to the Law of Zambia (unpublished) p. 448

<sup>ii</sup> Ibid. p. 449

<sup>iii</sup> Ibid

<sup>iv</sup> Ibid. p. 451

<sup>v</sup> Kelsick in 'Reports of the Meeting of Commonwealth law Reform Agencies in London,' (1977) p. 20

<sup>vi</sup> Bill introduced on 29<sup>th</sup> January 1974 and passed on 13<sup>th</sup> February 1974

<sup>vii</sup> Preamble of the Act

<sup>viii</sup> D. P. D. No. 35Q (7<sup>th</sup> August 1974)

<sup>ix</sup> Republic of Zambia, Government Gazette No. 1165 Vol. No. 25, 22<sup>nd</sup> February 1974.

<sup>x</sup> Republic of Zambia, Hansard, 29<sup>th</sup> February 1996, p. 1467-68

<sup>xi</sup> Ibid. p. 1469

<sup>xii</sup> Report of the Meeting of Commonwealth Law Reform Agencies in London (1977) p. 28

<sup>xiii</sup> Law Development Commission Report (1979) p. 28-29

<sup>xiv</sup> The Post Newspapers, 'An edited version of the speech delivered by Vincent Malambo, Minister of Legal Affairs at LAZ Annual General Meeting in Livingstone,' March 31 1998

<sup>xv</sup> As suggested by Dr. Sipula Kabanje in, 'The Machinery for Legal Reform to enhance the rule of law and good governance in Zambia, the Zambia Law Development Commission Act No. 11 of 1996.'

# **CHAPTER FOUR**

## **THE ZAMBIAN JUDICIARY AND LAW REFORM**

### **Introduction**

In this Chapter, the writer will analyse the role of the Zambian judiciary in law reform and how this role can be effectively carried out. The discussion will begin with an overview of the nature of judicial power in law reform, followed by a brief historical background of judicial law reform in the history of Zambia. This will be followed by a discussion of the doctrines of judicial self-restraint and judicial activism, their different impact on law reform and the extent to which they have influenced the Zambian judiciary's role in law reform.

### **Overview of the nature of judicial power in law reform**

“The ordinary meaning of the word judiciary is simply, ‘the judges of a country collectively.’ It also refers to ‘the system of law courts in a country.’ This is how the concept is understood in common parlance; and it is the meaning readily given in English dictionaries. This meaning of the term judiciary is universally accepted.”<sup>i</sup>

In the Zambian context, Article 91 of the Constitution of Zambia, however employs the term ‘judicature’ which has a similar meaning, namely the judges and courts, that is to say, the Supreme Court, High Court, Subordinate Courts, Industrial Relations Court, Local Courts and such lower courts as may be prescribed by an Act of

Parliament.

At the outset, it is worth recognising that adjudication is an aspect of governance. The judiciary is one of the three arms of government and is therefore involved in governance. Judiciaries perform a series of vital functions for any political system including law definition, conflict resolution and social control. This, inevitably, gives them, the Zambian judiciary inclusive, a great opportunity to participate effectively in law reform because they increasingly have to deal with a society whose ideas and interests are constantly on the move.

The judge is a product of his society and its culture, an agent whose training and work have endowed him with wisdom and learning in the traditions, philosophy and ethics of his people. The judge should continually try to deepen his insight by immersing himself in history and the changing conditions of his community<sup>ii</sup>. Judges, to the same degree as other leaders, and indeed the rest of society, must identify themselves fully with the national ideology if they are to be able to articulate it in their judgements. Judges should therefore be allies of social progress, ready to interpret social and economic legislation in a manner conducive to the attainment of its social objectives<sup>iii</sup>. This means that the judiciary should work to reflect the interests of society as opposed to that of government alone, if it is to participate effectively in law reform. Unfortunately, history reflects that the latter has had unbridled influence in the majority of past Zambian judicial decisions.

### **Brief historical background**

Historically, the view that the objectives and values of the state should be a factor in judicial decisions was predominant. The idea of 'political justice' was an accepted technique of British colonial administration in most African countries including Zambia. An important objective of the colonial state was the subjugation and exploitation of the colonial peoples, and law and the courts were a vital instrument in the pursuit of that objective. The courts were there to enforce the law as well as the extra-legal objectives and policies of the colonial government. The courts of the administrative officers were especially active in this. Unfettered by the principle of strict legalism, they administered a kind of 'political justice', which was thought to be pre-eminently conducive to an orderly and paternalistic administration of a backward people<sup>iv</sup>. Therefore, for the courts run by the administrative officers, the needs, values and aspirations of the Africans were not reflected in the judgements.

In addition, even with the coming of independence, the predominance of expatriate judges in the superior courts in the commonwealth Africa tended to produce a certain amount of judicial passivity. For instance, in Zambia, an expatriate judge who had no stake in the govt of the country, was usually reluctant to risk his tenure of office or even exposure to criticism by ruling against the govt in important critical constitutional cases. An expatriate judge, lacking sufficient acquaintance with local values and needs, could not be expected to be responsive to these values and needs to the extent of making them guiding principals in the decisions they gave. For him, a strict positive approach in an uncritical application of past precedent offered security from exposure.

Indigenous judges were no different from the expatriate ones. During the First and Second Republic in Zambia, the United National Independence Party (UNIP) government was so totalitarian that even the judiciary was modelled and had to decide along party lines. The interests of the Zambian people as a whole were rarely considered and therefore the Third Republic inherited backward and archaic laws which had been carried forward from the colonial period. However, even in the Third Republic, most judges, in the disguise of judicial self-restraint, continue to follow the trend of previous judiciaries to the detriment of effective law reform.

### **Judicial Self-Restraint**

Today, judicial **self-restraint** is undoubtedly a major hindrance in the judiciary's contribution to law reform. Courts are denied the vital attribute of governmental power, that is, to initiate the process of review of legislative and executive measures. Given a justiciable violation of the Constitution or of other laws by the political organs of government, however flagrant, the court cannot intervene on its initiative. It must wait until it is moved by someone.<sup>y</sup> This means that essentially, the court's role in law reform is limited to only cases brought before it by a person with locus standi in a case. Still, however, a person who suffers an injustice due to, for instance, an archaic law, may not have access to the court for various reasons including, ignorance, intimidation and lack of money to pay the legal fees.

It is not surprising, therefore, that some countries are beginning to shift from a strict adherence of the locus standi rule. No longer do they allow an attack on a statute to

be easily blocked on a mere plea of locus standi. For instance in the United States of American case of Katzanback V McClung<sup>vi</sup>, an owner of a barbecue in Alabama was allowed to challenge the Civil Rights Act of 1964 which desegregated places of public accommodation, although there was not so much as a contemplation of enforcement action against him, the government being unaware of the existence of his barbecue.

Another example, this time closer to home is the provisions of the South African Bill of Rights. According to this Bill of Rights, any one of the following persons may approach a competent court to challenge human rights violations:

- “a. Any one acting in their own interest
- b. Anyone acting on behalf of another person who cannot act in their own name
- c. Anyone acting as a member of or in the interest of a group or class of persons
- d. Anyone acting in the public interest
- e. An association acting in the interest of its members.”<sup>vii</sup>

On the other hand, in Zambia, Article 28 of the constitution provides as follows:

“...if any person alleges that any of the provisions of articles 11 to 26 inclusive, has been, is being or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for

redress.’<sup>viii</sup>

Therefore, in Zambia, in terms of human rights violations, standing is restricted to only victims of such violations. Furthermore, the Zambian judiciary’s role in deciding cases in the interest of justice has been limited by the increasing use of clauses in statutes excluding the jurisdiction of the courts or vesting absolute, non-reviewable powers in the executive. For instance, the Zambian courts themselves have ruled time and again that they cannot enquire into the validity of a state of emergency.<sup>ix</sup> This is an example of the court shying away from sensitive policy questions that involve government interest against society interest.

No one would dispute that the exercise of power, any power, calls for self-restraint, for self-restraint is, after all, a counsel of prudence. The need for such precedential restraint is perhaps greater in the case of an unelected body, like a court, exercising critical political power. Prudence demands that the court should never lose sight of the legal limits of its power nor of the practical limitation upon.<sup>x</sup>

However, while it may be undesirable to encourage the professional litigant and the meddlesome interloper to invoke the jurisdiction of the courts in matters that do not concern him, there is something paradoxical in the idea of a judge refusing, on the ground of lack of standing, to entertain a challenge to a law he himself knows to be unconstitutional because it makes criminal the exercise of a right granted by the constitution. The impression that this would leave on the ordinary man is that the court was throwing a cloak of approval around the law, and thereby condoning oppression. The result in the public eye would be to bring the law and the courts into

disrepute.<sup>xi</sup>

It seems clear, therefore, that the doctrine of self-restraint carries with it a distinct danger for justice to litigants and for the ability of the court to play a creative law reform effort. In fact in the words of Julius Stone;

“The restraint doctrine, insofar as it seems to require judges to respect the specific function of the legislator-centered on law-making policy-seems to set up some kind of ‘keep off’ notice against those very activities of policy choice-making which we have seen to be inseparable from appellate judicial functions...As applied by the judiciary to vacate its own authority the doctrine no doubt promotes good relations between power-wielders in a complex polity, and subserves justice (along with efficiency) as between them. It says little, however, about justice to litigants and subjects generally, even when this is the central issue in the case. This, and not mere personalities, may explain why such bitter controversy has surrounded the use of ‘judicial restraint’, when this was at the cost of judicial protection for the citizen...”<sup>xii</sup>

A further related theory is the so-called **declaratory theory** of the judicial function which asserts that, in adjudicating a case before it, the Court is simply to act according to law supposed to exist and to be known. Its role in the matter is to be the somewhat mechanical and passive one of merely declaring that law and applying it to the determination of the case. Whatever the issue, the court is not to exercise any creativity by invoking its own intuitive sense of what is best for the community; it is not to make any policy choices not expressed in the law itself. In so far as the

applicable law is ordained by statute, the court can exercise no freedom of choice, except to the extent that the statute is ambiguous. It must likewise feel itself bound even when the law emanates from judicial decisions.<sup>xiii</sup>

Two doctrinal sources can be discerned in this theory; **analytical positivism** and the **doctrine of precedent**. The central thesis of analytical positivism is legalism, the view that only rules forming a logically consistent system, and not any ethical notions of a just or wise result, are to be the sole guide for a judicial decision.<sup>xiv</sup> It has as its object certainty and predictability in the law. The same object of certainty and predictability coupled with that of stability and fairness inspires the parallel doctrine of precedent. Precedent directs a court to follow the law laid down in earlier decisions, not only those of courts above it, which is understandable, but also of its own. Thus, the highest court in the land is, according to the doctrine, bound by its own decisions, from which it can depart only in exceptional circumstances, notwithstanding that those decisions have ceased to reflect the policy aspirations of the society. Adherence to precedent overrides current policy objectives.<sup>xv</sup> It also restricts judicial activism for more effective law reform.

### **Judicial Activism**

Although an argument for the declaratory theory, as stated by the Jurist Julius Stone<sup>xvi</sup>, is that it brings about advantages of certainty, predictability, and gain of time and resources from not treating as open, questions already decided, and of fairness to litigants in maximising uniformity of decision, adjudication, especially in public law, requires an **activist judiciary**. In public law, the mark of the utility of judicial

decision is not the soundness of its logic, but how well it serves the life of the community by stabilising its political activity and keeping down to a minimum the inevitable divisions engendered by politics.<sup>xvii</sup>

The usefulness of a decision in resolving the problems that beset society and in maintaining thereby its equilibrium should bestow the needed legitimacy upon the authority which the court exercises. The discarding of past precedent may admittedly, undermine that legitimacy if the Court's decision is based on nothing more than the personal whim of fiat of the judge, or sheer force of logic or fine legal rationalisation, but it is unlikely to do so when it is based on a careful appraisal of the social purposes which the law is meant to serve. Therefore, the explicit and full articulation of the policy premises of a decision should not only make it more intelligible to the public and so legitimise it, but should also operate to limit the scope of personal discretion exercisable by the judge.<sup>xviii</sup>

In developing states like Zambia, there is perhaps a greater need and necessity for the court to assume a policy-making role. The reason for this can be found in the words of Church<sup>xix</sup> as follows:

“Some of the legislation emerging from parliaments in most developing democracies has not been impeccably consistent with the broad, basic policies applicable there. The process has been too hurried to be thoroughly grounded. In addition, there is often legislation that is still retained from pre-independence days simply because there has not been time enough to produce adequate replacements for it, and these statutes may only co-incidentally

reflect the policies currently followed. Finally, remedial legislation is sometimes attempted, but in the exigencies of the moment is itself merely copied from outside. Such legislation is also removed from current policy concerns. Thus, many of the statutes now on the books of the emerging democracies do not really satisfactorily reflect all the social, political and economic policies of the societies in which they operate. If the law in these societies is to be effective, the legislatures need help from other institutions. **The courts are ideally equipped to offer that help. They have the legal expertise and the time, in individual cases, to supplement the legislative effort, to conform the statutes presented in litigation to existing policy needs.”**

In addition, it is important that the judiciary should also be able to respond to the needs and moods the society, otherwise it would cease to be a dynamic force in the life of the community worthy of public respect<sup>xx</sup>. Simply stated, adjudication demands a balance of deciding how much and how fast a court can pursue what it sees as the goals of society without impairing the long run usefulness of Judge made law in contributing to their achievement.<sup>xxi</sup>

Therefore, while judicial passivity based on the declaratory theory is obviously a reactionary approach which may leave the door wide open to governmental absolutism, excessive judicial activism is also undesirable. What is needed is a balanced situation that allows the judge some creativity without unduly sacrificing the rule of law to the judge’s intuitive sense of right and wrong as the basis of decision. It has been suggested that this balance lies in not using precedent alone as the reason for

a decision, but only as a ‘convenient starting point for real analysis of a current problem, as a focus of a practical review of public policy, and perhaps as a source of inspiration and wisdom where a prior judge has contributed his incisive analysis of the problem and its implications in his decision.’<sup>xxii</sup>

To this effect, in Zambia, the Court since the case of **Paton V Attorney General**<sup>xxiii</sup> has said that it is not absolutely bound by its previous decisions, or by those of English courts.<sup>xxiv</sup> But a declaration of intent is one thing, and actual practice quite another. In practice, precedent is still followed somewhat automatically in most cases without a thoughtful analysis of the policy issues raised.

The mark of **judicial activism** is one of an active concern with public policy in the widest sense. What an activist role demands of the judiciary is to get away from the notion, traditional in Zambia and other Commonwealth countries, that policy is outside the concern of the courts. Activism requires of the judiciary a preparedness to break free of excessive legalism and to interpret the law broadly, not according to its literal meaning, but in its decisions the ideals of the nation, its needs and ethical sensibilities and the attitude of the public towards questions of the day.<sup>xxv</sup>

It is worth noting that in matters not specifically provided by statute, courts are at liberty and can easily reform the law. But for statutory law, the court can only direct or order that a law be repealed or adjusted accordingly by parliament. An example in this case is the Zambian Public Order Act.

## **The Public Order Act**

The amendment of the Zambian Public Order Act deserves special mention because it clearly illustrates a rare activism by the Zambian courts towards law reform. On 20<sup>th</sup> February 1995, the former President of Zambia, Kenneth Kaunda, was charged by the Attorney General with violating the Zambian Public Order Act, Chapter 104 of the Laws of Zambia. The charges alleged that Kaunda addressed an unlawful meeting in the township of Chongwe on 11 February 1995. Seven others, including Christine Mulundika, had been previously arrested and charged with unauthorised assembly without a police permit, contrary to the Public Order Act, section 7 (a).<sup>xxvi</sup>

Kaunda's lawyers, Professor Patrick Mvunga and Mr. Sebastian Zulu, immediately raised constitutional concerns about the validity of the Act. They contended that the Act violated Article 21, Freedom of Assembly and Association; Article 20, Freedom of Expression and Article 23, Prohibition of discrimination, of the 1991 Zambian Constitution.<sup>xxvii</sup>

In the High Court, Judge David Lewanika denied all of the plaintiff's contentions and declared the Public Order Act justifiable and constitutional. The real key for Judge Lewanika was whether the Public Order Act arbitrarily or excessively invades the enjoyment of a Constitutional right. He reasoned that since Parliament had continued to leave the Act on the books since independence in 1964 and since the Public Order Act was the only legislation regulating such activities, the limitations and restrictions imposed on the citizens were reasonably justifiable.<sup>xxviii</sup> Judge Lewanika wrote as follows:

“If I were to hold that section 5 (4) of the Public Order act is inconsistent with Article 21 of the Constitution and impugn it, I would be creating a vacuum and this would be a prescription for anarchy and chaos and I am not prepared to do that.”<sup>xxix</sup>

This is a typical example of unjustifiable judicial restraint. Judge Lewanika did not consider the fact that the Act was infringing upon the ideals of the Zambian people who were supposed to be living in a democratic society without undue infringement of their freedoms of expression and assembly. He did not even take into consideration that the fact that the statute had remained in place since 1964 did not necessarily mean that it was ideal and just in the current status of the Zambian society. In fact, the Judge should have been aware that this Act had been used to oppress political activists by the respective governments in the colonial period, First Republic, Second Republic and now in the Third Republic. Judge Lewanika should also have taken into consideration Chapter IX of the Penal Code, Cap 88 of the Laws of Zambia which provides for criminal sanctions for those who assemble unlawfully, riot, or commit other offences against public tranquillity. Therefore, his argument about leaving a vacuum in the law if he declared the section in issue unconstitutional was unfounded.

Judge Lewanika’s decision was a blow to the judiciary’s role in effective and constructive law reform. Therefore, in the writer’s opinion, it was fortunate that this decision was subsequently successfully appealed.

In the Supreme Court, after hearing the appeal, a landmark judgement was delivered by Chief Justice Matthew Ngulube. He began by addressing the broader philosophical question of what are the responsibilities a democracy owes its citizens if it is to call itself a democracy. He posed the following question:

“Is it justifiable that the citizens of this country can only assemble and speak in public with prior permission which permission is not guaranteed and whether the law under attack is consistent with the guaranteed freedoms of assembly and speech?”<sup>xxx</sup>

This was a good and progressive question in terms of law reform because it showed that the premise of the decision was to reflect on the ideals of the people in a society like Zambia that aspires to be democratic. He then reviewed the initial colonial purpose of the Public Order Ordinance as to prohibit the wearing of uniforms in connection with political marches and quasi-military organisations. In this regard, he cited the colonial case of Attorney General for Northern Rhodesia V Hangamata<sup>xxxi</sup>. The Chief Justice then stated that the Northern Rhodesia Legislative Counsel had little concern for the ideas of free speech and assembly, particularly with regards to the indigenous African populace<sup>xxxii</sup>.

The fact that the Chief Justice noted from the outset the oppressive intent behind the genesis of the Public Order Act in Zambia was also a reflection of the Court’s ability to look beyond the Statute and see its real purpose. Although he acknowledged that there was nothing wrong with legal provisions which serve purely regulatory public order interests, the Chief Justice stated that section 5 (4) of the Public Order Act

simply went too far in giving unlimited power to the regulating officer, reducing the fundamental freedoms to a mere license to be granted or denied on the subjective satisfaction of a regulating officer.<sup>xxxiii</sup> The section provided as follows:

“Any person who wishes to convene an assembly, public meeting or to form a procession in any public place shall first make application in that behalf to the regulating officer of the area concerned, and, *if such officer is satisfied that such assembly, public meeting or procession is unlikely to cause or lead to a breach of the peace, he shall issue a permit* in writing authorising such assembly, public meeting or procession and specifying the name of the person to whom it is issued and such conditions attaching to the holding of such assembly, public meeting or procession as the regulating officer may deem necessary to impose for the preservation of public peace.”

The Chief Justice rightly declared that the implication of the section was such that the permit must be refused unless the officer is able to satisfy himself or herself to the contrary and therefore that such a provision was a clear recipe for arbitrariness and abuse and asserted that democracy would wither without a free flow of ideas.<sup>xxxiv</sup>

The court then considered whether section 5 (4) was reasonably justifiable in a democratic society which the derogation clauses in Articles 20 and 21 of the Constitution allow as an exception. The Chief Justice declared that times have changed and that Zambia is now a country based on plural politics and a genuine exercise by the people of their own free will. He however agreed that some regulation was necessary for public order and suggested a notice provision to the authorities so

that they can be allowed to give regulatory directions to the proposed assembly.<sup>xxxv</sup> The Supreme Court consequently declared section 5 (4) unconstitutional as it was not in the spirit of a society that aspires to be democratic like Zambia.

This was indeed a landmark decision in Zambia which had a history of judges who advocated strictly for judicial restraint in decision making. The Judgement is a triumph for law reform in Zambia. However, for obvious reasons, it received wide criticism from many government officials<sup>xxxvi</sup>. It is quite surprising therefore that with uncharacteristic swiftness, the ruling party dominated Parliament, on 27<sup>th</sup> February 1996 passed a Bill amending the Public Order Act to require, among other things, a mandatory fourteen day notice prior to any public assembly.<sup>xxxvii</sup> Clearly, the Act was amended in bad faith because in retaliation to Chief Justice Matthew Ngulube's courageous decision, the government displaced him as Chairperson of the Council for Legal Education, a post traditionally held by the sitting Chief Justice of the Zambian Judiciary.

As stated earlier, the landmark decision in the Mulundika case is unfortunately one of the few isolated attempts by the Zambian judiciary to actively weed out bad laws that do not reflect the ideals of the Zambian people. The Zambian judiciary has been passive and has exercised religious judicial restraint for various reasons. Arguably some judges were put on the bench to defend government policy no matter how unprogressive, some are scared of government victimisation if they take a courageous stand like the Chief Justice in the Mulundika case, and others still, simply do not fully understand their role in a democratic society. Therefore, there is great need for the Zambian judiciary to take a more activist stance in its deliberations if at all it is to

carry out effective law reform.

### **Recommendations**

1. There is an urgent need of indigenisation of Zambian legal education as a way of freeing future lawyers and judges from the influence of the common-law judicial techniques and practices and the traditions of English legal thought, and so laying the foundation for a complete re-orientation of outlook. Zambian Judges, like most other Judges in Commonwealth countries are handicapped by the fact that their education in techniques of English law has insulated them from the values and needs of their own people. Their minds have become imbued with ideas about the unquestionability of parliamentary legislation under English law and about the perfection and symmetry of the common law as to render them almost incapable of performing effectively the more creative role demanded of them by constitutional adjudication under a written constitution. The common law attitude requires literalness and analytical positivism in the interpretation of the law, enforces a narrowness of outlook towards problems presented for decision and discourages creative activism.

Further still, the intellectual quality of the bench in commonwealth Africa, including Zambia , has been rather poor. This has resulted in an intellectual inability to appreciate some of the issues presented for decision; the judgements are thus often devoid of insight and intellectual stimulation.

Therefore, a system of legal education must be designed in Zambia to improve the intellectual quality of the bench and bar, and to equip them for a better understanding of govt, sociology and economics. Judicial training is a universal remedy, but its recommended content, format, and integration into appointment and career systems vary considerably. Therefore, in Zambia, this training should take into account the special circumstances of the Zambian situation rather than borrowing directly from other jurisdictions.

2. There is also a need to modify the criteria used in the selection of judges in order to ensure that those selected have sufficient familiarity with comparative constitutional law and the problems of government in relation to society through experience. Therefore, academic superiority is not enough.
3. Furthermore, its time that judges took heed of the general call for them to be impartial especially in cases involving the government and public interests. Zambian judges' political sympathies, conditioned as they are by their tribal identity and loyalty, often undermine their ability to approach constitutional cases impartially and objectively. This also calls for non-interference of the government in judicial deliberations.
4. Since the number of cases decided by judges is restricted by the locus standi rule, thus restricting the opportunity for law reform, the judiciary should lobby parliament directly for statutory law reform. This can be done through workshops between the judiciary and parliament to discuss laws that need reform to reflect the ideals of the Zambian people.

## **END NOTES**

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<sup>i</sup> George Kunda, 'Zambia's Judiciary in the 21<sup>st</sup> Century,' *Zambia Law Journal*, Vol. 30, 1998, p. 29

<sup>ii</sup> Bickel, *The Least Dangerous Branch* (1962), p. 236

<sup>iii</sup> B. O. Nwabuezo, 'Judicialism in Commonwealth Africa', C. Hurst & Company, London, 1977, p.

144

<sup>iv</sup> *Ibid.*, p. 144

<sup>v</sup> *Ibid.* p. 49

<sup>vi</sup> (1965), 380 U. S. 479

<sup>vii</sup> South African Constitution, section 38

<sup>viii</sup> Constitution of the Republic of Zambia, Chapter 1 of the Laws of Zambia, Article 28

<sup>ix</sup> For instance, in the case of *Chiluba V Attorney General*

<sup>x</sup> *Opcit.* B. O. Nwabueze, p. 72

<sup>xi</sup> *Ibid.* p. 73

<sup>xii</sup> Julius Stone, *Social Dimensions of Law and Justice* (1966), p. 668

<sup>xiii</sup> *Ibid.* p. 146

<sup>xiv</sup> *Ibid.* p. 146

<sup>xv</sup> *Ibid.* p. 147

<sup>xvi</sup> Julius Stone, *Social Dimension of Law and Justice* (1966), p. 654

<sup>xvii</sup> *Opcit.* B. O. Nwabueze, p. 149

<sup>xviii</sup> *Ibid.*, p. 149

<sup>xix</sup> Church, 'Courts, Legislatures and the Application of Statutes,' *Zambia L. J.* (1973), pp. 69 and 83

<sup>xx</sup> *Opcit.* B. O. Nwabuezo, p. 151

<sup>xxi</sup> Archibald Cox, *The Warren Court* (1968), p. 22

<sup>xxii</sup> Church, 'The common law and Zambia,' *Zambia Law Journal*, (1974)

<sup>xxiii</sup> (1969) S. J. Z. 10, 15

<sup>xxiv</sup> *Mullan V The People* (1971)

<sup>xxv</sup> *Opcit.* B. O. Nwabueze, p. 75

<sup>xxvi</sup> *The People V Christine Mulundika and Seven Others* (1996) SCZ

<sup>xxvii</sup> High Court Brief of Professor Patrick Mvunga, Mvunga and Associates, at 1

<sup>xxviii</sup> HPR/11/95, issued May 19, 1995 by the Lusaka High Court, at 17

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<sup>xxxix</sup> Ibid, p. 18

<sup>xxx</sup> SCZ Judgement No. 25, at 6 of the majority opinion

<sup>xxxix</sup> (1959) 1 R & N 226

<sup>xxxii</sup> Opcit. SCZ Judgement No. 25 at 7, 8 of majority opinion

<sup>xxxiii</sup> Ibid

<sup>xxxiv</sup> Ibid. at 11 of majority opinion

<sup>xxxv</sup> Ibid. at 13 of majority opinion

<sup>xxxvi</sup> For instance, in January, the then Vice President of Zambia, Brigadier-General Godfrey Miyanda, criticised the ruling as ‘likely to spark off violence’ and said that the court ignored ‘the violent nature of the local political scenario.’ The Post, 28 February 1996, p. 3

<sup>xxxvii</sup> Ibid, at p. 1

## **CHAPTER FIVE**

### **CONCLUSION**

The foregoing chapters of this essay have discussed the phenomena of law reform and how it has been carried out in Zambia through the main vehicles of law reform, which are the Zambia Law Development Commission (ZLDC) and the Judiciary. These two bodies as shown earlier are in a special position to carry out effective law reform that is going to reflect the ideals of the Zambian people.

The ZLDC is a specialised body mandated to research widely so that laws are in line with the continuously changing social circumstances in Zambia. However, this body as exemplified in chapter three of this essay is facing several problems, the most serious of these being funding. This has affected the performance of the ZLDC and it is time this problem was given the serious attention it needs. This is the key to effective operations in law reform work.

The Zambian judiciary too, as shown in the preceding chapter has not performed very well in its role as a law reform body. This is mainly because most Zambian judges are staunch supporters of the doctrine of judicial restraint which is not conducive to law reform effort. As mentioned earlier, the Zambian judiciary, therefore, needs to take a more activist stand in its deliberations. Judicial activism should be the main

philosophy of judges if bad laws that do not reflect the ideals of a democratic society are to be removed. The decision in *Christine Mulundika* should be emulated in future judicial deliberations.

However, since the main aim of progressive law reform is to put in place laws that are in harmony with societal values, law reform effort should not be left only to the ZLDC and the judiciary. The various groups that make up the *Zambian society* must also actively participate in law reform in order to ensure that their interests are reflected in the law.

In this respect, lawyers are in a special position to help in law reform. On one hand, lawyers deal with different situational problems faced by different clients from different walks of the *Zambian society*, while on the other hand they are in constant interaction with the judiciary. Lawyers should therefore also take a more activist stance when arguing cases before the judiciary because, unlike the latter, they are in closer touch with their clients' problems. Lawyers, especially through the Law Association of Zambia (LAZ) should also actively and consistently make submissions to the ZLDC on laws that they have seen to be not in line with societal values through the numerous cases they handle.

Other interest groups in the *Zambian society* including, the media, non-governmental organisations, the church and political parties must also participate actively in law reform. They too must make constant submissions to the ZLDC after reaching consensus on various issues that need to be taken into account in the law. In this respect, the various interest groups must network amongst themselves for proper

representation of the members' interests in submissions. In addition, most interest groups, especially non-governmental organisations, receive donor funding some of which they can contribute to the running of the programmes of the ZLDC which is beset with financial woes that hinder its law reform effort.

One example of admirable effort by citizens to participate effectively in law reform is the United Citizens for Legal Reform (UCLR) in the United States of America. This is a non-profit organisation which seeks to educate the masses on the American judicial system and also seeks to bring about legal justice reform. The activities of this body include wide research in the American justice system in relation to the society and wide publicity of the findings. This body also lobbies the concerned authorities for change. Zambian citizens should also emulate such progressive bodies like the UCLR if they are to participate effectively in law reform that is going to reflect their ideals.

In conclusion, the writer would like to emphasise that since the bulk of Zambian law is found in statutes, the Zambian parliament should be more progressive in the laws that it puts in place. It must, for instance, pass into law all recommendations of law reform submitted by the ZLDC, unless there is strong reason divorced from politics not to do so. Usually, since parliament is dominated by the ruling party, recommendations for law reform that touch negatively on government power do not become law. This is a big hindrance to law reform. Law reform effort cannot survive with a non-progressive parliament. The main solution here is for Zambian people to vote wisely so that they can put progressive people in parliament; people who are

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