AUTONOMY AND INDEPENDENCE OF THE JUDICIARY IN ZAMBIA: REALITIES AND CHALLENGES.

By

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I, ERNEST LINESI SAKALA, Do hereby solemnly declare that this dissertation represents my own work and that it has not previously been submitted for a degree at this or another University.

Signed .....

Date 20th September, 1999

This dissertation of ERNEST LINESI SAKALA is approved as fulfilling the requirements for the award of the Master of Laws Degree by the University of Zambia.

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ABSTRACT

The period prior to and after the reintroduction of multiparty system of politics in Zambia witnessed a flood of unprecedented litigation involving political cases in the Zambian Courts. The judiciary became the focal point and 'battlefield' of political cases. The political cases that were litigated during that period were all test cases on how independent the Zambian judiciary was. Indeed, criticism, attacks and accusations of the judiciary were at their highest ebb.

Judges were given labels. Some were labelled 'gallant' judges while others were labelled 'pro-government.' This all depended on the outcome of a particular case. There was, at that time, a clear danger of the judiciary creating an impression that it would change with the change of political fortunes.

The existence of constitutional and statutory provisions governing judicial independence did not protect the judges from the attacks and the criticisms. This study examines factors which have a bearing on judicial autonomy and independence but not provided for in the Zambian Constitution which enabled the judges to withstand the pressures of the time and continue to sustain judicial autonomy and independence today.

The study critically analyses the judicature as the starting point of measuring factors with a bearing on judicial autonomy and independence. Thereafter the study critically looks at the judges in relation to their appointment, conditions of service and discipline. The study further analyses the two concepts, judicial autonomy and

independence. This examination is followed by a chapter on threats to autonomy and independence. The last substantive chapter evaluates realities and challenges of autonomy and independence. The sixth chapter is the conclusion.

Basically the whole study is an examination of the real factors that influence judicial autonomy and independence in Zambia not found in the Constitution. The dissertation has shown that in the ultimate analysis autonomy and independence of the judiciary in Zambia are best secured, not by constitutional and statutory provisions, but by the sincerity and the good will of the people at the helm of power; by the responsible conduct on the part of the judges through understanding of their autonomy and independence; and by the public's acceptance of the court's decisions.

The study has revealed that while all the successive Zambian constitutions included provisions on independence of the judiciary, instances of attacks and intimidation directed at the courts never diminish, thereby making the whole concept of judicial autonomy and independence elusive and a mockery. The problem seems to be that many times the judiciary has in reality not been assertive enough. As a result of the lack of adequate self- assertion, the executive, the legislature and the public have not refrained from apparent, direct or indirect interference and attacks on the judges through derogatory comments, often made in bad taste with clear motive of intimidating the judiciary in 'politically sensitive' cases before or after judgment.

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Ernest Linesi Sakala.

DEDICATION.

To my wife Monica, the children: Eledesi, Mdaniso, Kambwera, Nthandose, and Chinkhokwe.

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ABBREVIATIONS.

1.	A.C.	-	Appeal Cases.
2.	ALL.E.R.	-	All England Law Reports.
3.	A.L.J.	-	Australian Law Journal.
4.	C.I.J.L	-	Centre for the Independence of Judges and Lawyers.
5.	C.L.B.	-	Commonwealth Law Bulletin.
6.	Cmnd	-	Command Papers.
7.	Cr. APP.R	-	Criminal Appeal Reports.
8.	D.P.P.	-	Director of Public Prosecutions.
9.	J.P.	-	Justice of the Peace.
10.	K.C. Deb.	-	House of Commons Debates.
11.	L.Q. Rev.	-	Law Quarterly Review.
12.	M.M.D.	-	Movement for Multiparty Democracy.
13.	N.R.L.R.	-	Northern Rhodesia Law Reports.
14.	P.	-	Probate.
15.	Q.B.	-	Queens Bench.
16.	S.C.Z.	-	Supreme Court of Zambia.
17.	S.J.Z.	-	Selected Judgments of Zambia.
18.	U.N.I.P.	-	United National Independence Party.
19.	U.S.	-	United States Reports.
20.	W.L.R.	-	Weekly Law Reports.
21.	ZCTU.	-	Zambia Congress of Trade Unions.
22.	Z.R.	-	Zambia Law Reports.

INTRODUCTION.

Independence of the judiciary is a subject that has been vastly discussed in the context of separation of powers and the Rule of Law. Most discussions on the concept of judicial independence have centred on constitutional and statutory provisions. In many countries the principle is recognised but qualified in practice. But this recognition of judicial independence has been provided for even in countries under dictatorial regimes. The importance of the judiciary therefore cannot be over emphasized. In the words of Justice T. Vanderbilt:

> 'It is in the courts and not in the legislature that our citizens primarily feel the keen cutting edge of the law. If they have respect for the work of the courts, their respect for law will survive the shortcomings of every other branch of government; but if they lose their respect for the work of the courts, their respect for law will vanish with it to the great detriment of society.'[1]

Thus, Griffith makes the point that if the judicial function were wholly automatic, not only would the making of decisions in the courts be of little interest but it would not be necessary to recruit highly trained judges and intellectually able men and women to serve as judges and to pay them handsome salaries.[2] The debate over an independent judiciary would thus be of no value. It is in the context of decision – making that judicial independence becomes important and relevant.

In the past thirty five years of Zambian political independence, the independence of the judiciary has been recognised under all the successive post-independence constitutions. It is now appropriate to highlight the realities and challenges of this judicial independence during this period to date.

This dissertation is a study of the realities and challenges of the independence of the judiciary in Zambia with particular emphasis on the factors that govern the concept which are not contained in the constitution and which have never been provided for in any of the post-independence constitutions. The study includes an examination of the realities and challenges of the complementary concept, judicial autonomy, recently introduced in the multiparty constitution. This work further examines how the people of Zambia have respected the work of the courts and in what circumstances they have lost respect. Most importantly, the study evaluates how the judiciary itself asserted its own independence in the manner it has handled politically sensitive cases under the different successive constitutions. Thus, the primary focus of the study is on the judges themselves.

The study has been divided into six chapters. The central purpose of each of the chapters is to identify and to analyse the unwritten factors, traditions and customs that play an important role in all matters concerning autonomy and independence of the judiciary in addition to those provided in the constitution. Chapter one examines the whole judicature, focussing on the organisation of the courts, the law and practice in the courts, and physical facilities available for the judicature. In the process, factors that enhance and erode judicial autonomy and independence are identified and analysed followed by some suggestions.

Chapter two deals with the judges themselves, the focus being on the unwritten factors affecting judicial appointments of superior and lower court judges, their conditions of service, their discipline and the applicable sanctions. The disparities between superior and lower court judges are noted.

Chapter three examines the meaning and parameters of judicial autonomy and independence. It identifies the safeguards of the two concepts under the successive Zambian Constitutions and under statute. The safeguards of the concept as provided by the judges' individual attitude are highlighted.

Chapter four looks at the threats to the two concepts as well as discussing the influence of the doctrine of separation of powers on the two concepts.

Chapter five is the evaluation of the realities and the challenges of autonomy and independence.

Chapter six is the conclusion of the whole dissertation.

In this dissertation reference and observations have been made to the Draft Code of Judicial Conduct for the judiciary. It must, however, be explained at this juncture that three months after the submission of this dissertation for examination, the Parliament of Zambia passed the Judicial (Code of Conduct) Act, No. 13 of 1999. The Act was assented to by the President on 23rd December 1999.

The Code took into account all the suggestions made by the judiciary except the composition of the Complaints Committee which now included a politician.[3] The Code places adjudicative responsibilities[4] on judicial officers and recognizes the unique position they occupy. It also prescribes certain limitations on extra-judicial activities.[5]

The limitations and prohibitions in the Code must have been calculated to secure the confidence of the public in the judicial system. Thus, the Code expressly prohibits political activity by judicial officers.[6] This prohibition is justified on the premise that those called upon to adjudicate must be seen to be non partisan for purposes of enhancing public confidence in the judicial system.

The concern of the members of the judiciary in relation to the Code is whether the involvement of the Executive and the Legislature in the appointment procedures of the members of the Complaints Committee[7] will not interfere with the independence of the judiciary. The Code is still untested, the members of the Committee are yet to be appointed. All that can be said is that time will tell.

The subject of Autonomy and Independence of the Judiciary: Realities and Challenges, was chosen mainly because the author felt that the re-introduction of multi-party political system of Government in Zambia, had to be seen as deep-rooted and not a transient development. Hence, judges must be seen to give life and meaning to the multi-party system of government. In this connection, judicial decisions ought to contribute to the consolidation of the multi-party democracy. The dissertation is intended to make judges aware that the factors that influence their autonomy and independence go beyond what is contained in a written constitution, that the two concepts largely depend on them.

The materials used in this study came from published and unpublished sources based on desk research through collecting, analysing and processing data on autonomy and independence. The materials included Zambian successive Constitutions, statute books, periodicals, journals, and newspaper articles. The Constitutions of Malawi and Zimbabwe were also a source of some of the ideas. The author talked to judges, magistrates and lawyers in Zambia. The author also used materials obtained from conferences, workshops and seminars personally attended or attended by other judges and made available. Selected judgments were also analysed. The author further drew from his own experience as an advocate of the High Court and Supreme Court, and as a judge of both the High Court and the Supreme Court.

ENDNOTES TO INTRODUCTION.

1. Cited by H.J., Abraham, **The Judicial Process,** Oxford University Press, 1962, p.3 from **The Challenge of Law**, (Princeton: Princeton University Press, 1955) pp. 4-5.

2. J.A.G. Griffith, **The Politics of the Judiciary,** 5th ed. Foutana Press, 1997, p.6.

3. Part VI, **The Judicial (Code of Conduct) Act,** No. 13 of 1999.

4. Ibid., Part IV.

5. Ibid ., section 11(1).

6. Ibid., Part V.

7. Ibid., section 20(2).

CHAPTER ONE

THE JUDICATURE

The contemporary problems confronting the functioning of the judiciaries of most developing countries, including Zambia, centre on the interpretation and understanding of the terms 'autonomy' and 'independence' of the judiciary. While it is generally accepted that independence of the judiciary is an indispensable requisite for a free society under the rule of law, the problem seems to be the absence of conditions necessary for the full realization and recognition of the concept. On the other hand, there are a number of factors which must be taken into consideration before judicial independence can be identified and measured. Thus, to protect judicial autonomy and judicial independence, most countries have made provisions in their constitutions and laws for appropriate mechanisms and machinery of appointment of members of the judiciary, security of tenure of office, discipline and removal from office, and conditions of service. Physical facilities within which the judges operate have also been made available. Hence, judicial autonomy and judicial independence must be gauged through a careful analysis of these provisions by identifying obstacles to the exercise and manifestation of the concepts.

In this chapter the effect and significance of recognition by the Constitution of the five courts[1] as part of the judicature[2] in Zambia will be analyzed to ascertain whether it has enhanced good administration of justice and independence of the judges. The organisation of the courts system will be analysed.

The laws applied in the courts as well as the procedures and practice will be examined to identify any obstacles in the exercise and manifestation of judicial independence and the judges' impartiality. The available physical facilities will be discussed to ascertain their adequacy and whether they enhance public confidence in the justice delivery system. They will also be discussed in the context of productivity and performance, including the morale of the judges.

Section 1. Organisation of the Courts.

An understanding of the Zambian Court system as it exists today is dependent, in large measure, upon an understanding of its history. This is so because Zambia's courts are a product of history. But very little is known of the precolonial period because much of its history is unrecorded. Most of the recorded history, however, begins with an account of the coming of the British South Africa Company in the late nineteenth century.[3]

The system of judicial administration introduced by the British under the British South Africa Company in Northern Rhodesia, as Zambia was known before it gained its independence in 1964, differentiated between Europeans and Africans. In practice, the company left judicial administration of Africans to the Africans.[4]

In 1900, a High Court and Magistrates Courts were created in Northern Rhodesia with civil and criminal jurisdiction over all cases in the territory. The creation of these courts brought about two systems of courts. The first system consisted of a High Court and Magistrate Court to administer English law (subject to local enactments). The second system was that of Native Courts, renamed Local Courts after 1964,

to administer customary law (subject to statutory law). The High Court and the Magistrate Courts were supplemented by the establishment of the Court of Appeal between 1939 and 1953. In 1963 a Federal Supreme Court was created as a final court for the three countries that had joined together as the Federation of Rhodesia and Nyasaland. The Federal Supreme Court died together with the Federation in 1963 after the dissolution of the Federation of the three countries.[5] Thus, the organisation of the courts, the applicable laws and practice and even most of the physical structures have continued in today's Zambia with very minor variations.

The court system today in Zambia has virtually remained the same as that which existed before Zambia attained its independence. In 1971, the Industrial Relations Court, with jurisdiction limited to industrial and labour matters, was the only addition to the system. The law applicable in the courts remained statutory law. The protocol hierarchy of the courts in Zambia today comprises: the Supreme Court, the High Court and the Industrial Relations Court, (hereinafter to be collectively referred to as the superior courts); the Subordinate Courts; and the Local Courts (referred to as the lower courts). This nomenclature of the courts, however, does not reflect the jurisdictions of these courts. More importantly, the whole hierarchical arrangement of the Courts system in Zambia appears to be a myth. Each court has its own jurisdiction which is either national or territorial and dependent on the subject matter. Thus, the question asked is "superior" court or "lower" court to what? Ordinarily, a more convenient classification of the courts, though not very satisfactory, would either be into courts of original jurisdiction and courts with appellate jurisdiction.

But in the Zambian courts system such a classification would not reflect a correct classification of the courts. All the courts, apart from the Industrial Relations Court and the Local Courts, have a mixture of original and appellate jurisdiction. Thus, the Supreme Court, which in theory is a final court of appeal, has some limited original jurisdiction to sit as a trial court in certain constitutional matters.[6] The High Court has both original and appellate jurisdiction in both civil and criminal matters[7] and so have the subordinate courts.[8] The identification of a court that will try a particular matter depends on the nature of the matter and the applicable law. The present court system on the other hand, has since eliminated the discrimination that existed between courts administering customary law and those administering English Law. But customary law has remained the main law applicable in the local courts.

The Supreme Court and the High Court are both created by the Constitution but governed by different Acts of Parliament. But the Industrial Relations Court, the Subordinate courts and the Local courts, although recognised by the Constitution, are not, on the other hand, creatures of the Constitution but established by different Acts of Parliament. It is submitted that a neater court structure should be that all these courts, as recognised by the Constitution, be governed by one Act of Parliament.[9]

A. Superior Courts.

The Supreme Court, the High Court and the Industrial Relations Court collectively form the superior courts of Zambia. The lower courts consist of the Subordinate Courts and the Local Courts.

(a) The Supreme Court of Zambia.

The history of the Supreme Court of Zambia, as it is known today, dates back to the Court of Appeal of Northern Rhodesia and the Federal Supreme Court. But the immediate predecessor to the present Supreme Court is the Court of Appeal which had replaced the Federal Supreme Court after the abolition of the Federation of Rhodesia and Nyasaland in 1963. The Supreme Court is at the apex of the Zambian Court system. It was established in 1973.[10] The Court has its seat in Lusaka, the Capital City of the Republic. In terms of its operations, it is decentralised to two provinces only, Central and Copperbelt Provinces where it holds sessions on circuit basis. Thus, three times in a year the Supreme Court moves to hold sessions in Kabwe town, the Provincial Headquarters of Central Province. Four times in a year sessions are held in Ndola city, the Provincial Headquarters of the Copperbelt Province. The court sits in Lusaka every Tuesday for either Civil or Criminal appeals. It also sits every Thursday in Lusaka for Civil appeals when there are no sessions in Ndola and Kabwe.[11]

This arrangement brings justice by the Supreme Court closer to the people of those provinces and enhances public confidence in the Supreme Court. Both the lawyers and the litigants of the two provinces benefit by this shuttling arrangement of the Court as they need not travel to Lusaka each time they have a matter before the Supreme Court. Questions have, however, been raised as to why the Supreme Court

shuttles between the two provinces and not the other six. There is no satisfactory answer. The only explanation, though not plausible, is that in relation to Criminal Appeals, all the convicted prisoners serving sentences of above five years and death penalties are accommodated at the Maximum and Medium Prisons which are all based in Kabwe, the Provincial Headquarters of the Central Province. Thus, from the point of view of transporting prisoners to attend Supreme Court Sessions, the two provinces are easily accessible. It is also cheaper to take prisoners to these two provinces than to the other far flung provinces. It is submitted that if the Supreme Court is 'truly' the Supreme Court of Zambia, it must at least hold sessions in all the provinces where there is a High Court Station. By so doing, the court will be really decentralised and people will feel that the Court comes to them. On the other hand, the present workload[12] of the Supreme Court may not justify the shuttles to all the provinces in terms of cost. But in civil matters, it is more expensive for appellants from other provinces to travel where the Supreme Court holds sessions.

The movements of the Court, however, create a problem on the available courtrooms. This is so because when the Supreme Court is holding sessions in two towns, all High Court operations come to a stand still to give room to the Supreme Court. On this account the Supreme Court programmes do interfer with the High Court work.

The establishment of the Supreme Court, in place of the Court of Appeal, introduced nothing of substance apart from the change in name. The Act creating the Supreme Court reproduced all the provisions that governed the Court of Appeal. The Supreme Court today, though not bound, still follows the decisions of its predecessors.

It only departs from the previous decisions if it considers that the case was wrongly decided and there is '... a sufficiently strong reason to decline to follow it.'[13] It is this author's submission that the change of name from Court of Appeal to Supreme Court can only be explained as a political move since the name Court of Appeal had its origins from the colonial period. The Supreme Court today exercises all the powers which hitherto were exercised by the defunct Court of Appeal.

The question that raises some concern about the Supreme Court in Zambia is whether the Court is truly the final court of Appeal for Zambia. The Constitution states that it is the 'final court of appeal.' It is submitted that in theory, it is the final court of appeal. But in practice not all appeals come to the final court. The bulk of appeals that come to the Supreme Court mainly emanate from the High Court and the Industrial Relations Court. Very few cases tried by the Subordinate Courts ever reach the Supreme Court on appeal. Furthermore, cases tried by the Local Courts hardly end up in the Supreme Court. The major reason for this is that the path to the Supreme Court is too long, expensive, arduous and difficult, particularly for the unrepresented persons. On the other hand, some litigants become contented with the decisions of the lower courts and find it unnecessary to appeal to the Supreme Court. Thus, for such litigants the final court is the court that settles their case. It follows that while the Court is the highest court in the land, it is only relevant to a limited number of litigants who afford to climb the ladder. Thus, 'final' only means it is the court of ultimate or last resort for litigants who may be minded to prosecute their cases to the 'bitter end' or fullest limits of the law.

Another area of concern about the Supreme Court relates to its exercising original jurisdiction in certain constitutional matters.[14] It hears these matters as a trial court and a final court. Whether this is good administration of justice is debatable. The only argument in favour of this arrangement is that such matters are disposed of quickly and cheaply. But the counter-argument is that such an arrangement denies an aggrieved party the opportunity of having a 'second bite at the cherry' in another forum.

The most vexing question about the Supreme Court, however, concerns the recourse open to an 'innocent' litigant or accused person once he has lost an appeal in the Supreme Court. Putting the question differently: How are miscarriages of justice rectified after the Supreme Court has rendered its final judgment in a case? This question has never arisen as an issue in the context of the administration of justice in Zambia. But in an adversarial system, like the one existing in Zambia, wrongful convictions and errors in law cannot be completely ruled out. The question is therefore not hypothetical.

In the United Kingdom the recourse after an appeal for an innocent prisoner is to petition the Home Office.[15] This is known as a 'reference back' procedure based on fresh evidence. A petition is submitted before the Home Office. When the petition succeeds the case is referred back to the Court of Appeal by the Home Secretary. The court then considers the appeal by applying a subjective test of whether it is contented for the matter to stand as it is or whether there is not some lurking doubt that an injustice has been done. On a reference back procedure the Court of Appeal may decide, on hearing fresh evidence, that the conviction should be quashed. This has still

been said to be unsatisfactory. The debate in the United Kingdom now is that a new institution - a '**court of last resort**' - should be established. The Devlin Committee proposed an **Independent Review Tribunal**, unfettered by the evidential rules restricting the Court of appeal. This proposal was rejected by Government. But the Royal Commission into Criminal Justice included in its report a Chapter recommending the establishment of a **Criminal Cases Review Authority,** empowered to refer appropriate cases back to a court of appeal with sufficiently flexible rules to enable it to consider such evidence that may be in favour of quashing the conviction.

The existence of the '**reference back**' procedure and the debate raging on in Britain of whether there should be a '**Court of last resort**,' an '**Independent Review Tribunal**' or a '**Criminal Cases Review Authority**' is an acknowledgement that no system of justice is infallible. No matter how careful the investigation, how capable the lawyers and how conscientious the courts, costly mistakes will sometimes be made. Errors by the lower courts stand the chance of being corrected on appeal by the superior courts. But who corrects the likely costly mistakes or errors of the Supreme Court in Zambia after an appeal? This is the question the authorities cannot afford to ignore.

One recourse that may be resorted to in the event of an obvious error in criminal cases is the prerogative of mercy by the President. The President has, under the Constitution, discretionary powers to grant pardon, a respite, or substitute a less severe form of punishment for a conviction of any offence.[16] The powers are exercised through an Advisory Committee on the prerogative of mercy.[17] But these powers of prerogative of mercy, as a matter of practice and procedure, are used for valid

convictions and not for errors that may be made by the Supreme Court. However, the prerogative of mercy does not take care of the need for another independent tribunal to deal with genuine errors by the Supreme Court. The danger of frequent use of the prerogative of mercy powers on the other hand is that they may be perceived as an interference with the judiciary and an erosion of the independence of the judges. This is exactly what was perceived in the unreported case of **Banda V Ottino**.[18] In that case a conflict almost errupted when the then President of Zambia exercised his constitutional prerogative of mercy powers and pardoned a member of his ruling party who had been sentenced to twelve months imprisonment for contempt of court. The judges resented the President's action and interpreted it as political interference in their function. The President quickly reassured them of his strong belief in the independence of the judiciary. This is a typical situation of the use of prerogative of mercy powers that can easily be perceived as an interference with judicial functions. The reaction of the judges in this particular case was, in the view of this author, uncalled for and unjustified for two reasons. First, the judge that handled the matter had himself become **functus officio.** Hence, the matter was no longer **sub judice.** There was in reality no interference with judicial independence. Secondly, the use of the prerogative of mercy powers was constitutionally in order.

Whatever reasons may be advanced against the 'reference-back' procedure, the 'Court of Last Resort,' 'Independent Review Tribunal' or a 'Criminal Cases Review Authority' and in Zambia, the prerogative of mercy powers, the fact is that our justice system is manned by men and women who are fallible and therefore bound to make mistakes. There is need for a safety-net. The Supreme Court in Zambia has no

jurisdiction to review its own judgments.This principle was recently reaffirmed in the case of **Trinity Engineering (PVT) Ltd V. Zambia National Commercial Bank,**[19] where the court said:

> 'Quite clearly therefore, this court has no jurisdiction to review its judgment or set it aside and reopen the appeal. If it were not so then there would be no finality in dealing with appeals'.

The position in Zambia is that the Supreme Court has no authority to hear substantially new evidence after an appeal for a criminal conviction has been unsuccessful. The Supreme Court Rules only allow the court to correct clerical errors and accidental slips or omissions in its judgment.[20] It is submitted that if clerical errors or accidental slips and omissions are acknowledged, there is no justification for rejecting errors that may cause serious miscarriages of justice. But the Court has nonetheless insisted that in order to have certainity in the law, it should stand by its past decisions even if they are erroneous, unless there is sufficiently strong reason requiring that such decisions should be overruled.[21] However, the desirability of achieving finality in the litigation of issues between parties is a doctrine that is consistent with good sense .[21(a)]

Judgment writing is another area of serious concern in the Supreme Court. The Constitution provides that when the court is determining any matter other than an interlocutory matter, it has to be composed of an uneven number of judges,[22] the minimum being three. The Supreme Court Act provides that 'The determination of any question before the court shall be according to the opinion of the majority of the members of the court hearing the case.' [23] The Supreme Court, being the highest Court in the land, its judgments are assumed to be final. However, the finality of the court's judgments must entail that such judgments are of very high quality and correct. The

criticism against the Supreme Court Judgments is that even when the Court is composed of three, five, seven or even nine judges on the hearing of an appeal, the tendency is to write one unanimous judgment, however important the case or matter under consideration may be. It is conceded that the criticism is valid. Indeed, as a practice, Supreme Court judges always agree to deliver one judgment dubbed the judgment of the court. It is in rare cases that each individual judge delivers his/her own judgment. The question often asked is why should three or five intelligent judges always have the same opinion, or be unanimous in their thinking, even in complicated cases? A comparison is often made with the judgments of the House of Lords and the Court of Appeal in England, where each member delivers his or her own judgment be it a concurring or dissenting judgment.

It is difficult to justify the practice of delivering one unanimous judgment in the Supreme Court of Zambia. But the propensity of writing one judgment militates against the development of law. Different judgments including dissenting judgments are known to form the basis of law reform in future. Furthermore, the practice of delivering one judgment creates the impression that the judges are simply lazy and that in politically sensitive cases, it is considered safer to decide as a group, than to have individual judgments identified with particular judges. This attitude has been criticised as a betrayal of the oath of office for a judge to think that way. A Jurist Reporter once observed and commented:

> 'For the Supreme Court to deliver reasoned individual judgments, in many cases, judges should be physically fit and able to withstand the rigours of their office. We do not need judges who are mere passengers, the type who hide under the judgments delivered by the other fit judges. We cannot afford to have half-baked judgments from this very important court. We need judgments which should be a shining example to the lower courts.

> Finally, it should also be emphasised that the need for Supreme Court judges to deliver individual judgments, should not be used as an excuse to delay the delivery of judgments. Ideally delays in the delivery of judgments, should be unheard of in the Supreme Court.
>
> Unfortunately, however, delays in the delivery of judgments are still prevalent in the Supreme Court despite the 'Law Lords' of the court knowing that delays in delivering judgments affect the quality of such judgments, since the judges have to re-read the Records of Appeal, to refresh their memories. Further delayed judgments may prove academic due to changed circumstances.The need for the Supreme Court to re-double its efforts in ensuring delivery of quality justice is, therefore, crucial'.[24]

This was a serious indictment against the Supreme Court Judges.

The practice of one judge delivering judgment for the court in the Supreme Court is explanable. First, it is historical. Hence, most of the reported judgements in the Zambia Law Reports have been delivered by one judge; but they are still the judgments of the court. Second, public criticism against delivery of single judgments in the Supreme Court is based on ignorance of the practice that goes on in the private chambers of the judges. The practice is that before any appeal is heard, all Supreme Court judges meet to discuss the appeal. Before they meet, they will each have read the record of appeal. At the meeting, every member expresses his or her own view. At the end of the meeting, a preliminary view is formed. At the end of hearing the appeal, the judges retire to consider arguments and submissions. The preliminary view is reconsidered. Where all the judges are agreed, one is selected to write a draft judgment of the court. The draft judgment is then circulated for approval. In the event of disagreement, a further meeting is held. The outcome of this meeting is either unanimity or majority decision. In the event of a disagreement, then a dissenting judgment is written. Thus, even in the case of a single judgment being delivered, that

judgment represents the views not only of the judges who sat on appeal, but even the views of those judges not involved in the hearing of the case. Third, the practice is further defensible on the ground of costs and realism. A perusal of the Zambia Law Reports from independence, reveals that there are fewer cases in which each judge delivered his own judgment than those where single judgments of the court have been delivered. In practice, individual judgments are preferable and are delivered where there is no consensus. This is the position even in the House of Lords in England. They are not delivered as a matter of routine. In an appeal against sentence only, it would be unpracticable and unnecessary expense to suggest delivery of separate judgments. Finally, the point must be made that judges of the Supreme Court do not sit as rivalries or monuments. They work as a team. They discuss the records before and after the appeal has been argued. At the end they agree and one judgment is written and delivered. It is only when there is disagreement that individual judgments are delivered.

Indeed, arguments in favour of individual judgments have merit. Individual judgments provide a variety of reasoning and opinion in a case and form the basis of future law reform especially where there are dissenting judgments. The disadvantage is that dissent also provides, at times, uncertainity in the law particularly for the lower courts. Above all, dissenting judgments cause delays in judgment delivery. This is, however, a weak argument. Delays in the delivery of judgments in the Supreme Court are prevalent even when the judgment is assigned to be written by one judge. Indeed, delayed judgments weaken public confidence in the judicial process. It is the author's submission that guidelines ought to be worked out defining the nature of appeals in

which individual judgments ought to be delivered. The arguments in favour of individual judgments, as of now, outweigh the disadvantages.

(b) The High Court of Zambia.

The history of the High Court dates back to the year 1900 when it was established to administer the English law for Europeans only. The court today is constituted by the Constitution and established by the High Court Act. There has been no change in terms of its structure and jurisdiction since independence. The Constitution of Zambia establishing the High Court states:

> 'There shall be a High Court of Zambia which shall have ....unlimited and original jurisdiction to hear and determine civil or criminal proceedings under any law...'[25]

The unlimited jurisdiction of the Court is not 'limitless'.[26] The other jurisdiction conferred on the High Court includes supervision of civil or criminal proceedings before subordinate courts or court-martial.[27] Further jurisdiction is conferred on the High Court by the High Court Act, the Subordinate Courts Act, the Penal Code and the Criminal Procedure Code. The jurisdiction is either original or appellate.

The High court is the most highly decentralised court of the superior courts. Each Provincial Headquarters has a High Court, but not every High court has a permanent judge at the station. The jurisdiction of the High Court is in practice limited to the Province in which the court is located. But the High court has general national jurisdiction .Zambia is divided into nine provinces. Five of the nine provinces have a resident judge or judges. The stations which have no resident judges are covered on circuit basis by a visiting judge. There is more workload in the urban centres than in the rural areas . Recently, three resident judges had to be withdrawn from three rural

stations to beef up the urban stations which have had a considerable increase in the workload.

The unlimited jurisdiction of the High Court has led to an unmanageable workload for the court particularly in the urban stations which are heavily populated. To cope with this phenomenon of heavy workload, the office for the Commissioners of the High Court was established in 1974.[28] From that time a number of High Court Commissioners had been appointed by the President. These commissioners exercised all the jurisdiction and powers of a high court judge and enjoyed the same privileges as high court judges. But unlike judges of the High Court, the Commissioners exercised their powers for a specified period or until the appointment was revoked if no period was specified. The establishment of the office of High Court Commissioner was justified on three grounds: to increase the number of judges when business before the High court was heavy; to facilitate the employment of members of the legal profession with specified legal qualification to deal with particular matters; and to provide a scheme through which potential judges could be exposed.

The establishment of the office of High Court Commissioner paid dividends to the judiciary. The heavy workload was reduced tremendously and cases were disposed of expeditiously. The present Chief Justice and many other judges, currently serving on the bench, started as High Court Commissioners before their appointment. But while the judiciary benefited, the position of High Court Commissioners raised serious questions of the independence of the judges and the whole concept of judicial independence. High Court Commissioners worked on part time basis. After their High Court work they returned to their respective legal practices. The next day they

appeared in the same court before a judge sitting in the same seat they occupied the day before and on which they will sit the next day. Some High Court Commissioners even bullied members of the lower courts when they appeared before them as counsel. The concept of High Court Commissioner eroded public confidence in the independence of the judiciary because the same person was a judge one day and a prosecutor or defence counsel the following day.

The appointment of these Commissioners was not limited to private legal practitioners. Members of the magistracy with legal qualifications were also appointed High Court Commissioners. These appointments turned out to be virtually on a permanent basis as those appointed never reverted to their positions as magistrates. Eventually they were appointed as High Court Judges. This arrangement of appointing magistrates as High Court Commissioners also undermined and eroded the independence of the judiciary. A magistrate so appointed as High Court Commissioner looked forward to an appointment to the High Court bench. Thus, although the establishment of the Office of High Court Commissioners was well meant, in practice it did not enhance the independence of the judiciary. The office was abolished in 1991 when multi-party politics were introduced.

A High Court is constituted when one judge sits. All the judges of the High Court exercise equal power.[29] This means a litigant who has appeared before one High Court Judge cannot present the same case before another in the same matter and on the same facts.[30] The Chief Justice is empowered to direct that an appeal from the subordinate court be heard by two High Court judges when such appeal raises a very important point of law of public interest.[31] The High Court Act has provision for a

judge to sit with two or more assessors if he so wishes and the matter raises a point which requires specialized knowledge.[32] The judge, however, is not, in such a situation, obliged to follow the advice of the assessors.

The fact of a judge not being obliged to follow the advice of the assessors defeats the very essence of the provision of using assessors. Indeed, if the use of assessors is on the basis that the matter raises a point which requires specialised knowledge, then the advice of assessors ought to influence the decision in the case. In practice, assessors are rarely used by the High Court. For instance, this author, as a High Court Judge, used assessors only in one case in the eight years stay on the High Court Bench.[33]

(c) The Industrial Relations Court.

The Industrial Relations Court was first established in 1971.[34] At its inception the court was not part of the judicature. Parties aggrieved with the decisions had no right of appeal to the Supreme Court. The reasons for denying the right of appeal were not stated. But a reasonable inference seems to be that it was intended to ensure quick finality in industrial relations disputes to avoid disruption of operations in industry.

Initially the court was not equated to the High Court. Although litigants dissatisfied with decisions of the Industrial Relations Court had no right of appeal, in one case the decision of that court was challenged before the High Court.[35] One of the legal arguments in that case centred on the question of whether the Industrial Relations Court was an inferior court to the High Court to warrant the High Court, in a proper case, to quash the decision of that court. This author, presiding as a judge of the High Court, in that case, held that the Industrial Relations Court could not be equated to the

High Court and that it was an inferior court. The matter was not pursued further to the Supreme Court to settle the actual status of the Industrial Relations Court. Thus, until 1991, the Industrial Relations Court remained with the status of an inferior court in the hierarchy of the courts in Zambia.

The 1991 Constitution made the Industrial Relations Court part of the autonomous Judicature of Zambia.[36] The Constitution further made specific provisions, for the first time, declaring the members of the court to be independent and impartial.[37] These provisions enhanced the independence of the members of that court. The court is now on the same hierarchical level with the High Court but has retained its exclusive original jurisdiction in industrial relations matters.[38]

The Industrial Relations Court is duly constituted if it consists of three members or such uneven number.[39] The 1971 Act that established the court was repealed and replaced by the Industrial Relations Act of 1990 which was in turn repealed and replaced by the Industrial and Labour Relations Act of 1993. The 1993 Act provided for the right of appeal on a point of law or any point of mixed law and fact to the Supreme Court for any person aggrieved by any judgment of that court.[40] This provision giving the right of appeal was a departure from the concept of settling industrial disputes with minimum delays. The provision of appeal introduced a further difficulty. While the main object of the court is to do substantial justice between the parties, and not to be bound by rules of evidence in civil and criminal proceedings,[41] the Supreme court is itself bound by rules of evidence. This means that the Supreme Court, in matters on appeal emanating from the Industrial Relations Court, cannot do substantial justice. Furthermore, the Industrial Relations Court is required to deliver

its judgments within sixty days after hearing the case.[42] Failure to do so amounts to inability which may result in proceedings for removal of the Chairman or the Deputy Chairman under the provisions of the Constitution.[43]

The requirement of sixty days within which to deliver a judgment was to enhance quick substantial justice by the court. But there are no similar provisions requiring the Supreme Court to deliver a judgment in the same matter on appeal in a specified period. The lack of a specific period within which the Supreme Court must deliver a judgment in an appeal from the Industrial Relations Court completely defeats the quick substantial justice concept.

The Industrial Relations Court has exclusive original jurisdiction in all industrial relations matters. What constitutes industrial relations matters is not defined. But the Act provides the extent of the court's jurisdiction which includes: inquiring into and making awards and decisions in collective disputes, interpreting the terms of awards, collective agreements and recognition agreements; generally, to inquire into and adjudicate upon any matter affecting the collective rights, obligations and privileges of employees, employers and representative organisations; and to commit and punish for contempt.[44] The jurisdiction of the court is very broad. The Act has defined 'dispute' to include differences concerning employment contracts between an employer and an employee arising from the terms and conditions of service. Although the Act has further conferred jurisdiction on the court to hear and determine disputes between employer and employee, notwithstanding that such disputes are not connected with a collective agreement or trade union matters, the dermacation between employment cases that are commenced exclusively within the Industrial Relations Court and those

that are commenced in the High Court is not clear. The ensuing result of this uncertainty in boundaries between the two courts is that litigants are tossed between the High Court and Industrial Relations Court at great cost and inconvenience.

There is no doubt that the 1971 Industrial Relations Act had excellent intentions aimed at settling industrial disputes, through the establishment of the Industrial Relations Court, within the shortest possible time by making provisions such as the court not to be bound by rules of evidence and to do substantial justice, denying the litigants the right of appeal and specifying the period within which the judgment of the court had to be delivered. The repealing and the replacing of the 1971 Act by the 1990 Act and then by the 1993 Act, removed the spirit behind the establishment of the Industrial Relations Court. First, the provision of the right of appeal against decisions of the court meant that the jurisdiction of the court had now come under the scrutiny of the procedures of the ordinary courts. Thus, the provision of 'substantial justice' could no longer hold because the court was now to be bound by the decisions of the Supreme Court which itself is bound by rules of evidence. Second, appeals from the Industrial Relations Court had to line up like any other appeal from any court. The concept of urgency in settling industrial disputes was thus lost. The requirement that the judgment of the court had to be delivered within sixty days could no longer be justified if the hearing of the appeal and the delivery of judgment by the Supreme Court could go beyond the sixty days period, which is now the case.

The Industrial Relations Court is now part of the judicature and therefore bound to suffer the common delays associated with the administration of justice in the formal justice delivery system. It is this author's submission that the original concept of

denying the right of appeal against decisions rendered by the Industrial Relations Court should have been retained to ensure speedy disposal of those matters in that court. Instead of appeal to the Supreme Court, the aggrieved parties should have been given the right of applying to the Supreme Court for review of the Industrial Relations Court decisions to avoid the lengthy procedure of appeal. In addition, the Supreme Court should have been given jurisdiction to treat Industrial Relations Court matters as urgent matters. Alternatively, a fast tract system for all 'appeals' from the Industrial Relations Court should have been created within the Supreme Court. This arrangement would have ensured continuity of the objectives of the Industrial Relations Court - speedy resolution of industrial matters and disputes.

B. Lower Courts.

(a) The Subordinate Courts.

The Subordinate Courts are established by the Subordinate Courts Act.[45] These courts, popularly and appropriately referred to as Magistrates Courts, administer the same law as that administered by the High Court. Although the Act itself establishing these courts states that they are constituted subordinate to the High Court, the constitution, jurisdiction and procedure of these courts are independent of the High Court. Indeed, the High Court has supervisory powers of these courts but that cannot be the basis for calling these courts 'Subordinate' Courts. They exercise their own jurisdiction. It is submitted that the description of these courts as 'Subordinate' is misleading.

The Subordinate Courts Act establishes and constitutes for each District three classes of subordinate courts as follows:-

(i) A subordinate court of the first class presided over by a magistrate styled principal resident magistrate, senior resident magistrate, resident magistrate who all hold law degrees or a magistrate class I who is not professional.

(ii) A subordinate court of the second class presided over by a class II magistrate, not professional.

(iii) A subordinate court of the third class presided over by a class III magistrate, also not professional.

This arrangement makes the Subordinate Courts the second highly decentralised courts in the courts structure of Zambia. Thus, there is a Subordinate Court in each of the seventy-two districts of Zambia. A subordinate court is properly constituted when a

magistrate sits to hear cases. A magistrate may sit in civil cases with two or more assessors where a case raises issues which require special knowledge, for instance, where the court has to apply African customary law.[46]

All classes of subordinate courts exercise both civil and criminal jurisdiction within their Districts.[47] The extent of the jurisdiction of a magistrate varies according to class. It also varies according to whether the court is presided over either by a professional or non professional magistrate. According to the 1994 establishment of magistrates, there are 5 positions of principal resident magistrates, 15 senior resident magistrates and 224 lay magistrates. Despite the numerical strength and decentralisation, the subordinate courts are the most congested courts. This congestion is compounded by the fact that in addition to trying the cases falling within their own jurisdiction, the courts also handle cases triable by the High Court by way of either preliminary inquiry or summary committal.[48] A preliminary inquiry is in reality a full 'trial' into a criminal charge aimed at establishing whether there is a **prima facie** case to warrant committal for trial by the High Court.[49] Hence, all criminal matters triable by the High Court first pass through the Subordinate courts. This makes the Subordinate courts form the pillar of the criminal justice system in Zambia. They handle the biggest volume of criminal cases. In addition, all civil and criminal matters tried in the local courts pass through the Subordinate courts in the event of an appeal.[50] The Subordinate courts are the gateway of all cases that proceed to the High Court for either a trial or on appeal.

However, the majority of the personnel that handle this volume of cases at subordinate courts level are lay magistrates. This raises the question of the quality of

justice administered in these courts. But on the other hand, a completely professional magistracy or one consisting of only legally trained magistrates is not possible to achieve in Zambia. This is so because of the poor conditions of service. However, the fact that many litigants appear before these courts unrepresented because of the high cost of legal representation, makes the need for a professionalised subordinate court more desirable. There is no shortage of lawyers in Zambia today. If there is any profession which is highly 'zambianised', it is the legal profession. All it needs is to improve the conditions of service to attract qualified lawyers to the magistracy.

The liberalization of the economy has resulted in increased complex commercial litigation, and criminals have become very sophisticated. The need for professional magistrates is no longer a matter for debate. These courts cannot function efficiently without highly skilled magistrates. While the services of lay magistrates cannot be done away with completely, a deliberate policy of encouraging law graduates to join the magistracy ought to be put in place. This is more so in the justice systems of developing countries like Zambia where persons are usually unrepresented and magistrates tend to take an active role in the proceedings.

Another serious factor affecting retention of professional personnel at subordinate court level is that the magistracy is seen as a ladder for promotion to positions of Deputy Registrar and Registrar as well as a judge at High Court level. But this aspect must be looked at as an incetive to encourage a hard working magistrate.

(b) The Local Courts.

The Local Courts are created by the Local Courts Act. The members of these courts are referred to as justices. In terms of the protocol hierarchy of the Zambian judicial

system, they are at the lowest level. But they are by no means less important in terms of workload. They try the largest portion of cases than all the other courts of the judicature. They are also the most decentralised and closest to the people in the whole court system with an establishment of over 900 justices of different ranks and grades spread throughout the country.

These courts are established by a court warrant issued by the Minister of Legal Affairs.[51] The warrant specifies the extent of the powers of the court named therein. The court is constituted when two members-the presiding justice, and one local court justice, sit to hear cases.[52] The jurisdiction of the court is based on the area within which the court is situated and whether the defendant is ordinarily resident within that area.[53] In a matter involving real property, the area in which the property is situated determines the jurisdiction of the court.[54]

This perhaps explains the name 'local' courts previously known as native courts. The reason for change to "local" is not clear. But an intelligent guess suggests that the change must have been for political expediency. The word 'native' was assigned the meaning "uncivilized" when in fact it could also have meant non-european. These courts were truly non-european in practice. This element of 'native' still exists today as the bulk of litigants in these courts are still Africans. The local courts still administer mainly African customary law.[55]

The local courts also exercise limited civil and criminal jurisdiction.[56] But the justices are not legally trained although they also administer statutory law.[57] The quality of justice in these courts has always been debatable. On the other hand, it would be unrealistic to contemplate that the local court justices should be professional.

whether the local courts justices should undergo some kind of legal training is a matter of policy decision. But the fact is that Zambia is part of the changing world. Local courts must also change with time. These courts still reflect dualism in the present court system which in practice serves no purpose and only continues to justify denial of legal representation in these courts.[58]

Section 2. Law and Practice.

The constitutional documents of most Commonwealth Africa at independence or their earliest statutes, provided that until amended, all existing laws would remain in effect. As a general rule, most or all existing laws of British colonies or protectorates were carried over beyond independence. The situation in Zambia at independence was no different. Section 2(1) of the Zambia Independence Act, 1964 providing for the operation of existing law stated:-

> '2.(1) Subject to the following provisions of this Act, on and after the appointed day all law which, whether being a rule of law or a provision of an Act of Parliament or of any other enactment or instrument whatsoever, is in force on that day or has been passed or made before that day and comes into force thereafter, shall unless and until provision to the contrary is made by Parliament or some other authority having power in that behalf, have the same operation in relation to Zambia, and persons and things belonging to or connected with Zambia, as it would have apart from this subsection if on the appointed day Northern Rhodesia had been renamed Zambia but there had been no change in its status.'

It is interesting to note that it was not until 1991 that a specific provision was made in the Constitution of Zambia declaring the Constitution the Supreme Law of Zambia and that any law inconsistent with it was void.[59] This is a glaring example of the colonial hangover. It took almost three decades after independence for the authorities to declare the country's most important document as the supreme law of the

land. The laws applied in the Zambian courts today consist of the Constitution, Local Statutes, English Law, Local and foreign case-law and the African Customary law. These will now be briefly discussed in turn.

A. Applicable Law.

(a) The Constitution.

The Constitution of Zambia is now specifically declared as the supreme law in the land. It binds all persons and all organs of the state at all levels.[60] All other laws must be consistent with it. Any law that is inconsistent is void. Article 1(3) states:-

> 'This Constitution is the supreme law of Zambia and if any other law is inconsistent with this constitution that other law shall, to the extent of the inconsistency, be void.'

The concept of the Constitution being the supreme law of the land entails the subordination of all persons, organs and legislation in the country to the constitution. This principle of constitutional supremacy implies the existence of some independent and impartial organ that ensures compliance with, and respect of the constitution and the constitutional order. Such organ in Zambia are the courts. It is this principle of supremacy of the constitution that empowers the superior courts of Zambia to declare certain acts of Parliament unconstitutional to the chagrin of the executive. It is also the interpretation and adherence to this principle that brings the courts in direct confrontation with the executive. The principle can therefore only survive through a fearless and independent judiciary. In a recent case,[61] the Supreme Court declared, by a majority, that the provisions of the Public Order Act, making a police permit a pre-condition to holding an assembly is contrary to the constitutional provisions relating to freedom of assembly.

In Zambia, only superior courts have jurisdiction over matters raising constitutional issues. If a matter before a lower court raises an issue involving the interpretation of the constitution then that court is required, of its own motion or on an application by any party to the proceedings, to refer the matter to the High Court for determination.[62] In practice, all cases raising constitutional issues are commenced in the High Court. The Supreme Court has also limited original jurisdiction in constitutional matters.[63]

(b) The Local Statutes.

The Zambian statutory law consists of enactments (which since independence are called 'Acts' but formerly termed 'Ordinances' and 'Proclamations') passed by Parliament, and statutory instruments made by any person or authority to whom Parliament has delegated power.[64] The legislative power of the Republic of Zambia is vested in Parliament which consists of the President and the National Assembly.[65] The National Assembly consists of one hundred and fifty elected members; not more than eight nominated members; and the Speaker of the National Assembly.[66] The legislative power of Parliament is exercised through Bills (drafts of proposed Acts of Parliament) passed by the National Assembly and assented to by the President.[67]

The President forms part of Parliament. But he is not a member of the National Assembly that exercises the legislative power and passes Bills. However, the role of the President in passing Bills lies in his assent to the Bills presented to him. A Bill is not law until the President has assented to it. In theory, the President in Zambia may withold his assent. But in practice this has never happened. The reason for this seems to be the composition of Parliament. In a One-Party system of Government, Parliament

consisted of members from one party. Bills were discussed and agreed at the Party caucus. Hence, Parliament was merely used as a rubber stamp. In the multi-party system the situation has also repeated itself. The ruling Party dominates Parliament, making it a **de facto** One Party Parliament.

In the unlikely event of the President witholding his assent to a Bill, the President may return the Bill to the National Assembly with a message requesting that the National Assembly reconsiders the Bill or any specified provision in the Bill. The President in his message may recommend amendments. When the Bill has been returned, the National Assembly reconsiders it. If passed by the National Assembly on a vote of not less than two thirds of the members of the National Assembly, with or without amendment, and presented for assent, the President is under obligation to assent to the Bill within twenty-one days of its presentation, unless he sooner dissolves Parliament. In practice, it is highly unlikely that a President would withold his assent on second presentation at the risk of dissolving Parliament.[68] Once the Bill is assented to, then it is part of the local statute law.

The statutory laws currently in force in Zambia are largely contained in twenty-six volumes of the 1995 revised edition of the **Laws of Zambia.** They are also contained in annual bound volumes known as **Acts of Zambia.** There is also a yearly compilation of subsidiary legislation known as **Statutory Instruments**. But not all the legislation contained in these volumes was enacted by the National Assembly. Some of the legislation had been in existence prior to the independence of Zambia. It continued in force even after independence. This arrangement was aimed at maintaining continuity with the inherited legal past. In the words of Church:

> '...independence was designed to bring about political freedom not legal chaos. If the new Republic was to achieve a desirable level of stability and growth, it would have to maintain considerable continuity with the inherited legal past.'[69]

These sympathetic words had justification some thirty years ago. There is neither legal nor moral justification today in Zambia to continue blindly and faithfully following some of the archaic laws inherited at independence and long abandoned in their country of origin. There is therefore a need for a review of all inherited laws and ascertain their relevancy for their continued existence on the statute books. Local Statutory law must now guide the development of the country in accordance with the needs of the local environment. But a review must not mean wholesale abandonment of the inherited laws. Some of the received law is still relevant and beneficial. Such laws must be retained but modified to suit the Zambia of today.

(c) The Received English Law.

Zambia is a sovereign independent state. It has a monopoly of legislation over its territory. Thus, the only laws that ought normally to apply in Zambia are those enacted by the Zambian Parliament, assented to by the President in accordance with the Zambian Constitution. That, however, is the general principle. By way of exception, certain extra-national laws apply in Zambia. Prominent among these laws is the Received English law. English law is one of the sources of laws applied in courts in Zambia because of its colonial past. Most of the laws are still of colonial origin – English.

The enabling statutes for the introduction and observance of English law in Zambia are the English Law (Extent of Application) Act, Chapter 11, the British Acts

Extension, Chapter 10, the Supreme Court Act, Chapter 25, The High Court Act, Chapter 27, and the Subordinate Court Act, Chapter 28.

The English Law (Extent of application) Act is the most important. It virtually ushered in all the doctrines of the English law. Section 2 of the English Law (Extent of Application) Act defines the content of the English law applicable in Zambia. Section 2 provides:

'2. Subject to the provisions of the Constitution of Zambia and to any other written law:-

(a) the common law; and
(b) the doctrines of equity; and
(c) the statues which were in force in England on the 17th August, 1911 (being the commencement of the Northern Rhodesia Order in Council, 1911); and
(d) any statutes of later date than that mentioned in paragraph(c) in force in England, now applied to the Republic, or which hereafter shall be applied thereto by any Act or otherwise; shall be in force in the Republic.'

These provisions are subject to the Constitution or any other written law. But nonetheless Parliament of Zambia (the founding Parliament) deliberately chose to receive the common law doctrines of equity and statutes which were in force in England on the 17th August, 1911 (being the commencement of the Northern Rhodesia Order in Council, 1911). Parliament also set the conditions for the applicability of statutes of later date than 17th August, 1911 which were in force in England. The first condition is that the statute must have been in force in England after 17th August, 1911. The second condition is that it must have been applied in Zambia (Northern Rhodesia). The third condition is that a Zambian Act should have made that statute applicable to Zambia. The conditions for the applicability of English statutes of later date than 17th August, 1911 meant that the Zambian Parliament could adopt any of the English statutes.

The continued existence of Section 2 explains the presence of so many English laws on the statute book. Indeed, it portrays serious 'laziness' on the part of our founding Parliament. The reality of the situation now is that some of these laws still on the statute books have ceased operation in the country of origin. The application of English statutes in Zambian courts is further governed by the practice in each court. The general formula of application of English law in the superior courts is that:

> 'all statutes of the Parliament of the United Kingdom applied to Zambia shall be in force so far only as the limits of the local jurisdiction and local circumstances permit.'

Despite this general discretion of the courts in applying English law, Section 2 of the English Law (Extent of Application) Act specifically refers to English Statutes 'in force' on a particular date or 'of later date'. But the reception of common law and doctrines of equity seem dateless. The Section refers also to Statutes 'which were in force in England.' But makes no express reference of the origins of common law and doctrines of equity. It is submitted that as a matter of legal and colonial history of Zambia, there can be no doubt that it is the English common law and the English doctrines of equity that were intended. This is buttressed by the fact that at the time of the Act in 1963 it was the English legal system that obtained in Northern Rhodesia. It cannot therefore be said that the colonial authorities intended that the Zambian courts should apply the common law and doctrines of equity of some other country other than England. This matter is however settled in part by the Interpretation and General Provisions Act which defines 'Common Law' to mean the Common Law of England. Northern Rhodesia, as Zambia was then known, was a British protectorate. It follows

that at independence it could only have inherited the English Statutes. It is logical to conclude that the Common Law and doctrines of equity must refer to those of England.

As a general rule the post-1911 English Statutes do not apply to Zambia.[70] Section 2 of the British Acts Extension Act,[71] has listed ten post - 1911 English Statutes applicable in the Zambian Courts. The most striking aspect about these Acts is that five of them were enacted in the country of origin before 1920 and the rest before 1960. In the country of origin some of these acts have been repealed altogether . But they are still treated as good law in Zambia thirty years after independence.

A typical example of the application of English law in Zambia is in the area of matrimonial causes. Section 11 of the High Court Act states:-

> '11(1) The jurisdiction of the court in divorce and matrimonial causes and matters shall, subject to this act and any rules of court, be exercised in substantial conformity with the law and practice for the time being in force in England.'

By these provisions the Zambian Parliament has completely surrendered its powers to legislate in divorce and matrimonial causes and matters. The direction to apply English law in divorce and matrimonial causes and matters, is imperative. The section uses the mandatory 'shall' and not the discretionary 'may.' The phrase 'for the time being in force in England' must obviously mean currently in force in England. Infact that is the understanding of the Zambian courts. Thus, the law in divorce and matrimonial causes and matters in Zambia changes as the law changes in England. This further means that the laws enacted by Westminister in matrimonial causes are automatically applicable in Zambia. Historically, these provisions had a meaning because the British colonial administration in Northern Rhodesia had specifically recognised African Customary

law to be the law for Africans in matrimonial matters. Thus, Section 14 of the Royal Charter, 1889 provided:

> 'In the administration of justice to the said peoples or inhabitants, careful regard shall always be had to the customs and laws of the class or tribe or nation to which the parties respectively belong, especially regard to ... and marriages, divorce, legitimacy ..'

The colonial legal system introduced by the British thus differentiated between Europeans and Native Africans. The provisions of the Charter and the existence of Section 11(1) of the High Court was then justifiable because it was meant to apply to Europeans only and not Africans who then married under customary law. But today most Africans marry under the local Marriage Act.[72] However, Zambia continues with a dual system of laws- customary law and common law. As a result, two types of marriage laws apply in the country leading to two types of marriages – customary marriage and statutory marriage. Most of the statutory law of marriage is composed of received law which in view of the colonial history, is in effect English law applicable by virtue of Section 11 of the High Court Act.[73]. It is most unrealistic to have automatic application of English statutes to the Zambian environment today.

(d). Case-Law.

Courts have the duty and the authority to interpret legislation. This, inevitably, involves limited power to make law. The courts fill in the gaps in the law. They assign meaning to obscure and ambiguous words and phrases. In this process, judges do make law called case-law. But judges often deny this, contending that they only interpret the law. Case-law is therefore created through the application and adoption of new rules by the courts in the process of the administration of justice. The authority of case-law as a source of law rests on judicial precedent. The doctrine of judicial precedent practised in

Zambian courts has its foundation from the English common law tradition. In England, the authority of case-law as a source of law is based on the doctrine of binding precedent sometimes known as **stare decisis.** Thus, the bulk of common law and equity has not been enacted by Parliament. It is largely judge-made law. In broad terms, the common law doctrine of judicial precedent is to the effect that every court in the judicial hierarchy is bound by the principles of law propounded in the decisions of courts which are superior to it. In Zambia, the highest court is the Supreme Court. Thus, all the courts below it are bound by its decisions. Equally, the courts below the High Court are bound by its decisions. But whether local courts are bound by precedents is doubtful. However, it can be argued that a decision of the superior court which originated from a local court on appeal ought to bind the local court if a similar issue arose before it.

As a general rule, the Supreme Court in Zambia does not consider itself absolutely bound by its own previous decisions. In **Paton V Attorney**.[74] Doyle, J.A. explained:

> 'Recently, the House of Lords in England has abandoned its rigid adherence to the rule of **stare decisis**. I have no doubt that this court as the ultimate court of appeal for Zambia is not absolutely bound by its previous decisions. It can, however, only be for very compelling reasons that the court would refuse to follow a decision of the court and only where the court clearly considered that the previous decision was wrong. The relaxation of the rule is not its abandonment and ordinarily the rule of **Stare decisis** should be followed. Abandonment of the rule would make the law an abyss of uncertainity.'

In England, the House of Lords no longer, as a general rule, considers itself absolutely bound by its previous decisions.[75] But case law in Zambia still remains a source of law applicable in the Zambian courts.

The decisions of one High Court judge on the other hand do not bind another judge. This is so because judges of the High Court exercise equal power, authority and

jurisdiction.[76] The Zambian courts, with the exception of local courts, do also apply foreign precedents, mainly English precedents. But these precedents are not binding but only persuasive. However, it is in fact highly relevant whether a foreign decision is binding or persuasive. In one case, if relied upon, it becomes part of the law of the land, while in the case of being persuasive it may not. In practice, matters heard before superior courts are determined by heavy reliance on precedents if the issue for consideration had already been settled by another court. Hence, arguments that Zambian courts are not bound to follow decisions of foreign courts are merely academic. If a court in England already decided on an issue raised before a court in Zambia, it cannot be said to be only persuasive when a Zambian court cites and relies on that decision. In Zambia, the law reports do show a list of cases referred to in each volume containing cases reported. A quick glance at the Zambian law reports shows a continuous list of 'cases referred to' than 'cases reported' in a particular volume. Most of the cases referred to are decisions reported in the English **All England Law Reports**. The very frequent reference and use of the English decided cases is a strong argument that in practice the English precedents successfully induce the Zambian courts to accept and rely on them. But in **Director of Public Prosecutions V. Lukwosha**[77], Blagden, C.J insisted:

> 'I am aware of the contrary (English) opinion... But we are concerned here with interpretation of a Zambian statute, not with interpretation of British Common law, and our interpretation must conform strictly to the words used, even although, as here these words constitute a codification of the British law.'

It is submitted that whether a foreign decision is binding or persuasive is irrelevant. In the end, once accepted it becomes part of case law, one of the sources of law applicable in Zambian courts.

(e) African Customary Law.

African customary law is a source of law applied in Zambian courts. The expression 'African customary law' has not been defined by any statute. The courts too have not attempted to define it, but they have assumed its existence.[78] In general, African customary law has been understood to mean all the unwritten laws which regulate the rights, duties and liabilities of Africans in the various communities.[79]

The earliest recognition of African customary law in Zambia starts with the coming of the British South Africa Company in the late nineteenth century. Section 14 of the Royal Charter of October 29, 1889, entrusting the administration of Rhodesia to the Company stated:

> 'In the administration of justice to the said peoples or inhabitants, careful regard shall always be had to the customs and laws of the class or tribe or nation to which the parties respectively belong, especially....., but subject to any British laws which may be in force...'

The application of African customary law in Zambian courts is recognised by specific statutory provisions governing the jurisdiction of individual courts. But in superior courts, the application of African customary law is based more on inference than on specific provisions. Thus, section 16(f) of the Supreme Court Act provides that the court may appoint any person with special knowledge to act as an assessor in an advisory capacity in any case:-

> 'Where it appears to the court that such knowledge is required for the proper determination of the case.'

This provision, is, by inference, construed to include also an expert in African customary law. The High Court provisions, on the other hand, appear more specific. Section 34(1) of the Act makes provision for the ascertainment of African customary law by the High Court as follows:-

> 'In any case, cause or matter in which customary law may be material to the issue...'

Indeed, in appeals to the High Court and Supreme Court, customary law may be material. These courts actually apply African customary law. The Industrial Relations Court however has no jurisdiction to apply African customary law.

Unlike in the superior courts, African customary law is categorically provided as a source of law applied in the subordinate courts. Section 16 of the Subordinate Courts Act, the most detailed provision in Zambia on the applicability of African customary law, provides:

> '16. Subject as hereinafter in this section provided, nothing in this Act shall deprive a Subordinate Court of the right to observe and to enforce the observance of, or shall deprive any person of the benefit of, any African customary law, such African customary law not being repugnant to justice, equity or good conscience, or incompatible, either in terms or by necessary implication, with any written law for the time being in force in Zambia. Such African customary law shall, save where the circumstances, nature or justice of the case shall otherwise require, be deemed applicable in civil causes and matters where the parties thereto are Africans, and particularly, but without derogating from their application in other cases, in civil causes and matters relating to marriage under African customary law, and to the tenure and transfer of real and personal property, and to inheritance and testamentary dispositions, and also in civil causes and matters between Africans and non-Africans, where it shall appear to a Subordinate Court that substantial injustice would be done to any party by a strict adherence to the rules of any law or laws other than African customary law:'

These provisions have been the subject of criticisms and observations by a number of scholars. According to these provisions the extent of enforceable or applicable

customary law is reduced by the criteria of not being repugnant to natural justice, equity and good conscience; not being incompatible with any law for the time being in force; and not being contrary to public policy. The validity upon which customary law derives its application in the Zambian courts depends on these criteria. This means any rule of customary law that fails to pass the three criteria cannot be enforceable in the Zambian courts.

Professor Mvunga, in a paper entitled: '**AFRICAN CUSTOMARY LAW--A TEST FOR SURVIVAL, AN EXPOSITION, ANALYSIS AND CRITIQUE**', makes the observation that to understand these criteria it is worth recalling that the various customs of England in the evolution of common law were subject to the same test. Hence, according to him, the motive behind these criteria could not have been a deliberate design emanating from preconceived ideas that colonized Africans were primitive.[80] But Professor Anyangwe, in his book entitled: '**The Cameroonian Judicial System**',[81] points out that to say that a rule of customary law will be enforced if it is not incompatible with any other law in force, simply means that where statute has adequately provided for cases covered by customary law, the latter must yield place to the former. In other words, the enactment of the statute at once entails the repeal of customary law on the subject. It is submitted that in these circumstances explained by Professor Anyangwe, the criteria and the existence of the provisions become superflous.

In Zambia, the application of customary law has not so far occasioned serious difficulties. The reasons for this seem to be that very few cases involving African customary law reach the superior courts. In addition, most litigants seem contented

with lower court decisions and costs of appeal are prohibitive. But the Zambian courts ought to recognise and accept that the validity of customary law should not be judged by exotic standards. In Zambia, it is in the local courts where the bulk of African customary law is applied. In practice, there is very little controversy.

The concerns in the application of customary law is that it is unwritten and there are no precedents. This situation ought to change with changing times. Customary law should not only be considered as the law of local courts. The description 'African' customary law is itself misleading. Local courts do not deal only with 'Africans.' People of all races have access to these courts depending on the nature of a dispute and the parties involved.

B. Practice and Procedure.

The practice and procedure in the Zambian superior courts is provided and regulated by the various Acts constituting the courts and the rules of the courts made under those Acts. But all these acts have **provisos** which are phrased in mandatory terms empowering the various courts, in so far as practice and procedure is concerned to follow the practice and procedure of the equivalent court in England. The **proviso** in the Supreme Court Act reads:-

> '...if this Act or rules of court do not make provision for any particular point of practice and procedure, the practice and procedure shall be...
>
> (i) in relation to criminal matters, as nearly as may be in accordance with the law and practice for the time being observed in the Court of Criminal Appeal in England.
>
> (ii) in relation to civil matters, as nearly as may be in accordance with the law and practice for the time being observed in the Court of Appeal in England.'[82]

For the High Court the **proviso** reads:-

> '...and in default thereof in substantial conformity with the law and practice for the time being observed in England in the High Court of Justice.'[83]

Indeed, in practice, any current editions in England of **Archbold's Criminal Pleading, Evidence and Practice** and the **Rules of the Supreme Court,** popularly known as the **White Book**, are common books of reference in Zambia. These books are costly but a law library without these reference books is incomplete.

The practice and procedure in the Industrial Relations Court does not make any reference to the practice that obtains in England. It has its own rules of practice and procedure. But it can be inferred that since appeals from the Industrial Relations Court lie directly to the Supreme Court; and since the High Court is at same level with the Industrial Relations Court, then it is likely to follow the practice in the High Court under the 'in default thereof' provisions hence it may resort to being '....in substantial conformity with the law and practice for the time being observed in England in the High Court of Justice.' In practice, the judgments of the Industrial Relations Court do *contain references to English decisions.*

The Subordinate Courts Act too, has word for word provisions contained in the High Court Act on practice and procedure but the 'in default' phrase relates to practice in the County Courts or Courts of Summary Jurisdiction in England.[84]

The practice and procedure in the Local Courts however, attracts some attention. Section 14 of the Local Courts Act provides that the practice and procedure in the Local Courts is to be regulated in accordance with rules made by the Chief Justice. Rule 2 of the Local Court Rules made by the Chief Justice reads:-

'2.The practice and procedure of Local Courts shall be regulated in accordance

Section 3. Physical Facilities.

A. Inadequacy of Facilities.

Physical facilities of any court system play a major role in ensuring judicial autonomy and independence for effective smooth administration of justice. In the widest sense physical facilities must include court buildings, housing, equipment, transport and support staff. To secure these facilities, the judicature often has to compete with the needs and requirements of other departments and so justify its own needs to the Treasury. Underresourcing, therefore, tends to be a common complaint. Indeed, in the end the quality of justice delivery is affected as the judges become demotivated.

The general belief in many developing countries now, Zambia being no exception, is that the paramount task of judicial reform of the administration of justice is to construct more courthouses and equip them with modern computer and photocopying machines. Sometimes higher salaries, new legislation and training are added to the list.[85] While upgrading of physical facilities on its own would not guarantee autonomy and independence of the judicature, better facilities and work environment often contribute to higher motivation and productivity of the members of the judicature and in turn enhance public acceptance and respect of the judiciary, which are some of the essential elements in guaranteeing autonomy and independence.

In Zambia, shortage of court rooms and chambers at both High Court and Subordinate Courts levels are identified as 'traditional problems.' These problems now include inadequate numbers of judges and magistrates at all stations. This has created another problem, abnormal workloads which in turn have resulted in delayed justice.

Indeed, for a number of reasons, among them, unemployment and liberalisation of the economy, there has been an upward trend or explosion in the number of cases that are now being litigated before the courts. The courts have become congested. The lack of trained supporting personnel, stationery and type writers has also aggravated the problem.

The Zambian situation is that at most stations members of the judiciary share chambers and alternate in the use of courtrooms. They share transport as well as support staff and equipment. In the case of local courts, most stations have no courtrooms to share. Court Sessions are held under trees.[86]

Libraries and archival facilities are important tools for any judge. Apart from the Supreme Court and High Court at Lusaka, all the court stations have no library facilities to talk about. Lack of these facilities compromises the quality of court performance. In the United Kingdom the success of the greatest judges has been attributed to the availability of the best law libraries.[87] For any judge to perform effectively a library is an urgent facility.

B. Findings of the Task Force.

In 1992, in an attempt to address the inadequacy of physical facilities, an **Advisory Task Force on Judicial Performance** was appointed.[88] The **Task force** was required, among others, to obtain information on physical infrastructures particularly the state of the court buildings around the country and the cost to rehabilitate them; to establish availability or shortage of equipment, supplies, physical requirements and generally all those needs which would conduce to a good working environment.[89] The Task force produced a report. The foreword to the report made the following observations:

> 'The overall view of the department from the results of the investigations does not give a good impression at the departments performance. Among the factors that were identified as causing delays in the smooth administration of justice was lack of equipment, lack of well trained supporting staff and inadequate court rooms and offices at some stations. All these factors point at one item only money or lack of it. Administration of justice is not cheap but it is (an intergral component) essential in a democracy and because of inadequate funding judicial performance has been greatly affected. The effect of this can be easily seen in the morale of the officers working in the department.'[90]

The situation now is that the Supreme Court has adequate accommodation at Lusaka. It has no accommodation at Ndola and Kabwe. The High Court stations at Lusaka, Livingstone, Kabwe, Ndola and Kitwe all require to be extended by providing additional courtrooms and chambers as well as office accommodation for support staff. The Task Force found that all the major centres of subordinate courts along the line of rail needed new court houses. The whole country needed new court houses for local courts. A shock finding of the Task Force was that some local court clerks kept exhibits that included money at their houses while others hid the exhibits in the bush.

The Task Force Report was submitted in September, 1994. The inadequacy of physical facilities is still dogging the judiciary. In turn, public confidence in the judiciary is being eroded, productivity and performance lowered. Recently four judges of the High Court were appointed. Three of them spent about six months sharing the conference room as chambers because there were no chambers available for them. Support staff had to be moved to share offices elsewhere in order to accommodate the newly appointed judges. This situation is unsatisfactory. It lowers the dignity of the courts and erodes judicial independence.

In concluding the discussion on the judicature, it must be noted that the court system in Zambia has still, to a great extent, continued with some of the main features of the past in relation to organisation, law and practice and the available physical facilities. The coming of political independence, however, led to specific provisions governing independence of the judiciary being enshrined in the Constitution.

Having considered the judicature, the following chapter will discuss judges themselves on whom the realisation of a truly independent judiciary, as a permanent feature of society, depends. Thus, the next chapter will attempt to evaluate the method of appointment of judges, their conditions of service and the method of disciplining judges.

ENDNOTES TO CHAPTER ONE.

1. The 1991 Constitution of Zambia recognised, for the first time, five courts as constituting the Judicature of Zambia. These are the Supreme Court, the High Court, the Industrial Relations Court, the Subordinate Courts and the Local Courts. The Constitution also provided that, in addition to the five courts, other lower courts may be prescribed by an Act of Parliament.

   Before 1991, the Industrial Relations Court, the Subordinate Courts and the Local Courts were not recognised in the Constitution as forming part of the judicature. Hence, the term 'judicial officer' or 'judge' in the pre-1991 Constitution was confined to judges of the Supreme Court and the High Court. This restriction followed the English tradition where the position of a judge is safeguarded by the statute. Today in Zambia, the judges, members, magistrates and justices of the courts of the judicature are specifically recognised in the Constitution which expressly states that they 'shall be independent, impartial and subject only to this Constitution and the law.' This has now enhanced and secured the independence of the magistrates and the justices too.

2. The term 'judicature' as used in the Constitution is not defined. **The Concise Oxford English Dictionary, The New Edition for the 1990s** gives four meanings of the judicature relevant to the present discussion as: 'the administration of justice,' a 'judge's office or term of office,' 'judges collectively' and a 'court of justice.' The dictionary further explains that the term comes from a latin word 'judicare' which means 'to judge.'

   For purposes of this study the term 'judge' will be used to mean all members of the judicature. In practice, however, members of the Industrial Relations Court are referred to as Chairman and Deputy Chairman; while members of the Subordinate Courts are referred to as Magistrates and those of the Local Courts are referred to as Local Court Justices. The term judicature will be used variously to mean: 'judges collectively,' 'courts of justice' and 'judiciary.'

3. E.L., Hoover,J.C., Piper, and F.O., Spalding, **'The Evolution of the Zambian Courts Systems,'** M. Ndulo, (ed), **Law in Zambia,** Nairobi, East African Publishing House Ltd, 1984, p. 47. See also J. L., Kanganja, **Courts and Judges in Zambia: Evolution of the Modern Judicial System**. (Ph.D.Thesis), University of London, School of Oriental and African Studies, October, 1980.

4. Ibid., p.47.

5. Ibid., pp. 48-49.

6. Article 41(2), 1991 Constitution of Zambia as amended by Act No. 18 of 1996.

17. Ibid., article 60.

18. **Banda V Ottino** (1967) unreported.

19. **Trinity Engineering (PVT) Ltd V. Zambia National Commercial Bank Ltd**, (1995/1997) ZR 189.

20. Rule 78, Supreme Court Rules, Chapter 25.

21. **Abel Banda V The People (1986) ZR 105.**

21(a) C. Anyangwe, '**Finality and miscarriage of Justice in Criminal Law: Post-Conviction Remedies in Common and Civil Law Jurisidictions,**' Zambia Law Journal, Volume 30, 1998, p. 51.

22. Article 92(5), 1991 Constitution of Zambia as amended by Act. No. 18 of 1996.

23. Section 3(2), The Supreme Court Act, Chapter 25.
24. The Post, February 8, 1999.
25. Article 94(1), The Constitution of Zambia as amended by Act no. 18 0f 1996.

26. **Zambia National Holdings Ltd and UNIP V Attorney-General.** (1993/1994) ZR 115. The Supreme Court explained that the jurisdiction of the High Court is 'unlimited' but not 'limitless,' that the High Court is bound by all the laws which govern the exercise of that jurisdiction.

27. Article 94(7), 1991 Constitution of Zambia as amended by Act No. 18 of 1996.

28. Section 7, The Constitution of Zambia (Amendment) Act, No. 18 0f 1974.
29. Section 4, High Court Act, Chapter 27.
30. **Obaid and Quasmi V The People (1977) ZR 119.**
31. Section 17, High Court Act, Chapter 27.
32. Ibid., section 34.
33. **Mwiya V Mwiya (1977) ZR 113.**
34. Section 96, The Industrial Relations Act No. 36 of 1971.
35. **ZNPF Board V Attorney-General and Others (1983) ZR 140.**

36. Article 91(1)(3), 1991 Constitution of Zambia as amended by Act No. 18 of 1996.

37. Ibid., article 91(2).
38. section 85, Industrial and Labour Relations Act Chapter 269.
39. Ibid., section 89(2).

40. Ibid., section 97.

41. Ibid., section 85(5).

42. Ibid., section 94(1).

43. Ibid., section 94(2).

44. Ibid., section 85.

45. Section 3, Subordinate Courts Act, Chapter 28.

46. Ibid., section 8.

47. Ibid., section 4.

48. Parts VII and VIII, Criminal Procedure Code, Chapter 88.

49. Section 2., Criminal Procedure Code, Chapter 88.

50. Section 56, The Local Courts Act, Chapter 29.

51. Ibid., sections 4 and 5.

52. Ibid., section 6.

53. Ibid., Section 8.

54. Ibid.,

55. Ibid., section 12(1)(a).

56. Ibid., sections 8 and 9.

57. Ibid., section 12(1)(b)(c).

58. Ibid., section 15.

59. Article 1(3), 1991 Constitution as amended by Act No. 18 of 1996.

60. Ibid., article 1(4).

61. **Christine Mulundika & Others V The People,(1995/1997) Z.R.20.**

62. Section 30, The Subordinate Courts Act, Chapter 28.

63. Article 41, 1991 Constitution of Zambia as amended by Act No. 18 of 1996.

64. Section 3, Interpretation and General Provisions Act, Chapter 2.

65. Article 62, 1991 Constitution of Zambia as amended by Act No. 18 0f 1996.

66. Ibid., article 63.

67. Ibid., article 78 (1).

68. Ibid., article 78(4).

69. L. Church, An Introduction To The Law of Zambia, (1974) Lusaka, (cyclostyled materials) cited by Kanganja, J.L , **Courts and Judges in Zambia: Evolution of the Modern Judicial System** (Ph.D Thesis) 1980, supra note 3.

70. **Nkomo V Tshili (1973) ZR 102** The High Court rejected the application of the English Affiliation Proceedings Act, 1957 in preference to the local statute on the subject.

71. Section 2, British Acts Extension Act, Chapter 10 lists the following Acts :The Conveyancing Act, 1911,
The Forgery Act, 1913,
The Industrial and Provident Societies (Amendment) Act, 1913,
The Larceny Act, 1916,
The Bills of Exchange (Time of Noting) act, 1917,
The Married Women (Maintenance) Act, 1920,
The Gaming Act, 1922,
The Industrial and Provident Societies (Amendment) Act, 1928,
The Limitation Act, 1939,
The Law Reform (Enforcement of Contracts) Act, 1954.

72. The Marriage Act, Chapter 50.

73. M. Ndulo, **'The changing nature of customary marriage in Zambia', Law in Zambia,** Ndulo, M.(ed.) East African Publishing House, 1984, p.144.

74. Paton V Attorney-General (1968) ZR 185.

75. **Practice Statement (1966) 1W.L.R.** 1234 also in (1966) 3 ALL E.R. 77. This practice was adopted by the Supreme Court of Zambia in Kasote V The People (1977) ZR 75.

76. Section 4, High Court Act, Chapter 27.

77. **Director of Public Prosecutions V Lukwasha (1966) ZR14**. See also (1966) S.J.Z 1 at p.12. See also **Patel V Attorney-General (1968) ZR** p.99 where at page 121 Magnus J. said:

> 'Unlike the judges of England, I am not bound by decisions of the House of Lords, although they have great persuasive effect, as indeed is the case with all other non-Zambian decisions cited to me, whether they be from the United States, Nigeria or India. It is Zambian law which I have to interpret and not the law by any other country.'

78. In **Munalo V Vengasai (1974) ZR 91** at page 95 Doyle, C.J., said, ***inter alia*:-**

'No definition of African Customary Law is contained in the Act (Local Courts Act), nor is there any such definition in the existing Interpretation Act.'

79. Kanganja, J.L., **Courts and Judges in Zambia: Evolution of the Modern Judicial System**.(Ph.D Thesis), 1980, supra note 3.

80. Mvunga, M.P. **'African Customary Law- A Test For Survival, an Exposition and critique'**. (LLM University of London, School of Oriental and African Studies, May, 1971.

81. Anyangwe, C. ,**The Cameroonian Judicial System** p. 243, Ceper-B.P. 808 Yaonde, 1987.

82. Section 8, Supreme Court Act, Chapter 25.

83. Section 10, High Court Act, Chapter 27.

84. Section 12, Subordinate Courts Act, Chapter 28.

85. I.F.I. Shihata, **'Judicial Reform: Issues Addressed in the World Bank Projects.'** Paper submitted to the Conference on Justice and Development in Latin America and the Caribean, Montevideo, Uruguay, October 19-20, p. 23, 1995, also made available at a Joint Workshop for Judges and Magistrates of Zambia and Malawi, Siavonga, 1997.

86. Judicial Department Management Audit, Management Development Division, Cabinet Office 1994,p.23.

87. When Lord Denning turned 80 years old, someone asked him to what he attributed the fact that he was considered the greatest English Judge since Lord manifield. He answered that he had the best law library of all the judges.

88. The membership of the Task Force included:
The Hon. Mr.Justice E.L. Sakala, Chairman; The Hon. Mrs. Justice F.N. Mumba, member; The Hon. Mr. Justice D.K. Chirwa, member; The Hon. Mr. Justice W.M. Muzyamba, member; The Hon. Col. Justice W. Mainga, member; The Hon. Mrs. Justice I.C. Mambilima, member; The Hon. Mr. Justice B. M. Bwalya, member; Mrs. G.Chawatama, member; Mrs, V. Mushibwe, member; Mr. A. Phiri, member; Mr. G.G. Shanzi, member; Mr. H. Nkonkesha, member; and Mr. I.B. Masupelo, Secretary.

89. Ibid., p.2.

90. Ibid., p.1.

CHAPTER TWO

JUDGES.

In this chapter the machinery for appointing judges[1] of the superior and the lower courts including their conditions of service will be critically analysed in order to ascertain whether they adequately safeguard judicial autonomy and judicial independence. The machinery of disciplining judges too will be examined to ascertain how security of tenure of judges is enhanced and protected.

Section 1. Appointment of Judges.

The quality of judges in any system of justice largely depends upon the method of recruitment and appointment, as well as upon the standards applied by the appointing authority in the process of selection.[2] Methods of appointment have a direct bearing on both the integrity and independence of the judges. But it is very difficult to predict what sort of a judge a person will be. Thus, there is bound to be irreversible mistakes in judicial appointments even when the method of appointment works well and the standards are high. This therefore, imposes, on the appointing authority and others who play a role in the process of selecting judges, an obligation to exercise a high degree of caution in the process of selection.[3]

Unlike in the United States of America where judgeship to some courts is elective, the method of selection of members of the judiciary in Zambia, as in England and most commonwealth countries, is by appointment and recruitment. The method of appointment and recruitment varies between the members of the superior courts and members of the lower courts. Members of the superior courts may be appointed from the senior ranks of the magistracy who ascend to the high office of judge by way of

promotion within the judiciary itself, from the rank and file of senior and distinguished lawyers from the Attorney-General's Chambers, office of the Director of Public Prosecutions, Senior Defence Lawyers from the Department of Legal Aid and senior and distinguished legal practitioners from private practice. The members of the Lower Courts are recruited from Law Graduates and from the Civil Service.

The advantage of appointments from such diverse background of lawyers is that the judiciary itself benefits from a variety of legal experiences and is likely to exhibit a broad outlook and experience to deal with multifarious legal issues that arise. It is, however, worth noting that in Zambia no judge has been appointed from academic lawyers. The only explanation that can be given could be that the constitutional requirements regarding qualifications for appointment to the higher bench exclude academic lawyers. In Britain for instance, it seems accepted that an academic lawyer is not qualified for appointment as a trial judge.[4] Thus, the prevailing view in England is against appointment of academic lawyers to the Bench. This appears to be also the view in Zambia. But in Zambia, the reality is that the Law School is too small to provide lawyers to the bench and most of the academic lawyers have not had much experience.

Practical experience on the other hand, ought not to be a hindrance to appointment to the higher bench. In some countries, such as the United States of America, emphasis is on intellectual ability rather than practical experience. The quality of decisions of superior courts in countries where academic lawyers are appointed to the higher bench is likely to be of the highest standard.

A. Superior Court Judges.

Judges of superior courts include the Chief Justice, Deputy Chief Justice, Judges of the Supreme Court[5] and High Court[6] and the Chairman and the Deputy chairpersons of the Industrial Relations Court[7]. The power to appoint these superior court judges is vested in the President. The 1973 Constitution empowered the President to appoint the Chief Justice, Deputy Chief Justice and Supreme Court judges in his discretion without any consultation.[8] This arrangement was perceived to erode judicial independence. A person lacking professional competence and moral integrity required of such office could have easily been appointed. Above all, lack of consultation in an important exercise of this nature was capable of producing negative or undesirable effects resulting in the appointment of persons who may have been unsuitable or who fail to measure up to the challenges of holding the office of judge. On the other hand, the 1973 Constitution empowered the President to appoint judges of the High Court acting in accordance with the advice of the Judicial Service Commission.[9] This method of appointing High Court judges ensured consultations and enhanced public confidence in the independence of judges. There is no discernible explanation why the same approach was not used in appointing Supreme Court judges.

The 1991 Constitution brought improvement and innovations to the method of appointment of superior court judges. Judges of the Supreme Court, who include the Chief Justice and Deputy chief Justice, are now appointed by the President, subject to ratification by the National Assembly.[10] Judges of the High Court are appointed subject to ratification by the National Assembly, by the President on the advice of the Judicial Service Commission.[11] The Chairman and the Deputy Chairpersons of the

Industrial Relations Court are appointed by the President on the advice of the Judicial Service Commission.[12]

The present system of appointment of superior court judges provides a number of checks and safeguards. Thus, although the President is the sole authority in appointing Supreme Court judges, there is the mechanism of ratification by the National Assembly which operates as a check and presumably ensuring that a person of high integrity is appointed to the Supreme Court. In the case of appointing High Court judges, there is the element of advice of the Judicial Service Commission and ratification by Parliament. The judges of the Supreme Court and the High court are formally appointed by **Letters Patent**[13] and the appointment is publicised in the Government Gazette for public information.

The Chairman and the Deputy Chairmen of the Industrial Relations Court, although appointed by the President on the advice of the Judicial Service Commission, are not ratified by Parliament and are not formally appointed by **Letters Patent.** If the High Court and the Industrial Relations Court are now at par, there appears to be no valid reason why these appointments of the Chairman and Deputy Chairpersons of the Industrial Relations Court are not ratified by the National Assembly and their appointments are not formalised by **Letters Patent.**

Indeed, the quality of justice that is administered in any court system is dependent on and to a large extent reflects the criteria employed in the identification, selection and eventual appointment of judges. The significance of 'advice' of the Judicial Service Commission and 'ratification' by the National Assembly, in ensuring that the judiciary commands the respect of the society, depends also on the composition

of the Judicial Service Commission and the National Assembly. Suffice it to observe at this juncture that where all members of the Commission are appointees of the executive and where the National Assembly is a **de facto** one party Assembly, then the machinery of appointment of judges becomes questionable. Opinions differ on the issue of how effective or useful are the devices of 'advice' and 'ratification' if what is desired is that political considerations should not enter the appointment process. There is, however, no substitute for an independent appointing body. However, the appointment of judges by the executive has been justified on the ground of democratic governance. Professor Nwabueze explains that :-

> '.....if the requirements of democracy are to be met, ... the people's elected representatives in government should be actively associated with the process of appointment. The executive in particular has been chosen by the people and entrusted by them and the constitution with full responsibility for the government of the country. Its responsibility for government requires that, except for those elected directly by the people, it should have an effective say in the appointment of all important functionaries of the State.'[14]

A completely independent machinery of appointment of judges is desirable. But whether there can be such a machinery is debatable. But an appointing authority composed of various groups frequently provides some assurance that judges will be selected because of their abilities and experience and not solely because of political considerations.[15]

(a) Process of Selection.

Before 1991, there was no established or formal procedure for selection of candidates for appointment to the High Court Bench. An incumbent Chief Justice played the vital role and probably exerted personal influence on selection by virtue of being both the head of the Judiciary as well as of the Judicial Service Commission.[16] There was no requirement and indeed no evidence that in executing this important and onerous task, the Chief Justice made any consultations with either the Bar and other relevant appropriate authorities. This lack of consultation was, indeed, likely to produce negative and undesirable appointments.

In the recent past, efforts have been made to develop and entrench a practice for the selection and appointment of judges.[17] In developing this practice, cognizance has been taken of the fact that the popular practice in many countries comprising of the common law jurisdictions is that the judiciary should be the ultimate for most outstanding and experienced lawyers with many and varied backgrounds. In addition to identification of candidates by the Chief Justice, candidates have been invited through advertisements in the press.[18] The names of those who respond to the press advertisements and those identified by the Chief Justice are presented to the Judicial Service Commission for scrutiny, comments and short-listing. The shortlisted candidates are, where necessary, invited for interviews. Thereafter, the Chief Justice carries out a process of consultations with other interested organisations, such as the Law Association of Zambia, senior lawyers or supervisors of those shortlisted. The consultation is subsequently followed by a report by the Chief Justice to the Judicial Service Commission on his findings. The Judicial Service Commission later makes

ratings and recommendations for appointment of deserving candidates. At the rating stage, candidates are awarded points for experience, competence, professional integrity, and impartiality.

This procedure of selecting candidates has ensured transparency and affords every candidate to offer his name for selection. It also affords the interested parties an opportunity to express their views on the suitability of any candidate or even advise that a candidate is not suitable to be appointed a judge. Above all, it ensures public confidence in the persons appointed.

(b) Criteria for Appointment .

Since 1993, the Judicial Service Commission has set out for itself the criteria and guiding philosophy governing appointment of candidates to judgeship. These criteria include legal experience and competence, sound training and education, integrity and professional conduct, impartiality, and social relations.[19] A candidate who meets all these criteria is more likely to be appointed a judge.

The question often asked is: why are all these requirements necessary? These qualities are sought because most countries, Zambia included, that have respect for the rule of law, accord high esteem and respect to persons holding the office of a judge. These qualities are also important in ensuring public confidence in the judiciary. They are the manifestation of a judge's independence. Practice and experience has, however, shown that not all these attributes are met in some of the appointments. Thus, some candidates appointed to judgeship had the requisite legal experience but no competence. Others have shown strong business connections which in turn has affected their judicial duties.

More importantly, appointments in Zambia are also considered on the basis of regional and tribal balancing. This practice has led to the best qualified candidate not being appointed because of coming from an area or tribe already represented on the bench. However, the aspect of regional representation has its own attributes. It makes the public perceive the judiciary as a national institution which does not practice discrimination.

(c) Qualifications for Appointment.

Independence of a judiciary can be enhanced by maintaining a high quality of judicial appointments. Minimum age and experience may be useful. In some countries a career judiciary has developed, with judges appointed at an early age to lower courts and they rise through promotion to superior courts. In Zambia, there is no strict career judiciary as appointments are made either within or outside the Judicial Service. The advantage of this practice is that it brings to the judiciary broad public and private experience.

The qualifications demanded for appointment to the superior courts are laid down in the Constitution.[20] The inclusion of qualifications in a constitution ensures a properly qualified judiciary and prevents the appointing authority using arbitrary methods of appointment. The provisions promote judicial independence. They ensure that only persons with legal experience and competence, training and education are appointed to the bench. Indeed, a person appointed to the bench without these requirements, may be incapable of performing the judicial functions. This would lead to loss of confidence in the judiciary.

The requisite minimum standard of education is a law degree from any reputable university.[21] However, the President is given a discretion, on advice by the Judicial Service Commission, to dispense with the stipulated requirement.[22] To do so, he must be satisfied, by reason of special circumstances that a person who has less than the required specified qualifications is 'worthy, capable and suitable' for appointment.[23] The appointment in those circumstances is made regardless of the fifteen years or ten years requirement. This provision is perceived to threaten public confidence in the judiciary in that a person of no experience and competence may be appointed. The provisions have, however, never been used.

B. Lower Court Judges.

(a) Magistrates.

The Judicial Service Commission, acting in the name of and on behalf of the President, appoints magistrates.[24] The phrase 'acting in the name of and on behalf of the President' does not seem to advance anything to the appointment of a magistrate. In practice, the President has no role in the appointments of magistrates. First consideration in appointments of magistrates is given to officers serving in the judicial service or public service and to residents of Zambia.[25] Where an appointment cannot be made from a person already in the service, then a vacancy is filled by appointment of a suitable person who has successfully completed a course of study or training designed to qualify a candidate for appointment to the judicial service.[26] Appointments of magistrates are also made by recruitment from outside. In exercising powers of appointment, the Judicial Service Commission is required to have regard to the maintenance of high standards of integrity and efficiency.[27] The Commission also takes into account qualifications, experience, merit and seniority where the appointment is of a serving officer. The Commission may consult any person and may seek advice of a selection board constituted by the Chairman.[28] All these procedures and criteria enhance the quality of justice at lower level and independence of the magistrates. Magistrates are recruited on permanent and pensionable terms. This is another aspect which enhances their independence by ensuring security of tenure.

In practice, magistrates are recruited and appointed from amongst persons who have successfully completed the Magistrates Training Course conducted at the National Institute for Public Administration in Lusaka. Law graduates from the University of

Zambia are recruited after successfully completing the Legal Practitioners Qualifying Examinations set by the Zambia Council for Legal Education, after a one year course of study at the Zambia Institute of Advanced Legal Education. Other eligible candidates for appointment are legal practitioners qualified and suitable to practice before courts in the United Kingdom or some other Commonwealth country where the English Common Law is the basis of the legal system.

The Magistrates Training Course at the National Institute for Public Administration lasts for thirty six weeks. Most of the participants in the course are holders of the General Certificate of Education. They receive instructions in the law of Evidence, General Principles of Law, Criminal Law, Criminal Procedure, Contracts, Tort and Local Statutory Laws. At the end of the training they are appointed to the position of magistrate class III, the lowest magisterial rank from which through promotion one rises to the rank of magistrate class I. As from 1971, the Government adopted a policy which is still in place to date of sponsoring very successful graduates to study for the Bachelor of Law Degree at the University of Zambia. This enhances their chances of promotion as well as widening their knowledge. Some of these graduates from the Institute for Public Administration are now judges of the High Court after having obtained their Law Degrees.

(b) Local Court Justices.

Local Court Justices, like magistrates, are also appointed by the Judicial Service Commission acting in the name and on behalf of the President.[29] Chiefs play an important role in the appointment of Local court justices. When a vacancy of a local court justice occurs, the chief in a particular area, rural or urban, is invited to nominate

up to three names of persons knowledgeable in customary law prevaling in the local community. The three persons are subsequently interviewed by a local court adviser or magistrate. The names are thereafter sent to the Judicial Service Commission at Lusaka where the appointment is made[30].

The involvement of chiefs in the appointment of local court justices enhances the community's confidence in the local court. Chiefs being respected in their own communities members of the public are obliged to respect their appointees.

The criteria for appointment is that a candidate should have resided in the area for a reasonable period. This requirement ensures that the candidate is conversant with the customary law of the community in the area. This is essential because local courts deal with customary law which is unwritten and hardly taught in any law school.

Whether the Judicial Service Commission is a competent authority for appointment of local court justices is questionable. First, the composition of the Judicial Service Commission does not include any traditional ruler. Secondly, members of the Commission do not themselves have the opportunity of interviewing the candidates. The Commission appoints a local court justice on the basis of interviews and submissions by different people. This arrangement is unsatisfatory. But the strong argument in favour of the arrangement is that the chief of the area is a very important element in the selection process and the interviews are, in addition, conducted by a local court supervisor. This ensures that a properly qualified and suitable person is appointed. Local court justices are employed on three year renewable contracts. This means their tenure of office is not secured.

The Local Courts Act does not stipulate qualifications for appointment of justices. In practice, those appointed justices are persons who have retired from the Civil Service. The main requirements for appointment as a justice is that the candidate must have resided or comes from the area where a vacancy has occurred. This ensures that the candidate is abreast with the area's customs on account that the main law administered in local courts is customary law; unwritten and barely taught. The local court justices do not undergo any formal training in any law. The concern is whether this trend should be allowed to continue today. On the other hand, very little attention is being paid to the development of the set up of the local courts. It is this author's submission that, in the context of the developments within which the local courts operate, a close look at their operations with a view to upgrading them is overdue.

Section 2. Conditions of Service.

Conditions of service for members of the judiciary are of great concern in many Commonwealth countries. The criteria for the determination of conditions of service, including judicial renumeration, are as varied as they are disputed. But underlying the whole question of conditions of service is the need to secure autonomy and independence of judges from not only political pressure but also from financial pressure and entanglements.

In presenting the Judges (Conditions of Service) Amendment Bill in Parliament, the Minister of Legal Affairs in Zambia stated:

> 'Judges and Judiciary's independence as a whole will only be enhanced by better conditions of service....The independence of the Judiciary is a necessary and vital element to good governance.'[31]

A. Conditions and Remunerations.

In Zambia, most legal practitioners shun judicial appointment despite the honour and prestige associated with it because of 'inadequate' and 'poor' conditions of service. The poor conditions are also a source of discontent for those already on the bench. Recently, the magistrates and local court justices expressed their dissatisfaction with the poor conditions of service by going on 'a go slow' for a period of several weeks.[32] Although they got what they demanded, this is an undignified manner for negotiating for better conditions of service. But it is a fact that a poorly remunerated and demotivated judicature cannot be expected to perform effectively. The work of the judges is so enormous and very delicate. If it is not given the priority and importance it deserves, the quality and dispensation of justice are bound to suffer.

The conditions of service are the criteria through which the quality of justice delivery is measured. A judge ought to have a 'high' salary and 'adequate' pension because of the heavy responsibilities of his office. But the financial reward ought to be sufficient to induce a very successful advocate to relinguish, not only his private practice, but many of his outside activities as well, and to compensate him for lifelong limitations on the additional sources of income available to him, but denied on being made a judge.[33] The conditions of service for the judicature ought to reflect the security of tenure of the judges. They ought to be commensurate to the duties and responsibilities to the society; hence sufficiently demonstrating judicial autonomy and independence.

Before 1996, the applicable conditions of service for superior court judges in Zambia were based on the civil service conditions. The arrangement was not only

unsatisfactory but also confusing. It furthermore eroded the autonomy and independence of the judiciary. While the Constitution provided the tenure of office of superior court judges to be until upon attaining the age of sixty-five years, a judge ceased to contribute to the pension scheme upon attaining the civil service pensionable age of fifty- five years. He was paid off, but continued working for the remaining years. No arrangement was in place in relation to conditions of service for those remaining years before reaching the constitutional retiring age of sixty-five years. The Constitution provided for the renumeration of superior court judges to be a charge on the general revenue, not to be altered to a judge's disadvantage. But the conditions relating to leave days and other benefits were governed by the civil service conditions and general orders.

B. The Judges (Conditions of Service) Act.

In 1996, the Judges (Conditions of service) Act[34] was enacted to supplement constitutional provisions governing conditions of service for superior court judges. The conditions of service for superior court judges in Zambia are now secured and safeguarded by the Constitution and an Act of Parliament[35] under two broad heads namely: actual emoluments, [36] and hidden emoluments.[37] Under actual emoluments are salaries, retention allowances and pension and or terminal benefits. Under hidden emoluments fall rent free accommodation, official car, fuel allowance, entertainment allowance, non-private practice allowance, domestic servants, court robes, business class travel on duty, armed guard at residence, two free daily papers, free telephone facilities for local calls and funeral grants. The retention and the non-private practicing allowance are a device to retain judges who might otherwise be wanting to leave for greener pastures and to attract successful private practitioners to accept judicial appointment.

The Judges (Conditions of Service) Act harmonized the judges' pensions with the constitutional retirement age of a judge at sixty-five years instead of fifty-five years.

The retirement age of a judge in Zambia is sixty-five years.[38] Upon retirement, a judge is entitled to a gratuity comprising sixty months of the basic salary last received while in office. Then until his death, he continues to receive eighty percentum of the basic salary payable to a serving judge.[39] There are also provisions for payments on **pro rata** basis when a judge resigns after serving for a period of not less than ten years;[40] upon retirement on grounds of ill-health;[41] and upon a judge dying after

serving for a period of not less than ten years.[42] Upon a judge dying after retiring at the age of sixty-five, the spouse of a deceased judge is, until death or upon remarriage, entitled to fifty percent of the benefits to which a deceased judge would have been entitled. At the happening of either event, the benefits go to the unmarried children or dependants until they attain the age of eighteen years.[43]

The new package of conditions of service for superior court judges has motivated the judges and enhanced their work attitudes. It cannot be changed at the will of politicians. Although it still is not adequate, it has reduced the superior court judge's financial anxiety to some extent. It is also indeed bearing fruit. For instance, three successful private legal practitioners recently accepted appointments to the High Court bench. To attract three practitioners from private practice to accept appointments on the bench is an achievement and an attraction to the bench and builds public confidence in the judiciary and enhances judicial independence. Indeed, the money package and the benefits look impressive on paper. But the catch is that the retirement package is calculated on the basic salary exclusive of all the allowances and hidden benefits. The result is that the final figure paid to a retired judge and the monthly pension are peanuts. It is submitted that an attractive package should be that the hidden emoluments and the allowances be built into a salary. This will result in a pension being calculated based on a higher figure. In short, pay the judges well and do away with the allowances and benefits. Based on the current value[44] of the Zambian Kwacha, a retired judge cannot live on a pension calculated on the figures of a basic salary. In reality judges thrive on allowances and hidden benefits than on the actual salaries.

The other concern raised by the 1996 Conditions of Service for Judges is that a

judge only retires and receives his full pension on attaining the age of sixty-five. The effect of this arrangement is that judges appointed in their forties and below fifty years of age can only receive a pension after serving as a judge for twenty-five years or a minimum fifteen years. This aspect of the conditions is unsatisfactory because unless a candidate had adequate income before his appointment to the bench, he will not have a substantial income before attaining sixty-five years. Serving judges on the other hand, who were below fifty-five years at the time the conditions came into effect, benefited by the change from the civil service pension to the judicial service pension. They were deemed to have reached the age of fifty-five years and qualified for their pension under the civil service before attaining fifty five years of age. Subsequently, they were placed under the constitutional conditions.

The conditions applicable to superior court judges, however, do not apply to magistrates and local court justices. Presently, magistrates and local court justices conditions of service are lumped together with the public service conditions. The contradiction brought about by this arrangement is that while the lower court judges' autonomy and independence are guaranteed by the Constitution, the same Constitution discriminates against them in the applicable conditions of service within the judicature. It is submitted that lack of constitutional protections and safeguards for lower court judges threatens their independence and impartiality. At the moment the conditions of service for magistrates and local court justices are controlled by the executive. They are not guaranteed. But although the tenure of office is not guaranteed by the Constitution, they are in fact employed on permanent and pensionable terms. They are dismissable only for misconduct and after an inquiry. On the other hand, local court

as to grounds and procedures. The grounds for removal should be clearly defined and limited to serious misconduct, such as corruption. There must be no opportunity to remove a judge because of disagreement with the judge's decision in a case. Procedures for removal should be complex. They should be workable but not so expeditious that removal can be accomplished so quickly.

In the United Kingdom and the United States of America, stern provisions, like "removal only on address of Parliament" and impeachment of a judge, coupled with established conventions, prevent any government to arbitrarily dismiss judges.[47] These provisions are intended to give judges security of tenure by ensuring against their arbitrary removal from office.

In Zambia, there are express constitutional and statutory provisions that protect judges from arbitrary discipline and removal.[48] The judges are protected from arbitrary action both as to the procedure and the grounds for removal. But they are not immune against disciplinary actions. An action for removal of a judge is initiated by the President. The power is not solely for the President to exercise as he may easily abuse it by dismissing unpopular judges, a trend which erodes judicial independence. To avoid such situations, specific grounds on which a judge may be removed are stipulated in the Constitution.[49] These grounds are applicable to all superior court judges. So far as the research of this writer has revealed, since 1964 when Zambia attained independence, there has been only one recorded case in which the powers of removal of a judge were exercised.[50] In a second case, the process of removal of a judge was aborted by the resignation of the judge after he had been suspended and charged and a tribunal appointed.[51]

A. Superior Court Judges.

According to the 1991 Constitution, as amended by Act No. 18 of 1996, a judge of the Supreme Court, High Court, Chairman or Deputy Chairman of the Industrial Relations Court may be removed from office only for inability to perform the functions of office, whether arising from infirmity of body or mind, incompetence or misbehaviour and shall not be so removed except in accordance with the constitutional provisions.[52] The phrase 'inability to perform the functions of office arising from infirmity of body or mind' has been questionable in practice. The experience of the Zambian judicature is that long illness of a judge, even where that illness lasts for long periods ending in the judge's untimely death, does not appear to amount to inability to perform. However, long illnesses of judges have caused injustice by long delays in disposing off cases pending before a sick judge, particularly in pending judgments. Thus, if a matter was pending for judgment and a judge was taken ill for two years and eventually died, that matter has had to be commenced **de novo** at great cost to the litigant.[53]

The failure to take the necessary action based on grounds of ill health has sometimes put the integrity and the seriousness of the judiciary into question and disrepute. A judge who had been bedridden for about two years refused to appear before a Medical Board which was set up to determine whether he was fit to carry on with the functions of judgeship. The explanation advanced for refusal was that the established precedent in Zambia is that a judge never retires on grounds of ill health. Indeed, such attitude has eroded public confidence in the judiciary.

The terms 'incompetence' or 'misbehaviour:' are a further source of dissatisfaction. They are not defined in the Constitution. The public in Zambia have complained of delayed judgments ranging from periods of one year to two years before being delivered. The question is whether delays do not amount to 'incompetence' and 'misbehaviour?' Although delays in the administration of justice seem to be a common feature, members of the public, including parliamentarians, complain bitterly about the length of time the judiciary takes to determine cases that come before it.[54] Suggestions have been made that there must be a time frame for delivery of judgments.[55] These suggestions have not been welcome. It has been argued that such a provision would encroach on the independence of the judiciary. But, a time frame for delivery of judgments within a certain period is provided for in the Industrial and Labour Relations Act.[56] In that Act, the Industrial Relations Court is required to deliver judgment within sixty days from the last day of hearing the case. Failure to do so amounts to inability to perform which may lead to appointment of a tribunal under the constitutional provisions.[57] The justification for the provision in that Act is that industrial and labour disputes ought to be settled as expeditiously as possible to avoid disrupting the operations at places of work. The sixty days requirement within which judgments have to be delivered by the Industrial Relations Court is now rendered unworkable by the process of appeals to the Supreme Court. These appeals last more than sixty days before they are disposed off.

The Constitution of Zambia has specific provisions for investigating and for removing judges of the superior courts. These provisions protect judges from arbitrary removal and enable them to be heard and represented before an independent tribunal.[58]

There is only one recorded case in Zambia where the constitutional provisions relating to removal of a judge were exercised.[59] This tends to suggest existence of adequate security for judges from arbitrary removal although there had been an instance in Zambia when three judges left the bench and the country not by removal, but due to the climate that prevailed at the time.[59(a)] Thus, removal can be actual or due to the environment and circumstances in which a judge leaves the bench or retires early. In the only precedent on removal of a judge, he was charged with misbehaviour. The allegations against the judge were that the judge, having been lawfully required by the Chief Justice to transfer to another station, he wilfully and without sufficient or proper cause refused to be transferred; that in the process of refusing the transfer, the judge freely insulted the Chief Justice and openly challenged and defied his authority; that the judge threatened to embarrass the incoming judge; and that he continued to disobey lawful instructions despite the judge having been warned of the serious consequences of the disobedience.

The case set out for the first time what constitutes misbehaviour of a judge in Zambia. In that case, the judge was removed after the tribunal presented its report to the President. At the opening of that inquiry, the tribunal acknowledged that there was no precedent to follow in Zambia.[60] The tribunal decided on its own procedure to follow. It decided not to be bound by the rules of evidence and that the evidence was to be received not on oath. An interesting point that arose at the hearing was whether the Chief Justice should be referred to as the complainant. After detailed submissions from the Solicitor-General, representing the 'complainant,' the accused judge himself

and the Chief Justice, it was resolved that since the Chief Justice was the initiator of the facts that led to the appointment of the tribunal, he was the complainant.

A number of observations and comments may be made with regard to this first case brought under the constitutional provisions for removing a judge. First, removal of a judge is a very serious matter. It is imperative that the procedure of conducting the inquiry by a tribunal ought to be expressly stated by way of regulations. There are no specific regulations governing procedure and practice for removal of superior court judges. Secondly, the Chief Justice's concern of being made a complainant in a matter involving his own judge was a valid one regardless of whether he initiated the facts that led to the appointment of the tribunal. Indeed, had the inquiry ended in the acquittal of the accused judge, the working relationship between the Chief Justice and the judge would have been ruptured. It is this author's proposal that regulations governing removal of a judge under the constitutional provisions ought to be made to enable any accused judge to know in advance what procedure will be applied on him to enable him to prepare his case. At the moment it is only implied that an accused judge is entitled to notice and an opportunity to be heard. It is further suggested that the complainant should be the State since the tribunal is appointed by the President.

The difficulties presented by the absence of removal regulations were demonstrated in the most recent case for the removal of a judge. The judge was suspended and a tribunal appointed. A few days before the tribunal could commence its proceedings, the judge resigned. The inquiry was aborted.[61] A number of unanswered questions were raised. First, could a judge, who is on suspension pending investigations under the provisions of the constitution, resign? Secondly, could he have

been forced to appear before the tribunal? Thirdly, if he could not be forced, should the tribunal have gone ahead with the inquiry to establish the guilty or innocence of the judge? Fourthly, is a judge who resigns when disciplinary proceedings for his removal are pending, entitled to any pension? Despite these pertinent questions, the resignation of the particular judge was treated as an acquittal, entitling him to all his benefits which included the purchase of a government pool house. This, it is submitted, was the most unrealistic ending of the case. The fact, however, is that the truth or the falsity of the allegations against the 'honourable' judge were never established and will never be. Indeed, for a judge who might have been perhaps acquitted, the public's perception of him must be that his resignation was an admission of his guilt. These are cobwebs in the absence of specific regulations to govern the procedure for removing a judge from office.

Another important observation of some concern that can be made about the removal procedure is that they make no provision for an aggrieved judge to appeal against the decision of the tribunal or even apply for judicial review of the decision of a tribunal. The Constitution is silent. But one would like to suggest that while an appeal may be inconceivable in the absence of rules, an aggrieved judge ought to be entitled to apply for judicial review against a decision of a tribunal. It is not far-fetched that situations might arise in which the grounds for removal might have been fabricated and false. But no remedy exists for a judge to vindicate himself after the tribunal has submitted its report and advised his removal. It is submitted that, granted that

short of removal, there are no other sanctions against a judge; the procedure for removal of a judge may result in miscarriage of justice. The law in Zambia does not even offer any other remedy for a suspended judge who is eventually removed.

It is a curious situation that when a judge is being appointed, there are five major players namely, the Chief Justice, who initiates the process of appointment, the Judicial Service Commission, which scrutinizes candidates and recommends them for appointments, the President, who makes the appointments and then Parliament that makes the ratification. But when it comes to removal of a superior court judge, there are only two players namely, the President and the tribunal. It is this author's submission that the number of players involved at the appointment stage of a superior court judge is an indication of the high esteem the office of a judge is held in. It is further submitted that to remove a man from an office in which he had been determining the fate of the numerous citizens, deserves equally serious scrutiny equal to that at the appointment stage. Any miscarriage of justice in the process of removing a judge does threaten the foundation of the administration of justice.

This author's proposal is that the procedure of removing a judge must even involve more players than those involved at the appointment stage. There ought to be an independent authority to scrutinize the findings of the tribunal before the President removes a judge. The Constitution of Zimbabwe seems to accommodate the proposal. In Zimbabwe, the tribunal inquires into the matter and reports to the President. The tribunal recommends to the President whether or not he should refer the question of the removal of the judge from office to the Judicial Service Commission.[62] The Judicial

Service Commission has a role to play in the removal of a judge. Section 87(6) of the Constitution of Zimbabwe reads:

> 'A tribunal appointed under subsection (2) or (3) shall inquire into the matter and report on the facts thereof to the President and recommend to the President whether or not he should refer the question of the removal of the judge from office to the Judicial Service Commission, and the President shall act in accordance with such recommendation.'

In an appropriate case in Zimbabwe, the Commission can advise against removal despite the recommendations by the tribunal. This arrangement ensures that another body, independent of the tribunal, reviews the recommendations of the tribunal. In the process, miscarriages of justice are minimized.

B. Lower Court Judges.

The Constitution of Zambia provides for the independence and impartiality of Lower Court Judges, subject to the Constitution and the law.[63] It also provides that they shall conduct themselves according to a code of conduct.[64] But unlike for the judges of the superior courts, it does not provide for their appointment, discipline and removal from office. These disparities governing members of the same institution raise the questions of the independence of the judges of the lower courts and the question of whether it is desirable that the constitutional provisions should apply equally.

The Judicial Service Commission appoints lower court judges. It is also the authority responsible for their removal from office . But unlike in the case of superior court judges, there are comprehensive written regulations governing discipline and removal of lower court judges.[65] The regulations provide for the suspension, and entitlements while on suspension; namely, half salary and not to leave Zambia while on suspension. It is also the practice to suspend lower court judges if criminal proceedings are pending against them. They are removable only on grounds of proved misconduct. The removal is preceded by a preliminary investigation and consultations with the Director of Public Prosecutions; and the framing of charges against the judge. The charges are subsequently served on the accused judge who in turn submits grounds on which he relies to exculpate himself. These are later submitted to the Commission which conducts an inquiry if necessary. No inquiry is conducted where the misconduct would not warrant removal. In the event of there being no inquiry, the Commission decides the matter on the basis of a report by a responsible officer; the statement of the charge and a reply from the accused judge. The regulations thus

differentiate between misconduct warranting dismissal and that which does not warrant dismissal. A lower court judge on suspension for a disciplinary action cannot resign before the inquiry is conducted and determined.

The procedure of removing a lower court judge is not only detailed but excludes any room for miscarriage of justice by the provision of consultation with the Director of public Prosecutions, a disinterested party in the inquiry. It is submitted that there is more justice in the process of removing a lower court judge than in the process for removal of a superior court judge. Thus, the exclusion of lower court judges from constitutional provisions of removal could be an advantage than a disadvantage. The process provides more protection and safeguard to lower court judges.

Regulation 28 of the Judicial Service Commission Regulations, however, raises some doubt in the fairness of a disciplinary action based on criminal proceedings. The Regulation states:

> '28. A judicial officer acquitted of a criminal charge in any court shall not be dismissed or otherwise punished on any charge upon which he has been acquitted, but nothing in this regulation shall prevent his being dismissed or otherwise punished on any other charges arising out of his conduct in the matter, unless the charges raise substantially the same issue as those on which he has been acquitted.'

The effect of this Regulation is that a lower court judge on suspension while facing criminal proceedings still stands the danger of facing disciplinary charges arising from the same conduct even when acquitted. He can still be dismissed. He cannot raise a defence of **autre fois acquit**[66] unless the charges raise substantially the same issues for which he was acquitted. It is submitted that the regulation exposes a lower court judge to double jeopardy. If he has been acquitted of a criminal charge,

there can be no other charges that can arise to warrant dismissal. The regulation is however supported by judicial interpretation. In the case of **The People V Lubasi,**[67] the High court, among others, held that 'the fact that a public servant has been acquitted by a court of law does not bar the authorities from taking any administrative measures which they deem fit to deal with a public servant.'

The justification of the regulation is that some acquittals in criminal proceedings are as a result of technicalities. It would therefore be administratively undesirable that a public servant who had defrauded government huge sums of money should be allowed to continue in office on account of an acquittal based on technicalities when it can be shown that he was negligent in the performance of his duty. The defence of **autre fois acquit** applies in criminal proceedings only and has no application in matters of administration.

C. Applicable Sanctions.

The constitutional mechanisms in Zambia for the removal of superior court judges from office provide no other sanctions against judges short of a suspension, while the tribunal is conducting the inquiry and thereafter removal of a judge if found guilty.[68] Thus, sanctions like warning, reprimand, demotion or suspension are unknown. This perhaps explains why there are not many recorded cases of discipline against superior court judges. Lack of lesser sanctions than removal has brought about indiscipline and laziness among some of the superior court judges. It has also led to delays in the administration of justice especially delivery of judgments. There have been cases of judges who have been drunk in public but have gone unpunished for lack of appropriate punishment. The sanction of removal from office has been exercised for only extreme cases. Hence, a critical examination of the facts of the only recorded case of removal of a judge from office in Zambia, reveals that had there been sanctions short of removal, the judge, who was renowned for hard work, would perhaps have not been removed as a less severe punishment would have remedied the situation.

The allegations against the judge, now with hindsight, appear to have been as a result of personal differences between the Chief Justice and the judge. The removed judge objected to his transfer to another station because, wrongly or rightly, he believed that the Chief Justice was favouring the judge who was to replace him. All his pleas that he be allowed time to complete building his house were turned down. As it turned out, the judge whom the Chief Justice transferred was, a few years later, promoted to the Supreme Court, superceding some of the senior judges of the High

Court. It could be said that the removed judge's fears were vindicated. Hence, his removal could be said to have been a miscarriage of justice.

It is submitted that sanctions, other than removal, ought to be introduced in Zambia. Removal must be the last resort and reserved for very serious offences. Judges are exceptionally rare workers. Not every lawyer can be a judge. It takes many years of experience to produce a good judge of the superior court. They should not be easily removed on grounds of a personal nature. Indeed, judges are human beings who are subject to numerous temptations and pressures from all angles. In an African context there are even more immediate pressures from relatives. The removed judge perhaps was building a house for his parents. To strike a balance between serious and less serious transgressions, it is desirable to have a variety of sanctions against superior court judges short of removal.

Although the mechanism for the removal of judges is rarely used in Zambia, there are nonetheless other mechanisms or censorship for checking judicial conduct of judges short of removal. Such checks are exercised either formally or informally, publicly or in private. These checks take the form of comments, complaints and criticism of the judiciary by Parliament, the Press, the Law Association, the Supreme Court and by the Executive. But it is never admitted that through these mechanisms some kind of disciplinary control is exercised over the judges. Whether they are admitted or not, they certainly attract attention.

In Zambia, Parliament frequently criticises the judiciary in the course of debate generally or on matters relating to the judiciary. Thus, judgments of courts have also been criticised and sometimes 'reversed' through amendments to the law.[69] Some

members of Parliament have freely commented on the personal behaviour of individual judges.[70] Indeed, the Speaker has sometimes ruled that the criticism uttered was out of order, but such rulings have applied to future criticisms because a criticism already voiced has been reported in the Press. In one instance, a member of parliament so heavily criticised judges who originate from one region accusing them of passing judgments in favour of a former Head of State.[71] Some members of Parliament raised points of order. The Speaker ruled the particular member out of order, but the attacks on the individual judges and their names were carried on the front pages of the papers the following day.[72]

The press also checks judicial conduct of judges. Lord Denning described this mechanism of checking judges conduct as follows:-

> 'In every court in England you will, I believe, find a newspaper reporter...He notes all that goes on and makes a fair and accurate report of it...He is, I verily believe, the watchdog of justice...The judge will be careful to see that the trial is fairly and properly conducted if he realises that any unfairness or impropriety on his part will be noted by those in court and may be reported in the press. He will be anxious to give a correct decision if he knows that his reasons must justify themselves at the bar of public opinion. Justice has no place in darkness and secrecy. When a judge sits on a case, he himself is on trial... If there is misconduct on (his) part, any bias or prejudice, there is a reporter to keep an eye on him.'[73]

The importance of the press in checking judicial conduct cannot be exaggerated. Indeed, it is only the Press that constantly and publicly critises judicial conduct. Not only does the press report and criticise the judiciary, but it helps to supply the information upon which other mechanisms can operate to discipline a misbehaving judge or to remedy the defects in the administration of justice. Thus, in Zambia, following the reports in the Press of what a judge had done in his releasing over hundred prisoners awaiting trial on grounds of delay, investigations leading to appointment of a tribunal were instituted against the judge, but he resigned before the case against him could be heard.[74] Moreover, when Parliament, the Supreme Court or the Law Association act against a misbehaving judge, the action is publicised in the Press giving it greater effect.

The right to criticise judges ensures a high standard of performance. But it is important to note that scurrilous attacks and charges against judges may undermine public confidence in the judiciary, particularly in the face of the practical difficulty of the judge's bringing a civil action to clear his name and the traditions that judges do not reply to criticism. Thus, theoretically there is freedom to criticise the decision of any court or the conduct of any judge, but in practice those who criticise the judges do so at the risk of being punished for contempt.[75]

The appellate court also plays an important role in securing high standards of judicial behaviour among lower court judges. In Zambia, the Supreme Court is the only institution which officially and openly passes upon judicial misconduct and, when warranted, does not only criticise, but reverses a lower court's judgment or sets aside a conviction coupled with severe condemination. Although such discipline does

not directly affect the tenure or position of the judge, it must have an effect on the judge to whom the criticism is addressed as well as on other judges. But the Supreme Court carefully phrases its criticisms. Thus, in a case in which the trial court appeared upset with the Supreme Court in an earlier decision in which the Supreme Court reduced sentence, the trial court ignored factors in mitigation of sentence in a reprehensible contempt. The Supreme Court used the following language:-

> "Instead, the learned trial judge offered to criticise in unnecessarily uncomplimentary terms the sentence which this court substituted for his own in the related case involving the practitioner. The principles of **stare decisis** and binding superior precedent so necessary in our hierarchical system of justice received short shrift. It is wrong in principle and conducive of discord, uncertainty and inconsistency for any lower court to adopt such a stance towards a senior court.'[76]

The Supreme Court in Zambia frowns upon any attempt by courts below it to question or criticise its decisions or, even worse, to disregard them. Improper conduct of the trial judge adds 'great weight' to the substance of the appeal; and together with other grounds of appeal may result in the reversal of judgment in a civil case or setting aside a judgment in a criminal case.[77]

The Law Association or individual lawyers do complain in writing to the Chief Justice about the performance of certain judges or delays in delivery of judgments. A reminder to the judge concerned by the Chief Justice, is a mode of checking the judge's performance. In the Supreme Court of Zambia, a practice has been developed where the office of the Master issues, at quarterly intervals, a list of pending judgments which acts as a reminder and a check on judges.

The foregoing various checks of judicial misconduct provide the solution to the question of the nature of sanctions that must be applied on superior court judges short

of removal. In Zambia, the problems of the nature of sanctions applicable to superior court judges became a real issue when drafting a Code of Conduct for the judiciary.[78] According to the preamble to the Code of Conduct, which is still in draft form, the objectives of the Code are to ensure an independent, strong, and respectable judiciary and to enforce high standards of conduct. The question that confronted the Drafting Committee was what sanctions shall be applicable for any breach of the rules of the Code? This was an issue because the Constitution itself stipulates the sanction applicable to a superior court judge in the event of misconduct. There are no other sanctions short of removal. However, to make the Code workable, the Drafting Committee came up with some formula. The concept of 'appropriate authority' for the various levels of the courts was introduced. The Code provides that any breach of rules of the Code 'shall be construed as a misconduct to be reported to the appropriate authority.' The 'appropriate authority' is explained thus:

> 'in the case of judges, the Chief Justice, who may admonish the judge concerned and in the case of a breach requiring removal under article 98(2) of the Constitution, he may report the breach to the President.'[79]

There is no provision in the Constitution for the sanction of admonishing an erring judge. But when the Code will be promulgated into an Act, provision for alternative sanctions against erring superior court judges may enhance security of tenure of office. Whether the provision for admonition as a punishment for erring judges will not be unconstitutional, it remains to be seen when the Code will be in force. But the point has to be emphasized that the complex the method for removal is, the more secure is the tenure of office.

The Judicial Service Commission Regulations provide a variety of nine punishments which the Commission may impose over an erring magistrate or local court justice. These punishments, listed in the regulations in a descending order of gravity starting with the severest are: dismissal or retirement in public interest or an abolition of office to effect greater efficiency or economy, or retirement on medical grounds; reduction in salary; deferment of increment; stoppage of increment; withholding of increment; fine , subject to the amount not exceeding five days' pay in one month or seven day's pay in two consecutive months; severe reprimand; reprimand; and the payment of the cost, or part of the cost, of any loss or damage caused by default or negligence.[80]

Unlike in the case of superior court judges where there is one punishment only for any misconduct, the punishments of lower court judges ensure that unless in the most serious misconduct, a magistrate or a local court justice may not be removed from office. Thus, the application of the Draft Code when promulgated will raise no inconsistencies in relation to the magistrates and justices. It is a serious anomaly that sanctions applicable to lower court judges should be more flexible than those applicable to superior court judges.

The constitutional mechanism for removal of superior court judges from office seems not to be adequate in enhancing security of tenure on account of limited sanctions applicable to a judge found guilty. However, the machinery for appointing judges in Zambia ensures their integrity and independence. The conditions of service equally safeguard their autonomy and independence. The next chapter is set to explore

the concepts of judicial autonomy and independence and ascertain the extent of their application under the different Constitutions in Zambia.

ENDNOTES TO CHAPTER TWO

1. The term 'judges' is used loosely to mean officers of all the courts of the judicature who hear and determine cases.

2. A.G., Gardner, (Later Lord Chancellor), **'The Machinery of Law Reform,'** 69L.Q.Rev.46 at 49,cited by S., Shetreet, **Judges On Trial,** p. 46, North-Holland, Publishing Company, Amsterdam. New York- Oxford, 1976.

3. S., Shetreet, **Judges On Trial,** p.46 North-Holland Publishing House, 1976, Amsterdam New York – Oxford, at p. 47 citing Lord Coleridge at Note 6: 'It is one of the curious things about our profession, that you can never tell what sort of a judge a man will be. One of the worst judges I ever recollect was Crompton, yet I am sure, if it had gone by election, the profession would have elected him when he was made; and Blackburn, of whom no one thought anything, made, with some grave defects, one of the very best judges of my time.'

4. Ibid., p.58 under sub paragraph (c) headed 'Academic Lawyers as Judges.'

5. Article 92 (2) 1991 Constitution of Zambia as amended by Act No. 18 of 1996.

6. Ibid., article 94(4).

7. Ibid., article 97.

8. Article 108(1) 1973 Constitution of Zambia.

9. Ibid., article 110(1).

10. Article 93 (1)(2), 1991 Constitution of Zambia as amended by Act No. 18 of 1996.

11. Ibid., article 95(1).

12. Ibid., article 95(3)

13. For Precedent of **Letters Patent** see Government Notice No. 1349/1977.

14. B.O.,Nwabueze, **Judicialism in Commonwealth Africa,** p.272, 1977, London, C. Hurst and Company.

15. Section 3(1), The Service Commissions Act, chapter 259, sets out the composition of the Judicial Service Commission.

16. Ibid.,

17. The Judicial Service Commission, ' **Basic Criteria for the Selection of Judges,'** approved at the 159th meeting of 16th June, 1993.

18. The Zambia Daily Mail, Friday, November 28, 1997.

19. The Judicial Service Commission, **'Basic Criteria for the Selection of Judges,'** supra note 17.

20. Article 97(1), 1991 Constitution of Zambia as amended by Act No. 18 of 1996. The Article reads:

    97.(1) Subject to clause(2), a person shall not be qualified for appointment as a judge of the Supreme Court, a puisne judge or Chairman or Deputy Chairman of the Industrial Relations court unless-

    (a) he holds or has held high judicial office; or

    (b) he holds one of the specified qualifications and has held one or other of the following qualifications-

    (i) in the case of a Supreme Court Judge, for a total period of not less than fifteen years; or

    (ii) in the case of a puisne judge, the Chairman and Deputy Chairman of the industrial Relations Court, for a total period of not less than ten years.

21. Section 12, Legal Practitioners Act, Chapter 30.

22. Ibid., article 97(2).

23. bid.,

24. Section 5, The Subordinate Courts Act, chapter 28 and also Section 4, The Judicature Administration Act, chapter 24.

25. Regulation 10, The Judicial Service Commission Regulations appearing as subsidiary legislation to Service Commissions Act, Chapter 259.

26. Ibid.,

27. Ibid.,

28. Ibid., Regulation 11

29. Section 4, the Judicature Administration Act, chapter 24.

30 J.L., Kanganja, **Courts and Judges in Zambia: Evolution of the Modern Judicial System** (Ph.D Thesis, 1980), supra note 3, p. 48.

31. The Post, Friday, September 18, 1998.

32. The Post, July 9, 1998.

33. K., Roberts-Wray, **'The Independence of the Judiciary In Commonwealth Countries.'** Cited by Anderson, J.N.D., (Ed) Changing Law in Developing countries, p.63 George Allen and Union Ltd, 1963.

34. The Judges (Conditions of Service) Act, Chapter 277.

35. Ibid.,

36. See Statutory Instrument No.140 of 1996.

37. Judges (Conditions of Service) Act, chapter 277.

38. Article 98(1), 1991 Constitution of Zambia as amended by Act No. 18 of 1996.

39. Section 4(2)(a)(b), The Judges (Conditions of Service) Act, chapter 277.

40. Ibid., section 4(3)

41. Ibid., section 5(1)

42. Ibid., section 6(1)

43. Ibid., section 6(2)(3).

44. The current value of the Kwacha to a United States Dollar at the time of the Dissertation was about K2,590=.

45. Section 117(d) , 1994 Constitution of Malawi.

46. Ibid., sections 111,114, and 119.

47. For a detailed discussion on the topic Removal and Discipline of Judges, see Shetreet, **Judges On Trial,** Chapter IV pp 87-120.

48. Article 98(2)(3)(4) and (5), 1991 Constitution of Zambia as amended by Act No. 18 of 1996.

49. Ibid.,

50. In the Matter of Article 113 and Hon. Mr. Justice B.S. Mumba, 1984.

51. In the Matter of Hon. Mr. Justice K. Chanda, 1997.

52. Article 98(2), 1991 Constitution as amended.

53. A Judge who fell ill was on sick leave for about two years. All cases before him waited until he recovered. A Judge who was involved in an accident never reported for work for over eighteen months until he died. Cases before him waited until he died.

54. The Post, Friday, September 18, 1998.

55. **Report of Special Committee On Delays In the Administration of Justice and Delivery of Judgments, 7th march, 1993, p. 23.**

56. Section 94(1), The Industrial and Labour Relations Act, Chapter 269.

57. Ibid., section 94(2)

58. Article 98(3)(4) and (5), 1991 Constitution as amended by Act No. 18 of 1996.

59. See note 50 supra.

59(a) Chief Justice, Mr. J.J. Skinner left the country, ostensibly on leave, and two other judges accelerated their retirement following the episode as a result of a judgement in the case of **Silva and Freitus V. The People (1969) ZR 121.**

60. Ibid., Proceedings p.1.

61. See supra note 51.

62. Section 87(6), The Constitution of Zimbabwe. See also In the Matter of: The Inquiry Into the Conduct of The Honourable Mr.Justice F.C. Blackie of Zimbabwe., 1995, Harare Zimbabwe. The Inquiry was chaired by this author.

63. Article 91(2) 1991 Constitution as amended.

64. Ibid.,

65. See Part IV, Regulations 25-33, Judicial Service Commission Regulations.

66. Section 277, Criminal Procedure Code.

67. **The People V Lubasi (1981) ZR 310**.This author was the Presiding judge.

68. See supra note 58.

69. S., Ruedisili, **' Zambia's Elusive Search For A Valid Public Order Act: An Appraisal.'** Vol. 25-28 Zambia Law Journal p.1 at pp 52-65 – 1996.

70. The Post, September 18, 1998.

71. The National Mirror, February 20-26, 1999.
72. The Times of Zambia, January 28, 1999.
73. Denning, **The Road to Justice,** 64 (1955) cited by Shetreet, **Judges On Trial** p. 179 see supra note 47.

74. See supra note 51.

75. Shetreet, **Judges On Trial** p. 186, see supra note 47.

76. **Kundiona V The People SCZ Judgement No. 4 of 1993.**

77. See for instance **Bassington V. Bassington** (1962) P. 276 at 281 also Yuill (1945) P.15 **RV Gibson** (1944) 2Cr. App. R. 174, also the **People V. Lungu** (1978) ZR 298.

78. **The Draft Code of Conduct For the Judicial Officers of the Judicature of Zambia** was adopted at a Special Meeting held on 28th March, 1998. This author chaired the Drafting Committee.

79. Ibid.,

80. Regulation 36, Judicial Service Commission Regulations, chapter 259.

CHAPTER THREE

JUDICIAL AUTONOMY AND JUDICIAL INDEPENDENCE.

A clear understanding of every concept largely depends on knowing its *meaning, its historical background and the extent of its application. This chapter sets* out to ascertain definitions and to identify parameters of autonomy and independence of the judiciary; and to provide a general background of the evolution of the two concepts in Zambia. It will examine the justification for judicial autonomy and the renaissance of judicial independence and how it has been nurtured under the different constitutional cultures of Zambia. The safeguards for both concepts will be identified and gauged.

Section 1. Autonomy.

A. Meaning and Justification.

The 1991 Constitution of Zambia, as amended in 1996, states that:

> 'The judicature shall be autonomous and shall be administered in accordance with the provisions of an Act of Parliament.'[1]

The expression 'autonomous' is not defined either in the Constitution or in the Interpretation and General Provisions Act.[2] According to the **Concise Oxford Dictionary of Current English,**[3] the term 'autonomous,' **inter alia,** means 'self-governing.' But historically, and even traditionally, the judicature in Zambia had never been thought to be 'self-governing.' For instance, under colonial rule, the judges were an integral part of the executive and performed some administrative

duties.[4] Equally in England in the sixteenth and seventeenth centuries, the distinction between judicial and administrative duties under the Tudor and the early Stuart regimes was rather obscure.[5]

Traditionally too, an essential function of both chief and village headman, prior to the advent of colonial rule in most African countries, was to administer justice by local standards. Thus, the traditional African pattern of government did not concern itself with the separation of powers. The total power was vested in the chief who was himself at once a ruler, judge, maker and guardian of the law.[6]

An autonomous judicature in Zambia today, implies that the judiciary manages its own internal administration thereby being delinked from any arm of government.[7] This is in line with the other organs of government.

The concept of autonomy in relation to the judicature is linked to the concept of independence of the judiciary. Although the two terms are not synonymous, they are significantly complementary because the absence of autonomy means incomplete independence. For many years after Zambia attained its political independence, the concept of judicial autonomy, in the sense of delinking it from Public Service and thus becoming self governing, was never contemplated as an issue. Indeed, in the early days of political independence, the judiciary in Zambia formed the backbone of the Ministry of Justice, now Legal Affairs. It was the largest, if not the main component of the Ministry hence the name Ministry of Justice in the early days of independence. Delinking the judiciary from the Public Service would then have meant scrapping the whole Ministry. However, the Ministry was subsequently renamed Ministry of Legal Affairs instead of the Ministry of Justice because it later

encompassed other departments which had no direct relationship to the administration of justice. But it is interesting to note that even after the Ministry was renamed Legal Affairs, and expanded by including more departments, successive constitutions and practices continued considering and treating the judiciary as a mere department of the ministry. Thus, the judiciary depended on the executive for all its administrative requirements, including routine ones. For instance, for a judge to travel abroad to attend a law conference, permission had first to be obtained from Cabinet Office through the Ministry. Transfers of staff, including judges, had to be sanctioned by the Permanent Secretary. The budget for the judiciary was prepared by the Ministry and was part of the Ministry budget. Indeed, fiscal autonomy was a far fetched cry. Undoubtedly, this arrangement severely impaired judicial independence and undermined the performance of judicial functions.

Historically therefore, the judiciary in Zambia was essentially a department of a government Ministry. This arrangement was a typical carry over from the colonial legal system. The Registrar, who was then the Head of the judiciary, was answerable to a Permanent Secretary at the Ministry. The Permanent Secretary was the controlling officer of the department as well as the responsible officer for the internal administration. Thus, the executive was responsible for providing physical and human resources which included courthouses, secretarial and administrative support staff down to judges' notebooks, pens and pencils.

In these circumstances, where the judiciary was under the control and supervision of a Ministry, an arm of the Government, it was difficult to guarantee an independent, neutral and impartial judiciary. Furthermore, a system which denied

the judiciary a semblance of self-governing of its own support staff, could not have been conducive to judicial independence in the traditional sense.

B. Agitation and Recognition.

The agitation for judicial autonomy in Zambia, in the sense of permitting the judiciary to enjoy total control over all its personnel and finances so as to consolidate its independence, first gained momentum in 1983. On 19th October, 1983, the Lusaka- based judges held a meeting at which it was among others, unanimously resolved that representations be made to the executive to turn the judicial department into an autonomous institution. The judges then felt that turning the judiciary into an autonomous institution would enhance the independence of the judiciary in that their conditions of service would be determined and secured by legislative provisions and not through the Cabinet Office Circulars which had hitherto been the practice when determining conditions of service for judges. It was also envisaged that an autonomous judiciary, like the Legislature, would carry out its own administration with powers of appointment, supervision, and discipline of all relevant and support staff including the judicial, quasi-judicial and specialised staff. It was further contemplated that an autonomous judiciary would have control of its own budget with funding guaranteed to avoid interruption of operations of the courts.

Nothing significant came out of the resolutions of the judges meeting of 1983. But the agitation for an autonomous judiciary continued. In 1987 and in 1989, autonomy of the judiciary was further discussed at two joint seminars of judges and magistrates. At both seminars resolutions in favour of an autonomous judiciary were further endorsed.

It must be mentioned that despite the agitation for judicial autonomy by the judges, the environment at that time was not conducive. First, Zambia had just emerged from a colonial system which did not itself acknowledge judicial autonomy. Secondly, eight years after attaining independence, Zambia became a One-Party State. The introduction of One-Party rule subordinated all organs of government, including the judiciary to the party. In such an arrangement, it was considered superfluous to make the judiciary autonomous. Thus, participants (who included this author) to the Seminar on Human Rights in One-Party State organised by the International Commission of Jurists in Dar-es-Salaam, Tanzania, concluded:

> 'The committee considered that, in the One-Party context, the crucial issue was to preserve the independence of the judiciary and to protect it in every way possible from executive pressures to interpret the law in a manner favourable to party interests. This did not mean that judges should not be free to join the party if they wished to do so and they ought certainly to identify themselves with its general aims and aspirations.'[8]

An autonomous judiciary was not an accepted aspiration of the One-Party system. In any event it was not possible for a judge to identify himself or herself with the aims and aspirations of the party and at the same time seek to be autonomous and independent if such aims and aspirations were to be in issue before him. But despite the 'hostile' environment, the judges in Zambia never relented in their quest for an autonomous judicature.

The judges' agitation for judicial autonomy was not to end up as a futile exercise . Exactly seven years after the judges first passed a resolution calling for judicial autonomy, political events in Zambia took a different turn (but not influenced by the desire of the judges for an autonomous judiciary). There was a general desire

to return to the multi-party constitution. There was further popular discontent with the one-party state exacerbated by the economic crisis that enveloped the nation. Towards the end of 1989, the Zambia Congress of Trade Unions General Council resolved to spear-head a campaign for restoration of political pluralism. These events culminated in the appointment of a Constitution Commission of Inquiry on 8th October, 1990. One of the terms of reference of the Commission was:- '..to examine and determine a system of Government that would ensure the seperation of the powers of the legislature, the executive and the judiciary so as to enhance the roles of these organs.'[9] By this term of reference, the Executive was indeed acknowledging that under the one-party system of government the roles of various organs of government were not clearly defined.

The Commission subsequently produced a Report.[10] Chapter six of the Report dealt with the Judicature. Under the heading 'Autonomy and Independence,' the Report summarised the evidence of the Petitioners as follows:-

> 'The majority of petitioners, including **The Report of the Special Parliamentary Select Committee** wanted to see the independence of the Judiciary maintained and that it should also be autonomous as this would ensure its independence. These petitioners also argued that in order to ensure that there is total separation of powers among the three main organs of the State, namely, the Legislature, the Executive and the Judiciary, this latter organ should be truly autonomous. Other Petitioners conceded that the present constitution safe-guards and guarantees of judicial independence were adequate, but pointed out that these safe-guards and guarantees would be made more meaningful and stronger if the judiciary was made autonomous. Yet other petitioners submitted that they wanted to see an autonomous judiciary that could only be checked by parliament which they considered as the supreme legislative body in the land.'[11]

Although no judge appeared before the Commission as a petitioner, a written submission, representing the judiciary urging for autonomy, was submitted. The Commission's recommendation on the autonomy of the Judicature was that:

> 'The Judiciary be de-linked from the Ministry of Legal Affairs in order to ensure true autonomy and separation of powers.'[12]

This recommendation finally culminated in the inclusion of an article in the 1991 Constitution specifically stating that 'The Judicature shall be autonomous..'[13] Four years later this constitutional provision was followed by Parliament passing the Judicature Administration Act.[14] The Act sealed the final endorsement to the introduction of an autonomous judicature in Zambia. The Judicature Act, assented to on 31st December, 1994, was the climax of the over ten years agitation by the judges in Zambia for an autonomous judicature. It brought about recognition that the judiciary had to be responsible for its own independence and put the judiciary on a footing similar to that of parliament of enjoying total control over all its personnel and finances in order to facilitate greater output and efficiency. Thus, the autonomy of the judiciary in Zambia today consists of administrative autonomy and autonomy of individual judges.

(a) Administrative Autonomy.

The Judicature Administration Act introduced a number of significant and tangible changes to the judiciary. The most important element in the Act is that the judiciary was given total administrative autonomy. A new post of Chief Administrator was created.[15] The Chief Administrator's functions included day-to-day administration of the judiciary and controlling the expenditure.[16] The Permanent Secretary at the

Ministry ceased to be controlling officer of the judiciary. The two tier system of recruitment wherein the Judicial Service Commission recruited professional staff while the Public Service Commission recruited administrative staff was abolished. The Judicial Service Commission was empowered to recruit all staff of the judiciary and exercise disciplinary powers on them.[17] In short, the judiciary ceased to be an appendage or a department of a government Ministry. It fell under the sole responsibility of the Chief Justice.

The notable features now of the administrative autonomy of the judiciary in Zambia are that the judiciary is able to plan for itself; it prepares its own budget and bargains directly with the Ministry of Finance although the budget is presented in Parliament through the Minister responsible for Legal Affairs. According to the Chief Administrator, there is now an excellent rapport between the judiciary and the Directorate of Budget at the Ministry of Finance in that the bureaucracy in securing funds has been reduced as a result of direct contacts.[18] In addition, the Chief Administrator now directly sources funds for the Judiciary from donors. As of now, the Judiciary has been able to purchase equipment which includes computers by direct funding from the donors. At the moment it is understood that the judiciary is in the process of putting up a new multi-million dollar magistrates court through direct donor funding. The architects and engineers would be hired by the judiciary.[19] It is doubtful whether the judiciary could have been able to achieve some of these things by forwarding its request through the ministerial bureaucracy.

The administrative authority of the Chief Justice is another notable feature of the autonomy now. It has been substantially magnified. He is responsible for all

policy matters dealing with the recruitment of all the personnel of the judiciary. Indeed, the Chief Justice is now responsible for granting authority to judges to travel abroad. The Chief Justice is now empowered under the Act to appoint various advisory committees to help in the administration of the judicature.[20]

However, despite the elaborate administrative autonomy, the judiciary in Zambia still lacks fiscal autonomy. The judiciary, as an institution, still depends on the executive for most of the funding for the administration of justice. In practice, the judiciary does not rank very high in the list of priorities where budget allocation is concerned. Indeed, unsympathetic bureaucratic external control of finances allocated to the judiciary can severely impair judicial independence and actually undermine the performance of the very functions which the independence of the judiciary is intended to preserve, namely, the right of the individual to a speedy trial by an independent judge. Situations have been experienced in Zambia, where a court session has not taken off on account of lack of funds for a judge or magistrate to travel to hear cases. More often than not, court delays are laid at the feet of the judiciary when the real cause can be the lack of funding. It is in this connection that the United Nations adopted the principle on Independence of the Judiciary that:

> 'It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.'[21]

It is submitted that in an ideal situation, the judiciary should be the institution to determine its own needs and set its priority for meeting those needs out of the resources at its disposal. In short, the judiciary should have fiscal autonomy to complete judicial autonomy.

Funding of the judiciary is a factor of the independence of the judiciary because the judiciary can be emasculated by under-funding even by a government which proclaims independence of the judiciary from the roof-top. Thus, while funding is a threat to the judiciary to discharge its functions, the real threat to the independence of the judiciary lies in a funding procedure which places the judiciary at the mercy of the executive.

In Zambia, although the budget is prepared by the judiciary itself, it is presented in Parliament, for practical reasons, by the Minister of Legal Affairs. After the budget has been approved by Parliament, the money is not allocated to the judiciary in one lump sum. It is allocated by monthly funding from the Ministry of Finance. The problem of the monthly allocations is that they are erratic and unrealiable. In some months the allocations are reduced; in other months they are delayed, thereby affecting the court operations which is a common feature. The method of budget approval, the practice of funding by monthly instalments from the Ministry of Finance creates an impression that the judiciary in Zambia is but still a department of the executive rather than a co-equal arm of government. It is submitted that there is need for provisions to prescribe a basic structure that would guarantee fiscal autonomy. The basic structure ought to ensure that the judiciary is not made subservient to and dependant on the executive branch of government for its funding. The humiliating spectacle of the judiciary having to go cap in hand for allocation of funds from its approved budget, even periodically, does not portray serious autonomy and independence of the judiciary.

(b) Autonomy of Individual Judges.

The judiciary is an institution; an abstract creature for that matter. When one talks of autonomy or independence of the judiciary, one is therefore not talking about an abstract creature, but talking about judges collectively, hence autonomy of the judiciary as a self-governing branch of government and autonomy of judges as individuals in the management of their judicial functions. A discussion of autonomy of an individual judge entails an inquest into standards of management of an individual judge's affairs both judicial and extra-judicial.

(i) Management on the Bench.

Management of Supreme Court judicial work is collective, apart from chamber matters determined by single judges in their chambers. These chamber matters are allocated to each judge by the Deputy Chief Justice, who, in practice, is the Judge President of the court, who handles the day-to-day administrative matters. In civil matters in Lusaka, the Deputy Chief Justice determines the session days of the court. Thus, as regards chamber matters each Supreme Court judge manages his own diary. Supreme Court Sessions on the other hand are conducted in open court. Criminal appeal sessions are published in the Government Gazettes for the information of the public at the beginning of each year. An appeal in the Supreme Court is heard by un-even number of judges.[22] Supreme Court judges do not sit in even numbers. They often sit in threes. In rare cases in which an important point of law of public interest is likely to be raised, the Chief Justice may direct that uneven number of more than three judges may sit on the appeal. This often happens in constitutional cases.

Although the sessions of the court are conducted by un-even number of judges, judgment writing is by a single judge. It is in the area of judgment writing that the autonomy of single Supreme Court judges comes into question. A judge selected to write the judgment of the court after an appeal has been heard determines his or her own programme. In practice, it is the source of concern and complaints. A judge writing the judgment of the court may take as long as two years or more before a judgment is written.[23] There are no guidelines and no time frame within which a judgment of the court has to be written and delivered. This has tended to undermine the integrity and independence of the Supreme Court. Delays in delivery of judgments has tended to erode public confidence in the independence of the Supreme Court. For instance, according to the list of Supreme Court pending judgments for the last quarter of 1998, one judge had about thirty five judgments pending for delivery against his name.[24] Some of these judgments had been pending for over eighteen months from the last date the appeal was heard. Litigants wrote letters of complaints about the delay in their individual cases. Regrettably no sanctions can be imposed on the individual judge apart from a gentle reminder. In practice, a judgment of the Supreme Court ought to be delivered within the maximum period of three months after the last date of hearing the appeal.[25]

Autonomy of individual Supreme Court Judges has in practice tended to operate as a threat to the independence of the judiciary through delayed judgments. It is this author's suggestion and submission that there ought to be guidelines governing time within which a judgment ought to be written.

Unreasonable delays in the delivery of judgments ought to be treated as inability on the part of the individual judge. This should warrant invoking the constitutional provisions for removal of such a judge. The practical difficulty in the Supreme Court is that a judgment written by an individual becomes a judgment of the court. Delay in delivery of such judgment by the individual judge is therefore blamed on the court and not the individual judge.

Judges of the High Court on the other hand have complete individual autonomy in the management of their diaries on today today basis. The criminal sessions of the High Court at all the stations are published in the Gazette at the beginning of each year for public information. A judge-in-charge of a station is responsible for the administration of judicial work. He or she assigns criminal sessions and civil cases to each judge. Once a criminal session and a civil case has been assigned to a particular judge, that judge has the sole responsibility for the conduct and management of those cases until completion except in case of recusal when the case is returned to the judge-in-charge for reallocation.

The pattern of autonomy of judges of the Industrial Relations Court follows that of the Supreme Court. But the Chairman or a Deputy Chairman who has always to sit with two members is responsible for writing and delivering the judgment of the court. The Industrial Relations Act has specific provision that judgment of the court should be delivered within sixty days from the last date the case was heard. The Act further provides that failure to deliver judgment within that period amounts to inability to perform warranting the invoking of the provisions for removal of the Chairman or the Deputy Chairman.[26] These provisions enhance speedy delivery of

judgments and public confidence in the court. On the other hand, it is argued that these provisions interfere with the autonomy and independence of that court.

In the subordinate courts, magistrates enjoy the same autonomy as that enjoyed by individual High Court judges. The magistrate-in-charge of the station is responsible for all the judicial work. He or she assigns cases to individual magistrates who thereafter manage their own diaries on daily basis.

The autonomy of local court justices follows the collective pattern of Supreme Court judges. Justices of local courts sit in twos. In practice, the judgment of the court is delivered by the presiding justice immediately after the case is heard and frequently before the court adjourns. Indeed, justice in the Local Courts is quicker and cheaper than in the other courts of the judicature. Delays in delivery of judgments in the local courts is not an area of concern.

The autonomy of individual judges in the management of their diaries and judicial functions on the bench seems not to be subject to any hard and fast rules apart from matters governed by rules of practice and procedure. Each judge manages his or her own diary. Each judge determines the time when to sit in court to hear a particular case. In case of judgment writing and delivery, each judge determines when to write and deliver the judgment except for judges of the Industrial Relations court who have a time limit. On the other hand, once a case is allocated to a particular judge, it cannot be removed unless for good reasons. These arrangements ensure autonomy and independence of the individual judge.

The question often asked is whether there is a conscious allocation of cases to individual judges by those in charge of assigning cases. In practice, the assumption is that a judge-in-charge or magistrate-in-charge, before allocating cases considers the pending workload, the experience and specialisation of the individual judge. But those judges in-charge talked to indicated that there is no conscious allocation of cases. Experience in the High Court, however, has shown that there is conscious allocation in certain cases. For instance, in two treason cases, each was allocated to a judge who was not handling a particular session. The recent treason trial, a case listed for the High Court Sessions at Lusaka, was heard by a judge brought in from Ndola, depriving a station with only four judges when Lusaka has ten judges. Special accommodation for the judge had to be arranged at great expense.[27] The danger of conscious allocation of cases is that it can easily be perceived to be a threat and interference to autonomy of a particular judge in that it creates the impression that the result of the case has already been pre-determined.

At the moment in Zambia, assignment of cases for hearing to individual judges has not raised any concern. The question, however, is whether it is desirable to lay down clear rules of practice to govern case allocation and individual management of cases. The danger of such rules of practice, useful as they may be, is that they may bring about undesirable inflexibility and rigidity which may militate against individual autonomy to the detriment of efficient administration of the courts. On the other hand, if properly designed, such rules would encourage transparency and eliminate grounds for rumours based on suspicion. In addition, such rules would enhance public confidence in the judicial process. In the recent treason trial,

'importing' of a judge from Ndola to hear a 'Lusaka case' was received with mixed feelings.

Individual autonomy of judges nonetheless provides flexibility in diary management of judicial work. Hence, at times judges decide to work out of official hours and sometimes even on non working days. The most noticeable weakness of individual judges' autonomy is the tendency to delay disposal of cases, particularly delivery of judgments. Indeed, some delays in the administration of justice are inevitable. They cannot all be attributable to judges, for instance delays caused by heavy workloads, rules of practice and procedure are caused by the judicial process itself. Others are brought about by the parties to litigation. But the most pronounced delays are those attributable to the Courts themselves. In the nature of things, although the English adage is that justice delayed is justice denied, it is also true that justice rushed is justice denied.

(ii) Management Off the Bench.

Management of the individual judge's affairs off the bench is one of the most demanding requirements of a judge's behaviour. Speaking on standards of conduct of the judiciary, Sir Winston Churchill once observed:-

> 'A form of life and conduct far more severe and restricted than that of ordinary people is required from judges and, though unwritten, has been most strictly observed. They are at once privileged and restricted. They have to present a continuous aspect of dignity and conduct.
>
> Far more freedom is granted by convention of our way of life to members of Parliament, to Ministers or Privy Councillors...,. The judges have to maintain, though free from criticism (in Parliament), a far more rigorous standard than is required from any other class that I know of in this Realm.'[28]

The 1991 Constitution of Zambia as amended provides that 'The judges, members, magistrates and justices.... shall conduct themselves in accordance with a Code of Conduct promulgated by Parliament.'[29] At the moment there is no Code of Conduct for the judges in Zambia. But the judges have themselves submitted a proposed draft Code of Conduct for themselves to the executive for consideration.

It is important to observe that for many years in Zambia, the judiciary had strongly opposed the introduction of the Code of Conduct for judges. The ground for the opposition was that the code would interfer with judicial independence. Despite the resistance, the 1991 Constitution was amended and provided for a code of conduct for the judiciary. But Parliament has not promulgated one yet. With the recent upsurge in popularity of judicial codes of conduct in Africa, the Zambian judiciary could no longer justify its resistance to the introduction of a code of conduct.[30] The judiciary in Zambia took the initiative to submit draft proposals of its own code to ensure that the code is judiciary driven than executive/ politicians driven so that it is not manipulated to suit the likes of politicians. The draft Code in its present form includes a list of unacceptable behaviour and graduated levels of sanctions for breaching of the code. The draft code is further drafted in such a manner as to ensure public confidence in the administration of justice and in a demonstrable spirit of openness and transparency, but also ensuring the integrity and independence of the judiciary.[31]

The general unwritten rule of practice in Zambia at the moment is that judges should indulge only in acceptable extra-judicial activities and avoid all non-judicial activities which are likely to interfer with the performance of their official duties, and those activities that might attract adverse comments or raise controversy. This is so

because such activities may affect or seem to affect the impartiality of the judge and may impair public confidence in the judiciary as a whole and the dignity and prestige of the judicial office. In short, judges in Zambia are expected to maintain a degree of insulation from the life of the community. While it is necessary and desirable for judges to maintain a degree of insulation from the life of the community; it should on the other hand not be carried too far. Insulation is fraught with the dangers that judges would lose contact with the world outside the court; which in turn would result in judicial shortsightedness and unresponsiveness to the changing needs of society.

In England, where charges of remoteness and conservatism have frequently been levied against the judges, the argument has been said to carry special weight. Thus, one critic argued:

> 'Judges, by reason of their self-imposed isolation, are much less capable of appreciating the weakness of human nature than is the intelligent man of the world. (Indeed, their professional lives in which they are immuned in the monastic life of the Temple and the aspect atmosphere of the courtroom, are hardly conducive to mitigating their unworldliness). English judges, moreover, think that free intercourse with their fellow citizens will inevitably detract from the dignity of the position they hold.'[32]

Indeed, not only are unduly strict standards of conduct likely to result in judges being divorced from the community, but they may also interfere with the judge's freedom to pursue activities like any other members of the community, for instance church activities. Thus, standards of conduct which are too strict may also deprive society of valuable public and community service which judges are capable of rendering.[33]

The most difficult off the bench activity for a judge in Zambia relates to business. There are no clear guidelines as to what business activities a judge can

involve himself in. At the moment, some judges are running bars, running taxis, renting houses and holding shares in some companies. Indeed, a total ban on business activities for judges in Zambia in the face of poor conditions of service would be unrealistic. One of the major impediment in Zambia in relation to the recruitment of best legal brains to the bench has been the strict standard of behaviour demanded of judges. But the demarcation between extra-judicial business activities that could easily drag a judge into litigation and fraught with hazards and those non controversial activities is difficult to draw. The list of what a judge can or cannot do or manage when off the bench can be endless. But in the absence of a code of conduct for judges, the traditions and conventions of the office tend to guide judges. In those circumstances the demand for a code of conduct for judges becomes the more justifiable. Judicial independence is no longer a valid reason for resisting codes of conduct. If the underlying premises for judicial independence is that it is in the interest of justice, it is vital that it be vested in persons who will behave in an ethical manner in their judicial and extra-judicial personal lives. The draft Code of conduct in Zambia recognises in the preamble that the cardinal feature of the justice system is still independence and that the code is intended to promote and not inhibit independence. It is, therefore, submitted that for independence to be respected it must be seen as existing to protect the impartiality of judicial decisions and not personal interests and extra-judicial activities of the judges.

Section 2. Independence.

Any analysis of judicial independence must begin with some idea of its core meaning. Most countries, including Zambia, with written constitutions, include provisions for an independent judicature. The dictionary meaning of the expression 'independent' is **inter alia:-** 'not subject to control of any person,... free to act as one pleases, ... not influenced or affected by others.' In practice, there is no judicature that claims independence in such absolute terms. Judges are constrained by, and follow existing laws, procedures and practices. They do not act as they please; otherwise one good, namely justice, would be sacrificed on the altar of another, namely, independence. The judges are also constrained by less tangible requirements, such as those of courtesy, fairness, etiquette of courts and the profession. Thus, judges are not free to act perversely, unfairly or for ulterior ends or motives. Consequently, judges find themselves under controls either of judicial or administrative nature. The Constitution of Zambia, for instance states that:- 'The judges ... shall be independent, impartial and subject only to this Constitution and the law and shall conduct themselves in accordance with a Code of Conduct.'[34] The Constitution also states that 'The judicature shall be autonomous and shall be administered in accordance with the provisions of an Act of Parliament.[35] These restrictions establish the hypothesis that there cannot be an independent judiciary in absolute terms in any country.

A. The Concept.

There is no totally acceptable 'judicial independence.' Various definitions and meanings have been advanced to explain 'judicial independence.' At the most basic level, judicial independence is related to the notion of conflict resolution by a 'neutral third;' in other words, by someone who can be trusted to settle controversies after considering only the facts and their relation to relevant laws.[36] This type of independence has also been called 'party detachment,' or the idea that a dispute should be decided by a judge who has no relation to the litigants and no direct interest in the outcome of the case.[37] According to the International Commission of jurists, independence of the judiciary means:-

> 'That every judge is free to decide matters before him in accordance with his assessment of the facts and his understanding of the law without any improper influence, inducements or pressures, direct or indirect, from any quarter or for whatever reason..'[38]

The emphasis in this definition is on the freedom of the judge to decide matters according to the facts and his understanding of the law without improper influence. Some scholars have cautioned against broader definitions. Recently Mr. Justice Macgarvie observed :-

> It is important in this area not to cast a good principle too widely. The only independence which I seek to justify within the principle of judicial independence, is that which, if absent, would put at risk impartiality in deciding court cases.'[39]

In this observation impartiality is an important factor of judicial independence. But Sir Ninian Stephen defines judicial independence from the point of view of the state and impartiality of the judges. He explains thus:-

> 'What its precise meaning must always include is a state of affairs 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 humanly possible from all other influences that may affect their impartiality.'[40]

The Chief Justice of Tasmania defines the term from the capacity of the courts to perform constitutional functions free from actual and apparent interference . In this context judicial independence means:-

> '...the capacity of the courts to perform their constitutional functions free from actual or apparent interference by, and to the extent that it is constitutionally possible, free from actual or apparent dependence upon, any person or institutions, including in particular the executive arm of government, over which they do not exercise direct control.'[41]

From all these scholarly enunciations, judicial independence has generally been thought of as freedom from interference by the Executive or the Legislature in the exercise of the judicial function. This was, for example, the clear conception expressed by the International jurists in 1959, obviously arising from the historical fact that independence of the judiciary was endangered by parliaments and monarchs. Cowen and Delham aptly state:

> ...it is improper and dangerous to regard or to allow judges to be regarded as part of the general public or civil service. Unless we are to live again some of the more painful episodes in our history, we must remember that judges and the courts they staff have for a long time occupied a very special position in the constitutional structure; and that position should be regarded tenderly by the other branches of government.'[42]

In modern times, with the changed economic environment and booming population, it is of utmost importance that independence of the judiciary from business or corporate interests should also be secured. In short, independence of the judiciary can no longer be defined or understood to imply only freedom of a judge from