

OBLIGATORY ESSAY

ON

**THE INDEPENDENCE OF THE JUDICIARY IN A MULTI-PARTY STATE:
ZAMBIA AS A CASE STUDY (1990-2003)**

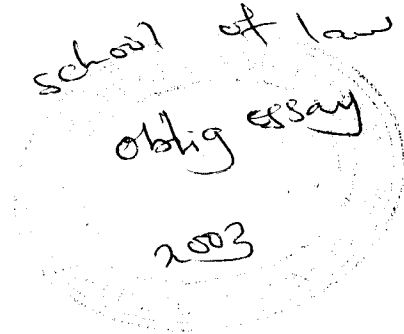
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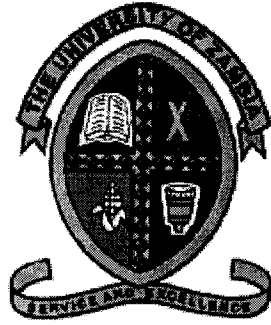
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**being a paper presented in partial fulfilment of examination requirement for the
degree of Bachelor of Laws (LLB) of the University of Zambia.**

November 2003

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THE UNIVERSITY OF ZAMBIA

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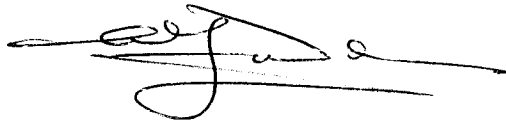

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DEDICATION

This paper is dedicated to my Almighty God for making it possible for me to study a degree in law and to my dear wife, Elizabeth Mwansa Lundah for her support during my stay at the University of Zambia.

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May the Almighty God be with you all.

Collins K. Lundah
11th November 2003
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ABBREVIATIONS

1. MMD - Movement for Multi-Party Democracy
2. UPND - United Party for National Development
3. UNIP - United National Independence Party.
4. HP - Heritage Party
5. ZRP - Zambia Republican Party
6. FDD - Forum for Democracy and Development
7. MAJAZ- Magistrates and Judges Association of Zambia.
8. UN - United Nations
9. PF - Patriotic Front
10. ZR - Zambia Law Reports
11. ADR - Alternative Dispute Resolution
12. DNA - Deoxyribonucleic Acid
13. DPP - Director of Public Prosecution
14. NIPA - National Institute of Public Administration

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PREFACE

This essay seeks to establish whether it is possible for judges to be Independent and impartial in a multiparty state with more than thirty-five political parties.

In dealing with the subject, the chapters have been arranged as follows:

Chapter One discusses the impact of multiparty politics on the independence of the judiciary, the rule of law and separation of power

Chapter Two deals with the Independence of the Judiciary and its function in a new political dispensation.

Chapter three presents the structure of the judicature.

Chapter four looks at the appointment of judicial officers.

Chapter five review and analyses selected decided cases during the period between 1990 and 2003.

Chapter six looks at party manifestos to establish whether or not there is any political will in ensuring an independent judiciary.

Chapter Seven attempts to identify factors that may undermine the independence of the judiciary.

Chapter Eight marks the end of the essay by way of recommendations and Conclusion.

Collins Kawesha Lundah
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ABSTRACT

More often than not both opposition political parties and civil society have raised concern that judiciary is not independent as it is compromised. They allege that despite the country reverting to multiparty political system, some members of the bench are partisan and are there to serve the interests of the ruling party.

Conversely, the members of the ruling party have also complained that some judges are being used by the opposition political parties to frustrate their policies or to facilitate their downfall. These attacks and suspicions have come at a time when the courts have made decisions against any of the above complainants. The judiciary has remained at the crossroad. It has to provide the checks and balances. This paper sought to establish the actual position as to whether or not the allegations are justified.

Consequently, the study has revealed that judges are human beings and have their own social and political convictions. It has been established that enough legislations have been introduced in the period between 1990 and 2003, which guarantee the independence of the judiciary but there is no political will by the political party in power to ensure their full implementation. This is because the independence of the courts is at variance with political survival.

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RESEARCH METHODOLOGY

The research was carried out by use of books, interviews, law reports, articles by various scholars, thesis, journals, United Nations publications, Government documents, newspapers and other publications.

CHAPTER ONE

INTRODUCTION

In a modern state the powers and functions of government are mainly exercised by three organs. These are the Legislature, Executive and Judiciary. The legislative power is vested in the Parliament, whose major function is to make new laws, alter or repeal existing ones. The executive power is vested in the President whose executive function is the general and detailed carrying on of government according to law, including the framing of policy and the choice of the manner in which the law may be made to render that policy possible.¹ Lastly the judicial power is vested in the courts, whose function consists in the interpretation of the law and its application by rule or discretion to the facts of particular cases. This involves the ascertainment of facts in a dispute according to the law of evidence.²

INTERPRETATION

In this essay, the term 'Court' will denote Supreme Court, High Court, Industrial Relations Court, Subordinate Court, Local Court and any other court established by law.³ The term 'Judge' will refer to adjudicators in general.

The independence of the judiciary cannot be discussed in isolation from other related concepts, such as, the rule of law, separation of powers and the impact of multi-party politics on the above doctrines.

¹ *Constitution of Zambia (as amended by Act No. 18 of 1996) Cap 1*, Article 44 (1)

² O. Hood Phillips: 1973 *Constitutional and Administrative Law*, fifth edition, Sweet & Maxwell, London, pp. 12-13.

³ *Ibid* Article 91 (1).

MULTI-PARTY POLITICS

One of the challenges of emerging democracies in Africa today is a question of achieving the independence of the judiciary in a multi-party state. In 1990, Zambia returned to plural politics from a one-party system. The repeal of Article 4 of the Constitution⁴ witnessed the formation of many political parties, which in turn created 'excitement' in the general citizenry. Many people from all disciplines were desirous of making a contribution towards the dawn of democracy and judiciary was not an exception. Twelve years down the line, Zambia with a population of about eleven million has more than thirty-five political parties. In view of the number of political parties, it would not be prudent to imagine that one political party will persuade all judges.

However, judicial independence is the practice whereby judges are free from outside pressures. These pressures could be political, economic, religious, social or cultural. Notwithstanding the outside factors that may influence the judge, he/she is expected to be impartial in that the decision in a case should be based on the facts and the law applicable thereto and not extrinsic considerations.

RULE OF LAW

According to the International Commission of Jurists in their recommendations styled the **Declaration of Delhi 1959**, which was meant to apply to the entire humanity, the rule of law involves the right to representative and responsible government, that is, the right to be governed by a representative body answerable to the people. They

⁴ *The Constitution of 1973, Article 4* which was repealed and replaced by *Act No. 20 of 1990* and the President assented to it on *17th December 1990*.

declared that a citizen who is wronged by the government should have a remedy. They also said that everybody has a right to a fair trial and that there must be independence of the judiciary including having proper grounds and procedure for the removal of the judges.⁵

Professor Dicey outlined, in his book,⁶ the concept that the regular law of the land predominates over and excludes the arbitrary exercise of power by the government, all people are equally subject to the law administered by the ordinary courts and that law is derived from individual's rights as declared by the courts. The last part was based on the British system which has unwritten constitution. However, most Constitutions of the world have included the Bill of Rights.⁷

At the time of taking office, at a swearing in ceremony held at the Lusaka High Court,⁸ President Levy Patrick Mwanawasa stated that his New Deal Government would be: "*A Government of laws and not of men as all are equal before the law.*" The essence of this statement is that even his government will be subject to the law and that he will rule the country according to the powers given to him by the Constitution.⁹

⁵ Molan M. T., 1993-1994, *Constitutional and Administrative Law Text*, 15th Edition, H. L. T London p. 21.

⁶ The *Law of the Constitution* published in 1885.

⁷ For example, the *Zambian Constitution, Part III*.

⁸ On 2nd January 2002

⁹ *Ibid.* Article 1(3).

THE RULE OF LAW IN ZAMBIA FROM 1990 TO 2003

As to whether the Zambian rulers govern in compliance with the rule of law is debatable. Instances of ignoring or impugning the laws abound. For instance, the Presidential Housing Initiative was created without the back up of law.¹⁰ Zambia Privatisation Agency was a statutory body created by an Act of Parliament¹¹ and was tasked to Privatisate State and parastatal companies but the Government appointed few individuals who were accountable only to the President. After the coup detat attempt in 1997, a number of suspects which included eminent members of the opposition were arrested, detained and tortured, and others later released without a charge. Under the Constitution the President has power to establish and dissolve government ministries and departments with the approval of the National Assembly,¹² but it is common knowledge that the office of the District Administrator was established without approval of the National Assembly and up to date it is a hot issue both inside and outside Parliament. An example of having no respect for the law can further be illustrated in the case of the former President Frederick Chiluba who attempted to go for a third term of office despite the limitation of only two five year terms.¹³ He was only stopped by mass demonstrations and revolt from within his party.

In view of the foregoing, there is need to have an independent and impartial judiciary that can ensure respect of the constitution and the constitutional order. But it is almost impossible to achieve accountability, transparency and effective government when the functions of government are not separated.

¹⁰ *United Party National Development Manifesto* 2001 p. 24.

¹¹ Privatisation Act Cap 386

¹² *Ibid.* Article 44(2), paragraph (e)

¹³ *Ibid* Article 35 (1) (2)

SEPARATION OF POWERS

The doctrine of separation of powers entails that there are three functions of the government, namely legislative, executive and judicial and that each of these three functions should be vested in one organ of government with no overlap. Each should then act as a check and balance on the others. It further states that to concentrate more than one function in any one organ of government is a threat to individual liberty.¹⁴ The above is the original text but in modern times the concept has been expanded and has come to mean a number of things to scholars and other interested parties. An illustration of the concept is that a judge of the Supreme Court or High Court should not be part of the Executive branch of Government.¹⁵ Conversely, a member of the Executive should not be part of Judiciary.¹⁶

SEPARATION OF POWERS IN ZAMBIA

The Zambian Constitution has no explicit statement on separation of powers. This 'omission' is of no legal significance because the principle is axiomatic and is subsumed in the structure of the Constitution and the constitutional order of the country. In fact the actions and activities of all state institutions and authorities and of all individuals must conform to the constitution or else be nullified by the courts on the ground of unconstitutionality.¹⁷

¹⁴ O. Hood Phillips (Supra) note 2 p. 14

¹⁵ The appointment of Ms. Justice Chibesakunda, a sitting Supreme Court Judge, as Chairperson of the Permanent Human Rights Commission and Justice Bobby Bwalya, a sitting High Court judge as Chairman of the Electrical Commission. Illustrates the point.

¹⁶ For example, the appointment of Gregory Phiri as Judge of the High Court from the office of DPP

¹⁷ *Zambia Law Journal Vol. 29, 1997*, Professor C. Anyangwe, *The Zambian Constitution and the Principle of Constitutional Autochthony and Supremacy* at p. 1.

The extent to which separation of powers may be said to exist in Zambia can be seen from Presidential appointments. For example Ministers are chosen and appointed by the President from among members of Parliament.¹⁸ The President himself is part of Parliament.¹⁹ The National Assembly acting together with the President in the Legislative process makes up Parliament. This happens when the President assents to bills to become law.²⁰ As regards the appointment of sitting judges to head executive institutions as earlier alluded to, while the appointments may add credit to the institutions concerned, they do not help the office holders to work with an independent mind when presiding over cases involving the Executive.

CONCLUSION

Having discussed the theme of the topic, the concepts of rule of law and separation of powers in the Zambian context, reference and observations have been made to the legislations that guarantee the independence of the judiciary. These are the Constitution, Judicature Administration Act and the Judicial (Code of Conduct) Act. The limitations and prohibitions in these legislations must have been calculated to secure confidence of the public in the judicial system. For instance, the Judicial (Code of Conduct) Act²¹ expressly prohibits political activities of judicial officers.²² This prohibition is justified on the premise that those called upon to adjudicate must be

¹⁸ Ibid Article 44 (3)

¹⁹ Article 62 provides that the legislative power of the Republic of Zambia shall vest in Parliament, which shall consist of the President and the National Assembly.

²⁰ Ibid Article 44 (3)

²¹ Act No.13 of 1999.

²² Ibid Part V

seen to be non-partisan for the purposes of enhancing public confidence in the judicial system.²³

The subject of the independence of the judiciary in a multi-party was chosen mainly because the author felt that the re-introduction of multi-party political system of government in Zambia and Africa as a whole has come to stay and any attempt to reverse the trend would be frowned upon both locally and internationally. Hence it is incumbent upon the judges to make a meaningful contribution towards the consolidation and development of the multi-party democracy through their independent and impartial judgements, that is, without fear or favour. This study is intended to make judges at all levels be aware of the pitfalls and refuse to be intimidated or influenced by extraneous forces by sticking to their oath of office and above all being assertive.

This study however seeks to establish whether or not the Zambian Judiciary is capable of providing checks and balances as demanded by the concept of rule of law and separation of powers. Chapters two and three will discuss in detail the independence of the judiciary per se and the structure of the judiciary and establish whether or not in its present form is capable of delivering quality justice. This will be done by looking at the appointment procedures and determine whether or not there are enough safeguards to prevent the Executive from interfering with the selection process to favour their cadres. The subject will be discussed in detail in Chapter four. In chapter five the review of decided cases will be discussed in relation to decisions biased in

²³ E L Sakala, Judge: *Autonomy and independence of the Judiciary in Zambia: Realities and challenges*: A dissertation submitted to the University of Zambia fulfilment of the requirements for the degree of Master of Laws 1999.

favour of a ruling party, judicial membership of political parties²⁴ and political interference. Chapter six is dedicated to political commitment by various political parties to the Independence of the Judiciary. This is important in order to assess the general attitude of politicians as whether or not a change of government would make a difference. Under this topic a number of party manifestos will be considered. Factors that may undermine the independence of the judiciary will be identified and examined in chapter seven. The subject will be discussed in relation to what is obtaining within Zambia. Lastly, the study will close by recommendations and conclusion. The chapter will summarize the findings of the research and then make proposals that may help in safe guarding judicial independence in a country with more than thirty-five political parties.

²⁴ B O Nwabueze, 1977, *Judicialism in Africa, the role of courts in government*, C Hurts and Co London pp. 280-282

CHAPTER TWO

THE INDEPENDENCE OF THE JUDICIARY

Judicial Independence is the practice whereby judges are free from outside pressures.²⁵ These pressures could be political, religious, tribal, social and economic. However, It should be observed that the concept of judicial independence carries different meanings in different periods.²⁶ While the same phrase may have been used, the standards prevailing in society at large and the social and political environment changed with the times.²⁷ Therefore the meaning given to the term judicial independence at any period must be seen within the context of the political philosophy of that time.²⁸ For example, Zambia is a democratic country with more than thirty-five political parties and therefore the meaning of the term should be understood in that context.

At International level, it is anticipated that the judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, or interferences, direct or indirect, from any quarter or of any reason.²⁹

Zambia believes in the concept of independence of the judiciary and this has been enshrined in a constitutional provision, Article 91 (2) of the 1996 Constitution, which provides thus: -

“The judges, members, magistrates and justices, as the case may be, shall be independent, impartial and subject only to this Constitution and the law and shall conduct themselves in accordance with a code of conduct promulgated by Parliament.”

²⁵ Curzon L.B, 1998: *Dictionary of Law*: Pitman Publishers, London.

²⁶ Shetreet S, 1976: *Judges on Trial*, North-Holland Publishing Co, Oxford.

²⁷ Ibid

²⁸ Ibid

²⁹ *Compendium of United Nations Standards and Norms in Crime Prevention and Crime Justice*, United Nations, New York, 1992, United Nations Publication.

Section 3 of the Judicial (Code of Conduct) Act³⁰ states:

“A Judicial Officer shall uphold the integrity, independence and impartiality of the Judicature in accordance with the Constitution, this Act or any other law.”

A “Judicial Officer” means the Chief Justice, the Deputy Chief Justice, a Judge, Chairman, Deputy Chairman, Registrar, Magistrate, justice of a court or other person having power to hold or exercise the judicial powers of a court.³¹

JUDICIAL INDEPENDENCE AND INTEGRITY

The modern concept of judicial independence and integrity contains many elements. Basically a judge should have security of tenure and only be removed for specific grounds and by means of an adequate procedure.³² Secondly, the process of selection of judges should be free from any political, religious, tribal or personal or other irrelevant considerations.³³ Thirdly, upon appointment a judge should receive adequate remuneration.³⁴ Adequate remuneration not only means a sufficient sum of money to provide for respectable living but also that the sum is received by the judge without involving him in practices which might give rise to improprieties.³⁵ Adequate remuneration requires a regular pension scheme to inspire office holders of a secure retirement. Judicial remuneration should be adequately safeguarded against being used as means of asserting control over judges.³⁶ However, a judge must be free from political or other pressures. This means that a judge must first be immune from such systems of distorting justice as direct pressure, bribery or approaches by the litigants, a friend or counsel, he must also be removed from any sophisticated entanglements,

³⁰ Act No. 13 of 1999

³¹ Ibid Section 2

³² Ibid Op. Cit

³³ Ibid

³⁴ Ibid

³⁵ Ibid Op. Cit p.383

³⁶ Ibid

be they political, personal or financial, which might seem to influence him in the exercise of his judicial functions, let alone entanglements that might actually affect his impartiality.³⁷

THE FUNCTION OF THE JUDICIARY

To the ordinary man judiciary has only one function and that is adjudication but in real sense it has many functions. For the purposes of this study, the most important function of the judiciary is to act as a check on the other two arms of government. Under this function of checking falls the function of adjudication. The ordinary citizen is not as much apprehensive of wrongs committed against him by fellow citizens as he is of wrongs committed against him by the Government.

In a democracy, people enjoy fundamental rights and freedoms. These fundamental rights and freedoms enshrined in the Constitution³⁸ are often intruded upon usually by the Executive, which appears to be the only mischievous of the three arms of the Government. This led to Montesquieu to observe, "Political liberty is to be found only when there is no abuse of power. But constant experience shows that every man invested with power is liable to abuse it, and carry his authority as far as it will go... To prevent this abuse, it is necessary from the nature of things that one organ should check on the other. When the Legislative and Executive powers are united in the same person or body... there can be no liberty... Again, there is no liberty if the judicial power is not separated from the Legislative and the Executive."³⁹ Here lies the important role of the judiciary to act as a check. People whose fundamental rights and

³⁷ Ibid

³⁸ *Part III of the Constitution* (known as the "National Bill of Rights")

³⁹ *Le Esprit de Lois*, Chapter XI, pp 3-6

freedoms have been or are being or are likely to be contravened may apply to the High Court for redress and the High Court may make an order, or issue a writ and give directions for the purposes of enforcing or securing the enforcement of the fundamental rights and freedoms.⁴⁰ The judiciary is therefore, the anchor of democracy in a democratic state and the protector of the people's fundamental rights and freedoms.

Associated with the function of acting as a check on the powers of the other arms of government, the judiciary has also assumed the function of being a stabilizing force. This is particularly so in the developing countries. When politicians quarrel, they go to the courts on issues, which, most often, are non-legal instead of going into the bush and resort to violence. The result is that as soon as the cases start in court tempers cool down and the country is saved from turmoil.⁴¹

The judiciary also has a function to play in the economic development of a country. Investors are unwilling to invest in countries where there is no sound judiciary because they are not sure of the safety of their investments. Investors would like to invest in a country where there is an independent, incorruptible and efficient judiciary. They would like to see these commercial cases quickly disposed of by the courts without horrendous delays, which usually lead to economic ruin. However, Judiciary in Zambia is alive to these issues and has put in place a *Commercial List*⁴² with judges specifically dedicated to that list in order to address the special needs of the

⁴⁰ The Constitution as amended by Act No. 18 of 1996 Cap 1 Article 28

⁴¹ E. L. Sakala: *Autonomy and independence of the Judiciary in Zambia: Realities and challenges*:
Supra Note 23.

⁴² *High Court (Amendment) Rules 1997. Order LIII.*

business community. Commercial list is a section of the High Court, which hears and resolves commercial disputes. Further, the judiciary in Zambia has introduced *Court Annexed Mediation*⁴³ otherwise known as *Alternative Dispute Resolution* (ADR) to speed up settlement of disputes. Many cases involving large sums of money have been quickly and cheaply disposed of through Mediation.

As earlier alluded to, most people associate the judiciary with trying cases and delivering judgments, passing sentences and ordering litigants to pay damages. But the judiciary offers a myriad of other services to the public, which have nothing to do with litigation. This is in reference to the ministerial functions performed by certain categories of officers of the judiciary. Certain court officers execute ministerial functions where the exercise of discretion is not involved. For example, authenticating a document does not require a Magistrate to make a decision.

Judicial officers and Clerks of Court are ex officio Notaries Public⁴⁴ and Commissioners for Oaths respectively.⁴⁵ These officers attest Affidavits and authenticate other documents for use in courts and commerce and industry in Zambia and outside Zambia and for various other purposes. The courts are also engaged in the granting of probate⁴⁶ and administration of estates.⁴⁷

As can be seen from the above, the judiciary has a role to play not only in the administrative sphere but also in the economic and social sphere. But more

⁴³ *Statutory Instrument No. 77 of 1997 and High Court (Amendment) Rules 1997*, Order XXXI

⁴⁴ *Notaries Public and Notaries Functions Act* Cap 35.

⁴⁵ *Commissioner for Oaths Act* Cap. 33

⁴⁶ *Wills and Administration of Estates Act* Cap. 60.

⁴⁷ *Intestate Succession Act* Cap 59

importantly judiciary should be representative of the society, which it judges. If the decision handed down by the courts tended to be in favour of one segment of the community and against another, whether because of the social background of the judges or because of their political philosophy, the judiciary has not properly discharged its role in the society. Whatever social background a judge comes from he/she should endeavour to ensure that his background and prejudices do not obviously influence his/her decisions.

JUDGES' TENURE OF OFFICE

Zambia has adopted the American System of entrenching the judicial independence guarantees in the Constitution.

JUDGES OF THE SUPERIOR COURTS

The office of Chief Justice, Deputy Chief Justice,⁴⁸ and puisne judge⁴⁹ shall not be abolished while there is a substantive holder thereof. A person appointed to such office can only retire at the age of sixty-five⁵⁰ with a proviso to extend it further to a period not exceeding seven years.⁵¹ The salaries paid to judges are charged on the Treasury but appropriated by an Act of Parliament.⁵² These salaries cannot be reduced or altered in any way to a Judge's disadvantage. Their removal from office depends on the inability to perform functions of their office subject to the findings of the tribunal.⁵³ Moreover, judges are immune from any civil or criminal actions for acts or omissions committed in the exercise of their jurisdiction. The issue of

⁴⁸ Ibid Article 92 (3)

⁴⁹ Ibid article 94(5)

⁵⁰ Ibid Article 98(1)

⁵¹ Ibid Article (98)(1)(b)

⁵² The Judges (Conditions of Service) Act. Cap 277.

⁵³ Ibid Article 98 (3) (4)

immunity was tested in the case of *Godfrey Miyanda v. The High Court*.⁵⁴ In this case the petitioner sued Judge Mathew Chaila for delaying to deliver a judgment in a civil matter in which he was a plaintiff. The Supreme Court held, inter alia, that,

“The remedy of mandamus is not available against the judges of the superior courts of Zambia in the event of an alleged failure to perform their judicial functions.”

JUDGES OF THE INFERIOR COURTS

MAGISTRATES

Their offices are not protected by the Constitution as they are considered non-Constitutional offices. However, their salaries and conditions of service are as per general civil service payroll. Retirement age is fifty-five subject to a renewable three-year contract, which however is not automatic. Their judicial independence is guaranteed by the protection from actions in respect of acts or omissions or ought to be done in the execution of powers vested in him/her.⁵⁵ The salary could only be reduced if on disciplinary charge.⁵⁶

LOCAL COURT JUSTICES

Like Magistrates, Local Court Justices are considered as any ordinary member of the Public Service with no specific labour union to represent their interests. They have civil service salaries. They are also indemnified from civil or criminal actions in respect of acts or omissions done in the course of their duties.⁵⁷ The appointment age is above forty and to retire at seventy-five years.

⁵⁴ (1984) ZR 62

⁵⁵ Section 55 of the Subordinate Courts Act, Cap. 28.

⁵⁶ *General Order 92 (b) (ii)* of 1990 Edition.

⁵⁷ Section 65 of the *Local Courts Act*, Cap. 29.

This disparity in security of tenure and salaries and conditions of service between the superior court judges and members of the lower courts have led to numerous work stoppages by Magistrates and Local Court Justices. The recent strike by Magistrates was from March to April, this year and it prompted the Nalikwanda UPND Member of Parliament Honourable Simasiku Kalumiana in the National Assembly to say that,⁵⁸

“President Mwanawasa’s increment of Judges salaries was done in bad faith. He should have known the judiciary is not just judges but Magistrates, Local Court Justices and other support staff equally involved in the day-to-day dispensation of justice.”

Though the Magistrates’ and Judges’ Association of Zambia (MAJAZ) is not a trade union, it is nevertheless the only forum through which Magistrates and Local court justices air their grievances.

THE PREVAILING SITUATION

While there could be flamboyant provisions in the Constitution and other statutes to safeguard the independence of the judges, these provisions seem not to be adequate as evidenced by the following: -

INTIMIDATION OF THE JUDICIARY

Throughout 1996, the judiciary and the legal profession came under increasing attack from the Government and its supporters for being independent-minded and criticizing the Constitutional Amendment Act.⁵⁹

⁵⁸ *The Post*, issue No. 2361, Friday, 4th April, 2003

⁵⁹ *Human Rights Watch/Africa, Zambia: The Elections and Human Rights*, pp. 31-32.

In a move that received International attention, President Frederick Chiluba exercised his Constitutional powers and suspended⁶⁰ an independent-minded Lusaka High Court Judge Kabazo Chanda on 11th January 1997. President Chiluba appointed a three-member tribunal, two Supreme Courts judges and a judge from Malawi's Supreme Court to investigate whether judge Chanda should be relieved of his duties.⁶¹ However, justice Chanda's history of criticizing the President and the Country's human rights record was long.⁶² In March 1996, he overruled the efforts of the speaker of Parliament, Dr. Robinson Nabulyato, to sentence journalists Fred M'membe and Bright Mwape to indefinite prison terms for contempt of Parliament. Chanda had argued that the Speaker and Parliament had no right to imprison people because they were not a court.⁶³ Earlier in 1997, Chanda released fifty-three prisoners, some of whom had been awaiting trial since 1992, on the grounds that the state had failed to bring them to court speedily. His justification centred on the argument that justice delayed was justice denied.⁶⁴

Many saw a direct link between Judge Chanda's judicial independence and the President's action. The Magistrates' and Judges' Association of Zambia (MAJAZ) called the President's suspension of Justice Chanda as "intimidatory" and warned that "this tribunal might be a tool to undermine the independence of the judiciary".⁶⁵

⁶⁰ Ibid Article 98 (5).

⁶¹ National Mirror, January 12-18, 1997, The tribunal was composed of Supreme Court Judges, Justice R. Kapembwa, B. Gardener and L. Unyolo at p.1

⁶² Electronic Mail and Guardian, January 24 1997, Johannesburg, *Chiluba suspends top Judge*

⁶³ **Fred M'membe and Bright Mwape v. The Speaker of the National Assembly and the Commissioner of Prisons and the Attorney-General.** 1996/HCI/X

⁶⁴ Ibid Mail and Guardian

⁶⁵ Ibid

Liberal Patriotic Front Chairman Dr. Rodger Chongwe said the suspension signalled that Chiluba and his ruling party would not tolerate Judges who checked their sinister interests. He said: -

“The action was political. It has nothing to do with performance. It’s a warning to other judges. If they don’t toe the line of Chiluba’s politics, they will suffer the same fate.”⁶⁶

The then Zambia Democratic Congress President Dean Mung’omba⁶⁷ commented:

“This amounts to intimidation of the judiciary by the Executive. In normal democratic systems the Executive should not have muzzling powers. The aim is to control the judiciary.”

Later, when judge Chanda was finally slapped with three charges, his response was as follows:

“I finally received the three charges last week and contrary to what most people thought, there is no political or social charges which has been framed against me. I want the nation to know that my suspension has nothing to do with the state per se or with my social conduct. It is purely a conspiracy within the judiciary to get rid of me because of my contribution during the reintroduction of Multi-Party system in Zambia.”⁶⁸

Incidentally, Judge Chanda did not elaborate as to what contribution he had made to the reintroduction of multiparty politics in the country. Finally, Judge Chanda resigned before the tribunal began its work.

The independence of the Judiciary was on test earlier after a tribunal found the then Minister of Legal Affairs the late Dr. Remmy Mushota and Mandevu MP Patrick Katyoka, guilty of corruption contrary to the Ministerial and Parliamentary Code of Conduct Act Cap 16. The former Chief Justice, Mathew Ngulube and other judges who sat on the tribunal were subjected to vicious and spurious attacks. In 1996, The

⁶⁶ Ibid

⁶⁷ National Mirror January 12-18 1997

⁶⁸ *The Post* June 23rd 1997

Confidential,⁶⁹ a newspaper sympathetic to the ruling party and State House, published a story accusing the Chief Justice of having raped a cleaner at the Supreme Court. Surprisingly, despite finding Dr. Mushota guilty of impropriety, President Chiluba appointed him as Chairman of the Citizenship Board, undermining the findings of the tribunal and at the same time showing confidence in Dr. Mushota.⁷⁰

Another attack on the judiciary by the executive was witnessed after the court declared Section 5 (4) of the Public Order Act unconstitutional⁷¹ where the then Vice President, Brigadier – General Godfrey Miyanda⁷² described the court's decision as ridiculous and Energy Deputy Minister, Ernest Mwansa⁷³ was also quoted as saying, "the Chief Justice and Supreme Court must go."⁷⁴

Consequently, the courts have in most cases grown cold feet by either searching for the ratio decidendi at any cost in order to rule in favour of the government instead of searching for a correct and justifiable decision or delayed in making a ruling so that by the time the ruling is made, it becomes of less or no effect at all against the Government.⁷⁵ Another example of a prolonged case ruling was the case of the twenty-two Members of Parliament when challenging their expulsion from the MMD. Obviously a prompt ruling would have assisted the speaker of the National Assembly and the MPs themselves to know what to do next. Reluctance on the part of the

⁶⁹ A privately owned newspaper published weekly

⁷⁰ *Zambia Law Journal Volumes 25-28, 1993-96 Zambia Fledging Democracy: Prospects for the Future*, by Dr. A. W. Chanda at p. 141.

⁷¹ *Mulundika and Others v. The People* (1995/1997) ZR 20

⁷² Heritage Party President

⁷³ Member of the opposition party Forum for Democracy and Development Party

⁷⁴ Ibid

⁷⁵ The case of *the Resident Doctors Association v. Attorney General* 1997/HP/0817 (unreported) where the ruling over a permit was made too late and there was no need for a demonstration.

judiciary to exercise such power in an efficient and timely manner tends to shift the balance of power between the state and citizen in favour of the state. The long-term effect is the lack of confidence in the judicial administration process.

REMUNERATIONS

As earlier stated judicial remunerations should be adequately safeguarded against being used as a means of asserting control over judges. As a form of safeguard, the salaries and conditions of services for judges is contained in the Judges (Conditions of Service) Act Cap 277, which also has regulations, made by the President who reviews and amends them from time to time through Statutory Instruments.⁷⁶ During the 1996 Petition case we saw former President Chiluba effectively exercise his powers contained in sections three and twelve of the Act to increase salaries and improve conditions of service for all the judges of the superior courts on many occasions. A precedent has been religiously followed by his successor, President Levy Mwanawasa who has already increased Judges remunerations twice in less than six months through statutory instruments⁷⁷ while the petition case is still going on. It is clear that the Act has no provision for the judges to initiate a demand in the improvement of their salaries and conditions of service as that is the duty of National Assembly and the President. The executive has taken advantage of that and only decides to improve conditions at the time when the courts are expected to make very important decisions like determining the outcome of the 2001 election petition and the President himself is the subject of the controversy. In such situations Judges end up being compromised and fail to offer checks and balances on the executive.

⁷⁶ *Judges (Conditions of Service) Act* Cap 277 Sections 3 and 12

⁷⁷ *Statutory Instruments No. 64 of 2002 dated 8/8/2002 and No. 6 of 2003 dated 4/1/2003.*

Since the Judges (Conditions of Service) Act can be abused at will by the Executive, it can be safely concluded that judicial remunerations are not adequately safeguarded against being used as a means of asserting control over Judges by the Executive in Zambia.

WHO CONTROLS THE JUDICIARY?

National Assembly participates in the appointment of certain judicial officers (judges of superior courts, that is High Court and Supreme Court) presupposes responsibility towards the people who, after all are represented by the Members of Parliament.⁷⁸ For the sake of the independence of the judiciary the right to freedom of expression, and reporting by the media, is limited by the offence of contempt of court. This does not exclude all criticism of courts as a form of public control.⁷⁹

Judicial bodies (from Small Claims Court to High Court) are subject to different forms of judicial control. The comprehensive system of appeal courts amounts to an extensive form of judicial control.⁸⁰

In addition, the immunity of judicial officers to civil actions, which may result from their decisions, is not absolute. Immunity applies only if the officer acted bona fide. If the judicial officer acted malafide, the officer can be held liable.⁸¹

⁷⁸ Ibid Articles 93 (1) (2) and 95 (1)

⁷⁹ *Jennison v. Baker* (1972) 1 All Cr. 997 as per dictum of Salmon L. J. at page 1001.

⁸⁰ *Elias Kundiona v. The People* (1993-4) ZR 39

⁸¹ *Subordinate Court Act* Cap 28 Section 55

CONCLUSION

Independence of the Judges means far more than immunity from interference, it means that they are free to bring their own sense of values to bear in considering legislation and do not simply reflect the values of Government. For there can be no protection against abuse of power, even when safeguards are enshrined in a written Constitution, if the Judges who have to interpret these whenever the Government is challenged are only puppets of government.⁸² Supreme Court Judge Ernest Sakala (now Chief Justice)⁸³ acknowledged the inadequacy of safeguards and stated that:

“Autonomy and independence of the judiciary in Zambia are best secured, not by the Constitutional and Statutory provisions, but by sincerity and the goodwill 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 courts decisions.”

But in spite of the intimidation or dangling of a carrot to the Judges of the superior courts in form of increase in allowances and salaries, they should be mindful of their oath of allegiance, which is only to the Constitution and the law and not to external pressures. A compromised judiciary cannot offer checks and balances and thereby could fail to contribute to the promotion of the rule of law.

⁸² R. W. M. Dias 1985 *Jurisprudence*, Fifth Edition, Butterworths, London at p. 99.

⁸³ E L Sakala, *Supra*, note 41

CHAPTER THREE

STRUCTURE OF THE JUDICATURE

The judicature in Zambia consists of about six⁸⁴ courts and these are: -

- (a) The Supreme Court of Zambia
- (b) The High Court for Zambia.
- (c) The Industrial Relations Court
- (d) The Subordinate Courts
- (e) The Local Courts, and
- (f) Such lower courts, as may be prescribed by an Act of Parliament.

There are nine provincial High Courts, two Industrial Relations Courts situated in Lusaka and Ndola, sixty-five Magistrate Courts and four hundred and forty-one Local Courts.⁸⁵

The judicature is divided into superior and inferior courts. The first superior court is the Supreme Court, which is the final court of appeal in the land.⁸⁶ It has original jurisdiction only in the presidential petition pursuant to Article 41 (2) of the Constitution. The second superior court is the High Court, which is a Court of record and has unlimited and original jurisdiction to hear and determine any civil or criminal proceedings under any law.⁸⁷ The judges of the Supreme Court and High Court man both of the above courts. The third superior court is the Industrial Relations Court, which is on the same level with the High Court and has exclusive jurisdiction under

⁸⁴ Article 91 (1) of the Constitution as amended by Act No. 18 of 1996

⁸⁵ As per paper entitled: *The impact of judicature administration Act on the Justice delivery system in the Magistrate Courts*. Presented by Mr. P. Musonda, Chief Administrator, Judiciary at Magistrates Seminar held at Savoy Hotel, Ndola, 16th March 2001.

⁸⁶ Ibid, note No.81, Article 92 (1)

⁸⁷ Ibid Article 94 (1) (6)

the Industrial and Labour Relations Act.⁸⁸ The Chairman and the Deputy Chairman with powers of a judge of the High Court preside over this Court.⁸⁹

The inferior Courts comprise Subordinate Courts commonly known as Magistrates Courts, which are presided over by Magistrates, and these courts are the first courts of record and have limited jurisdiction in civil and criminal cases.⁹⁰ The second inferior court is the Local Courts, which administer customary law and are presided over by Local Court justices. Lastly, there are the Small Claims Courts,⁹¹ though not yet functional, are to be presided over by magistrates.

For the sake of this paper, the question to be addressed is whether or not the present structure enhances the independence of the judiciary or the rule of law. There is no doubt that there are concerns over inordinate delays in disposing of cases before the courts and such concern is even more grave in urgent constitutional matters.⁹² To alleviate that problem there is need to create a Constitutional Court which would ensure that constitutional provisions are strictly adhered to by protecting, interpreting and enforcing the Constitution. *The Court would allow neither the President nor the Parliament to abuse their powers.*

Furthermore, any person may seek redress directly to this court if he/she feels that his/her rights have been abused and expect to have the matter disposed of quickly.

The creation of such a court would in the end enhance the rule of law. But more often

⁸⁸ Ibid Article 94 (1)

⁸⁹ Ibid Article 95 (3)

⁹⁰ As provided by the *Subordinate Court Act* Cap 28 and the *Criminal Procedure Code Act* Cap 88.

⁹¹ Established by the *Small Claims Act* Cap 47

⁹² For example, urgent matters such as the petitioning of the nomination and appointment of a person who once stood and lost in the previous Election.

than not, the structure may be adequate but what matters most is the calibre and independence of the personnel to manage these courts. The next chapter will look at the appointment, qualifications and discipline of the judges in charge of these courts.

CHAPTER FOUR

APPOINTMENT OF MEMBERS OF THE JUDICATURE

SUPERIOR COURTS

(i) SUPREME COURT

The President appoints the Chief Justice, Deputy Chief Justice and seven other Judges of the Supreme Court subject to ratification by the National Assembly.⁹³

(ii) HIGH COURT

The puisne judges are appointed by the President on the advice of the Judicial Service Commission subject to ratification by the National Assembly.⁹⁴

(iii) INDUSTRIAL RELATIONS COURT

The President on the advice of the Judicial Service Commission appoints the Chairman and Deputy Chairman of the Court.⁹⁵

CRITERION OF APPOINTMENTS

Some judges are appointed not because of their sound qualifications, hard work or integrity but because of other irrelevant considerations or as the adage goes “a good deed serves another.” Few examples will illustrate this point.

A Principal Resident Magistrate was appointed as puisne judge of the High Court few months after the trial and acquittal in 1991 of the aspiring Presidential candidate who later won and formed government.⁹⁶

⁹³ Ibid Article 93

⁹⁴ Ibid Article 95 (1)

⁹⁵ Ibid Article 95 (2)

⁹⁶ The Magistrate had travelled from his base in Mongu to try the case in Monze. The accused was former President F. T. J. Chiluba and was charged with unlawful assembly.

Another Principal Resident Magistrate at Lusaka tried and convicted a sitting President's son of assault to whom he exercised maximum leniency. Within a few months, the presiding Magistrate was appointed Director of Public Prosecutions. Judge Bonaventure Bweupe was appointed to the position of Deputy Chief Justice on mainly two grounds, namely that he was a supporter of the ruling party and that his tribe was that of the President's. Though the Judge's health was very poor the President extended the judge's tenure by seven years – the years he never lived to serve.

After the demise of Judge Bweupe, Judge Ernest Sakala was appointed to act as Deputy Chief Justice. But after about one year of acting⁹⁷ Judge David Lewanika replaced him. Both had Presided over the 1996 Presidential petition,⁹⁸ in which only judge Sakala was in favour of ordering the sitting President to undergo a DNA test to establish his parentage which was in contention. On the other hand, Judge David Lewanika was believed to be closer to the ruling class and had refused to grant a DNA test.

However, when the incumbent President took office, and following the resignation of the former Chief Justice Mathew Ngulube,⁹⁹ Supreme Court judge Ernest Sakala was appointed Chief Justice.

⁹⁷ After six months an employee is supposed to be confirmed but Judges act on the pleasure of the President.

⁹⁸ *Akashambatwa Lewanika and Others v. FTJ Chiluba* SCZ/8/EP/3/96, SCZ/8/EP/4/96

⁹⁹ Op. Cit

From the above illustrations it can safely be concluded that there are very few appointments which are on merit other than in consideration of irrelevant factors such as tribe, nepotism, pay back, and so on. The levels of staffing in the superior courts are shown in Appendix I.

INFERIOR COURTS

(i) SUBORDINATE COURTS

There are two categories of Magistrates. There are those with a degree in law with a practicing certificate who join as Resident Magistrates and can rise up to judgeship. Others are those with a diploma in Magistracy obtained at National Institute of Public Administration (NIPA) and start as Magistrate Class Three and can only rise up to Magistrate Class One. The Judicial Service Commission appoints both of these officers.¹⁰⁰

But some appointments cannot pass without comment. In normal circumstances a person cannot be appointed as Magistrate without the above qualifications. In practice, however, appointments have been made in the recent past to judicial workers with massive experience to fill up the vacancies in certain districts, which have no resident magistrates. It is this practice which has led to abuse of the office of the magistrate by indiscriminate appointment of people who have little or no knowledge of law as evidenced by the following appointments in the year 2003: -

- (a) A retired Senior Training officer, trained in Civil Procedure and Court Reporting only was appointed Magistrate Class II.

¹⁰⁰ Section 5 of *Service Commissions Act* Cap 259.

- (b) A retired Departmental Secretary within judiciary, whose main job was administration while in active service was appointed Magistrate Class One. Both officers in (i) and (ii) have been working at Judiciary Headquarters in Lusaka.
- (c) A Court Bailiff at Chingola subordinate Court with no formal legal training in Law was appointed Magistrate Class Three.
- (d) In Mongu, a retired police officer, whose only professional attainment is a certificate in Criminal Law obtained after six months training at Lilayi Police Training College in Lusaka, was appointed Magistrate Class Two.

The Judicial Service Commission appointed all the above officers. The question is what value have these appointments brought to the system? The Secretary to the Judicial Service Commission told this writer that most of the appointees were “highly” recommended by various judges of the superior Courts but had not consulted their immediate supervisors.¹⁰¹ Worthy of note is the fact that the Judicial Service Commission did not make any objection to these sham appointments. Corruption, nepotism and maladministration cannot be ruled out. It is important to state that the⁹⁸ quality of men and women on the bench determines the quality of justice administered. In the meantime there is a critical shortage of trained manpower in the Subordinate Courts as evidenced by staffing levels in Appendix II.

We can then conclude that it is not only the Executive that may interfere with the selection or appointment of judicial officers but judiciary itself. The only problem is who can watch the watchman?

¹⁰¹ Mr. Lamont Funtuta at High Court on 9th September 2003.

(ii) LOCAL COURTS

The system of selection depends on whether it is done in the urban or rural area.

(a) URBAN LOCAL COURTS

When a vacancy falls at a particular Local Court in the District, the Local Court Officers with authority from the Director of Local Courts in Lusaka will pick three names identified as having qualities such as integrity, no criminal record and commands respect in that community. He will interview them, and make recommendation on each one and finally transmit them to the Director of Local Courts. The Director will subsequently forward the names and recommendations to the Secretary of Judicial Service Commission out of which one will be appointed. In some cases, the Commission may prefer a candidate with fewer points.¹⁰²

In town, no one custom is applied because of its cosmopolitan nature hence appointment takes into account the balance of tribes and wide knowledge of various customs.¹⁰⁰ In addition, other qualifications include grade 9 level of education and should be able to speak and write in English. The minimum age is forty years and above. The justices retire at the age of seventy-five years. The Director intimated to this writer that they normally prefer retired teachers.

¹⁰² This information is not written but based on the communication this writer had with the Deputy Director of Local Courts, Mr. Morris Kanyama at the High Court on 9th September 2003.

(b) RURAL LOCAL COURTS

The nomination process is the same as in the urban Local Courts. The only difference is that in rural areas nomination is done by the Chief of that particular area who sends names with his recommendations to the Provincial Local Court or Local Court Officers who will in turn interview the three nominees and later forward the results to the Director of Local Courts. Finally, Judicial Service Commission will then appoint one person out of the three nominees.¹⁰³

This is a short and simple process of selecting and appointment of Local Court Justices. However, that method has its own pitfalls. For example, there is no advert to the public hence could not attract well-qualified individuals. The system of nominating names is not transparent and is open to abuse, as only relatives and friends would be picked. The method can easily breed corruption because both the Local Courts Officer and the Chief sits alone when picking the three names. Some senior judicial officers are also likely to take advantage of the flaws in the process by lobbying to have their friends and relatives appointed as justices of the Local Court. It must be born in mind that the quality of the judges depends largely on the method and standards of appointment. When nepotism and corruption plays an important role in the selection process, naturally, that will adversely affect the quality of Judges. Corollary to the quality is the discipline in the system, which is likely to fall to its lowest ebb. However, the Local court has the largest staffing levels as shown in Appendix III.

¹⁰³ Ibid

CHAPTER FIVE

REVIEW OF DECIDED CASES

This chapter will look at some of the cases decided by Judges of Superior Courts from 1990 to date. There is no doubt that before and after the 31 October 1991 General Elections, some Judges were labelled radical and pro-Movement for Multi-party Democracy (MMD) and others pro-United National Independent Party (UNIP). Whether or not the suspicions were justified is dependent entirely on the public perception of some of the decisions that come from these Courts.

*ARTHUR LUBINDA WINA, F. T. J, CHILUBA, V. J. MWAANGA, A. K. LEWANIKA, L. P. MWANAWASA, E. CHIBWE AND A. KASHITA V. THE ATTORNEY GENERAL*¹⁰⁴

On 1st November, 1990, the President of Zambia¹⁰⁵ had, at a news conference issued a directive that certain government owned newspapers¹⁰⁶ were not to provide coverage to or accept advertisements from the Movement for Multi-Party Democracy (MMD). The petitioners (who were all members of the MMD) applied for an order quashing and setting aside the directive as it violated their rights in terms of Articles 22 and 25 of the Constitution of Zambia.

The Court held that the President was a creation of the Constitution and that he had issued his directive as the Head of state. His order of telling the editors of the newspapers what to and what not to publish affected the activities of the petitioners and gave them the legal basis to bring the application. From the evidence before the

¹⁰⁴ (1990/1992) ZR. 95 (HC)

¹⁰⁵ Dr. Kenneth David Kaunda

¹⁰⁶ Times of Zambia, Sunday Times and Daily Mail

Court it was held that the newspapers in question were government-controlled papers. The court commented that, had they not been government controlled newspapers then their management would have been at liberty to determine what they published.

As the newspapers were government papers, the directive was discriminatory and unconstitutional unless it fell within one of the permitted derogations of the right against discrimination. The court found that the directive was not reasonably justified in a democratic society, which allowed for differences in peoples' political views. The directive further hindered the petitioners in the enjoyment of their freedom of expression as they were prevented from publishing their opinions through government newspapers. The directive was accordingly quashed. This was a High Court case and was presided over by Judge C. M. Musumali who delivered that Judgment. It is worth noting that this was a rare display of courage because at that time it was almost impossible to overrule a directive from a sitting President and for that matter Dr. Kenneth Kaunda. But what is important however was that the Judge was believed to be an MMD supporter and this was one amongst his contributions to the party.

KAMBARAGE MPUNDU KAUNDA V. THE PEOPLE¹⁰⁷

The appellant is a son to Dr. Kenneth Kaunda and at the time of the commission of the alleged offence his father was President of this Country. The appellant was charged with a homicide. However, before commencement of criminal proceedings the Director of Public Prosecutions (DPP), on examining the police docket, announced publicly that he had decided not to prosecute for homicide on the ground of self-defence. The police docket was then closed.

¹⁰⁷ (1990/1991) ZR 215 (SC)

An inquest was subsequently held and on consideration of the evidence before him the coroner directed that appellant and a co-accused be charged with murder of the deceased. The appellant was arrested by the police and charged with murder. Meanwhile the DPP died of natural causes and a new DPP was appointed. The new DPP decided to prosecute the appellant for manslaughter and filed information in the High Court accordingly.

In the trial court, the court on its own motion upgraded the indictment from manslaughter to murder and convicted the appellant for murder. It is interesting to note, however, that it was Judge C. M. Musumali who tried and convicted the appellant.¹⁰⁸ Apparently it is difficult to know why and how hard and sensitive cases ended up with the same Judge. The only inference this writer could make is that he was the only Judge MMD could use to get at Dr. Kenneth Kaunda when his grip on power was waning.

On appeal, however, Chief Justice Silungwe, who was viewed as pro-UNIP, delivered the Judgment of the Supreme Court and had this to say,¹⁰⁹

“In our view, the situation of the appellant was that it was reasonable, after the blows delivered to the car and after seeing the two groups continue to advance towards him, despite the warning shots that were fired, to be in fear of his life and the lives of his friends, especially as some, including PW11, were very close to him. In those circumstances, it was reasonable for him to lower his aim with intent to frighten the oncoming people by the sound of the bullets despite the dangers to those people of doing so.”

The Court went further and stated: -

¹⁰⁸ Judgment was delivered in open court on 16th October 1991

¹⁰⁹ Supra on page p. 228

“It seems to us that there was no good reason for the learned trial judge to reject the version of events as given by the appellant and DW2. The defence account by two sober men as to what happened at the material time should have been accepted or at least the appellant and his witness should have been given the benefit of doubt as against the version of the prosecution eyewitnesses some of whom were shown to have been lying in their evidence”

The Supreme Court concluded by holding that the Judge in the Court below misdirected himself by failing to warn himself when considering evidence of witnesses who were friends and relatives to the deceased as witnesses with possible bias against the appellant who had earlier complained against them. The Court went further by continuously attacking the trial Judge of holding that the learned trial Judge misdirected himself by applying improper tests in his assessment of the credibility of the prosecution eyewitnesses some of whom lied on the amount of alcohol they had consumed. The appellant was found to have acted in self-defence and was acquitted of the offence of murder.¹¹⁰

Interestingly, these cases were the last to be handled by Judge Musumali as High Court Judge because he was appointed as Supreme Court Judge¹¹¹ while Chief Justice Annel Silungwe was “retired” and replaced with Mathew Ngulube, who was his deputy. It is this kind of reaction from the Executive that makes Judges be obsessed with prospects of promotion or in the converse become timid for fear of being asked to step down in the name of resignation or retirement in order to circumvent the constitutional provision of establishing a tribunal.¹¹²

¹¹⁰ Judgment was delivered in open court on 19th February and 19th March 1992.

¹¹¹ (1993/1994) *Zambia Law Report, Judges for 1993 and 1994* pp. (iv) (v).

¹¹² Op. Cit.

*BANDA V. CHIEF IMMIGRATION OFFICER & ATTORNEY GENERAL*¹¹³

The appellant who was a UNIP Youth Constituency Secretary and rose to be District Governor during the Second Republic, was served with a deportation order and was detained pending deportation on 9th November, 1991. He appealed under Article 28 of the Constitution for a declaration that his fundamental right to personal liberty had been contravened, that his detention went beyond the legitimate period and that the deportation order was null and void. He sought orders of prohibition and certiorari to prohibit his removal from Zambia to Malawi or elsewhere and quash the deportation order respectively. He also sought a declaration that he is a Zambian and therefore not deportable.

Nevertheless, the Court agreed with the state and held that the appellant must satisfy immigration authorities that he has been ordinarily and lawfully resident in Zambia or the former protectorate of Northern Rhodesia or both for him to qualify as an established resident. It further held that the appeal court will not interfere with the findings of fact of the lower Court unless it is apparent that the trial Court fell into error.

In the High Court Judge Tamula Kakusa handled this matter. On appeal, Bweupe, D. C. J. delivered the Judgment of the Court in which the Supreme Court upheld the dismissal of the appellant's appeal to have his deportation order quashed. The Court said that the Minister of Home Affairs' declaration that the appellant's presence in Zambia was inimical to the public interest and in issuing a warrant of deportation was good in law. The relevance of this case to this study is that it illustrates the extent to

¹¹³ (1993-1994) ZR 80 (HC)

which judiciary can be used by the Executive to help it fight its political battles. Apparently, the ruling party had aimed at completely wiping out UNIP from the Zambian political scene, of course, with the assistance of “its” Judges.

This position is reinforced by the action of the current President Levy Mwanawasa who in 2002, that is about 10 years later, recalled the appellant into Zambia. The reasons however could be two facets, namely, that the President in his opinion felt that the court was wrong to have found Banda a non-Zambian since the matter was political or merely ignored the judgement of the court. In both cases, the integrity and independence of the judiciary is put into question.

DR. KABANDA K. MUSHOTA AND PATRICK G. KATYOKA V. DR. KENNETH D. KAUNDA AND ATTORNEY- GENERAL¹¹⁴

The persecution of Dr. Kenneth Kaunda and the opposition party continued as he was a member of UNIP and was the only credible challenge to MMD. Dr. Remy Mushota was a senior member of MMD and was at time serving as chairman of Citizenship Board. The second applicant was also a founder member of MMD. This is a matter for judicial review in which the two applicants asked the Court to review the Zambian Citizenship of Dr. Kenneth Kaunda and to grant prerogative orders of certiorari directed to the second respondent to quash his Zambian citizen on the premise that it was obtained as a result of decisions which were an abuse of power, unreasonable, ultra-vires, illegal and procedurally irregular and to declare that Dr. Kaunda has never and does not qualify to be elected President of the Republic of Zambia. It was further sought that Dr. Kaunda having been a non-Zambian citizen

¹¹⁴ 1997/HW/357 (unreported)

should be declared to have ruled Zambia as President illegally and that he is stateless. However, Dr, Kaunda's counsel submitted by drawing the attention of the Court to the recent Supreme Court judgment No. 14 of 1998 in which it was decided that any British protected person who "belonged" to Northern Rhodesia before 24th October 1964 was entitled to claim Zambian citizenship after 24th October 1964.¹¹⁵ The trial Judge, with impunity, ignored the doctrine of judicial precedent; went ahead and declared Dr. Kenneth Kaunda stateless on 31st March 1999.

The first respondent appealed to the Supreme Court. But for fear of embarrassing the Judiciary both parties agreed on a consent order in which it was agreed to ignore the High Court judgment and restored Dr. Kaunda's citizenship.¹¹⁶ This case was suspect from the start. Both parties in this case resided in Lusaka but the applicants decided to take the matter to Ndola High Court. It cannot be ignored that Dr. Kaunda ruled this Country for 27 years and the Supreme Court had clearly explained the issue of citizenship in the 1996 Presidential Petition case¹¹⁷ and therefore it cannot be imagined as to how a Judge could go all the way in making such an outrageous declaration. It therefore, goes without saying that the fear that some Judges are partisan is more real than fiction.

¹¹⁵ *Lewanika & Others v. FTJ Chiluba*, Supra note 95

¹¹⁶ Based on the communication with the respondents Counsel, Professor Patrick Mvunga on 24th September, 2003 at UNZA.

¹¹⁷ Op. cit.

*MAXWELL MWAMBA & STORA MBUZI V. ATTORNEY GENERAL*¹¹⁸

Though this case is relevant to the subject of locus standi, it is equally important to the topic under discussion because it will show the dilemma in which judges may find themselves if compromised.

The brief facts of this case are that the applicants who were members of an opposition party challenged the appointment by the President of two members of his political party, who had previously been investigated for trafficking in drugs. The challenge was premised on Article 44 of the Constitution.

The substance of the case was that by appointing the two members of Parliament to ministerial positions the President had acted contrary to the provisions of Article 44 of the Constitution. They were not themselves affected by the appointments. The four Judges of the Supreme Court observed

“However, on the question of locus standi, we have to balance two aspects of the public interest, namely the desirability of encouraging individual citizens to participate actively in the enforcement of the law, and the undesirability of encouraging meddlesome private “Attorney Generals” to move the Courts in matters that do not concern them.”¹¹⁹

Surprisingly, having stated the issue so well, the Court went on to say: -

“For the present purposes, we are prepared to proceed, without coming to any firm conclusion on the points, on the footing that the appellants have a legitimate interest in the national leaders and the governance of the country. We would like to make it clear that four of us do not wish to come to any firm conclusion on the issue of locus standi but our brother Musumali, JS, would like to do so and adds his own view.”¹²⁰

Although Musumali, JS, set out to make a serious pronouncement on the subject, his view is of very limited significance. He said: -

¹¹⁸ *SCZ Judgment No. 10 of 1993* (unreported)

¹¹⁹ *Ibid* J4

¹²⁰ *Ibid* J4 – J7

"My firm belief is that a citizen has a right to sue on Constitutional issues unless the Constitution itself explicitly or by necessary implication has taken away that liberty."

Musumali, JS, limited the liberal position on locus standi to Constitutional issues but failed to make a declaration. This is not helpful if it is accepted that the essence of judicial review is to ensure rule of law. Moreover, this case has demonstrated the effects of partisanship, which could render Judges literally impotent. Failure to act in this case meant that the judges were in violation of the Constitution, which they swore to defend and be answerable to.

CHAPTER SIX

POLITICAL COMMITMENT

The commitment of any political party to any important principle such as separation of powers *visa vis* independence of the judiciary can only be contained in its manifesto. A manifesto is a public declaration of policy by a political party before an election.¹²¹ This is, therefore, a projection of what a party could do if it assumed power or what improvements it intends to effect if it is already in power. In this case the writer considered and analysed four (4) political parties with representation in the National Assembly, namely: -

1. The ruling Movement for Multiparty Democracy (MMD)
2. The Heritage Party (HP).
3. The United National Independence Party (UNIP)
4. The United Party for National Development (UPND).

Apart from the ruling Movement for Multiparty Democracy, would any of the other political parties make any difference in securing and ensuring the independence of the judiciary, if at all, they assumed power? This paper will now look at what each party said on the separation of powers *visa vis* independence of the judiciary.

THE MOVEMENT FOR MULTI-PARTY DEMOCRACY 1996 MANIFESTO

The party was formed on 20th July 1990 as an umbrella group of opponents to a one-party state, including the unionists, businessmen, church leaders, students and former

¹²¹ H. W. Fowler 1990, *The Concise Oxford Dictionary of current English*, Eighth Edition Clarendon Press, Oxford.

politicians. On separation of powers it states that during the UNIP era separation of powers did not exist as the party reigned supreme to the various of organs of government such as the Legislature and the judiciary, hence compromising the Executive.

It further states that since 1991: -

- (a) *Observing separation of powers has strengthened checks and balances.* But it does not explain how that has been done.
- (b) *The judiciary is now autonomous after the passing of the Judicature Administration Act (No. 42) of 1994.*¹²² What is the position after six years of existence? Answers to this question are considered in Chapter Seven below:
- (c) *Presidential appointments to certain constitutional offices are now subject to ratification by Parliament.* What about the composition of Parliament where in most cases the ruling party has the majority number of members of Parliament. As at 15th September 2003, the composition of Parliament¹²³ is as follows: - MMD = 72, UPND = 44, UNIP= 13, FDD = 12, HP = 02, PF = 01, ZRP = 01, Independent = 01, plus nominated members = 08, total number 154. At this time there were four (4) vacancies waiting to be filled. It is important to note that while the ruling party has a slight majority, it has sympathizers like UNIP and in addition, President Mwanawasa has appointed some members of Parliament from the opposition political parties as Ministers. This now means that the MMD by “hook and crook” has increased its tally. Further, the system of holding a caucus at State House and Party discipline intimidates Members of Parliament from

¹²² Cap 24

¹²³ *Parliamentary Statistics as at 23/07/03*

debating freely. The above factors tend to turn Parliament into a rubber stamp and in the long run affect the quality of ratification.

(d) *To ensure that the judicial service commission performs its functions effectively.*

Unfortunately, the Party has not elaborated on how that is intended to be attained. Looking at the appointments at all levels in judiciary as evidenced in Chapter Four, it would not be true to conclude that the commission is performing effectively.

THE HERITAGE PARTY 2001 MANIFESTO

This is an opposition party formed and registered on 9th July 2001.¹²⁴ Brigadier General Godfrey Miyanda leads it.¹²⁵

The party in its Executive Summary of its Manifesto does not have specific provisions to deal with Human Rights, separation of powers, rule of law, let alone the independence of the judiciary. However, the nearest statement under “Justice and Law” is that the Heritage Party will “review and reform the judicial and penal system.” It is clear that the independence of the judiciary is not a priority to this party.

THE UNITED NATIONAL INDEPENDENCE PARTY 1991 MANIFESTO

This is the oldest political party in Zambia having been formed in 1953 and subsequently led the country into political independence on 24th October 1964.

¹²⁴ The Party was launched at a public rally in Kitwe on 28th July 2001

¹²⁵ Brigadier General Miyanda was a former Vice President of the Movement for Multi-party Democracy

Doctor Kenneth David Kaunda pioneered it¹²⁶ until 31st October 1991 when he lost elections to Doctor Fredrick Chiluba of the Movement for Multi-party Democracy.

The manifesto¹²⁷ provides that in the Third Republic¹²⁸ UNIP intends to achieve the following policy objectives: -

“Reaffirm our faith in, and commitment to strong democratic government, characterized by the separation of powers among the three wings of the government, the Executive, Legislature and the Judiciary.”

But notwithstanding the declaration, it is on record that all organs including judiciary were considered branches of the party since the party reigned supreme during UNIP rule.

THE UNITED PARTY FOR NATIONAL DEVELOPMENT 2001 MANIFESTO.

The Party was launched on the 24th December 1998 and is led by Mr. Anderson K Mazoka, a former Chairman of Anglo American Corporation and was an ordinary member of the Movement for Multi-Party Democracy before leaving to form his own party. On the separation of powers, on pages 24 and 25 of its manifesto the party has this to say:-

“... The decade under the Movement for Multi-Party Democracy (MMD) the Government has seen the erosion of the separation of powers by the Executive compromising the judicial system.”

That the UPND will: -

- (a) Ensure the independence of the judiciary
- (b) Guarantee the security of judicial officers
- (c) Provide research assistants who will help judges research their decisions.

¹²⁶ Dr. Kenneth David Kaunda ruled Zambia from 1964 to 1991

¹²⁷ Page 15

¹²⁸ First Republic (1964-1972), Second Republic (1973-1991)

From the above promises, we are not told how the party intends to ensure the independence of judiciary. Secondly, it has not defined the (term) judicial officers being referred to. Politicians have a tendency of taking care of the welfare of only Judges of the superior courts. Lastly, the intention to provide research assistants to help Judges research their decisions is a clear pass of no confidence in the Judges' decisions, which are often seen to be devoid of insight.

CONCLUSION

As can be deduced from the contents of the three manifestos of political parties which are aspiring to form government in future, there is no political will in the ruling party today neither will it be there in the long time to come. Politicians especially in Africa take pleasure in making vague promises. No party so far has come out plainly on how the independence of the judiciary can be secured. Putting in legislation alone is not enough if it cannot be implemented fully or the Executive still retains control over resources. This point will be expanded in the next Chapter. However, it is important to end by saying that where there is political will nothing is impossible. Judiciary can be made strong and independent so that it provides the necessary checks and balances. But I also take cognisance of the fact that a party in power would be much comfortable with a weak judiciary for easy manipulation when it matters most.

CHAPTER SEVEN

FACTORS THAT MAY UNDERMINE THE INDEPENDENCE OF THE JUDICIARY

FUNDING

Internationally, it is the duty of each member state to provide adequate resources to enable the judiciary to properly perform its function.¹²⁹

In the preceding chapter the Movement for Multiparty Democracy in its manifesto stated that since 1991, the Judiciary is now autonomous after the passing of the Judicature Administration Act (No. 42) of 1994.¹³⁰ Section 6 (1) of the Act provides that the funds of the Judicature shall consist of such moneys as may: -

- (a) be appropriated by Parliament for the purposes of the Judicature.
- (b) be paid to the Judicature by way of Court fees or by way of such grants as the Chief Administrator may accept or.
- (c) vest in or accrue to the Judicature.

Section 6 (2) provides that the Chief Administrator may accept money by way of grants, whether or not subject to conditions for the benefit of any activity, function, fund or asset of the judicature or any part thereof.

Section 6 (3) provides that there shall be paid out of the funds of the Judicature,

¹²⁹ Ibid, *Compendium of United Nations Standards and Norms in Crime Prevention and Crime Justice*. Note 29

¹³⁰ Cap 24

- (a) The salaries and allowances of members of the Judicature in accordance with the Constitutional Offices Emoluments Act.¹³¹
- (b) The loans of members of the Judicature.
- (c) The salaries, allowances and loans of the staff of the Judicature.¹³²

This Act came into effect on 31st December 1994. Although the Act is not as comprehensive and detailed as expected, having only sixteen sections, it is a commendable starting point by the government to free the judicature from depending on the government for funding. As observed in the preceding chapter nothing can materialize if there is no political will. It is now nine years from inception that section 6 is still a pipe dream. Funds are still being disbursed and controlled from the central government through the Ministry of Finance. Money is released to Judiciary at the time and when the government wishes and not at the users demand or as need dictates. In such a situation judiciary is unable to plan effectively and in the end affect the delivery of justice.¹³³

Inadequate funding of the judiciary is one of the most serious ways in which the independence of the judiciary is undermined. For example, in 2002 judiciary's estimated budget was K323,192,095 287 but only K18, 153, 636, 199¹³⁴ was approved. The Government's extent of funding to the judiciary is illustrated in Appendix IV.

¹³¹ Cap 263

¹³² Staff of Judicature means: the Chief Administrator, any sheriff or other officer or person appointed under sub section (1) of section four other than a member of the judicature.

¹³³ For example, Court may have no stationery, fuel spare parts, judges failing to go for circuit sessions due to lack of funds.

¹³⁴ *Republic of Zambia: Estimates of Revenue and Expenditure for the year January 1, 2002*

BIASED APPOINTMENTS

For Judges of the superior courts, entry into the system is by appointment either from within or outside Judiciary and rarely by promotion. As already observed the President makes these appointments subject to ratification by the National Assembly. In Chapter Six we saw the composition and effectiveness of the House. However, many factors affect the selection process of people to sit on the bench. The reasons range from tribal balancing, gender considerations, and nepotism or as a sign of gratitude for the past service rendered to political a party in power. This applies to all levels of the Judiciary. Judges appointed under such circumstances would rarely execute their duties independently as their main concern would be how to satisfy the appointing authority especially in matters against the Executive.

Moreover, the President is empowered by the Constitution¹³⁵ to reappoint a judge of the High Court on the advice of the Judicial Service Commission or a judge of the Supreme Court who has attained the age of sixty-five years for further seven years as he may determine.¹³⁶ To an African President this could be used as a weapon against his rivals especially in a multiparty democracy where the losing party has a right to petition the Presidential election.¹³⁷ Consequently, the composition of the Supreme Court is critical to the sitting President. This is because the court has original jurisdiction and a final one in Presidential petitions.¹³⁸ For instance, a Supreme Court Judge was maintained as Deputy Chief Justice despite his ill health and advanced age

¹³⁵ Ibid Articles 93 and 95

¹³⁶ Ibid Article 98 (1) (b)

¹³⁷ After 1996 General Election the opposition parties challenged the re-election, of former President FTJ. Chiluba. In the 2001 General Elections, the opposition have petitioned the election of President Levy Mwanawasa and the matter is yet to be determined.

¹³⁸ Ibid Article 41 (2)

because he was a valuable Judge to the party in power. Apparently, it was easy to predict the outcome of any case against the executive over which he presided.

JUDGES ON CONTRACT

Corollary to appointments is the number of Judges serving on contract of employment. Pursuant to the communication this writer had with the Registrar of the High Court it was stated that following the passing of the Judicature Administration Act,¹³⁹ Judges of the Superior Courts were retired. They were paid their terminal benefits and they began serving on new contracts of varying terms from five to seven years. Currently, most newly appointed Judges are on contract.

In the same vein, a number of old and retired Magistrates have been re-engaged on contracts of three years due to acute shortage of magistrates. Furthermore, all Local Court Justices work on three years contract which is renewable subject to good conduct.¹⁴⁰

Consequently, Judges who are on contract cannot be independent because tenure is dependent on "good behaviour." To make matters worse for inferior Courts, officers are considered civil servants and not protected by the Constitution and therefore their contracts could be terminated on a stroke of the pen. The system of contracts therefore tends to violate Article 98, which guarantees the tenure of the office of Judges of the *Supreme Court and High Court*.

¹³⁹ Act No. 42 of 1994

¹⁴⁰ Section 6 (2) of the **Local Court Act** Cap 29

CORRUPTION IN THE JUDICIARY

Corruption generally refers to an inducement by means of an improper consideration to violate some duty.¹⁴¹ In Zambia, corruption is regulated by the Corrupt Practices Act No. 42 of 1996. Section 2 defines corruption as the soliciting, accepting, obtaining, giving, promising or offering, of gratification by way of a bribe or other personal temptation of inducement, or the misuse or abuse of a public office for private advantage or benefit.

There is no record of a Judge of either High Court or Supreme Court who has been charged and convicted of the offence of corruption. Those who have been found wanting however, have been transferred to some administrative departments within the government service or forced to retire before a tribunal could be convened under Article 98 (3) of Constitution. A case in point is former Chief Justice Mathew Ngulube who was forced to resign on the alleged ground that he had received bribes from the former President Fredrick Chiluba.¹⁴² He resigned from his position due to pressure from non-governmental organizations and the press.

In regard to inferior courts, it is not uncommon to hear that a magistrate has been arrested and charged with soliciting or corrupt practices.

In between 1991 and 2003, four magistrates were convicted of corruption and subsequently removed from the bench.¹⁴³ At the Local Court Level there are no records of justices being charged with corruption apart from mere complaints from

¹⁴¹ Curzon L B, 1998, *Dictionary of Law*, 5th Edition, Pitman Publishers, London

¹⁴² It received wide publicity in both private and government controlled print and electronic media.

¹⁴³ Relied on the communication the writer had with the Registrar of the High on 9th September 2003.

members of the public who complain through the press that certain court officials in the Local Courts are corrupt.¹⁴⁴

In Africa, corruption in the judiciary is not uncommon. For example, in Kenya it was reported that half of the Judges and nearly a third of the magistrates are corrupt.¹⁴⁵ Currently, the matter is under probe by the Tribunal appointed by the Republican President.

Corruption for whatever reasons and level results in the loss of confidence not only in the Judges as individuals but also in the judiciary as an institution. A corrupt Judge is compromised and therefore incapable of objectivity in his decisions.

BEHAVIOUR OF JUDGES

The independence of the judiciary is synonymous with the independence of the Judges themselves. All adjudicators at all levels take oath to protect and defend the Constitution and are subject only to the law and therefore decisions should be made without fear or favour. Notwithstanding the oath of allegiance to the Constitution and the law, some factors tend to sway some Judges from their noble duty, some of which are: -

(a) FEAR

Despite the constitutional protection, immunities and other privileges enjoyed by Judges while executing their judicial function, some of them are timid and fail to

¹⁴⁴ This is done mostly through ZNBC radio programmes in various languages

¹⁴⁵ *The Post*, Issue No. 2556, Friday 17 October 2003

administer justice for fear of repercussions from their decisions. They abandon what they swore to protect and start acting to whims of extrinsic considerations induced by timidity. For instance, Judge Anthony Nyangulu apologized publicly to President Mwanawasa after the latter reacted angrily to the Judge's order of an injunction to restrain the President from appointing opposition political party members of Parliament into the executive.¹⁴⁶

(b) THE AGE OF JUDGES

Retirement age of Judges of the superior courts is sixty-five (65) with an option of extending it by seven years bringing the total years to seventy-two. There is an old adage that the "older the man is the wiser he becomes." But the physical condition of elderly Judges affect the efficient discharge of their function and results in unnecessary inconvenience and delays in the judicial process. This, in turn imposes an unnecessary burden on the parties and their lawyers. This is applicable to Local Court Justices as well.

These are but few examples of factors that may affect the independence of the judiciary. In addition, however, gender bias has shown that female Judges tend to be extremely harsh in sentencing male convicts who commit violent crimes against females. Card-carrying judges of political parties are naturally biased against the parties they do not ascribe to. Prospects of promotion tend to detract a judge's attention from serving the people to personal aggrandizement. The process of selection of judges should be free from any political, personal and other irrelevant

¹⁴⁶ **The Post**, issue No. 2315, Monday February 17, 2003 p. 2

considerations. It is equally vital that upon appointment a Judge should receive adequate remuneration.

Above all, this writer is in total agreement with what Judge Ernest Sakala said before he was appointed Chief Justice of Zambia:¹⁴⁷

“Individual Judges are the main actors in ensuring judicial independence. It is their specific contributions which add up to the overall image and the public perception of their autonomy and independence...”

The above passage calls for assertiveness on the part of all Judges in order to counter the forces, which tend to weaken the institution.

¹⁴⁷ E. L. Sakala, *Autonomy and Independence of the Judiciary in Zambia: Realities and Challenges* (supra) Note 23 p. 314

CHAPTER EIGHT

RECOMMENDATIONS AND CONCLUSION

RECOMMENDATIONS

In view of the factors identified as threatening the independence of the Judiciary in a multiparty state with about thirty-five political parties, a number of recommendations are suggested.

1. REMUNERATIONS

Every time the President increases salaries and improves the conditions of service for the Judges of the superior courts, pursuant to section 3 of the Judges (Conditions of Service) Act, Cap 277, it raises public indignation on the suspicions that the President was bribing the judges. This is because it is only judges of the superior courts who preside over Presidential petitions and other constitutional matters and thus conveniently considered more important than the Magistrates and Local Court justices. Section 2 of the Act defines judge as a judge of the Supreme Court, a puisne judge and the Chairman and Deputy Chairman of the Industrial Relations Court. It is strongly recommended, therefore, that section 2 be expanded to include Magistrates and Local Court justices so that any increment could trickle down to the inferior courts. This gesture could motivate the lower ranks and curb the numerous work stoppages let alone corruption that have dodged the judiciary.

2. RESEARCH ASSISTANTS

For superior courts to have well reasoned judgments with insight and of intellectual stimulation, judges need research assistants who should be legally qualified with a minimum qualification of a bachelor of laws to assist them in analysing and researching the law.

3. TRAINING

Before appointment to high judicial office, the candidates should undergo training in research, judgment writing and other intricacies of the bench. This would create confidence in the new judges and help them face new challenges with vigour and resilience. Local court justices should also go on training for at least three to six months before being sworn to take up their positions. This can improve the quality of justice.

4. RATIFICATION

The appointment of judges of superior courts is subject to ratification by Parliament. But ratification in a de facto one-party membership in Parliament is a mockery and meaningless. This is because the ruling party, which has the majority in parliament, will always have its way as the few opposition members' dissent may not have any effect. Therefore, in such a situation another well-represented body should be used. For example, a body consisting of equal number of members from all the political parties with representation in Parliament could approve the appointments.

5. DELAYS IN DISPOSING OF CASES

Delays in disposing of cases have become a source of concern to the government and the general citizens. A number of people have been reluctant to take their grievances to the courts because of taking too long in delivering judgments. This problem was identified and litigated upon by Godfrey Miyanda when he petitioned the Supreme Court in 1984. It has also been evidenced that by the time the judgment is received it is too late to benefit the successful litigant. Consequently, for the maxim "justice delayed is justice denied" to be respected it is suggested that a court should deliver the

judgment within 30 days after the conclusion of the trial. In this way, confidence in the judiciary will be rekindled.

CONCLUSION

With the advent of plural politics and the shift from socialism to capitalism there is a need to have a strong and independent judiciary. It is expected that disputes would arise amongst political players in their struggle for power, or between ordinary citizens and the government, or the employee and employer. In all these situations, the courts are expected to be impartial and independent.

In regard to legislation, there is no doubt that from 1990 to date, the government under the Movement for Multi-Party Democracy (MMD) has responded well in securing the autonomy and independence of the judiciary. The 1991 Constitution gave birth to the Judicature Administration Act of 1994. The 1996 Constitution under article 91 provided for the enactment of the Judicial Code of Conduct Act, whose objective was to ensure that the probity of adjudicators was beyond reproach. This means that Zambia has reached a level whereby judicial independence is adequately safeguarded in the Constitution and other statutes. But what is not yet achieved, however, is the implementation of the guarantees, which seem to be at variance with political survival.

There is no political will to see an independent and autonomous judiciary as evidenced in this study. The first exposure was when a High Court Judge exercised his independence in declaring the imprisonment of two journalists and a civil rights leader by National Assembly to indefinite terms illegal, null and void.

This was in addition to his earlier order of releasing fifty-three remandees who had been detained for many years without trial. Incidentally, these acts earned the said judge exit from the bench. Further test of the political will was when the Supreme Court declared Section 5 (4) of the Public Order Act unconstitutional and inconsistent with the demands of democratic governance. This ruling upset the political balance as a result of which many attempts were made to intimidate the judiciary through allegations of impropriety against its Chief Justice.

In this study many other incidences have been referred to in which it has been established that the Zambian courts are not independent. The Executive continues to control the judiciary through its failure to financially delink it from depending on the central government for its survival. There is still Executive's influence in the appointment of judges at all levels and this tends to compromise the judiciary.

More importantly, the judiciary has been found to be its own enemy. This is true to the extent that judges themselves have failed to exploit the guarantees to the fullest because of various factors such as fear, timidity, partisanship, corruption, incompetence and many others. Consequently, the judges' failure to assert themselves has led to loss of confidence in them. The hallmark of multiparty democracy depends on the independence of the judiciary.

The study ends with a quotation from Lord Denning: -

"Every Judge in his appointment discards all politics and all prejudices. He needs to have no fear. He must be vigilant in guarding freedoms. Someone must be trusted. Let it be the judges."

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6. Daily Mail
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8. Electronic Mail & Guardian (Johannesburg) January 24, 1997.

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2. Movement for Multiparty Democracy (MMD) Manifesto.
3. United National Independence Party (UNIP) 1991 Manifesto
4. Heritage Party (HP) 2001 Manifesto.

APPENDIX 1

ESTABLISHMENT FOR JUDGES

SUPREME COURT		
1.	Hon. Mr. Justice E.L. Sakala	Lusaka
2.	Hon. Mr. Justice D.M. Lewanika	Lusaka
3.	Hon. Mr. Justice D.K. Chirwa	Lusaka
4.	Hon. Madam Justice LP Chibesakunda	Lusaka (F)
5.	Hon. Madam Justice IMC Mambilima	Lusaka (F)
6.	Hon. Mr. Justice P. Chitengi	Lusaka
7.	Hon. Mr. Justice SS Silomba	Lusaka
8.	Hon. Mrs. Florence Mumba	The Hague (F)
LUSAKA HIGH COURT		
1.	Hon. Mr. Justice T. kabalata	Lusaka
2.	Hon. Mr. Justice Mushabati	Lusaka
3.	Hon. Mr. Justice EE. Chulu	Lusaka
4.	Hon. Mr. Justice T. Kakusa	Lusaka
5.	Hon. Mr. Justice GS Phiri	Lusaka
6.	Hon. Mrs. Justice H. Chibomba	Lusaka (F)
7.	Hon. Mr. Justice TK Ndhlovu	Lusaka
8.	Hon. Mr. Justice P. Musonda	Lusaka
9.	Hon. Mr. Justice M.M. Imasiku	Lusaka
10.	Hon. Mr. Justice A. L. Nyangulu	Lusaka
11.	Hon. Mr. Justice J.A. Banda	Lusaka
12.	Hon. Mr. Justice C. Kajimanga	Lusaka
13.	Hon. Mr. Justice Zikonda	Lusaka
14.	Hon. Mr. Justice N. Mwanza	Lusaka
NDOLA HIGH COURT		
1.	Hon. Mr. Justice Munthali	Ndola
2.	Hon. Mr. Justice M. Wanki	Ndola
3.	Hon. Ms. Justice FM Lengalenga	Ndola
4.	Hon. Mr. Justice L. Siame	Ndola
KITWE HIGH COURT		
1.	Hon. Mr. Justice Okafor	Kitwe
2.	Hon. Mr. Justice Kabamba	Kitwe
3.	Hon. Mr. Justice E. Hamaundu	Kitwe
KABWE HIGH COURT		
1.	Hon. Mr. Justice R. Mwape	Kabwe
LIVINGSTONE HIGH COURT		
1.	Hon. Mrs. Justice E. Muyovwe	Livingstone (F)
2.	Hon. Mrs. Justice R. Kaoma	Livingstone (F)
INDUSTRIAL RELATIONS COURT		
1.	Hon. Judge S. Nyundo	Lusaka
2.	Hon. Judge T. Katanekwa	Ndola
3.	Hon. Judge G. Chawatama	Ndola (F)
4.	Hon. Judge E. Zulu	Lusaka

SOURCE: The Office of the Registrar of the High Court, Lusaka Date 9th September, 2003

Professional Magistrates (Establishment: 72)

	<u>Establishment</u>	<u>Filled Positions</u>	<u>Vacancies</u>
(i) Principal Resident Magistrates	9	5	4
(ii) Senior Resident Magistrates	15	6	9
(iii) Resident Magistrates	48	6	43

Total Vacancies at the Professional Level: 56

“Lay” Magistrates (with Diplomas in Magistracy (Establishment: 170))

	<u>Establishment</u>	<u>Filled Positions</u>	<u>Vacancies</u>
(i) Class I Magistrates	63	56	7
(ii) Class II Magistrates	52	23 + 12 (Ziale) = 35	17
(iii) Class III Magistrates	55	4	51

Total Vacancies at the Lay Magistrate Level: 75

Total Vacancies in the Subordinate Courts 131

(i) Senior Resident Magistrates on Contract	1
(ii) Class I Magistrates on Contract	15
(iii) Class III Magistrates	3

Total Vacancies on Contract: 19

SOURCE: The Office of the Registrar of the High Court, Lusaka

DATE: 9th September 2003.

APPENDIX III EXISTING ESTABLISHMENT FOR LOCAL COURT JUSTICES

<u>CATEGORY</u>	<u>ESTABLISHMENT</u>	<u>ACTUAL</u>
1. <u>Administration</u>		
(i) Director of Local Courts	1	1
(ii) Deputy Director of Local Courts	1	1
(iii) Provincial Local Court Officers	9	9
2. <u>Adjudicators</u>		
(i) Principal Presiding Justices	12	12
(ii) Presiding Local Court Justices	436	436
(iii) Local Court Justices	462	462

DISCIPLINE

(i) Number of Justices on suspension	NIL
(ii) Contracts not renewed	NIL
(iii) Number of Justices prosecuted	NIL

COMMON OFFENCES WHICH WARRANT DISCIPLINE

- (i) Corrupt Practices
- (ii) Incompetence

SOURCE: The Office of the Deputy Director of Local Courts, Lusaka

DATE: 9th September 2003

APPENDIX IV

JUDICIARY: ESTIMATES OF REVENUE AND EXPENDITURE 2002 (IN KWACHA)

SECTION	PERSONAL EMOLUMENTS		RECURRENT DEPT. CHARGES		CAPITAL EXPENDITURE	
	ESTIMATES	APPROVED	ESTIMATES	APPROVED	ESTIMATES	APPROVED
HQS	1 731 928 666	681 229 088	3546461581	971 815 522	6 443 548 671	1 744 023 148
SUPREME COURT	876 503 908	710 080 348	1 792 383 984			
HIGH COURTS	1 971 886 496	1 471 159 924	994 256 938	552 348 238	2 966 143 434	2 065 156 086
SUBORDINATE COURTS	4 960 322 695	2 600 493 505	1 140 300 668	636 770 358	6 100 623 363	3 282 570 907
LOCAL COURTS	11 973 802 984	7 091 826 791	12 909 860 383	7 615 408 539		
SMALL CLAIMS COURTS	84 287 760	156 007 680	248 501 592	128 361 476		
INDUSTRIAL RELATIONS COURT	833 778 722	590 079 053	495 530 980	555 873 265	1 529 309 702	1 285 455 748
SHERIFF OF ZAMBIA	403 247 427	248 644 838	714 188 971	343 038 213		

SOURCE: Estimates of Revenue and Expenditure for the Year January 1, 2002 to Dec.31, 2002 (Yellow Book) pp 133-141.