

ZAMBIA'S APPROACH TO JUDICIAL ETHICAL STANDARDS: A COMPARATIVE
STUDY WITH SOUTH AFRICA

By

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Being a Directed Research essay submitted to the University of Zambia Law Faculty in
Partial fulfillment of the requirements for the Award of the Bachelor of Laws (LLB) Degree.

DECLARATION

I, **HAGGAI CHOMBA**, do hereby declare that this Directed Research Essay is my authentic work and to the best of my knowledge, information and belief, no similar piece of work has previously been produced at the University of Zambia or any other Institution for the award of Bachelor of Laws Degree. All other works in this essay have been duly acknowledged. No part of this work may be reproduced or copied in any manner without the prior authorization in writing of the author.

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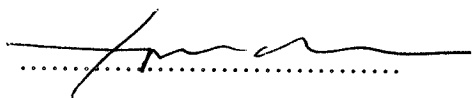
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ABSTRACT

The concept of judicial conduct is fairly a new occurrence for both Zambia and South Africa whose genesis can be traced as far back as the 1990s. Having judicial ethical standards is one of the ways by which judicial accountability can be achieved. The purpose of this research, which involved desk and field research, was to illustrate the various approaches available for the regulation of judicial conduct. The challenge that the paper sought to address was that Zambia's approach to judicial conduct needed to be more comprehensive.

This paper first introduced the concept of judicial conduct and brought the challenge of Zambia's approach to judicial ethical standards into perspective. The approaches by both Zambia and South Africa were discussed and it was revealed that the framework for regulation of judicial conduct and legislation in both jurisdictions were not the same but had common features. From the analysis and comparison made it was found that both jurisdictions' approaches are based on the constitutional provisions, respectively. The *Faustin Kabwe*, *Nigel Mutuna* and *Hlophe* cases were analysed thereby illustrating the challenges of balancing judicial accountability and independence. The conclusion illustrated that there was need to have clearly defined judicial ethical standards and that there was a correlation between constitutionalism, judicial accountability and independence and that when the Judiciary is held accountable public confidence is enhanced.

This research further made recommendations which included; the creation of a legal framework which clearly defines judicial ethical standards, the distinction between impeachable and non impeachable misconduct, enhancing the powers of the institutions that administer laws for judicial conduct and renaming such institutions, restriction on the Executive's powers with regard to judicial discipline, clearing defining processes for selection and appointment of judges and ensuring security of tenure for judges.

DEDICATION

This research paper is dedicated to my beloved wife Margaret Malasa and children Joshua, Nane and Kachinvya. The unconditional love you have for me and the sacrifices that you have made are unmatched and highly appreciated. I love you all very much.

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CHAPTER ONE

1.0 INTRODUCTORY CHAPTER

1.1 INTRODUCTION

Judicial conduct has become prominent in most of the public discussions in the country. This can be deduced from people's opinions in both the print and electronic media. The common theme seem to be a desire by the people of Zambia for an independent and impartial judiciary and hence the calls for judicial reforms. One such available avenue for reform is the enhancement of judicial accountability through establishing and implementing judicial ethical standards. Currently, the judiciary is held accountable through the Judicial Complaints Authority (JCA) which administers the Judicial (Code of Conduct) Act no. 13 of 1999.

The Constitution also provides for the establishment of the three arms of government, namely, The Executive, Legislature and the Judiciary. It is also envisaged that these arms of government will act independently in the light of separation of powers and checks and balances to one another. With regard to the Judiciary and due to the critical role it plays in society through adjudication, the imperative need to be independent, impartial and accountable cannot be over emphasised.

In addition, the perception and opinions of the public about the judiciary are essential in ensuring that the judicial department is relevant and effective. It follows therefore that the calls for judicial reforms have to include judicial conduct based on clearly defined ethical standards. While civil law jurisdictions tend to enact statutes for judicial conduct, the common law jurisdictions may

rely on self regulation without necessarily having to enact an act of Parliament regulating the conduct of judicial officers¹.

It is in this vein that this paper aims to look at Zambia's approach to the aspect of judicial conduct and compare and contrast it with that of South Africa and make recommendations for reform with the view of enhancing the current approach by Zambia.

1.2 DEVELOPMENT OF JUDICIAL ETHICAL STANDARDS IN ZAMBIA AND SOUTH AFRICA

The concept of judicial ethical standards is fairly new in both Zambia and South Africa. Before 2002, the issue of judicial conduct was informally addressed in an ad hoc manner within the Judicial department in South Africa² whereas Zambia formalised the manner in which it addressed judicial conduct much earlier in 1999. However, it was not until 2002 when the Judicial Complaints Authority in Zambia (the Authority), a public institution, was established by the Judicial (Code of Conduct) Act No. 13 of 1999 as amended by the Judicial (Code of Conduct) Amendment Act of 2006. The code of conduct was promulgated by parliament pursuant to article 91 (2) of the Constitution of Zambia. The Authority enforces the code of conduct and is mandated to objectively and thoroughly investigate allegations of misconduct against Judicial Officers³. The objective of the Code of Conduct is to promote professional conduct, integrity and competence among Judicial Officers in the performance of their adjudicative duties.

¹ Shameela Seedat, *Judicial Ethics in South Africa*, IDASA, (2009), p.3

² Shameela Seedat, *Democratic Governance and Rights- Setting the Scene*, IDASA, (2009), p.1

³ Judicial (Code of Conduct) Act No. 13 of 1999

In South Africa, the Judicial Service Commission (JSC) Amendment Act was only passed into law in October 2008 as a way of formalising the mechanism to deal with judicial conduct⁴. Prior to that, the judicial ethics were regulated in an informal manner to varying degrees. In 2000, The Chief Justice introduced a document referred to as 'Guidelines for Judges of South Africa'. However, these guidelines were not binding but merely promulgated to guide judges on their activities and behaviour as the title suggests. The JSC Amendment Act established a new complaints and discipline procedure for judicial misconduct.⁵

1.3 STATEMENT OF THE PROBLEM

The Judiciary is critical to the success of the three arms of government in Zambia. The need to have an independent and impartial judiciary is also important but judicial accountability is equally essential and this can be achieved through ensuring that judicial conduct is defined and administered in a proper and effective manner. To achieve this, it is necessary to benchmark with other countries or jurisdictions in this regard. The quest for judicial reform demands that the current regime on judicial ethical standards be reviewed with the aim of enhancing its operations. The challenge at the moment is that Zambia's approach to judicial conduct may not be comprehensive.

1.4 OBJECTIVES OF THE STUDY

The general objective of this research paper is to highlight the current approach to the judicial ethical standards in Zambia and compare and contrast it with that of South Africa. The study will further endeavour to examine the current approach with the view of proposing reforms for improvements.

⁴ Shameela Seedat, *Judicial Ethics in South Africa*, IDASA ,(2009), p.1

⁵ Shameela Seedat, *Judicial Ethics in South Africa*, IDASA ,(2009), p.3

1.4.1 SPECIFIC OBJECTIVES OF THE STUDY

- i. To consider the mechanisms and tools employed by Zambia and South Africa in administering the judicial code of conduct.
- ii. To scrutinise factors that affect the various approaches to Judicial conduct in Zambia and South Africa
- iii. To highlight the pros and cons of the different approaches mentioned above
- iv. To assess the current judicial conduct regime's comprehensiveness in Zambia concerning the intended purpose of enhancing public confidence in the judiciary

1.5 RATIONALE & JUSTIFICATION OF THE STUDY

The justification for this study seems to be in the need to enhance the effectiveness of the judiciary and ensuring that ethical standards are upheld and properly administered. While the above mentioned aims can be achieved using the current regime, better results can be obtained through benchmarking and looking outside the box and taking a leaf from countries like South Africa. This also entails an assessment of what mechanisms can work for Zambia and make necessary adjustments as there is no 'one size fits all' approach. However, the aspects that are working for the country should not be disturbed as there is no need to fix that which is not broken. In addition a better approach to judicial ethical standards will enhance public confidence in the judiciary and the overall performance of the three arms of government while upholding the principles of judicial independence and separation of powers, respectively.

1.6 RESEARCH QUESTIONS

1. What is the current legal regime of Zambia's approach to judicial ethical standards?
2. How is the current legal regime different from that of South Africa?
3. What are the advantages and disadvantages of the current regime?

4. What factors have affected the approaches by Zambia and South Africa?
5. Is Zambia's current regime comprehensive in addressing its intended purpose?
6. What is the prevailing approach to judicial ethical standards at regional and/or international levels?
7. Are there lessons that can be learnt from South Africa and the international approach in general?

1.7 METHODOLOGY

The research will be conducted through desk research and other scholarly articles which are relevant to the subject of judicial ethical standards. In addition, informal interviews will be employed in the collection of data including discussions with various stakeholders such as the officials from the Judiciary, Ministry of Justice, National Assembly, JCA, academia and the public.

1.8 ANALYSIS OF CONCEPTS

1.8.1 INDEPENDENCE OF THE JUDICIARY

The independence of the judiciary shall be guaranteed by the State and enshrined in the Zambian Constitution⁶ or the laws of any country. It is the duty of the three arms government and other institutions to respect and observe the independence of the judiciary. The judiciary shall decide matters before it impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.⁷

The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as

⁶ Article 91(2) of the Zambian Constitution

⁷ The Judicial Integrity Group, The Bangalore Principles of Judicial Conduct ,(2002), p.29

defined by law.⁸ There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law. Everyone shall have the right to be tried by ordinary courts or tribunals using established procedures.⁹

1.8.2 FREEDOM OF EXPRESSION AND ASSOCIATION

In accordance with the Universal Declaration of Human Rights to which Zambia and South Africa are parties, and the Bill of Rights, Judicial Officers are entitled to freedom of expression, belief, association and assembly, provided that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.¹⁰

1.8.3 QUALIFICATIONS, SELECTION AND TRAINING

This standard entails that persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status.¹¹

The terms of office of judges, their independence, security, adequate remuneration, and conditions of service, pensions and the age of retirement shall be adequately secured by law. In Zambia and South Africa, Judges have guaranteed tenures until a mandatory retirement age or

⁸ The Judicial Integrity Group, Commentary on the Bangalore Principles of Judicial Conduct ,(2002), p.29

⁹ The Judicial Integrity Group, Commentary on the Bangalore Principles of Judicial Conduct ,(2002), p.29

¹⁰ The Judicial Integrity Group, Commentary on the Bangalore Principles of Judicial Conduct ,(2002), p.30

¹¹ The Judicial Integrity Group, Commentary on the Bangalore Principles of Judicial Conduct ,(2002), p.30

the expiry of their terms of office and can only be removed due to gross misconduct and after the due process of the law.¹²

1.8.4 PROFESSIONAL SECRECY AND IMMUNITY

The judiciary shall be bound by professional secrecy with regard to their deliberations and to confidential information acquired in the course of their duties other than in public proceedings, and shall not be compelled to testify on such matters

1.9 ADVANTAGES OF JUDICIAL ETHICAL STANDARDS

The merits of having defined judicial ethical standards are that the conduct of judicial officers is regulated in a formal manner. Moreover, the conduct of these officers becomes more predictable and certain. The standards also increase the level of accountability of judges and other judicial officers. In addition, in case of misconduct on the part of the judges, the ethical standards become a yardstick against which their behaviour is measured. These ethics also assist in enhancing public confidence in the judiciary. With regard to the performance of their duties, judges are more likely to act professionally according to the set ethical standards. Judicial ethical standards enhance the independence and impartiality of the judiciary¹³.

1.10 DISADVANTAGES OF JUDICIAL ETHICAL STANDARDS

One of the demerits of having judicial ethical standards is that these tend to address the most glaring aspects of misconduct by judges such as corruption but may overlook the salient aspects of ethical dilemma which are not obvious¹⁴. The other disadvantage is that the ethical standards may not be comprehensive to cover unforeseen situations that may arise later. These standards may also lead to complacency on the part of the judges who feel they are meeting the set

¹² Article 98(2) of the Zambian Constitution

¹³ Section 5(3) of the Public Officer Ethics Act (a de facto Judicial Code of Conduct) – Kenya. At the time of the research there was a draft Judicial Code of Conduct based on The 2002 Bangalore Principles of Judicial Conduct

¹⁴ Alex Kozinski, *Real Issues of Judicial Conduct*, *Hofstra Law Review*, Vol32, (August 2004), p.1095

standards so there may be no motivation to go beyond what is stipulated. The other demerit regarding judicial ethical standards is that they can be used to undermine the independence of the judiciary in the pretext of regulating judicial conduct. Judicial ethical standards can be ambiguous and hence lead to different meanings and interpretations.

1.11 CONCLUSION

This introductory chapter focused on the outline the contents of this research paper. In this regard, chapter one briefly introduced judicial ethical standards and elaborated the various types of standards. The chapter also gave an overview of the development of these standards in both South Africa and Zambia. The pros and cons of having judicial ethical standards were also discussed and it emerged that there are more advantages of having these standards than not having them at all. Chapter one also illustrated the role that these standard plays in enhancing judicial independence, accountability and public confidence in the judiciary. The next chapter will endeavour to discuss the framework for the judicial conduct system and in the process touch upon factors that affect the framework.

CHAPTER TWO

2.0 FRAMEWORK FOR REGULATION OF JUDICIAL CONDUCT

2.1 INTRODUCTION

This chapter considers the framework for regulation of judicial conduct and also examines the factors that affect judicial accountability. The framework for judicial accountability should be clear and attention should be given to circumstances that have an impact on the overall administration of judicial conduct.

2.2 JUDICIAL ETHICS AND CODES

Judicial ethics consists of the standards and norms that bear on judges and covers such matters as how to maintain independence, impartiality, and avoid impropriety¹⁵. Disciplinary actions for breach of the rules of conduct by judges or judicial officers are typically investigated by a judicial commission or authority. Many countries have established such a commission or authority either by statute or by reference to the constitution. The responsibility of such institutions is to deal with complaints of judicial misconduct. If a complaint directed to the judicial commission passes the screening and deposition phases, it is investigated and a hearing is instituted. Judicial committees typically have the power to sanction a judge and to recommend to the relevant authorities that a judge retires or resigns.¹⁶

The judicial ethical standards or norms are usually embedded in a document called Judicial Code of Conduct and all judicial officers are expected to adhere to the codes. These norms have been standardized and there are draft proposals at the international level by the Judicial Integrity

¹⁵ Bradley Wendell, *Judicial Ethics and Accountability: At Home and Abroad: The Behavioural Psychology of Judicial Corruption: A Response to Judge Irwin and Daniel Real*, 42 McGeorge Law Review, 35, (December 2010), p. 38

¹⁶ S. 177 of the South African Constitution

Group¹⁷ to that effect and some of these norms are also present in the Judicial Codes of Conduct for both Zambia and South Africa, respectively.¹⁸ Judicial ethical standards form the basis for a judicial accountability. These include self regulation, codes, regulations, guidelines and statutes, including a laissez faire approach.

2.3 ELEMENTS OF THE FRAMEWORK FOR REGULATION JUDICIAL CONDUCT

2.3.1 Introduction

The factors that affect the regulation of judicial conduct will be discussed in this section with a view of understanding them better in order to enhance the framework for regulation of judicial conduct.

2.3.1.1 Separation of Powers

Judicial conduct is affected by the concept of separation of power i.e. the independence of the three arms of government, namely, the Executive, Legislature and the Judiciary while offering checks and balances to each other. In this set up, it is commonly understood that the judiciary would be independent and must provide the checks and balances to the excesses of the Executive and the Legislature¹⁹. It is the Judiciary that interprets the law as provided for in the Constitution. As CJ Marshall once retorted that 'it is emphatically the duty and province of the judicial department to say what the law is'.²⁰

The Zambian Constitution provides that the Judges, Members, Magistrates of the courts shall be independent, impartial, and subject only to the Constitution and the law and shall conduct

¹⁷ The Judicial Integrity Group, The Bangalore Principles of Judicial Conduct, (2002)

¹⁸ Judicial (code of conduct) Act of Zambia and Judicial Service Amendment Act of 2008 of South Africa

¹⁹ Preamble of the Code of Judicial Conduct Act of South Africa

²⁰ *Murphy v Madison* [1803] US, 1 Cranch 137

themselves in accordance with a code of conduct as promulgated by Parliament.²¹ While it is imperative to have an independent and impartial judiciary, it is equally essential that the judiciary is accountable for its actions.²² Ultimately, the independence of the judiciary may be irrelevant if it does not facilitate and enhance public confidence.²³

On the efficacy of the Judicial Complaints Authority (JCA), Banda²⁴ noted that the Zambian judiciary had immense powers and played an important role in the separation of powers as it provides checks and balances on both the Executive and the Legislature in the form of judicial review. Therefore, the Judiciary must be independent and impartial in exercising its functions as this is the hallmark of good governance and democracy. The Judiciary should be held accountable in order to maintain minimum standards of competence and ethics. Banda also calls for holistic judicial reforms and adds that the public are increasingly losing faith in the judiciary thereby opting to settle disputes outside court.²⁵ She also states that judicial accountability promotes public confidence in judges and the judiciary while promoting institutional responsibility which renders the judiciary more responsive to the needs of the public. In conclusion, she asserts that the JCA needs to be revamped and restructured in order to make it more efficient, effective and autonomous in administering the judicial code of conduct in Zambia.

²¹ Article 91(2) of the Constitution, Cap 1 of the Laws of Zambia

²² Preamble of the Judicial Service Commission Act of 1994 of South Africa

²³ Bishnu Upadhyaya, *Current Situation and Issues Relating to Ethics and Codes of Conduct for Judges*, (August 2010), p.7

²⁴ Jacklyn Banda, *The Efficacy of the Judicial Complaints Authority, Obligatory Essay*, (2011), p13

²⁵ Jacklyn Banda, *The Efficacy of the Judicial Complaints Authority, Obligatory Essay*, (2011), p7

2.3.1.2 Constitutionalism

Prof. Ojwang²⁶, has observed that there is a very strong correlation between constitutionalism, good governance and the independence of the Judiciary. He adds that the notion of good governance presupposes the existence of a stable and fair judicial system that is impartial and accountable.

2.3.1.3 Self Regulation by the Judiciary

Swisher propounds that there are some judges who feel that self regulation to judicial conduct is better than the one that seeks to regulate them. An example includes the US Chief Justice Roberts who used his annual report to defend his Court's indefensible lack of a judicial ethics code.²⁷ His point of view distills into these three: (1) the other justices and I are good people so we do not need binding rules; (2) we and our court are special; and (3) ethics codes cannot guarantee ethical behaviour (only the good people mentioned in (1) can do that). The principle of 'a government of law and not of men' was reversed.

2.3.1.4 Freedom of Association

Prof. Swisher²⁸ also postulates that, ethical standards prohibit judges from holding membership in any organization that practices invidious discrimination on the basis of race, sex, religion, or national origin. But others would disagree. Thus if a judge has voluntarily chosen to join or remain in the allegedly discriminatory organization, the judge will presumably have the best access to the organization's membership rosters and policies and the ethics will be concerned with the appearances of impropriety that may arise. In those circumstances, then, perhaps it might be permissible to shift the burden to the judge to prove that the organization does not

²⁶ Jackton Ojwang *Judicial Ethics and Judges' Conduct: The Complaints Mechanism*, Kenya Law Review, Vol 63 (July 2011), p5

²⁷ Keith Swisher, *Recusal and Related Constitutional Theory*, Md. Law Review. (December 2012), P.5

²⁸ Keith Swisher, *Recusal and Related Constitutional Theory*, Md. Law Review. (December 2012), P.7

discriminate and perhaps that the organization also does not reasonably appear to discriminate.²⁹ A judge considering membership in an organization should therefore take steps to ensure that such membership would not appear improper. Naturally, those steps will differ to some degree depending on the particular circumstances.³⁰

2.3.1.5 The Rule of Law and the Independence of the Judiciary

Upadhyaya³¹, noted that the independence of the judiciary was a measure of a nation's devotion to democracy and the rule of law. To have an effective and competent criminal justice system, politicians and stakeholders of this system, i.e. judges, prosecutors, and law enforcement officials, should perform their functions legally and ethnically. Among others, detection of corruption and imposing suitable punishment on corrupt public officials and politicians is one of the pivotal duties of a criminal justice system.

If judges, prosecutors and law enforcement officials are involved in corruption the criminal justice system will perish³². Where the justice system fails, impunity will prevail, badly affecting society and weakening democracy. The trust of the people depends on judicial performance. Therefore, it is better to prevent such evils rather than provide remedies. So, by using various guidelines, codes of conduct, norms, and standards, the state can run the criminal justice system efficiently³³. The judges, prosecutors and law enforcement officials are the main actors of the state, which must maintain the rule of law and promote good governance. If the judges and

²⁹ Keith Swisher, *Recusal and Superannuated Constitutional Theory*, Md. Law Review. (December 2012). P.9

³⁰ Bishnu Upadhyaya, *Current Situation and Issues Relating to Ethics and Codes of Conduct for Judges*, Judicial Reform Programme- Supreme court of Nepal, (August 2010), p.1

³¹ Bishnu Upadhyaya, *Current Situation and Issues Relating to Ethics and Codes of Conduct for Judges*, Judicial Reform Programme- Supreme court of Nepal, (August 2010), p.2

³² Bishnu Upadhyaya, *Current Situation and Issues Relating to Ethics and Codes of Conduct for Judges*, Judicial Reform Programme- Supreme court of Nepal, (August 2010), p.2

³³ Bishnu Upadhyaya, *Current Situation and Issues Relating to Ethics and Codes of Conduct for Judges*, Judicial Reform Programme- Supreme court of Nepal, (August 2010), p.3

prosecutors lack in their duties, society will be victimized by corruption, impunity will increase and the morale of the people and their faith in the justice system will deteriorate. Therefore, the quality of their performance plays a prominent role. To ensure quality performances, their qualifications, selection system, training, and codes of conduct are vital.

2.3.1.6 Silent Issues regarding Judicial Ethics

Kozinski³⁴, emphasises that more often than not, Judicial Codes of Ethics overlook the real issues underlying judicial ethics. He proceeds to say that the Codes of conduct usually address the glaring and obvious breaches while leaving out the more subtle ethical dilemmas faced by Judges in privacy.

2.3.1.7 Socio-economic status of Judicial Officers

Prof. Neitz³⁵ has written an insightful essay on judges' implicit socio-economic bias. One of the essay's motivators was Chief Judge Kozinski's (United States of America) dissent from a denial of rehearing, in which he in effect accused the panel of socio-economic bias in *United States v. Pineda-Moreno*³⁶ where he was implying that the panel drove BMWs and engaged in 'unselfconscious cultural elitism'.³⁷

Prof. Neitz further observed that Judges hold a prestigious place in our judicial system, and they earn double the income of the average households. How does the privileged socio-economic status of judges affect their decisions on the bench, he asks? He adds that this 'unselfconscious cultural elitism' of judges can manifest as implicit socio-economic bias. This socio-economic bias may be more obscure than other forms of bias, but its impact on judicial decision-making processes can create very real harm for disadvantaged populations. Thus, even those judges who

³⁴ Alex Kozinski, *The Real Issues of Judicial Ethics*, *Hofstra Law Review*, (August 2004), p. 10

³⁵ Michele Neitz, *Socioeconomic Bias in the Judiciary*, *Cleveland State Law Review*, (January 2013)

³⁶ (2010) 617 F.3d, 1120

³⁷ Michele Neitz, *Socioeconomic Bias in the Judiciary*, *Cleveland State Law Review*, (January 2013)

believe their wealthy backgrounds play no role in their judicial deliberations may be influenced by implicit socio-economic bias. The article by Prof. Neitz reveals that judges can and do favour wealthy litigants over those living in poverty, with significant negative consequences for low-income people.

2.3.1.8 Judicial accountability and responsiveness

Leib³⁸ has observed that for centuries legal theorists and political philosophers have unsuccessfully sought a unified theory of being able to account for the diverse, and often times conflicting, responsibilities judges possess. How do we reconcile the call of judicial independence - a function of a judge's obligation to uphold the rule of law - with that of judicial responsiveness - the obligation that, as a branch of government in a democratic polity, judges must ensure that the law does not derogate too far from the will of the people? He reveals how the law governing fiduciary relationships sheds new light on the very nature of the judicial office itself. Leib further explains why a fiduciary theory of judging offers important insight into what it means to be a judge in a democracy and the role of public opinion in constitutional interpretation.

The judicial ethics writer Prof. Geyh retorts that we have traditionally analyzed judicial impartiality piecemeal.³⁹ As a consequence, current understandings of judicial impartiality are balkanized and muddled. Thus, he seeks to reconceptualise judicial impartiality comprehensively. He observed that perfect impartiality is an ideal, while impartial enough could be a more realistic goal. He further alludes to the fact that conceptualizing judicial impartiality can be in three distinct dimensions: A procedural dimension in which impartiality affords parties

³⁸ Ethan Leib, A Fiduciary Theory of Judging, 101 California Law Review, (January 2013)p.5

³⁹ Charles Geyh, The Dimensions of Judicial Impartiality, Florida law Journal, Vol. 65, (January 2013), p.201

a fair hearing; a political dimension in which impartiality promotes public confidence in the courts; and an ethical dimension in which impartiality is a standard of good conduct core to a judge's self-definition. Being impartial enough to assure parties a fair hearing in the procedural dimension may or may not be impartial enough to satisfy the public in the political dimension, which may or may not be impartial enough to ensure that judges are behaving honourably in the ethical dimension.⁴⁰

Prof. Geyh goes on to conclude that analyzing partiality problems through the lens of the dimensions they occupy not only resolves many of the imponderables that have long plagued the subject, but also reveals a distinct trend, in which impartiality is being transformed from a value traditionally regulated largely by judges and the legal establishment in the procedural and ethical dimensions, to one that is increasingly the province of the political dimension, where it is regulated by the public and its elected representatives.⁴¹

2.3.1.9 Judges and the Social Media

Janoski-Haehlen⁴² recently observed that the Courts are all a 'Twitter': The Implications of Social Media Use in the Courts. She further observed that with the tweet, poke, post, friend, like, blog, link, comment, and share, the opportunities to communicate electronically using social media tools seem never ending. Facebook, Twitter, YouTube, MySpace, and LinkedIn are just a few of the social media sites that allow people to communicate and "connect" with others across the world in seconds. The legal profession has also jumped aboard the social media bandwagon with judges joining the social media sites and also attorneys reported having a presence on social

⁴⁰ Charles Geyh, *The Dimensions of Judicial Impartiality*, Florida law Journal, Vol. 65, (January 2013), p.11

⁴¹ Charles Geyh, *The Dimensions of Judicial Impartiality*, Florida law Journal, Vol. 65, (January 2013), p.8

⁴² Emily Janoski-Haehlen *The Courts Are All a 'Twitter': The Implications of Social Media Use in the Courts*, Valparaiso University Law Review, Vol46, (December 2011), p.3

media sites. Unfortunately, social media communication is also dangerous to the integrity of the courts.

2.3.1.10 The Line between Judicial Error and Misconduct

Gray⁴³ suggests that there is a very thin line between judicial error and judicial misconduct. Gray adds that some complaints by the public do not allege a violation of the code of judicial conduct per se. For example, litigants sometimes complain that a judge did not return telephone calls because they do not understand that a judge is required to avoid such ex parte communications. Others are dismissed because the evidence does not support the complaint. Most of the complaints that are dismissed every year are dismissed as being beyond the jurisdiction of the complaints commissions, because in effect the complainants are asking the commission to act as an appellate court and review the merits of a judge's decision.

2.3.1.11 The Judge, Politics and Law

Wendell⁴⁴ states, in his article on Jurisprudence and Judicial Ethics, that the fundamental value in judicial ethics is impartiality. This means that a judge is duty-bound to decide cases on their merits, be open to persuasion, and not influenced by improper considerations. The paradigm case of unethical behaviour by a judge is taking a bribe to decide a case in favour of one of the parties⁴⁵. This kind of corruption, which is fortunately rare in many developed countries, is also relatively uninteresting from an intellectual point of view. A more difficult case of failure of

⁴³ Cynthia Gray, *The Line Between Legal Error And Judicial Misconduct*, Hofstra Law Review Vol. 32:1245, (October 2004), p.2

⁴⁴ Bradley Wendell, *Jurisprudence and Judicial Ethics*, Cornell Legal Studies Research Paper No. 08-009, (December 2007), p.2)

⁴⁵ Bradley Wendell, *Jurisprudence and Judicial Ethics*, Cornell Legal Studies Research Paper No. 08-009, (December 2007), p.2

impartiality, conceptually speaking, involves a judge who relies on extra-legal factors as the basis for a judicial decision.⁴⁶

Making sense of judicial ethics therefore requires a distinction between factors a judge may take into account when rendering a decision, and those which are excluded from consideration. In a general legal discourse, this distinction is often stated in terms of law versus politics.⁴⁷ In contrast with legal decisions made by actors within the executive branch of government, in which policy and ideological factors may play a role, judicial decisions are supposed to be justified solely on the basis of legal reasons.⁴⁸ Talking about legal reasons and criticizing judges for relying on non-legal reasons presupposes a tenable distinction between the legal and non-legal domains. This, of course, is one of the principal points of contention between legal positivists and their critics.⁴⁹

On the other hand, if some kind of moral or political argument is required to differentiate between law and non-law, it is not simply an empirical matter to draw a boundary separating inside from outside. The distinction between law and non-law would be evaluative and contestable, and would make reference to the very sorts of political, ideological, and policy reasons that may or may not be part of the law.

Thus firstly, principles of judicial impartiality must take a position on the existence of judicial discretion and the problem of legal interpretation.⁵⁰ The second area is the justification for

⁴⁶ Bradley Wendell, *Jurisprudence and Judicial Ethics*, Cornell Legal Studies Research Paper No. 08-009, (December 2007), p3

⁴⁷ Bradley Wendell, *Jurisprudence and Judicial Ethics*, Cornell Legal Studies Research Paper No. 08-009, (December 2007), p5

⁴⁸ Bradley Wendell, *Jurisprudence and Judicial Ethics*, Cornell Legal Studies Research Paper No. 08-009, (December 2007), p5

⁴⁹ Bradley Wendell, *Jurisprudence and Judicial Ethics*, Cornell Legal Studies Research Paper No. 08-009, (December 2007), p7

⁵⁰ Bradley Wendell, *Jurisprudence and Judicial Ethics*, Cornell Legal Studies Research Paper No. 08-009, (December 2007), p8

certain restrictions imposed on judges by positive law (rules of judicial conduct, statutes, and court rules) often referred to as rules of judicial ethics.⁵¹ Many of these restrictions purport to regulate bias and the risk that judges will not be impartial. Courts applying the rules governing judicial conduct often regulate in a preventive manner, by disqualifying judges from presiding over certain types of cases, based on conduct that is taken to be evidence of bias⁵². However, the discussion of the Hart and Dworkin debate shows that the political viewpoints of judges may necessarily influence the outcomes of cases. In Dworkin's view, judging is inherently a political practice, because ascertaining the content of law is impossible without resort to normative political argument⁵³. In Hart's view, by contrast, it is possible to ascertain the content of law empirically, but there may be a further normative question about the best way to prioritize or balance competing legal considerations.

2.3.1.12 The Content of Law and Its Application

Wendell believes that the right approach to judicial ethics is to focus on the application side of the distinction between the content of law and standards for its application. Where there are multiple plausible interpretations of existing cases, statutes, and other applicable legal norms, all we can reasonably expect is that judges deliberate in good faith and reach the conclusion they believes represents the best reading of the governing law. Judging in good faith, he suggests, is fundamentally about being prepared to give reasons in justification of a judicial decision.⁵⁴

⁵¹ Bradley Wendell, *Jurisprudence and Judicial Ethics*, Cornell Legal Studies Research Paper No. 08-009, (December 2007), p9

⁵² Bradley Wendell, *Jurisprudence and Judicial Ethics*, Cornell Legal Studies Research Paper No. 08-009, (December 2007), p11

⁵³ Bradley Wendell, *Jurisprudence and Judicial Ethics*, Cornell Legal Studies Research Paper No. 08-009, (December 2007), p17

⁵⁴ Bradley Wendell, *Judicial Ethics and Accountability: At Home and Abroad: The Behavioral Psychology of Judicial Corruption: A Response to Judge Irwin and Daniel Real*, 42 MCGEORGE Law. Review 35, 38-39 (September 2010).

2.4 CONCLUSION

This chapter looked at the framework for regulation of judicial conduct as elaborated and expounded by various scholars. It is essential that this framework should be clearly understood so that a more comprehensive framework for regulation of judicial conduct can be employed. It has also become apparent that a lot of elements have to be taken into consideration when establishing such a framework. The elements that can be identified include, constitutionalism, the public, the rule of law, freedom of association, socioeconomic status of judges, social media and jurisprudence.

CHAPTER THREE

3.0 A COMPARATIVE STUDY OF THE LEGAL FRAMEWORK FOR REGULATION OF JUDICIAL CONDUCT IN ZAMBIA AND SOUTH AFRICA.

3.1 INTRODUCTION

The concept of judicial ethical standards is fairly new in both South Africa and Zambia. In South Africa, the judicial conduct system review was inevitable due to its past apartheid era when the judiciary was seen to be inactive or an accomplice to the injustices that ensued during that period.⁵⁵

3.2 SOUTH AFRICA

In 1994 the Judicial Service Commission was enacted and came into force on 13 July in the same year. The Act was meant to regulate matters incidental to the establishment of the Judicial Service Commission (JSC) by the Constitution of the Republic of South Africa and to provide for matters connected therewith. On 4th February 1997, the constitution of South Africa came into force and the transformation of the judiciary was envisaged⁵⁶. In particular, section 16(6) of schedule 6 to the constitution states that:

As soon as is practical after the new constitution took effect, all courts, including their structure, composition, functioning and jurisdiction and all relevant legislation must be rationalized with a view to establishing a judicial system suited to the requirements of the new constitution.⁵⁷

The schedule further provides that the minister in charge of the administration of justice shall consult the Judicial Service Commission Act in order to manage the rationalization of the

⁵⁵ David Dyzenhaus, *Truth, Reconciliation and the apartheid legal order*, (1996), p27.

⁵⁶ Shameela Seedat, *Judicial Ethics in South Africa*, IDASA, (2009), p.1

⁵⁷ Sec 16 (6)(a) of Schedule 6 of the South Africa Constitution.

achieving the above reforms.⁵⁸ The JSC Act was amended in 2008 to specifically allow for the formulation of the Judicial Code of Conduct⁵⁹ Section 14 defines any wilful or gross breach of the code as an act⁶⁰ of misconduct which must be dealt with in terms of the complaint mechanism prescribed in the Act.⁶⁰

The long title of the amended JSC Act now reads:

To regulate matters incidental to the establishment of the Judicial Service Commission by the constitution of the Republic of South Africa, 1996; to establish the Judicial Conduct Committee, to receive and deal with complaints about judges, to provide for a code of judicial conduct which serves as the prevailing standard of judicial conduct which judge must adhere to; to provide for the establishment and maintenance of a register of Judges' registrable interests,⁶¹ to provide for procedures dealing with complaints about judges, to provide for the establishment of judicial conduct Tribunals to inquire into and report on allegations of incapacity, gross incompetence or gross misconduct against judges; and to provide for matters connected there with.⁶²

It must be noted that the amended JSC Act of 2008 made provision for the institutional framework for the judicial conduct system in South Africa. For instance, it is envisaged that there shall be a Judicial Conduct Committee⁶³ and ad hoc Judicial Conduct Tribunals would be set up as and when need arises. The code has become the prevailing standard for judicial conduct.⁶⁴ The preamble also sheds more light on the direction of the judicial ethical standards in South Africa by stating:

SINCE the Judicial Service Commission has been established by section 178 (1) of the Constitution of the Republic of South Africa, 1996;

⁵⁸ Sec 16 (6) (b) of schedule 6 of the South African Constitution.

⁵⁹ S.12 (1) of the Judicial Service Commission Amendment Act, 2008.

⁶⁰ S.14(4)(b). of the Judicial Service Commission Amendment Act, 2008.

⁶¹ S. 13 of the Judicial Service Commission Act of South Africa

⁶² The Judicial Service Commission Amendment Act of 2008

⁶³ S.8 of the Judicial Service Commission Act of 1994 of South Africa

⁶⁴ S. 12 (5) of the Judicial Service Commission Act of 1994 of South Africa

AND SINCE section 178 (4) of the Constitution provides that the Judicial Service Commission has the powers and functions assigned to it in the Constitution and national legislation;

AND SINCE section 180 of the Constitution provides that national legislation may provide for any matter concerning the administration of justice that is not dealt within the Constitution, including procedures for dealing with complaints about judicial officers;

AND SINCE section 177 (1) of the Constitution provides that a judge may be removed from office only if-

(a) the Judicial Service Commission finds that the judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct; and

(b) the National Assembly calls for that judge to be removed, by a resolution adopted with a supporting vote of at least two thirds of its members;

AND SINCE section 177 (3) of the Constitution provides that the President, on the advice of the Judicial Service Commission may suspend a judge who is the subject of a procedure in terms of section 177 (1);

AND SINCE it is necessary to create an appropriate and effective balance between protecting the independence and dignity of the judiciary when considering complaints about, and the possible removal from office of, judicial officers, and the overriding principles of openness, transparency and accountability that permeate the Constitution and that are equally applicable to judicial institutions and officers;

AND SINCE it is necessary to create procedures, structures and mechanisms in terms of which-

- complaints against judges could be lodged and dealt with appropriately;
- allegations that any judge is suffering from an incapacity, is grossly incompetent or is guilty of gross misconduct could be investigated; and
- information can be placed before the Judicial Service Commission and Parliament in order to enable these institutions to make a finding whether a judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct.

From the above cited legislation it is clear that there has to be a balance between the independence of the judiciary and the need for accountability by the judicial officer. In addition, the aspect of following the due process of the law is also emphasized in order to safeguard the abuse of such disciplinary processes for judges. It must be noted also that the constitution provides for the procedure whereby a judge can be removed from office for a serious offence⁶⁵.

⁶⁵ Article 177 of the South African Constitution

This same approach emanating from the Constitution has also found its place in the gazetted Code of Judicial Conduct for Judges⁶⁶ and the preamble illustrates this by stating the following:

Whereas the supremacy of the Constitution, the rule of law, and the rights and freedoms enshrined in the Bill of Rights are the foundation of the democracy established by the Constitution;

And whereas section 165(1) of the Constitution provides that the judicial authority of the Republic vests in the courts;

And whereas section 165(2) of the Constitution provides that the courts are independent and subject only to the Constitution and the law, which they must apply without fear, favour or prejudice;

And whereas section 174(8) of the Constitution provides that before judicial officers begin to perform their functions, they must take an oath, or affirm, in accordance with paragraph 6(1) of Schedule 2, that they “will uphold and protect the Constitution and the human rights entrenched in it, and will administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law.;

And whereas section 180(b) of the Constitution provides that national legislation may provide for any matter concerning the administration of justice that is not dealt with in the Constitution, including procedures for dealing with complaints about judicial officers;

And whereas the Judicial Service Commission Act, 1994 (Act No 9 of 1994) (the Act), seeks to maintain and promote the independence of the office of judge and judiciary as a whole, while at the same time acknowledging that it is necessary to create an appropriate and effective balance between protecting the independence and dignity of the judiciary when considering complaints about, and the possible removal from office of, judges as defined in section 7(1)(g) of the Act, and the overriding principles of openness, transparency and accountability that permeates the Constitution and that are equally applicable to judicial institutions and officers;

And whereas it is necessary for public acceptance of its authority and integrity in order to fulfil its constitutional obligations that the judiciary should conform to ethical standards that are generally accepted, more particularly as set out in the Bangalore Principles of Judicial Conduct (2001) as revised at the Hague (2002);

And whereas Part II of Chapter 2 of the Act provides the legal framework for judicial conduct which judicial officers in South Africa must adhere to, and Part III and IV of Chapter 2 of the Act, particularly sections 14, 15, 16 and 17, specify mechanisms, structures and procedures to be applied if a judge acts in a manner unbecoming a judge in respect of any of the five grounds spelt out in section 14(3)(a) of the Act;

And whereas section 12 of the Act provides that the Chief Justice, acting in consultation with the Minister, must compile and maintain a Code of Judicial Conduct, which must be tabled by the Minister in Parliament for approval;

⁶⁶ section 14(3)(a) of the JSC Act of South Africa

And whereas section 12(5), read with section 14(3)(a) of the Act, specifically provides that the Code of Judicial Conduct shall serve as the prevailing standard judicial conduct, which judges must adhere to and that any wilful or grossly negligent breach of the Code may amount to misconduct which will lead to disciplinary action in terms of section 14 of the Act;

BE IT THEREFORE APPROVED by the Parliament of South Africa, a Code of Judicial Conduct for Judges, which judges must adhere to, as required in terms of section 12 read with section 14(4) of the Act.

The above excepted Code of Judicial Conduct Act will become the prevailing standard judicial conduct, which judges must adhere to.⁶⁷ This is essential in creating transparency, predictability, accountability and sanity in the judiciary. It follows therefore that all the stakeholders will perform their duties knowing exactly what their rights and obligations are and will therefore align their behaviour accordingly.

Apart from Judicial Service Commission Act and the Judicial Service Commission Amendment Act which established the JSC to regulate the appointment and conduct of judges and enactment of a code of conduct, the South African Judicial Education Institute Act⁶⁸, the Judges Remuneration and conditions of service Act which outlines the remuneration and conditions of services for judges and The Independent Commission for the Remuneration of Public Office Bearers Act which highlights of mechanism for the determination of salaries and allowances for judicial officers have all in also assisted in strengthening the independence and accountability of the judiciary as envisaged by the South African Constitution.⁶⁹

The South African constitution also provides a procedure by which a judge who misbehaves can be removed from the judiciary:⁷⁰

A judge may be removed from office only if

⁶⁷ Section 14(3)(a) of the Judicial Service Commission Act of 1994

⁶⁸ Act no. 14 of 2008 of South Africa

⁶⁹ Patrick Mtshaulana, *Constitutional Amendment 2010: A major shift in our separation of powers doctrine*, Advocate Law Journal, Vol 102 (August 2010)

⁷⁰ S. 177 of the South African constitution 1996

- (a) the Judicial Service Commission finds that the judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct;
- (b) the National Assembly calls for that judge to be removed, by a resolution and adopted with a supporting vote of at least two thirds of its members.
- (2) The President must remove a judge from office upon adoption of a resolution calling for that judge to be removed.
- (3) The President, on the advice of the Judicial Service Commission, may suspend a judge who is the subject of a procedure in terms of subsection (1).

The JSC Act, 1994 stipulates that if the Tribunal discovers that the evidence before it discloses a commission of an offence by the judicial officer, then the Tribunal must notify the National Director of Public Prosecutions accordingly⁷¹. The Constitutional Amendment Bill 2010 proposes to make the Chief Justice the Head of the Judiciary. In that capacity s/he will be empowered to exercise responsibility over the establishment and monitoring of norms and standards for the exercise of the judicial functions by all courts. If the constitutional amendment is passed, the judiciary shall consist of the Constitutional Court as the highest court, the Supreme Court of Appeal, the High Courts of South Africa, the lower courts and other courts recognized or established by the legislature. The traditional courts fall into this latter category.⁷²

The Constitutional Court has been the highest court in constitutional matters only. The Bill would make it the highest court in the Republic, with jurisdiction to hear appeals in all matters, including non-constitutional matters. The Constitutional Court will have jurisdiction to hear appeals in non-constitutional matters a litigant would require leave of the Constitutional Court before s/he can go to the Constitutional Court on a non-constitutional matter. The Constitutional Court itself will be constrained by law to grant leave only in those cases where it is in the interest of justice to do so.

⁷¹ s.32 of The Judicial Service Commission Act of South Africa, 1994

⁷² Preamble of The Constitutional Amendment Bill 2010

3.3 COMPARISON OF THE ZAMBIAN LEGAL FRAMEWORK FOR REGULATION OF JUDICIAL CONDUCT WITH THE JURISDICTION ANALYZED

In view of the above analysis on how South Africa has approached its judicial conduct framework, the Zambian scenario can now be highlighted. The Zambian Constitution in article 91(2) states that:

the judges, magistrates and justices, as the case may be, of the courts mentioned in clause (1) 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.

The proposed draft constitution of Zambia⁷³ states:

A judge may be removed from office only on the following grounds:

- (a) a mental incapacity or physical disability that would make the judge incapable of performing judicial functions;
- (b) incompetence;
- (c) gross misconduct; or
- (d) bankruptcy.

A person who has a complaint against a judge may, based on the grounds specified under Article 187, submit a petition, to the Judicial Complaints Commission, requesting the removal of the judge on the ground cited in the petition. (2) Where the Judicial Complaints Commission determines that a petition submitted under clause (1) is not frivolous, vexatious or malicious, the Commission shall recommend, to the President, the suspension of the judge from office, and the President shall forthwith suspend the judge from office⁷⁴.

With regard to the removal from office of a judge, the Zambian constitution in article 98 (2) provides that:

(2) A judge of the Supreme Court, High Court, Chairman or Deputy Chairman of the Industrial Relations Court may be removed from office only for inability to perform the functions of his office, whether arising from infirmity of body or mind, incompetence or misbehaviour and shall not be so removed except in accordance with the provisions of this Article.

⁷³ Article 187 of the draft constitution of Zambia

⁷⁴ Article 188 (1) of the draft constitution of Zambia

In both the Zambian and South African jurisdictions, it is evident that judicial conduct has its genesis from the supreme law of the land, the constitution. Both constitutions stipulate that there has to be a separation of powers between the arms of government. Moreover in both instances there is a process of appointment, security of tenure for the justices and in the event that a judge should be removed, conditions have been outlined which would warrant such an action and the procedure to be followed is equally laid down and has to be followed to the letter. The constitutions also require that judges take an oath of allegiance before taking office.

Pursuant to the constitutional provisions of Zambia⁷⁵, the Judicial Code of Conduct and the subsequent amendment Act have since been enacted. The latter established the Complaints Committee which has now been turned into an Authority, namely, the Judicial Complaints Authority. (JCA) as per the 2006 Amendment Act and it's composed of five members who have held or are qualified to hold high judicial office. Whereas the South African one is called a Judicial Conduct Committee and the Zambian one is now an Authority, the functions seem to be the same, that of scrutinizing the conduct of judicial officers in as far as professional ethical standards are concerned.

While the Judicial Code of Conduct Act of South Africa is largely based on the Bangalore Principles of Judicial Conduct 2002⁷⁶, the Zambian Code, enacted in 1999, cannot be said to have its roots in the Bangalore Principles but there are certain provisions and principles which are strikingly similar, particularly those that relate to the independence, impartiality and the integrity of the judiciary.

The JCA functions are limited to merely investigating the alleged misconduct and cannot pass verdict but merely make recommendations to the relevant authority for disciplinary action. On

⁷⁵ Article 91(2) of the Constitution of Zambia

⁷⁶ South African Government gazette, October 2012, no.35802

the other hand the Judicial Conduct Committee in South Africa seem to have more powers in this regard because the committee is empowered to deal with non impeachable complaints and impose appropriate remedial actions such as an apology to the complainant by the judicial officer, a reprimand, appropriate counselling, attendance of a specific training course or other appropriate corrective measure.

The Zambian Code reads in sections 24⁷⁷:

24. (1) The functions of the Committee shall be to –
 - (a) receive any complaint or allegations of misconduct and to investigate any complaint or allegation made against a judicial officer;
 - (b) submit its findings and recommendations to—
 - (i) the appropriate authority for disciplinary action or other administrative action; and
 - (ii) the Director of Public Prosecutions for consideration of possible criminal prosecution.
- (2) In this Part, "appropriate authority " means—
 - (a) in the case of the Chief Justice, the President;
 - (b) in the case of a Judge, the Chief Justice, who may admonish the Judge concerned and in the case of a breach requiring removal under subsection (2) of article ninety-eight of the Constitution, the Chief Justice' shall inform the President;
 - (c) in the case of the Registrar, the Chief Administrator, who shall inform the Commission;
 - (d) in the case of a magistrate, the Director of Local Courts or any other judicial officer, the Registrar, who shall report to the Commission for action; and
 - (e) in the case of a local court officer or justice, the Director of Local Courts, who shall report to the Commission for action.
- (3) The appropriate authority or the Director of Public Prosecutions shall, where a report is made by the Committee under sub-section (1), notify the member against whom the report is made within seven days from the date the report is received.

In section 25, a procedure on how to lodge a complaint is given as follows:

25. (1) Any member of the public who has a complaint against a judicial officer or who alleges or has reasonable grounds to believe that a judicial officer has contravened this Act shall inform the Committee.

⁷⁷ Sections 24 of the Judicial Code of Conduct Act of 1999 of Zambia

(2) Where a judicial officer alleges or, has reasonable grounds to believe that any other judicial officer has contravened this Act, the judicial officer shall inform the Committee.

(3) A person who has a complaint or allegation against any judicial officer shall lodge it with—

(a) the Secretary; or

(b) the clerk of court in the area where the incident or circumstances giving rise to the complaint or allegation occurred; or

(c) the District Administrator in the area where the incident or circumstances giving rise to the complaint or allegation occurred.

Receipt of complaint by clerk of court

Powers of Committee

(4) A complaint may be made orally or in writing.

(5) A complaint shall include the following;

(b) the complainant's age; and

(c) a detailed statement including the facts of the incident or circumstances giving rise to the complaint.

(6) Where a complaint or allegation is made orally, the recipient of the complaint shall reduce it to writing.

(7) A Complaint shall bear the signature or thumb print of the person making it.

(8) A complaint or allegation lodged against a judicial officer and any investigation carried out into the complaint by the Committee shall be treated as confidential, and shall not be open for public inspection except for the judicial officer concerned and the complainant.-

(9) A judicial officer or a member of staff shall not prevent or attempt to prevent the lodging of a complaint or an allegation against any judicial officer.

(10) A person who contravenes subsection (9) commits an offence and is liable, upon conviction, to a fine not exceeding two thousand penalty units, or to imprisonment for a period not exceeding one year, or to both.⁷⁸

The other difference between the South African and the Zambia approach to judicial conduct is that the Judicial Complaints Authority only has investigative powers and functions⁷⁹ whereas the South African one has powers to appoint an adjudicative tribunal. In addition the misconduct of judges in South Africa is split into serious and non serious breaches and the procedures and sanctions for dealing with these are different. As for the Zambian scenario there is no such distinction. Even the constitutional provisions dealing with judicial conduct in both countries are different in that the Zambian one tends to give unfettered powers and discretion to the

⁷⁸ Section 25 of the Judicial Code of Conduct Act of Zambia

⁷⁹ Section 24 of the Judicial Code of Conduct Act of Zambia

Executive⁸⁰ while the South African one has balanced the need for accountability and judicial independence by involving the National Assembly which is required to vote before a judge can be removed⁸¹. Both jurisdictions empower the judicial conduct authorities to refer the matter to the Director of Public Prosecution for possible criminal prosecution.

3.4 CONCLUSION

This chapter was a comparative study of the legal framework for regulation of the judicial conduct in Zambia and South Africa. The South African one, though more recent, seem to have addressed the issue of judicial conduct more comprehensively than the Zambia one. The next chapter will examine the jurisprudence on the subject matter of judicial conduct from the two jurisdictions.

⁸⁰ Article 98 of the Constitution empowers the Republican President to set up a tribunal and even suspend a judge unilaterally

⁸¹ Article 177 of the South African Constitution requires a two thirds majority vote to remove a judge

CHAPTER FOUR

4.0 CASE LAW ON JUDICIAL CONDUCT.

4.1 INTRODUCTION

This chapter endeavours to analyse the jurisprudence that has been generated on the interpretation and enforcement of judicial ethical standards in Zambia and South Africa. Both Zambia and South Africa have constitutional democracies which demand that the constitution is the supreme law of the land and that the rule of law should be upheld at all times even when it comes to judicial accountability. This is important because the three arms of government must be separate and independent of each other and are subject only to the constitution and the law.

It follows therefore that the issue of judicial discipline attracts a lot of attention from the three arms of government and of course the public. Since the constitution cannot have detailed provisions regarding judicial accountability except for providing for a general framework, the Legislature has been on hand to promulgate laws that govern the behaviour of judicial officers. To this effect the Judicial (Code of Conduct) Act 1999 of Zambia confers powers on the JCA to receive and investigate complaints of judicial misconduct. Consequently, there has been a slow build-up of case law as some of the complaints have ended up being subject of the court's interpretation. In Zambia some of the most recent cases that make interesting reading are those of *Faustin Kabwe and Others v the Attorney General and JCA*⁸² as well and *The Attorney General v Mutuna and Others*⁸³. In South Africa the case of *Hlophe Mandlakayise John v Constitutional Court of South Africa*⁸⁴ will be discussed.

⁸² 2009/HP/0996

⁸³ APPEAL No. 088/2012 SCZ/8/185/2012

⁸⁴ CASE NO: 08/22932

4.2 FAUSTIN KABWE AND OTHERS V THE ATTORNEY GENERAL AND JCA

In this case, the Petitioners filed a petition pursuant Article 28(1) of the Constitution of Zambia in which they were alleging that the JCA was a statutory body and an adjudicative body provided for in Article 18(9) of the Constitution. This followed the petitioners' earlier complaint to the JCA alleging misconduct by the Chief Justice, Mr. Justice Ernest Sakala and Mr. Justice Essau Chulu for violating Sections 3, 4, 24(2) and 25(2) of the Judicial (Code of Conduct) Act No. 13 of 1999, as amended by Act No. 13 of 2006.

The Secretary to the Authority wrote to the Petitioners acknowledging receipt of the complaint and advised that the decision of the Authority on the complaint will be communicated to the Petitioners after consideration of the complaint by the Authority. The Petitioners wrote to the Secretary to the Authority acknowledging receipt of the response and sought clarification as to how the Authority could make its decision on the matter without a hearing and asked to be advised on the steps to be taken by the Authority. In response the Secretary to the Authority explained how the hearing of the complaint was going to proceed based on the provisions of the Judicial (Code of Conduct) Act. However, the Petitioners demanded that the Authority should comply with the provisions of Articles 18 (9) and (10) of the Constitution and should conduct a public hearing. The Petitioners were requesting the High Court to compel the JCA to accept their demands. In response the Attorney General raised preliminary issues requesting the court to determine whether the JCA was an adjudicative body and could conduct public hearings. It was held by the High Court that the JCA was not an adjudicative body but merely an investigative one and could not hold public hearings. The petition was dismissed.

This case illustrated that the Judicial Code of Conduct Act did not intend for the JCA to be an adjudicative body but an investigative one and therefore cannot decide cases with finality as

courts or tribunals do. The JCA merely makes recommendations of its findings to the relevant authorities. Moreover, the Judicial Code of Conduct Act also states that the investigations must be conducted with confidentiality which entails that a public hearing was not envisaged in the investigative process. However, the holding of public hearings would definitely enhance public confidence in the judiciary although this should only be done if a preliminary case has been established against a judicial officer complained against.

4.3 THE ATTORNEY-GENERAL v NIGEL KALONDE MUTUNA CHARLES

KAJIMANGA AND PHILLIP MUSONDA

This is an appeal against a Ruling of the High Court in an application by the Appellant to discharge leave which was granted ex-parte to the 1st, 2nd and 3rd Respondents for Judicial Review of a decision announced by the President of the Republic of Zambia of appointing a tribunal to investigate the three Respondents for misconduct and also suspending the three respondents from office pending the outcome of the tribunal. The President was exercising powers vested in him under Article 98(5) of the Constitution of the Republic of Zambia although he did not state the reasons for the Judges' suspension. However, the President on the same day held a Press Conference at State House where he stated that:-

He had received credible complaints against Justice Nigel Kalonde Mutuna, Justice Phillip Musonda and Justice Charles Kajimanga and have accordingly decided to appoint a tribunal to investigate allegations of misbehaviour or incompetence of the said Judges pursuant to the powers vested in him under the Constitution of the Republic of Zambia. The said Judges will accordingly be suspended pending the recommendations of the tribunal.⁸⁵

The three Respondents' position was that at no time had these allegations lodged against them been made known to them or to the Judicial Complaints Authority as prescribed under the

⁸⁵ APPEAL No. 088/2012 SCZ/8/185/2012

Judicial Code of Conduct Act No. 13 of 1999. The respondents sought the following relief which was granted by the High Court:

(a) an Order of Certiorari to remove into this Honourable Court for the purpose of quashing the decision of His Excellency the President of the Republic of Zambia made on the 30th day of April, 2012 in so far as it purports to decide that a Tribunal be constituted to conduct an investigation of misbehaviour or incompetence and also to purportedly suspend the Applicants without recourse to the provisions of Article 91 (2) of the Constitution of Zambia,...⁸⁶

The Supreme Court of Zambia in upholding the appeal stated the following:

We hold, therefore, that it was a misdirection to hold or even suggest that there were questions still to be responded to at the main judicial review inquiry. We hold that the President did not usurp the powers of the Judicial Complaints Authority nor those of the Chief Justice. We, therefore, find merit in the appeal.

Before we end, we want to state that although we agree that the President in exercising the powers vested in him under Article 98 has unfettered discretion under the said Article, we nonetheless believe that it would be advisable, considering circumstances of this matter, for the tribunal not to proceed.

The above mentioned case is unprecedented and is very important in that it touches on the independency of the Judiciary, the security of tenure of Judges and the right to a fair and impartial hearing. The case has given unfettered discretionary powers to the Executive, through the President, to commence disciplinary action against any Judge as long as the Executive has received credible information that a judge has misbehaved. The risk exists because the Executive can use this process to intimidate and interfere with the operations of the Judiciary and yet the constitution states that the three arms of government must be independent of each other and subject only to the constitution. What amounts to credible information is equally a subject of

⁸⁶ APPEAL No. 088/2012 SCZ/8/185/2012

speculation. The role of the JCA and that of the Executive in Judicial accountability is also ambiguous. In addition, the judges' security of tenure would also be untenable. The obiter dicta also seem to suggest that the Supreme Court usurped the powers of the Attorney General when it was advising the Executive not to proceed with the tribunal. Being the highest court in Zambia, the Supreme Court's decision will bind all courts in Zambia.

4.4 CASE LAW FROM SOUTH AFRICA

4.4.1 HLOPHE V CONSTITUTIONAL COURT OF SOUTH AFRICA⁸⁷

This emanated from the earlier case when in March 2008 the Constitutional Court heard a case involving the validity of search and seizure raids by the Directorate of Special Operations at properties belonging to the then ANC president Jacob Zuma and his attorney, as well as Thint (Pty) (Ltd). A few weeks later, the Constitutional Court issued a public statement alleging that the president of the Cape High Court, Judge John Hlophe had approached some of the judges of the Court (Acting Judge Chris Jafta and Judge Bess Nkabinde) and attempted to improperly influence their pending decision in the Thint case.

The complaint further alleged that the attempt by Judge Hlophe to influence the two Judges 'was calculated to have an impact on... the capacity of the Court...to adjudicate in a manner that ensures its independence, impartiality, dignity, accessibility and effectiveness as required by Section 165(5) of the Constitution'.⁸⁸ In addition, Judge Hlophe's conduct constituted a breach of Section 165(3) of the Constitution which prohibits any person from interfering with the functioning of the courts. In this vein, Judge Hlophe sought declaratory orders. The court held that it could not make such orders and hence the appeal.

⁸⁷ Case No: 08/22932

⁸⁸ Shameela Seedat, *Guide to Complaint against Judge- President John Hlophe*, IDASA, (June 2008), p.2

On appeal the Supreme Court of South Africa dismissed the appeal in so far as it related to the JSC's dismissal of the counter-complaint and held that the JSC was entitled to do so on the basis of concessions by Hlophe that his allegations rested solely on inferences for which he could proffer no evidence in support. In the event, the JSC could not be faulted in their decision to accept the constitutional court judges' denial that they were activated by an ulterior motive. Moreover, the Supreme Court held that it could not usurp the constitutional powers of the JSC. The Courts in the above case did not find it improper for Judges to complain against another Judge for allegedly trying to influence the decision of a court. However, the courts refused to delve into the details of the case as doing so would have made the proceedings before the JSC of no effect. This would also have led to usurping the powers of the JSC by the Courts. In this regard, the JSC was at liberty to proceed with its investigations and subsequently adjudication of the case concerning the alleged misconduct by Judge Hlophe as provided for by the constitution and the Judicial Service Commission Amendment Act of 2008.

4.5 CONCLUSION

This chapter looked at the existing jurisprudence on judicial ethical standards in both Zambia and South. What has emerged from these cases is that the provisions of the constitution and the respective Acts regulating judicial conduct are key in the courts interpretation of how judicial accountability should be handled. The proceeding chapter will conclude and make recommendations regarding the enhancements to judicial conduct in Zambia.

CHAPTER FIVE

5.0 CONCLUSION AND RECOMMENDATIONS

5.1 GENERAL CONCLUSION

The general objective of this research was to examine the approaches by both Zambia and South Africa in addressing judicial accountability through judicial ethical standards with a view of proposing reforms for improvements. The current trend towards judicial conduct seems to be based on constitutionalism and the need for separation of powers between the three arms of government. It is sacrosanct that the Judiciary must be independent of the Legislature and the Executive and should provide the checks and balances to the excesses of the Executive and the Legislature. While the judicial officers should enjoy the freedoms of expression and association, their behaviour must be above reproach both in their private and public lives. To this effect this research paper has endeavoured to highlight the concept of judicial ethical standards and has illustrated why there is need to have these ethical standards as a yardstick for judicial conduct.

This research introduced the concept of judicial ethical standards and elaborated the various types of standards available. The introductory chapter also gave an overview of the development of these standards in both South Africa and Zambia while highlighting the pros and cons of having these standards and it emerged that there were more advantages of having the standards than not having them at all.

The second chapter gave an overview of the framework for regulation of judicial conduct and stated the principles that affect the framework for judicial conduct. The chapter concluded by

demonstrating that certain factors have to be considered when establishing and implementing judicial ethical standards.

Chapter three examined legislative framework concerning judicial conduct in Zambia and South Africa. In addition, the chapter made comparisons between Zambia and south Africa and concluded that the South African one seem to have addressed the issue of judicial conduct more comprehensively than the Zambia one as the mechanism of judicial conduct in South Africa has struck a balance between judicial accountability and judicial independence by involving the Legislature in the process of removing a judicial officer from office.

The fourth chapter examined the cases of *Faustin Kabwe and Others v the Attorney General*⁸⁹ and *The Attorney General v Mutuna and Others*⁹⁰ and case law from the South African jurisdiction that of *Hlophe Mandlakayise John v Constitutional Court of South Africa*⁹¹. In examining the case law, the need to balance between judicial accountability and judicial independence was illustrated. Further, it emerged that the constitutions and the respective Acts of parliament on judicial conduct play pivotal roles in the administration of judicial conduct.

Both Zambia and South Africa have the respective Judicial Codes of conduct as the prevailing standards to which the judicial officers must adhere. The norms have been standardised and at international level the Judicial Integrity Group has drafted the Bangalore Principles of Judicial Conduct upon which the South African Code of Judicial conduct is based and a distinction between impeachable and non impeachable misconduct has been made. Moreover, it is

⁸⁹ 2009/HP/0996

⁹⁰ APPEAL No. 088/2012 SCZ/8/185/2012

⁹¹ Case No: 08/22932

imperative that the mechanism for judicial accountability is not disguised as a method of interfering with the powers, functions and independence of the judiciary. As observed in the second chapter,⁴ there is a correlation between constitutionalism, good governance and judicial independence and accountability. Judicial accountability enhances public confidence in the Judiciary.

Some the incidents of judicial misconduct are not easy to recognise and as such the onus is upon the judges to endeavour to perform their duty in a professional manner and in good faith. It is for this reason that the relevant legislation stipulates the educational and training requirements which judges must fulfil prior to appointment as well as after appointment. The requirement that judges take an oath of allegiance before taking office also plays an important role in ensuring that the judicial officers uphold the rule of law and the constitution.

Benefits of having judicial ethical standards include the formal manner in which judicial conduct is regulated and this entails that the behaviour of judges becomes more predictable and certain and the code becomes the standard against which behaviour is measured. The legislative framework also provides procedures that must be invoked when addressing judicial misconduct so that the rights of the judges are respected and to avoid abuse of such disciplinary processes. This is essential in creating transparency, predictability, accountability and sanity in the judiciary. It follows therefore that the judges will know exactly what is expected of them and will therefore align their behaviour accordingly. Apart from having a Judicial Service Commission with oversight functions concerning the activities of the judiciary, it is also common practice both in Zambia and South Africa to have a Judicial Conduct Authority that receives and investigates reported judicial misconduct. However, it was mentioned earlier in chapter three that

some of the functions of these judicial conduct institutions are the same while others differ. For instance the South African one has powers not only to investigate alleged misconduct of judges but also to set up tribunals which adjudicate and impose sanctions on erring judges for non impeachable misconduct. On the other hand the Zambian Judicial Complaints Authority only has investigative powers as the case of *Faustin Kabwe and Others v the Attorney General* illustrates. In this case the High Court held that the JCA was not an adjudicative body as envisaged by Article 18 of the Constitution. With regard to the removal from office of a judicial officer, the South African constitution stipulates that this can only be done by the recommendation of the Judicial Service Commission to the National Assembly and such a motion must be supported by a two thirds majority of the Members of Parliament.

The Supreme Court in the case of *The Attorney General v Mutuna and Others* stated that the President had unfettered powers to suspend a judge and set a tribunal pursuant to Article 98 (2) of the constitution. This seem to have a risk of giving the Executive a leeway to undermine the independence and impartiality of the Judiciary as the disciplinary process can be initiated unilaterally by the Executive and consequently the tenure of office for the judges may not be guaranteed. The other concern arising from this case is that the Judiciary seem to have usurped the powers of the principal legal advisor to the Executive, the Attorney General, when in its judgment it held the view that it was not advisable for the president to proceed with the tribunal investigating the alleged misconduct by the three judges.

The court in the case of *Hlophe Mandlakayise John v Constitutional Court of South Africa* stated that it would not interfere in the adjudicative process before the JSC regarding a counter complaint by judge Hlophe who it was alleged had tried to influence the outcome of the Thint

(Pty) Ltd case. The court also acknowledged the constitutional mandate of the JSC and stated that delving into the details of that case before it was concluded by the JSC would amount to usurping the powers of the JSC.

The imperative need for judicial ethical standards and judicial reform in Zambia cannot be over emphasized but more attention need to be paid on the mechanisms and legislative framework put in place in the quest to holding the judiciary accountable. Thus, there has to be a balance between Judiciary independence and accountability. If judicial ethical standards are not properly administered there exists a risk that public confidence in the Judiciary would be eroded and the Judiciary would not be subject to the constitution but the Executive and the Legislature.

5.2 RECOMMENDATIONS

This chapter seeks to make relevant recommendations regarding judicial conduct in Zambia with a view of enhancing judicial accountability bearing in mind that the Judiciary must be independent. These recommendations include; a legal infrastructure which spells out clearly the major stakeholders in the implementation of Judicial conduct, the set judicial ethical standards to be adhered to, the process of selection and appointment of judges, an appropriate disciplinary procedure for judicial officers, a distinction between misconduct that warrants removal from office and one that merely requires non impeachable remedies and the powers, functions and name of the Judicial Complaints Authorities. In this vein, the recommendations will also include the aspect of security of tenure for the judges. The recommendations would be incomplete without including the aspect of the independence of the Judiciary. The above recommendations will be discussed below separately.

a) The legislative Framework

There is need to have a clearly defined legislative framework which is based on the best international practice so that all pertinent issues are addressed in a holistic manner. Such a framework will assist in making the subject of judicial conduct clearer to all the stakeholders.

b) The Code of Conduct

A more elaborate and holistic Code of Judicial Conduct should be promulgated. Since the constitution would not normally have detailed procedures and guidelines on judicial conduct, the Code of Conduct should be sufficiently elaborate and could be based on the internationally recognised Bangalore Principles on Judicial Conduct of 2002 which has captured most of the pertinent issues regarding judicial accountability. If the judicial ethical standards are clear and simple to understand, it will follow that the judicial officers will know exactly what their rights and obligations are with regard to their behaviour.

c) Appointment and selection of Judicial Officers

Judicial conduct is linked to the manner in which judicial officers are appointed and selected. Thus if the selection process is flawed, then the judicial officers selected would be questionable in terms of competence and conduct. Since a judge can be removed from office due to incompetence as stated in the constitution, adequate screening of would be judges is necessary as a preventive measure right from the selection and appointment stages. In addition, the selection of judges should not be left to the Executive as the case is currently, but rather the selection should be done by an independent and competent body such as the Judicial Service Commission or the Judicial Complaints Authority and then the names of successful candidates submitted to the Executive and later to Parliament for ratification as the case is in South Africa. This would

eliminate the notion that Judges are appointed by the President and therefore may feel obliged to the Executive. Moreover, it is logical that the appointing authority (JSC or JCA) should also be involved in the process of removing a judge from office.

d) Due Process of the law

The disciplinary procedure to be applied to judicial officers for alleged misconduct should be clearly stipulated in both the constitution and the enabling Act of Parliament and the principles of natural justice must be upheld such as the right to a fair trial and the right to be heard. Justice should not just be done but should be seen to be done.

e) Distinction between gross misconduct and minor offences

It must also be clearly stated in the constitution and the Code of Conduct what amounts to misconduct and the penalties that accrue in this regard. In this vein, there should be a separation between gross misconduct which necessitates removal from office of a judge and the unacceptable behaviour that would only end up in censorship. This is important because misconduct has different gravity and should therefore attract different sanctions as the case s in South Africa.

f) Powers of the Judicial Complaints Authority

It can be deduced from the functions of the JCA that it is merely an investigative body and not an adjudicative one and the recommendations from its investigations are passed on to the relevant authorities for further action at their discretion. It is therefore recommended that the JCA should be empowered to appoint tribunals to determine the alleged misconduct and the recommendations of these tribunals should then be passed to the Legislature for a resolution.

This would also assist in curtailing the ambiguity and duplication of processes as well as the conflict discussed in the *Mutuna* case between Article 91 and 98 of the constitution.

g) Name of the Judicial Complaints Authority

Further, it is suggested that the name Judicial Complaints Authority be appropriately changed as the use of the term complaints has negative connotations and is prejudicial. An appropriate name would be Judicial Conduct Authority or Judicial Conduct Commission.

h) Security of tenure of Judges

The judges' security of tenure must be guaranteed in the constitution and the Code of Conduct and the attention has to be given to the disciplinary process so that such a process should not be used as a subtle way of undermining the judges' tenure of office. For this reason, the process of removing judges should not be initiated and concluded by the Executive as the case is at the moment. The Judiciary should be allowed to initiate such a process and the matter should be referred to the National Assembly for a two thirds majority vote as the case is in South Africa.

i) Independence of the Judiciary

All the above mentioned recommendations should culminate into upholding the independence of the Judiciary based on the principle of separation of powers. Thus the Executive and Legislature should not be seen to be interfering with the powers of the Judiciary in the guise of judicial accountability.

5.3 CONCLUSION

In conclusion, it is necessary to recap the objectives of the study set forth in the chapter one and ascertain whether or not the research paper has endeavoured to achieve these objectives. These objectives included the need to examine the approaches by both Zambia and South in addressing judicial accountability through judicial ethical standards with a view of proposing reforms for improvement. Specific objectives were to consider the mechanisms and tools employed by Zambia and South Africa in administering the judicial code of conduct; to scrutinise factors that affect the various approaches to Judicial conduct in Zambia and South Africa; to highlight the pros and cons of the different approaches mentioned above; and to assess the current judicial conduct regime's comprehensiveness in Zambia concerning the intended purpose of enhancing public confidence in the judiciary.

Based on the jurisprudence, legislation and scholarly articles, it has become evident that there is need to set clear ethical standards based on international best practice in order to address the subject of judicial conduct in a holistic manner. In addition a balance has to be struck between judicial accountability and judicial independence. Moreover, other aspects that must be taken into consideration when formulating include the selection and appointment of judges, training and education of the judges, the manner in which judicial officers are disciplined, the clarity of the set standards of behaviour, the powers and functions of the judiciary.

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