

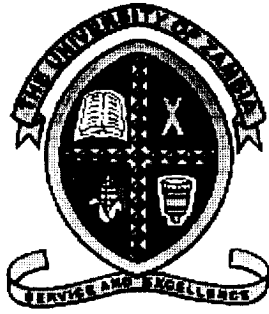
**OBLIGATORY ESSAY
ON THE IMPACT OF THE EXECUTIVE ON THE JUDICIARY
IN ZAMBIA SINCE 1964 – 2004**

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Obligatory Essay

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PREFACE

The essay on the impact of the executive on the judiciary since 1964 to 2004 seeks to show the significance of judicial independence in a democracy which cannot be overemphasized. Without a strong independent and fearless judiciary it is not possible to maintain the rule of law in any democratic country.

The concept of the independence of the judiciary is a noble one and constitutes the foundation on which rests the edifices of every democracy which is based on the rule of law.

In the Zambian scenario, judicial independence, though guaranteed by the constitution in Article 91(2) and (3), has been seriously eroded in practice. It is submitted that some magistrates and judges are intimidated by intemperate attacks on the judiciary by senior Government officials, churches, opposition political parties, and the civil society.

It must always be done in mind that in a country where judicial independence is undermined, there can be no democracy properly so called. The dismissing of judges and the changing of the Chief Justice by every new government that comes to power is a serious and most unfortunate way of compromising with the independence of the judiciary.

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ABSTRACT

Essentially, the dissertation has primarily focused on the impact of the Executive on the judiciary from 1964 to 2004. The exposition has endeavoured to illustrate that in the Zambian scenario, judicial independence, though guaranteed by the Constitution in Article 91(2) and (3) has been seriously eroded in practice. It is submitted that some magistrates and judges are intimidated by intemperate attacks on the judiciary by senior government officials churches, opposition political parties, and the civil society.

Furthermore, the dissertation has examined whether the judiciary has remained abreast with its constitution requirement especially when it is faced with cases that are politically motivated or involved the government which expects the judges to rule in there favour, and if the courts fail to do so what repercussions that befall the judiciary, especially the judge who handled the case? It will be seen that those judges have been asked to retire, resign, apologize and if they have to renew there contracts they have been refused to do so because of the judgments they passed. Even the Chief Justice who is at the helm of the judiciary has not been spared, it will be seen that at various points the executive branch of government have facilitated the removal of the Chief justice from Office contrary to the provisions of the Constitution on the removal of judges from office. Other judges or Chief Justices were give political appointments in order to silence them or to get rid of them.

In view of the foregoing a comparative analysis on the independence of the judiciary has been made with other jurisdditions. It will be seen that most African countries are just like Zambia in terms of the executive interfering with the judiciary.

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CHAPTER ONE

THE FIRST REPUBLIC

1.1 INTRODUCTION

Judicial independence is the practice whereby judges are free from outside pressure.¹ These pressures can be political, religious, tribal, social and economic. 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.²

Article 91 (2) of the 1996 constitution provides that the judges, members, magistrates and justices, as the case may be shall be independent, impartial and subject only to the constitution and the law and shall conduct themselves in accordance with a code of conduct promulgated by parliament. Section 3 of the judicial (code of conduct) Act 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”³

To understand the above problem the paper will start to discuss such factors from the time of independence up to 2004. The paper will then compare the situation in

¹ Curzon L. B., (1998) Dictionary of law. London; pitman publishers.

² Compendium of United Nations standards and Norms in Crime prevention and crime justice UN, New York, 1992, UN publications.

³ Act No. 13 of 1999

Zambia to other jurisdictions, and in doing so the paper will be touching or discussing the following related concepts, such as rule of law, separation of powers and checks and balances. The paper will then conclude by making recommendations and conclusions.

1.2 THE POST INDEPENDENCE PERIOD

At independence on 24th October 1964, the British, the former colonial masters, handed over to Zambia a multiparty system of government, which unfortunately lasted until 13th December 1972. The independence constitution vested broad executive power in the president.⁴ The presidential powers were so enormous that in exercising his executive powers, the president was not really obliged to follow the advice tendered by any other person or authority. It is submitted that the multi party system or plural politics worked satisfactory in the early years after independence, notwithstanding the enormous executive powers.

In the first republic the courts were ready to perform the constitutional requirements of upholding the constitution as the Supreme law of the land and any act which was ultra vires the constitution was declared null and void. However there was one major event, which sent unprecedented waves in the judiciary. This is what is popularly referred to as the skinner saga, which involved the first Chief Justice, James Skinner, in a Controversy with President Kaunda.⁵

⁴ Section 48 (1) (2) (3)

⁵ Thomas K. Ndhlovu, "The problem of constitutional in Zambia: A thing of the past". Zambia Law Journal vol (2002) p.9

Two Portuguese soldiers, Silva and Treitas, had been found guilty of illegal entry into Zambia by a magistrate. The penalty imposed on them appeared to be in excess of the magistrate's jurisdiction. Thereupon, judge Evans called for a review of the cases and found, indeed, that the magistrate had erred, and made the following remarks.

“There was nothing sinister on the part of the prisoners; they divested themselves of their weapons before entering Zambia and they came openly across the border in day light after exchange of non abusive words with a Zambian immigration officer who called across.....”¹

Upon learning of these remarks, President Kaunda was so infuriated that he called upon the Chief justice to apologies on behalf of the presiding judge. The chief justice refused to do so, maintaining that the judge acted in his judicial capacity, that there was nothing he could do about it. President Kaunda was enraged at this response. In no time he unleashed his party cadres of the United Nation independence Party (UNIP). They invaded the High Court and stoned judicial staff, smashing window panes in the process. All the staff fled fearing for their lives. For the Chief justice and a few expatriate judges, among them justice Evans, who was at the center of the storm, this day marked the end of their services. In came Chief Justice Bladgen as a replacement with justice Doyle as his deputy.² But before the dust of the skinner saga settled, the new judges found themselves handling the controversial subsequent cases of Kachasu, Patel and Nkumbula.

¹ ibid

² Ibid, p. 10

1.3 KACHASU V THE ATTORNEY GENERAL³

In this case the validity of regulations requiring School children to sing the national anthem and salute the national flag were challenged on grounds of unconstitutionality, that the applicant, a watch tower follower, was denied the right to enjoyment of freedom of conscience and religion. The regulations under the Education Act, which appeared to hinder that enjoyment, were upheld on the grounds that the applicant had not established that it was reasonably required in the interests of public security or public order. The court was of the view that in order to ascertain national security, it was essential to have national unity. Blagden C. J. presiding at the time, nevertheless, recognized the violation of the fundamental right by the state as enshrined in the constitution. It is interesting to note that His Lordship had earlier dealt with the case of **Attorney General v Thrixton**,⁴ where when considering the fundamental rights of the respondents who faced the possibility of being deported, held that where fundamental rights and liberty are concerned the courts should be slow to place an interpretation on the relevant provisions which have the effect of denying these rights of the subject. His Lordship said so when he dismissed the Attorney General's appeal against the respondent's continued stay in Zambia as ordered by the Lower Court.

But his preliminary remarks, as he began considering the case, gave a clue as to what his inclination would be when he cited Franfurter J's dictum in the American case of **Mineville School District v. Cobits** saying:

³ [1967]ZR 145

⁴ [1967]ZR 10

“A grave responsibility confronts this court whenever in course of litigation it must reconcile the conflicting claims of liberty and authority. But when the liberty involved is liberty of conscience, and the authority is to safeguard the nation’s fellowship, judicial conscience is put to its severest test.”

Thereupon Blageden CJ, went on to state that this was very much the situation before him in the Kachasu case.

1.4 **OBSERVATION**

Soon after the petition was refused, Simbi Mubako commenting on the decision said that it will be very difficult now in Zambia for an individual ever to challenge successfully any measures which the authority claimed to be in favour of public security.¹ John Hatchard endorsing Mubakos sentiments, urged that in practice it was difficult for the court to judge the question of proximity with certainty, and that a value judgment was required in order to balance state interests and individual freedoms.²

1.5 **PATEL V. ATTORNEY GENERAL**¹³

This was a reference case to the High Court in terms of section 28 of the constitution of Zambia alleging infringement of the applicant’s right to privacy and property. The alleged infringement came about when customs officers and police officers opened and examined the applicants articles, and subsequently seized them, together with the

⁵ [1940] 310 us 586

¹ S. Mubako, “Fundamental Rights and Judicial Review: The Zambian Experience, 1 Zimbabwe

² J. Hachard (1993) Individual Freedoms and state security in African conflict at p. 42.

³ [1945] A. C. 219

currency, which the officers believed were intended for export in violation of exchange control regulations 1965. It is these regulations which were challenged on grounds of unconstitutionality.

The court recognized the fact that if parliament were to introduce measures which gave the police or any other official powers of search at their own discretion, then such measures would not be reasonably justified in a democratic society. Magnus J. Presiding over the case, recognized the violation of the fundamental rights to privacy and property but, upon applying the objective test to the customs officers action, rejected the application. His Lordship had considered the dictum in **Liversidge v. Anderson**⁴ where a subjective test was applied to an officers conduct.

From this decision it meant that if the customs officer's actions were subjective, the court would not question why he searched and seized the applicants property. But where the objective test is adopted, the customs officers actions would be subject to scrutiny. There is no doubt that the court departed from the test adopted by the majority of judges in the Liversidge case.

1.6 OBSERVATION

To start with professor Gupta commenting on the Patel case, referred to Liversidge and argued that Magnus J, may have fallen into error by departing from what, he believed, was a well-established test. He submitted that the court should have adopted the objective test rather than the subjective one.⁵

⁴ [1968] Z.R 128. 129

⁵ Gupta, "The people case, in Zambia Law Journal at p. 49 – 56 (1969 – 72)

On the other hand Justice Thomas Ndhlovu observed that the court quite properly directed itself and took into account all the circumstances of the case, going by the judgment of the court, including possible violations of fundamental rights to privacy and property, and yet, for all that, the court decided to reject the application and ruled in favour of the executive.¹

Therefore in the **Patel** case Magnus J's approach was equally suspicious. Having directed himself so well as to the standard to apply to the customs officer's conduct, for reasons best known to himself, he decided to Veer off course as it were, in favour of the executive branch of government.

1.7 CONCLUSION

The significance of judicial independence in a democracy cannot be overemphasized. Without a strong, independent and fearess judiciary it is not possible to maintain the rule of law in any democratic society. The concept of judicial independence is a noble one and constitutes the foundation on which rests the edifices of every democracy which is based on the rule of law.²

¹ Justice Thomas K. Ndhlocu p. 5

² M. S. W. Ngulube, "challeges of the Bench", Lagality Journal, LSK 1 (1993 – 94)

CHAPTER TWO

THE ONE PARTY STATE

The one party state was introduced on 13th December, 1972. All efforts to thwart its establishment failed. Mr Nkumbula of the African National Congress (ANC) was in the fore front to do so, but to no avail. What it meant was that no one could legally form a political party to rival UNIP. Hence, freedom of expression, freedom to associate and assemble and exchange ideas were completely restricted. Press freedom was muzzled, only government controlled papers could be allowed to operate.¹ It has been seen that after independence the newly appointed black judges also tightly attached themselves to the apron strings of the executive for three reasons. Firstly, they did so in order to display their patriotism with their kith and kin political leaders against subversive actions of agents of the former colonial authority. Secondly, they did that in order to fight perceived neo-colonialism by former colonial rulers and thirdly, they did that to preserve their jobs.² The Zambian judiciary therefore, has never been independent of the executive.

A vivid instance of cases unfairly decided by the Zambian Court of Appeal (renamed the Supreme Court in 1973) which lends credence to the assertion that the one-party state judges were pro-government in their stance³ are in the following cases:

¹ Thomas K. N'dlovu p.10

² Justice Kabazo C. Chanda (Retired) "The Conduct of the Judiciary in the 27th December, 2001 General Elections." Southern Africa : Human Rights Review Issue No. 9 Feb. 2002. p.4

³ Ibid., p.4

2.1 HARRY MWANGA NKUMBULA V. THE ATTORNEY GENERAL ⁴

In this case Mr. Nkumbula applied to the High Court to stop Dr. Kenneth Kaunda from introducing a dictatorial one party system. The Law, section 28 of the 1964 constitution provided that any citizen of Zambia who felt that his right or freedom was violated or threatened with violation was at liberty to bring an action before the High Court to stop the violation or remove the threat.

Using the above-stated constitutional provision Mr. Nkumbula went to court to stop the fruition of Dr. Kaunda's projected one party dictatorship.

The judgment of the High Court and the Supreme Court was a clearly partisan judgement, , dismissing Mr. Nkumbula's action as premature because the law creating the one-party state had not yet been enacted. The Judges deliberately misinterpreted the phrase, " threatened by an existing law." ⁵

Judicial independence was undermined by the practice of transferring judges from the judiciary to other government departments or the parastatal sector. By accepting such appointments, judges compromise their security of tenure and independence as they can then easily be removed from their new jobs. In fact, this device was used by President Kaunda to neutralise judges whose rulings or philosophy he found unacceptable.¹ There were many such transfers during the one-party era as will be illustrated in the following cases:

⁵ Justice Kabazo Chanda p.5

¹ Dr. A Chanda (1992) Zambia: A Case Study of Human Rights in Commonwealth Africa. P. 363

2.2 ELEFThERIADS V ATTORNEY GENERAL²

This was an application for a writ of habeas corpus, the applicant having been detained for an offence believed to be unsustainable in law. Doyle C.J., for the first time attempting to break the ice, decided to allow the application for the writ to issue.

The judgement was delivered on 9th April, 1975. A week or so after the chief justice had gone overseas on a trip to attend a Chief Justice Conference in Germany. He was not aware that the executive was not happy with his decision. Within those few weeks of his absence, Justice Annel Silungwe then Minister of Legal Affairs and Attorney General was appointed Chief Justice. Meanwhile, Doyle C.J., returned from abroad only to be told of what had befallen him. There was a sharp reaction from expatriate judges. Again a few resigned in protest. As a compromise, Doyle C.J. was appointed Director of the law Development Commission, on a personal-to-holder basis, he retired as such subsequently.³ It should be noted that the removal of the Chief Justice was not in accordance with Article 98 of the constitution which provides for the retirement at a certain age, inability to perform his functions or misconduct and misbehaviour and only upon the recommendations of the tribunal to the president. Hence there was no security of tenure.

³ Dr. A Chanda p.363-364

2.3 MIKE KAIRA V ATTORNEY GENERAL⁴

This was yet again an application for habeas corpus. One of the very few expatriate judges, Justice Brenden Cullinan, presided over it. The evidence led before the court did not support continued detention of the applicant.

The executive was not amused by this decision. The matter was clandestinely handled and the executive waited for the judge's application for renewal of his contract of service. They gladly seized the opportunity to act on his application, turning it down to the disappointment of the judge. This was so because previously renewal was almost automatic. Again as a compromise, the judge was appointed Director of the legal services corporation, a newly established parastatal organisation and he subsequently retired from there.⁵

Nearly at the same period when Justices Doyle and Cullinan were transferred, there were two other cases whose transfers were shrouded in secrecy. Deputy Chief Justice Leo Baron was transferred to the industrial relations court as chairman, again on a personal-to-holder basis until he finally retired. Whereas Justice Bruce-Lyle, Supreme Court judge of Ghanaian origin was transferred to the Anti-corruption commission as commissioner, also on a personal-to-holder basis and he subsequently retired as such.¹

It is interesting to note that there is no record of conflict between the judiciary and the executive in Northern Rhodesia. No controversial issues arose between the courts and the executive. The reason could not be that there were no controversial issues but

⁵ Dr. A Chanda p.364

¹ Thomas Ndhlovu p.11

perhaps that the judiciary and the executive were one and the same. For this reason it is questionable whether there was any judicial independence in the absence of any separation of powers.²

2.5 OBSERVATION

In the Kaunda era when the civil liberty cases presented any real choice within the constitution courts almost invariably sustained the government action impugned.³ For instance in **Shamwana v The Attorney General**⁴, where Shamwana for the first time challenged the validity of the continued state of emergency. Silungwe C.J. presiding over it, held that the state of Emergency was validly in force. It should be noted that Zambia, inherited a state of Emergency imposed by the former Governor of Northern Rhodesia. However it was lifted in 1991 by the Chiluba administration.

Most of the detention cases were decided in favour of the government. The courts, except for one or two exceptions⁵, declined to inquire into detention orders.⁵ Moreover, the courts even allowed the government to detain people for economic crimes that had absolutely nothing to do with public security.¹ Furthermore, the courts upheld detention without trial of people acquitted of purely criminal offences.² The only cases that were decided in favour of detainees were those in which there was clear non-compliance by the government with the procedural safeguards laid down by

² Ernest Sakala (1999) *Antonomy and independence of the judiciary in Zambia realities and challenges*. P. 129

³ Dr. A Chanda p.374

⁴ (1980) ZR 270

⁵ see *Lombe and Chisata v Attorney general* (1981) ZR 35; *Chiluba v Attorney General* 1981/HD/713 [unreported].and;

⁵ *Kapwepwe and Kaenga v Attorney General* (1979) ZR p.248; In *Re. Puta* 1981/HN/774

¹ *Mudenda v Attorney General* (1979) ZR p.245; *Chibwe v Attorney General* (1980) ZR p.10;

² *Kapwepwe and Kaenga v-Aig supra note*; *Re Buitendey* 91974) ZR 156; *Maseka v Attorney General* (1979) ZR 136; *Munalula v Attorney General* (1979) ZR 154

the constitution³ or where torture was conclusively established.⁴ In many cases the government simply issued fresh detention orders curbing the original error.⁵

There was only one instance of the court declaring a provision in a statute void for being in conflict with the constitution. This was the case of **Mumba v The People**¹. In this case the applicant was charged with corrupt practice by a public officer contrary to section 23 (1) of the Corrupt Practices Act, which states that

“An accused person charged with an offence under part IV shall not, in his defence be allowed to make an unsworn statement, but may give evidence on oath or affirmation from the witness box”

While Article 20(7) of the constitution read that:

“A person who is tried for a criminal offence shall not be compelled to give evidence at trial.”

Chirwa, J. held that as the constitution is the supreme law of the land and above all the laws and section 53(1) of the corrupt practices Act is in direct conflict with Article 20(7) of the 1972 constitution. Therefore section 53 (1) is null and void. An accused person in a criminal trial cannot be compelled to give evidence in his defence.

Also during the one party state at the election of the president no one was allowed to campaign against the election of the party candidate. Those who dared to do so were harassed or arrested on dubious charges. For example, on November 26, 1973 a labourer, Idon Chongo, was arrested and prosecuted on a charge of engaging in

³ Mutale v Attorney General (1976) ZR 139; Chipango v Attorney General (1970) S.J.Z 197; Re Alice Lenshina Mulenga (1973) ZR 243

⁴ Chimba and others v Attorney General High Court 1972

⁵ Dr. A. Chanda p.375

¹ (1984) ZR 38

conduct likely to cause a breach of peace because he urged people attending an election rally to vote for a hyena (i.e. symbol for “No”) and not Kaunda. Kalulushi magistrate, Martin Mulenga who sentenced Chongo to two weeks in jail with hard labour, said that he would prefer to leave Zambia with his family and seek protection elsewhere if the people of Zambia sank so low as not to vote for Kaunda.²

It can be seen that such kind of judgements emanate from the impact of the executive on the judiciary. A reasonable justice cannot make such statements to the extent that he can leave the country if any body opposed Dr. Kaunda. This shows that judges during the one party-state were not independent from the influence of the executive.

2.5 CONCLUSION

In conclusion, it can be seen that after the first republic, the judges who remained on the bench understood that it was dangerous to pass judgements against the government, in favour of individual rights especially in politically sensitive cases. It can be seen that this trend continued during the one-party state. For instance, the then chief Justice Annel Silungwe was over the years calling for autonomy of the Judiciary but his pleas were being ignored by the government.³ The crisis underscored the fact that the judiciary could only function if the executive respected its judgements.⁴

² Zambia Daily Mail, November 30, 1973, at p.1.

³ Zambia Daily Mail, October 23, 1990 at p.4

⁴ Dr. A. Chanda p.364

CHAPTER THREE

THE THIRD REPUBLIC OF ZAMBIA

The movement for Multi-Party Democracy (MMD) came to power in 1991 and saw the return of multi-party democracy. The good news that ensued afterwards was the lifting of the state of emergency. This development brought a lot of excitement politically and also in judicial circles. However, sooner or later the new government's tolerance was to be challenged¹.

3.1 KAMBARANGE KAUNDA V. THE PEOPLE²

It will be recalled that prior to the presidential and parliamentary elections of 1991, there was pending before the Supreme Court, a murder case involving Kambarange, the son of the former president of Zambia, Dr Kenneth Kaunda. When Kambarange first appeared before Mr. Justice Cleaver Musumali in the High Court, the learned trial judge ruled that the proper charge, in his view was murder. The learned trial judge then proceeded to full trial and found Kambarange guilty of murder and sentenced him to death by hanging. It is important to note that Mr. Justice Musumali's judgment was delivered on 14th October 1991 two weeks before the MMD came to power. At that time public feelings, were generally, rising against Kaunda's government.³

¹ Thomas k. Ndhlovu p. 11

² Selected judgments of the Supreme Court No 1 of 1992 (unreported)

³ Julius sakal (2000) The Role of the Judiciary in the enforcement of Human Rights in Zambia PhD thesis p. 331.

The prisoner appealed to the Supreme Court which acquitted him on 19th March 1992 citing several defects in the trial judge's judgment. The coram consisted of Chief Justice Annel Silungwe, Acting Deputy Chief Justice Brian Gardner and Supreme Court Judge Mr. Justice Ernest Sakala.⁴

The Supreme Court judgment was swiftly condemned by the then Minister of Legal Affairs, Rodger Chongwe. He was reported telling the MMD activities in his Mandevu Constituency in Lusaka that they were free to protest against the judgment. Chief justice Annel Silungwe was accused of being a close friend of former present Dr. Kenneth Kaunda.⁵

Judge Kabazo Chanda who has now resigned and the trial Judge Musumali himself joined the chorus of condemnation. Musumali was later elevated to the Supreme Court surpassing to some Senior High Court Judges. The executive and the MMD made it virtually impossible for Chief Justice Annel Silungwe to stay in office. He resigned and he is now at the High Court of Namibia.¹

3.2 OBSERVATION

Interesting the Kambarange case was one of the last cases to be handled by Judge Musumali as high court judge because he was appointed as Supreme Court Judge² while Chief Justice Silungwe was retired and replaced by Mathew Ngulube, who was his deputy. It is this kind of reaction from the executive that makes Judges be obsessed with prospectus of promotion or in the converse become timid for fear of

⁴ Supreme Court Judgment no 1 of 1992 (unreported)

⁵ The weekly post No 38 March 227 April 12 of 1992 front page

¹ Ibid, The Weekly Post, editorial comment, p. 1

² [1993/94] ZR, Judges 1993 and 1994 pp (iv)(v)

being asked to step down in the name of resignation or retirement in order to circumvent the constitutional provision of establishing a tribunal.

It can be seen that the removal of Chief Justice Annel Silungwe was not in accordance with Article 98 of the constitution, which provides for the retirement of the Chief Justice at a certain age. It also provides for removal from office for misbehavior or misconduct, failure to perform his functions, and a tribunal should be appointed to probe the allegations made against the Chief Justice or a judge of the High Court or supreme Court. All this shows how the Executive arm of government have an impact on the judiciary.

3.3 CHRISTINE MULUNDIKA AND 7 OTHERS V. THE PEOPLE³

After the Kambarange case, came the Mulundika case; another test for the new regime. In the Mulundika case, the accused were members of a political party (UNIP). They were aware of the requirement to obtain a permit to hold a public meeting or demonstration. They held a public meeting at Chongwe, without a police permit. Unfortunately, the police were on hand and pounced on them, arresting them for holding a meeting without a permit.

In the magistrate court, upon arraignment for unlawful assembly, the learned counsel for the accused persons raised a preliminary point of law challenging the validity of the public order act, cap 104 of the Laws of Zambia, section 5(4), which provided for the requirement to obtain a permit from a public officer before holding a public

³ [1995/1997] Z. R. 20

meeting. It was argued that this was inconsistent with the constitution. The matter was then referred to the High Court for constitutional interpretation. The high court judge held that the legislation was valid and that the accused should accordingly be prosecuted. The accused appealed to the Supreme Court for interpretation as to whether the requirement of a permit to hold a peaceful assembly was necessary in a democratic society in the light of fundamental freedoms and rights guaranteed under articles 20 and 21 of the constitution.

After diligent consideration of submissions before it, the Supreme Court held that subsection 4 of section 5 of the public order Act contravened articles 20 and 21 of the constitution and was, therefore, null and void for unconstitutionality. The main thrust of reasoning revolved around the wide discretionary powers exercised by a regulating officer which the Court held were open to abuse and arbitrariness in the absence of effective controls and guidelines.

Justice T. K. Ndhlovu observes that: "Many years ago, a decision of this nature was unthinkable and inconceivable. Many civic activists, the press, churches and trade unionists hailed the decision as a "second" wind of change"⁴. Earlier Courts, faced with a similar situation, and detention cases would have interpreted the case restrictively, in favour of the executive".

3.5 OBSERVATION

In this case judicial independence was undermined. This decision was vehemently rejected by the executive and the government quickly introduced legislation in

⁴ Thoma Ndoluvu p.1

parliament to overturn the court ruling⁵. This piece of legislation went through all procedures for passage of a bill in one day. There was no debate as the opposition walked out of parliament in protest at the introduction of the bill¹. To make matters worse the then Chief Justice was personally attacked by the then Vice president, Brigadier General Godfrey Miyanda, cabinet ministers and the ruling party's members of parliament². For example, it was suggested that the decision was meant to benefit the former ruling party. Some journalists criticised the ruling party and parliament was moved to cause their appearance for contempt of the house³.

One of the heinous attacks on Chief Justice Mathews Ngulube was the unsubstantial claim that he raped a lady office orderly⁴.

According to Dr. Alfred Chanda, "This was meant to force the Chief Justice to resign from office".⁵ Muna Ndulo, a professor of Law, said the attacks were aimed at achieving two things. Firstly, to intimidate the judiciary to give up its independence and not to decide according to the law and give favourable judgments to the government. Secondly, to pressure the judges who were perceived in MMD circles as anti-Government to resign from the bench¹.

3.5 INTIMIDATION OF THE JUDICIARY

Throughout the Third Republic, the judiciary and the legal profession came under increasing attack from the government and its supporters for being independent-

⁵ Public Order (Amendment) act, 1996, No1 of 1996

¹ Alfred W. Chanda (Dr) "Zambia's fledging democracy

² Ibid

³ Fred M'membe and another V. The speaker of the National Assembly 1996 Hp/1029 (unreported)

⁴ Alfred W. Chanda p 140.

⁵ Ibid p 141

¹ Ibid, p 141 - 142

minded. In a move that received international attention, President Frederick Chiluba exercised his Constitutional powers and suspended Lusaka High Court Judge Kabazo Chanda on the 11th January 1997 as per article 98(5) of the constitution. President Chiluba appointed a three member tribunal, comprising Mr. Justice R.M Kampembwa who served on the Mr. Justice Bartholomew Sampa Mumba inquiry in 1984, Mr. Brian Gardner, a retired Supreme Court judge and a judge from Malawi's Supreme Court, Justice Leonard Unyolo to investigate whether Judge Chanda should be relieved of his duties.²

The constitution provisions regarding the suspension or removal of a judge from office are somewhat vague as to who makes the complaint for the president to "consider" the possibility of instituting an investigation against the accused judge. In the case of justice Mumba it was the Chief Justice who laid a complaint against him for gross insubordination. The tribunal upheld the complaint but in the case of Mr. Justice Kabazo Chanda it was not clear who the complainant was. It is not clear why even after the resignation, judge Kabazo Chanda's inquiry should not have proceeded. Many saw a direct link between Judge Chanda's judicial independence and the president's action.³ 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".⁴

² Julius Sakala p 309

³ ibid

⁴ Mail and Guardian, January, 1997 "Chiluba suspends top judge"

Liberal Progressive Front Chairman Dr. Rodger Chongwe said the suspension signaled that Chiluba and his ruling party would not tolerate judges who checked their sinister interests.⁵

The first incidents that connect Justice Chandas' to his removal are the overruling of parliament decision to send Fred M'membe and Bright Mwape to prison. Justice Chanda had argued that the speaker and parliament had no right to imprison people because they were not a court.¹ The second incident is when he released 53 prisoner, some of whom had been awaiting trial since 1992, on the grounds that the state had failed to bring them to court on time. He argued that justice delayed is justice denied.²

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. 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. Mushota³

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

⁵ ibid

¹ Fred M'membe and bright Mwape v The speaker of the National Assembly.

² Mail and Guardian

³ A Chanda, p 141, Zambia law journal vol. 25 – 28.

by the time a ruling is made, it becomes of less or no effect at all against the government.⁴ 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 Judiciary to exercise such power in an efficient and timely manner tends to shift the balance of power between the state and the citizen in favour of the state. The long term effect is the lack of confidence in the judicial administration process.⁵

3.6 REMUNERATIONS

As earlier stipulated 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 service for judges 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.¹ During the 1996 Petition 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 judges of the Superior Courts on many occasions. In 1997 salary increments were more than doubled in less than one year and they were made in midstream of the presidential and parliamentary petition then before the supreme court. This raised suspicions that the increments were meant to influence the supreme

⁴ The case of the Resident Doctors Association v. the Attorney General 1997/HP/0817 (unreported) were the ruling over the permit was made too late and there was no need for demonstration.

⁵ Colins Lundah (2003) The independence of the judiciary in a multi-party state: Zambia as a case study (1990 – 2003)p.19-20

¹ Judges (conditions of Service) Act cap 277 sections 3 and 12.

court judges who were adjudicating over the presidential petition challenging the president's nationality.²

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

3.7 POSITION OF THE JUDICIARY IN THE 1996 GENERAL ELECTIONS

In the 1996 General Elections they maintained their traditional pro-state position. In 1997, following an attempted coup d'état. Dean Mung'omba and Princess Nakatindi Wina were arrested, detained and charged with trumped up offences connecting them to a foiled coup. They both separately, applied for writs of habeas corpus asking the High Court to order their release.³

The timid judges refused to set these innocent citizens free. It was the state itself which subsequently released them from detention, without conducting trial by entering nolle prosequis.⁴

A number of other cases in the 1996 elections were undeservedly decided in favour of the state. Space does not permit their enumeration here. These decisions confirm the

² Julius Sakala page 309

³ Justice Kabazo Chnda, p5

⁴ Ibid

people of Zambia's complaint that their judiciary has compromised its noble function of being their sentinel.⁵

There is no doubt that before and after the 31st October General Elections and the 1996 General Elections, some judges were labeled radical and pro-movement for multi-party democracy (MMD) and others pro- UNIP. Whether or not the suspicions were justified is dependent entirely on public perception of some of the decisions that come from the Courts.

BANDA V. CHIEF IMMIGRATION OFFICER AND THE ATTORNEY GENERAL¹

The appellant who was a UNIP Youth Constituency Secretary and rose to be a District Governor during the second republic, was served with the deportation order and detained pending deportation on the 9th November 1991.

He appealed under article 28 of the constitution for a declaration that his fundamental right to personal liberty has been contravened; that his detention was beyond the legitimate period and that the deportation order was null and void. He sought orders of prohibition 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.

In the High Court Judge Tamula Kakusa handled the matter. On appeal, Bweupe D.C.J delivered the judgment of the Court in which the Supreme Court upheld the

⁵ Ibid

¹ (1993- 1994) ZR. P80 (S.C)

dismissal of the appellant's appeal to have his deportation order quashed. The court said that the appellant's presence in Zambia was inimical to the public interests and in issuing a warrant of deportation was good in law.

3.8 OBSERVATION

The relevance of this case to this study is that it illustrates the extent to which the Judiciary can be used by the Executive to help it fight 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 Patrick Mwanawasa S.C who in 2002, that is 10 years later recalled the appellant to Zambia. The reasons 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 judgment of the court. In such cases, the integrity and the independence of the Judiciary is put into question.

3.9 JUDICIAL PRECEDENT

The common law is the product of judge made law. Courts are an institution vested with authority to make law in the sense of adjudicating. Judicial precedent is any pattern on which future conduct will be based. So judicial precedent is Superior Courts passing judgments that are binding on lower courts, what is binding in the principle of law which is stare decisis. The rationale of stare decisis is that there must be predictability, consistency, certainty and fairness in the law. This principle entails

that lower courts are bound to follow the decisions of the superior courts, and a superior court can depart from its earlier decisions if there are compelling reasons.²

There are difficulties in the Zambian situation. For example **In the Matter of the Presidential Elections held on the 18th November 1996**,³ which was determining the status of whether the then President Dr. Chiluba was a Zambian or not, and **Dr Kabanda K., Mushota R. and Patrick Katyoka v. Dr. Kenneth Kaunda and Attorney General**⁴, also a case determining the status of the first President Dr. Kaunda, whether he was Zambian or not?

These cases were of considerable interests and embarrassment. The decision of the lower courts was total insubordination of the superior court.

In the presidential petition the court took into account disputed facts as to who the Father of President Chiluba was, because there were allegations that he had two fathers. The argument in respect of one father was that he was not Zambian. Hence Chiluba cannot be a Zambian citizen. The father also known as Kafupi came from Congo D.R. and settled in Luapula Province. The court reviewed the whole legal origins of nationality starting with the nationality Act, orders in council, the independence constitution e.t.c.

There were various British protected persons at the time of independence who were declared to be Zambians by the Constitution. The court found that Mr Kafupi was a Zambian at the time of independence hence Dr. Chiluba was also Zambian.

² Neil Merritt and E. G Howard Clayton (1966) Business law p 13

³ SJZ No 14 of 1998

⁴ 1997/HW/357 (unreported)

But in the Kaunda case the judge ignored the principle of judicial precedent and stare decisis and held that on account of Kaunda's parents coming from Nyasaland will not be declared a Zambian citizen.

The High Court went otherwise instead of following the decision of the Supreme Court. The court ought to be bound by the decision of the Supreme Court. The settlement of Dr. Kaunda's parents in Zambia entails that they were also British protected subjects at the time of independence.

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's judgment and restored Kaunda's citizenship. It therefore, goes without saying that the fear that some judges are partisan is more real than fictitious. The judge in the Kaunda case failed to follow the principal of stare decisis for fear of the executive if he in favour of Dr. Kaunda.

3.10 CHECKS AND BALANCES

With the National Assembly, which was so firmly under the control of the Executive, there was no way of checking the excesses of power by the government in power. This task of keeping the Government in check has fallen on the Judiciary. What has been seen is an attempt to use the courts to settle matters that can best be resolved on

a political platform⁵. The case of **Derrick Chitala v. the Attorney General**¹ reflects such attempts. The government remained unmoved by most of these cases.

Judicial review cases used together with other political activities can present a viable means of altering Government's policies. This is possible where the courts are truly independent. In order to avoid an embarrassing decision the Government may decide to change a controversial decision or policy. In Zambia this is yet to be realized.² The case of **Derrick Chitala v. the Attorney General**, presents another illustration.

The Government went ahead with the debate on the Constitution amendment when the case was already before the court. The debate was not suspended pending the outcome of the decision of the court. When the application for leave to apply for judicial review and for the stay of the decision was renewed before the Supreme Court the president went ahead to set a date for the assent of the constitution amendment Bill. The ruling of the court on whether to grant a stay or not pursuant to order 53(3) (10) was set for 09:00 hours, on the same day the Bill was set for assent by the President at 13:00 hours.

In a ruling which took less than five minutes to deliver the Supreme Court refused to stay the decision to amend the constitution until after the determination of the substantive matter, and offered to give reasons later, which reasons have never been given. The Bill was given assent. The Chief Justice who presided over the case was

⁵ John Peter sangwa "Administrative Law in Zambia" p. 39

¹ SCZ Judgmet No 14 of 1995 [unreported]

² John Peter Sangwa p. 39

among the people invited to a special function to witness the assent of the Bill into law.³

3.11 CONCLUSION

It can be seen from the foregoing chapter that judges in the Third Republic continued to be shaken up, short of dismissals. Notwithstanding, in the Mulundika case, for the first time in the history of the Judiciary, the Judiciary interpreted the constitution in a liberal approach and indeed did something new. This revolutionary decision changed the interpretation of the law. What is more is that the Supreme Court, having decided the way it did was aware of the attitude of the Executive towards the judiciary. Past experience spoke for itself. What is interesting, nevertheless, is that the Supreme Court came up with this bold decision. Surely there must have been some impetus, which gave rise to this “second” wind of change.⁵

³ Ibid

⁵ Justice T. K. Ndhlovu p13 - 14

CHAPTER FOUR

THE MWANAWASA ERA

The “New Deal Administration” under President Mwanawasa came to power in January 2002. When the President came to power he promised the people of Zambia that his rule is going to be a rule of law and not a rule of men.¹ But in this Chapter it will be shown that the executive still continues to have an impact on the judiciary despite the rule of law that the President pledged to the people of Zambia.

To start with, in June 2002 Chief Justice Mathew Ngulube went on leave pending retirement following revelations that he was bribed by the former president Fredrick Chiluba in cash payments amounting to over \$168,000.² There was mounting pressure from members of the general public, civil societies, Non Governmental Organizations and the Church calling for his resignations. President Mwanawasa accepted Chief Justice Mathew Ngulubes resignation and appointed Supreme Court judge Ernest Sakala as the New Chief Justice.³

It can be seen that the removal of the Chief Justice was not done in accordance with article 98 of the Constitution which provides for the retirement of the Chief Justice after attaining the age of 65 years. The Chief Justice or judges can only be removed from office for inability to perform there functions of the office, or for incompetence or misbehaviour. Article 98(3) provides that:

¹ The Post, January 3rd, Front page

² The post, July 8, 2002 “Ngulube resigns to face probe” Front page

³ *ibid*

“If the President considers that the question of removing a judge of the Supreme Court or of the High Court under this article ought to be investigated, then-

- a) he shall appoint a tribunal which shall consist of Chairman and not less than two other members, who hold or have held high judicial office.
- b) The tribunal shall inquire into the matter and report on the facts thereof to the President and advise the president whether the judge ought to be removed from office under this Article for inability as aforesaid or for misbehavior.”
- c)

Article 98(4) states that:

“where a tribunal appointed under clause (3) advises the president that a judge of the Supreme Court or of the High Court ought to be removed from office for inability, or incompetence or misbehaviour, the president shall remove such judge from office.”

Therefore President Mwanawasa should have appointed a tribunal to probe the corruption allegations against the former Chief Justice Mathew Ngulube so that the people of Zambia know the truth as to whether the allegations were true or false. The Chief Justice could also have been afforded a chance to defend himself before the tribunal.⁴ All this shows how the executive has an impact on the judiciary, in that the constitution which is the Supreme Law of the Land provides for a way on how to remove a judge from the bench and the president uses a method which is not provided for under the Constitution and that is the accepting of the resignation rather than appointing a tribunal.

⁴ Ibid

4.1 JUDICIAL INTIMIDATION

On 8th February 2003 High Court Judge Athorny Nyangulu granted an injunction restraining President Levy P. Mwanawasa SC from appointing opposition MPs as Ministers.⁵

In reaction to this President Mwanawasa when addressing cabinet, castigated the Lusaka High Court judge for granting the Heritage Party president Brigadier General Godfrey Miyanda an injunction restraining him from appointing opposition MPs'

"I wish to mention that with or without the reported injunction, I am going ahead and make appointments".¹

He reminded both the High Court and Supreme Court judges that when they were appointed, they took oath of office to the effect that they would defend and uphold the constitution and the laws made there- under. President Mwanawasa explained that the state proceedings act provided that no injunction may be issued against the state.

"Any restraining order may not be issued against the state. And also the constitution provides that I am not amenable to any sanction from the judiciary. This is the immunity which I enjoy until it is lifted. Now I am not prepared to accept that a judge of the High Court can say that he was not aware of this provisions"²

⁵ The post 8th Feb, 2003 "High Court grants injunction against Levy" Miyanda Blocks Levy from appointing opposition MP's" P1

¹ The post, 9th Feb 2003 "Judiciary cant make an order against the President: Mwanawasa" p.1

² ibid

He asked the chief Justice to hold discussions with the judges to ensure that issues which have the effect of bringing the executive in conflict with the judiciary were avoided at all costs.

“The law is very clear. And obviously, if this injunction was issued it merely intended to embarrass me in particular and the executive”³

A few days later Judge Nyangulu apologized to President Mwanawasa, saying he was sick when he issued the injunction.

“Through my Lord the Honourable Chief Justice Ernest Sakala I wish to assure the President Mr. L. P. Mwanawasa SC that the order complained of was indeed made inadvertently and certainly not intended to embarrass him or the executive”⁴

4.2 OBSERVATION

To start with it can be observed that the MMD and its leaders have little regard for the Zambian courts of law. That is why Enock Kavindele the former Vice president could write straight to the Chief Justice commenting on issues before the courts because he knew that our justices will do nothing except give him a verbal warning.⁵

During the MMD convention in Kabwe a similar injunction as the one General Miyanda placed before the court was granted by the High Court restraining the

³ ibid

⁴ The post 15 Feb, 2003 “Judge Nyangulu apologizes to Mwanawasa, Chief Justice”

⁵ The Post, Feb 9 2003 “disregarding court orders” p 13

National executive Committee (NEC) from expelling certain members from the party. But in the name of not receiving the injunction or ignorance that such an order has been granted, the NEC went ahead to disregard the court order and expelled the 22 controversial members.¹

President Mwanawasa did the same by going ahead to appoint opposition MP's despite the courts order restraining him from doing so. If our leaders cannot respect the same constitution they were sworn to defend, then Zambia is heading towards the Ivorian and Zimbabwean situation where lawlessness has become a norm.²

General Miyanda commenting on the presidents stance stated that the presidents behaviour would lead to people losing confidence in the judiciary because the President was intimidating the judges and suggesting that they don't know their work.³

The Law Association of Zambia reminded president Mwanawasa that the President's Immunity against lawsuits and the consequences of failure to obey court orders does not alter the legal position of the order whether erroneously or irregularly granted.⁴

".....our state counsel is fully aware that the legal profession presumes all our judges to be knowledgeable in the law and to posses equal abilities"⁵

¹ ibid

² Ibid

³ The post February 10, 2003 "We are not safe under Levy's rule – Miyanda" P1.

⁴ The post, Feb 13, 2003 "President Immunity does not alter legal position – LAZ p1

⁵ Ibid,p.3

LAZ also noted that although everyone is entitled to interpret the law in any manner they may desire, the authoritative interpretation and pronouncement of what the law is remains the exclusive preserve of the judicature. This is the whole essence and meaning of the doctrine of Separation of powers which our country has embraced.¹

LAZ also described president Mwanawasa's position as a naked affront to individual independence which judges ought to enjoy including the integrity of the judiciary. LAZ cautioned that if any judge were to shy away from any issue involving the executive, then such a judge would not only be abdicating their judicial function and responsibility but would be violating their judicial oath including contravening the judicial code of conduct.²

On judge Nyangulus apology to president Mwanawasa, the then LAZ Honorary Secretary Mr. Mumba Malila observed that there was no need for the judge to apologise for the decision. He noted that it was clear that the judge was intimidated by the president's "dress down" of him at the press conference. What the judge should have done was to reverse the earlier decision without apologizing. He set a dangerous precedent by apologizing and people will lose confidence in the judiciary. An order of the court must be challenged in the same court.³

It can be noted that, this was the first time a judge was apologizing for the decision which he delivered. It can be noted that even during the skinner saga or during the one party state there was no judge who apologized for his action.⁴

¹ Ibid

² Ibid

³ The Post, Feb 16, 2003 "judge Nyangulu has set a dangerous precedent" LAZ p1.

⁴ Ibid

Judges should not succumb to political pressure because political pressure destroys weak character like in the case of judge Nyangulu. It is clear that the separation of powers for the three arms of government are just on paper and hence, the executive is above the judiciary. It can therefore turn down a ruling from the judiciary at will.⁵

There were calls from the Zambian people calling for judge Nyangulu to resign because he was inimical to the administration of justice. However judge Nyangulu can resign but the question that remains is our judiciary going to be independent from the executive? Maybe this is why we need a better constitution that will protect the integrity and independence of the judiciary.

4.3 PROTECTION FROM UNRESTRAINED CRITICISM

Criticism of judges is circumscribed in the sense that it must be made bonafide and must not impute improper motives to the judges. It must be genuine criticism and not malicious or calculated to subvert the administration of justice. When criticism oversteps proper bounds courts have the power to punish the offender for either criminal or civil contempt of court.¹ Examples of contempt committed in the face of the court include former Vice president Enoch Kavindele and opposition United Party for National Development (UPND) President Anderson Mazoka after they commented on matters that were before the court and were cited for contempt of court.²

⁵ The post, Feb 17, 2003 "judge Nyangulu has made himself unwise charges Mwamba" p.4

¹ A Chanda (1992) Zambia: A case study of Human Rights in Commonwealth Africa p. 366

² Penal Code, Cap, 87, 5116 (1), 599 subordinate court act, see also contempt of court (Miscellaneous provision) Act, cap 53

Home Affairs Minister, Lt General Shikapwasha accused the judiciary of being corrupt because he felt perhaps the judiciary was lenient with the “economic plunders”. He never withdraw this statement but instead went further by stating that the judiciary was complacent with the plunders and that he would in good time expose the corrupt judges which he has not yet done. The same Shikapwasha cried foul at the granting of bail by the courts to the plunders even as his ministry failed to take adequate measures to avoid the running away of two accused plunders, that is Xavier Chungu and Shansonga. Now he is concerned and hurt about the courts denying bail to accused former service chiefs that is former Zambia Air force commander S. Kayumba; Zambia National Service Commander, W. Funjika and former Army Commander G. Musengule . What does this mean? Is he telling the courts that it is all right to deny bail to other accused persons and not former service chiefs? Or does he even know what he is talking about?³ The law take its course and not for the executive to dictate what course the law should take. It is not the function of the executive to assume judicial functions.

Even the president has been commenting on matters that are before the courts of law and he has been warned of that on several occasions but he keeps on repeating. In a recent development president Mwanawasa S.C has been cited for contempt of court for commenting on Chiluba’s case in the media.

Lusaka principal Resident Magistrate Jones Chinyama censured President Levy Mwanawasa to stop mocking the courts by passing prejudicial statements on corruption case against Chiluba and others. This was after former president Fredrick

³ The post, June 14, 2004 Shikapwasha has lost it’ p. 10

Chiluba's Lawyers applied to the court to cite President Mwanawasa for contempt for commenting on the proceedings that were in court.⁴

Article 43(2) of the constitution grants immunity to the president in that he cannot be charged with any criminal offence in respect of anything done during his tenure of office within the performance of his official functions. But Article 44 of the constitution which sets out the function of the President does not include passing comments of serious prejudicial nature on proceedings before the courts of law.

Therefore it does not augur well for the administration of justice that the executive should make comments on the proceedings before the court. The administration of justice will be boasted if the executive reduced commenting on political matters before the public loses confidence in the judiciary. It would amount to mocking the administration of justice if president Mwanawasa and the executive continued commenting on the proceedings before the courts of law.⁵

Citing President Mwanawasa for contempt was a good decision which illustrated or shows that there is no one who is above the law whether the executive, the legislature, the judiciary, public officer, citizens including the president. It can be seen that the judiciary can be independent from the executive interference.

⁴ The post, August 20, 2004 "stop mocking the courts Chinyama tells Mwanawasa"

⁵ *ibid*

4.4 REMUNERATIONS

As earlier stated in chapter III judicial remunerations should be adequately safeguarded against being used as a means of asserting control over judges. President Levy Mwanawasa in 2003 awarded Supreme Court and High Court judges a 100% increment of their basic salaries and housing allowances. President Mwanawasa had earlier in August 2002 increased judges salaries.¹

As a result there was a strike by magistrate and local court justices, because their salaries were not increased like their counterparts. It can be seen that president Mwanawasa acted selectively when he awarded hefty salaries and housing allowances to judges. He should have known that the judiciary is not just judges but also magistrates and local justices and other support staff equally involved in the day to day dispensation of justice. While we appreciate that judges salaries are meager, the increment should have extended to other members of the judiciary.² some quarters of society viewed this increments were meant to influence the supreme court judges who were adjudicating over the presidential petition before the court challenging his election.

The workload of magistrate is heavy yet they have worse conditions of service and most if not all have no transport. A 1993 judiciary report states that the investigating committee was shocked to hear that some magistrates have their residential accommodation in shanty compounds. To date the situation has not improved.³

¹ The post, March 15, 2003 "Levy increases judges housing allowances. P. 3

² The post, April 4, 2003 "Levy must find money to increase magistrates salaries" p.7

³ See the Report of the special committee on delays in the administration of justice and delivery of judgment in Zambia, March 1993, chaired by justice Enerst sakala of the SC, at p.25.

4.5 CORRUPTION IN THE JUDICIARY

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 found wanting however, have to retire or a tribunal will be convened under Article 98(3) of constitution to probe them. 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. He resigned from his position due to pressure from Non-Governmental organization and the press.⁴

With regard to inferior courts, it is not uncommon to hear that a magistrate has been arrested and charged with soliciting or for corrupt practices. Between 1991 and 2004, four magistrates were convicted of corruption and subsequently removed from the bench. At the local court level there are no record of justices being charged with corruption apart from mere complaints from members of the public who complain through the press that certain court officials in the local courts are corrupt. A recent corruption scandal is where a Kabwe Magistrate Shadreck Nkhoma was acquitted for corruption charges. He was arrested by the Anti-Corruption commission (ACC) for allegedly soliciting for K300,000 as a bribe from a suspect in 2002.⁵

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 being objective in his decisions.

⁴ It received wide publicity in both private and government controlled print and electronic media

⁵ The post August 4, 2004 "Magistrate Nkhoma acquitted of corruption charges" p.3

4.6 CONCLUSION

When President Mwanawasa was sworn into office he vowed that his government would be a government of laws and not men, he also pledged to uphold the rule of law, and to uphold the constitution as the supreme law of the land.

But what has been found in this chapter is that president Mwanawasa is infant the one in the forefront of violating the law and undermining judicial independence like for instance the castigation of judge Nyangulu in public and his propensity to disregard court orders, like the injunctions issued against him. He should have respected the court order although erroneously issued until it was set aside.

However the courts of law have maintained their independence despite some intimidation's from the executive. This can be seen in the way the court reversed the executives decision to deport post columnist Roy Clarke.¹ During the one party state Roy Clarke could have been history, because he could have been deported without even giving him a chance to defend himself in the courts law. The other courageous stance by the courts is the citing of the President for contempt for commenting on matters that are before the courts of law. This is good stance to reject the impact of the executive on the judiciary.

¹ 2004,HP.6003

CHAPTER FIVE

COMPARATIVE ANALYSIS

A part from expounding on the theoretical and practical aspects, problems and hopes of and for the Zambian judiciary, a comparative analysis of judicial systems in other jurisdictions like England, the USA and some African countries. The comparative analysis has been done from realization that one can gauge the direction of the Zambian judiciary from the experiences of other well established jurisdictions.³

5.1 ENGLAND

Before 1688 judges like other crown servants, were appointed and dismissed at the crown's pleasure. Today the position depends on whether the judge is a superior court judge or an inferior court judge. Superior court judges have considerable security of tenure. They cannot be dismissed by the crown except following a resolution of both houses of parliament and then only for misconduct. In exceptional circumstances judges can be removed by the Lord Chancellor on medical grounds. In theory appointment of superior court judges are made by the queen on the advice of the Prime Minister.⁴

The "checks and balance" theory of the separation of powers plays no part in the appointment procedure. There is mechanism for independent scrutiny of judicial appointment, and there are no formal selection procedures. There is no evidence that

³ George Kunda "The Zambian judiciary in the 21st century" ZLJ vol 30 1998 at p29

⁴ *ibid*

political factors have in modern times, been used in making judicial appointment, except of course in the case of the Lord Chancellor himself. Prestige and the attraction of the work are incentives but by and large there is little direct pressure upon the English judge to fall with the wishes of the executive. However some people argue that a shared background of culture, education and economic interests between judges and the senior civil servants responsible for advising on promotions and appointments makes this unnecessary.⁵

Judicial salaries are charged directly on the consolidated fund and are secured by statute. Salaries of superior court judges are substantial with the aim of reducing any temptation to corruption, but are probably less than a person of equivalent could earn in legal practice. Salaries can be increased by the Lord Chancellor with the consent of the Prime Minister unlike here in Zambia where it is done by the president instead of the chief justice. These salaries change due to inflation.⁶

However the fundamental constitutional principles need to be noted. In the United Kingdom the sovereign power is vested in parliament: the two houses of parliament and the queen. In them is vested the power through various legislation to determine the powers which may be exercised by other organs of government, which includes the power to determine the extent of judicial review.⁷

Given the British constitutional arrangements, the mention of judicial review has to be seen in the context of general administrative system, where different mechanisms are employed to hold public bodies accountable. In comparison to Zambia the extent of

⁵ *ibid*, 36

⁶ *ibid*, 27

⁷ John Peter Sangwa "Administrative law in Zambia" p22

Judicial review in the United Kingdom is limited. Judicial review in the UK does not extend to the activities of the parliament. Judicial review in the United Kingdom relate to the activities of the executive branch of government or the administration.¹

In Zambia, however the position is different because of the country's constitutional position. The sovereign will of the people is embodied in the constitution, which is the supreme law of the land. All institutions of government derive their existence and authority from the constitution and anything done or purported to be done by them, which is inconsistent with the constitution is, to the extent of the inconsistency unconstitutional, null and void. Article 1 (4)² of the constitution binds all the persons in the Republic of Zambia and all legislative, executive and judicial organs of the state at all levels. It follows that judicial review in Zambia lies against the actions or activities of the Executive Branch of Government and the legislature.

5.2 UNITED STATES OF AMERICA

Judges are drawn from the practicing bar and less frequently from government service or the teaching profession. The legal profession is not entirely unaware of the advantages of a career judiciary, but it is generally thought that they are outweighed by the experience and independence which American lawyers bring to the bench. Many of the outstanding judges of the countries highest courts have had no prior judicial experience. Criticism has centred instead on the present method of selection of judges.³

¹ *ibid*

² The constitution of Zambia cap 1

³ George Kunda p 38

Since 1937, the American Law Association has advocated the substitution of a system under which the governor appoints judges from a list submitted by a special nominating board and the judge then periodically stands unopposed for re-election by popular vote of the basis on his or her record. Popular election has been the subject of much disapproval, including that of the American Bar Association, on the ground that the public lacks interests in and information on candidates for judicial office and that therefore the outcome is too often controlled by leaders of political parties. In a small group of states, judges are appointed by the governor subject to legislative confirmation.⁴

This is also the method of selection of federal judges, who are appointed by the president subject to confirmation by the senate. Even under this selection political influence is there, appointees are usually of the presidents or governors own party. But names are submitted to the American Bar association for approval. The chief Justice of the USA is appointed by the President, subject to senate confirmation.⁵

The judges can only be removed from office only for gross misconduct and only by formal proceedings. Instances of removal have been rare indeed and only a handful of federal judges have been removed from formal proceedings. The independence of the judiciary is even encouraged by the rule that a judge incurs no civil liability for judiciary acts, like here in Zambia¹.

Salaries for the higher judicial offices are usually good although less than the income of a successful private practitioner. The prestige of there offices is high, and the

⁴ Ibid

⁵ Ibid

¹ Miyanda v Attorney General [1984]Z.R 62.

bench has been able to attract many of the countries ablest legal minds. The great names in American law are in large the names of its great judges.²

5.3 AFRICA

The Zambian judiciary, like most other judiciaries in common wealth Africa, has not been a sentinel of liberty. Until the dawn of political pluralism in late 1990 the courts supinely upheld government actions and laws against constitutional change.³ As Professor Drew Days observes that:

“The Kenyan courts have often eroded their constitutional mandated responsibility to protect individual rights. The courts have stood aside as the Kenyan government has used the preservation of public security Act. (the Kenyan detention law) as an instrument of political repression. The courts have largely refused to review allegations of torture or other mistreatment. In the face of judicial inaction, blatantly political prosecutions for treason and sedition have proceeded without serious examination of the constitution values at risk”⁴

In most and if not all African countries just as in Zambia, judges are appointed by the president. In Kenya and Uganda the president must act in accordance with the advice of the respective judicial service commissions. In Tanzania the president appoints judges after consultation with the Chief Justice. In most countries, however, the

² George Kunda p.38

³ Dr. Chanda p 366

⁴ Drew Days et al (1992) Justice enjoined: The state of the Judiciary in Kenya. P.9.

constitution vests the powers of appointing the chief justice in the president.⁵ This shows that even in the context of these African countries the executive has an impact on the judiciary. Some of the reasons which impact on the independence of the judiciary are as follows:

a) Judges on contract

Experience in most countries has shown that this trend is undesirable. Successive governments refused to renew the contracts of judges because of the views they expressed in their judgments just like it was shown in the preceding chapters on the Zambian Scenario. For example in Uganda Chief Justice Udo Udomas' contract was not renewed because he insisted on taking precedence over Minister Obote. Mr. Justice Jones had to flee the country because his life was in danger as a result of his report on two missing Americans. Chief Justice Allen's contract was not renewed because of the judgments he rendered against the government.¹ It follows therefore that all judges (citizens and expatriates), must be appointed for permanent terms so that they do not have to fear the displeasure of the authorities when rendering their judgments.

b) The position of the Chief justice

The most insecure job in most African countries is that of the chief justice. Most African constitutions provide that the chief justice "shall be appointed by the president". Successive presidents have assumed that on taking office they can appoint

⁵ Abraham Kiapi "Prolegomena on judicial independence in Kenya, Tanzania and Uganda". A report of seminars held in Lusaka from 10 to 14 November 1986 and in Barful from 6 to 10 April 1987 on the Independence of the judiciary and the legal profession in English speaking Africa p. 41

¹ Ibid

a new Chief Justice and they have indeed done so. In Uganda under sir Edward Mutesa the Chief Justice was sir Udo Udoma, a Nigerian. After Milton Obote usurped power in 1966, Sir Udo Udoma went to Nigeria to settle family problems, and Obote would not allow him to return to the country. Obote appointed Sheridan to succeed him. After Idi Amin overthrew Obote, he appointed Benedicto Kiwanuka as Chief Justice. Kiwanuka was taken by unknown people from his chambers and was assassinated. William Wambuzi took over as chief justice when he was elevated to the presidency of the court of appeal for east Africa, Amin appointed justice Saied to succeed him. When Amin's forces were routed by Tanzanian troops in April 1979, and Lule assumed power, he brought back Wambuzi as Chief Justice. In 1980, Paulo Mawanga, the Chairman of the military commission that overthrew Godfrey Binaisa appointed George Masika chief justice, without first dismissing Wambuzi. After Tito overthrew Obote, he appointed Peter Allen as chief justice. When his current contract expired, Museveni's government refused to renew it and Wambuzi was back in the saddle.²

The changing of Chief Justice's by the executive government whenever they fill like without even following constitutional provisions for his removal is similar to Zambia. In that the job of the Chief Justice in Zambia seems, from a historical perspective, to be indeed the most insecure. Since Zambia attained independence, the judiciary has been headed by six Chief Justices. The departure of each one of them tends to confirm the theory of the insecurity of the job of a Chief justice because of the impact of the executive on the judiciary. Each of the six Chief justices departure has

² *ibid.*, 42

had connections with some incident which in reality or indirectly influenced the departure³ as shown in the preceding chapters.

Under the constitution's of most African countries just like Zambia, a judge of the high court can be removed only after his conduct has been investigated by a judicial tribunal including the chief justice. As the chief justice is a judge of the High court he should only be removed in accordance with the procedures set out in the constitutions of various countries.

c) Corroding the morale of the judiciary

There are some practices in most African countries by the executive and the legislature which are calculated to corrode the morale of the judiciary. These practices include forestalling cases sub judice, invalidating court decisions and fragrant contempt of court by the executive. For example when the post of chiefs was abolished in Tanzania the orders of the courts were not to be executed without the consent of the President.⁴

d) The exclusion of the jurisdiction of the courts

One important element which has resulted in the erosion of the independence of the judiciary in most African countries is that the courts are sometimes denied jurisdiction to enquire into various matters a "ouster of jurisdiction of the courts"⁵ for instance, S. 170(10) of the suspended constitution of the Federal republic of Nigeria 1979, barred

³ Enerst Sakala, p 136

⁴ Abraham Kiapi, p 42

⁵ Ebene Osieke " An evaluation of the Independence of the Judiciary in Nigeria" A report of seminars held in Lusaka and Bunful in 1986 and 1987 p.113

the courts from entertaining any proceedings on whether the House of Assembly of a state had acted properly or constitutionally with respect to the impeachment of the Governor of the State. When the Kaduna House of Assembly impeached Barade Musa in 1981 in a manner not in strict conformity with the express provisions of the constitution, the Kaduna High Court held that it had no jurisdiction to entertain the proceedings instituted by the impeached Governor.¹

It is clear that no society can expect to have an effective judiciary if the courts are denied the opportunity to enquire into complaints and allegations of breach of law by the main organs of Government the executive or the legislative branch. To deny the courts jurisdiction to determine any matters involving the government or individuals is a denial of justice to the society and an erosion of the independence of the judiciary.

5.4 CONCLUSION

It can be seen from the discussion in this chapter that the impact of the executive on the judiciary is not only a problem here in Zambia but also with other countries. However the trend seems to have changed from the 1990s as pointed out earlier when most African countries attained democracy. For example in Tanzania since 1993 when the one party state system came to an end, the courts have had to exercise powers of review in matters such as preventive detention, deportation orders,² removal of a civil servant from service in public interest³ which Julius Nyerere so vigorously defended just like his counterpart, former President Kaunda of Zambia. The death

¹ Barade Musa v Speaker Kaduna state House of Assembly and others (suite KDTH 17 1981)

² Chumchura Marwa v Officer in charge and Attorney General, High Court Criminal case No 2 of 1988 ([unreported])

³ James F v Gwangilov Attorney General [1993] 2 L.R.C 317

penalty for instance, has been declared unconstitutional by a Tanzanian judge only to be upset by the court of appeal.⁴ Such is the admirable judicial activism in Tanzania.

⁴ Republic v Mbushu and Anuki [1994] 2LRC 335

CHAPTER SIX

CONCLUSION AND RECOMMENDATIONS

6.1 CONCLUSION

The Zambian judiciary, which has been fully Zambianised, has performed well in spite of the bad conditions of service and sometimes adverse political atmosphere, and the impact of the executive on the judiciary as shown in the preceding chapters. The judiciary, which for a long time has not been well supported and funded, has assumed its own Zambian character. The judiciary has settled many serious disputes. So far only one judge has been removed from the bench since independence, while the other one resigned, which augurs very well for the independence of the judiciary.

Of course, there have been shortcomings, some serious which have been highlighted above, such as the removal of the judges, especially the Chief justice and judges on contract by the executive from office, if they are viewed to be passing judgments which are not in favour of the Government of the day. This is bad especially in a country that has embraced democratic principles, and rule of law and upholding of Human rights.

In cases which are politically sensitive, the judiciary has acquitted itself in such a way that criticism of some of its judgments has come from both the government, civil society, individuals, NGO's and from the opposition parties. Perhaps this is an indication that the judiciary is independent in Zambia. It is, however, up to the judiciary to prove to the people of Zambia that it is independent through the way it

dispenses justice. Again the judiciary must guard its independence as guaranteed by part VI of the constitution jealously and judiciously.

It is understandable that our constitution and institutions have only been in existence for 40 years. Whereas other systems to which Zambia has been compared have been in existence for a long time such as America and the United Kingdom.

6.2 RECOMMENDATIONS

In view of the factors identified as threatening the independence of the judiciary because of the impact of the executive on the judiciary the following recommendations are suggested:

1. Impartiality

Judges, magistrates and local court justices should perform their responsibilities with courage and without bias. They must resist any external pressures and bribes. The pressure may come from the state or powerful individuals in society. If these justices have an interest in the case or knows one or both of the parties he or she must recuse himself or herself from the case as it is important that justice is not only done but also that it is seen to be done. Judges should not be influenced by media reports or sentiments expressed by politicians and the public. They should decide cases before them on the basis of evidence presented and the law applicable to the case.¹

¹ A. W. Chanda "Role of the lower courts in the implementation of Human Rights" Zambia law Journal vol 33, 2001 at p.7

Judges must be courageous independent and impartial. They must be pro-active. They must realize that the ordinary citizen looks to the court for protection given the weaknesses of civil society and the dominance of the executive in Africa.² If the courts fail to come to the occasion, the ordinary people has nowhere else to turn to. People will only respect the judiciary if it demonstrates an unshakable commitment to uphold individual rights and freedoms.³

2. Appointment of Judges

The independence of the judiciary can also be encouraged by ensuring that judges are only appointed from legal practitioners of integrity and good character who have distinguished themselves in the practice of law. All stakeholders including organizations like LAZ must be consulted when judges are being appointed. This is to ensure that the appointments of the judges must be independent or free from executive interference. The current mode of appointment is not good. This is because the people who are involved in the appointments are also appointed by the President, hence they will ensure to appoint judges who are more favourable to the government.

Ratification by parliament is good but not where a party in power has a majority of seats. In that they will ratify a judge who has been chosen without much scrutiny. The other reason why parliament is not good for appointment is that it will usurp the powers of the judiciary and hence defeat the doctrine of separation of powers.

² ibid

³ ibid, 17

3. Security of tenure

Judges should enjoy security of tenure and be allowed to retire at the prescribed age. A judge should only be removed from office for genuine reasons and in very exceptional circumstances. Removal should require misconduct, incompetence or infirmity of body on the part of the judge and should occur after formal procedures prescribed by the constitution.⁵ When formal proceedings before a tribunal are in motion, for example, the conduct of the judge may not be criticized in parliament or the public media. If criticism is allowed the executive can take advantage of this and will influence the outcome of the tribunal.

4. 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 as seen in chapter 3 and 4. This is because they preside over the presidential petitions and other constitutional matters. While magistrates and local court justices salaries remain the same which lead to strikes and work stoppages which are not good for the independence of the judiciary. It is therefore strongly recommended, that the judges (condition of service) Act, cap 277 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 courts and curb the numerous work stoppages let alone corruption that have dogged the judiciary. If this is done it will stop the suspicion from members of the general public that the

⁵ Article 98 of the constitution of Zambia cap 1.

increment was meant by the executive to influence superior court judges to pass judgments in their favour.

5. 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 the minimum qualification of a bachelor of law to assist them in analyzing and researching the law. There are cases where judges do not even give reasons which is bad to the development of the law.¹ This will also help judges to find more authorities to help them in deciding sensitive political cases that come before them and will reduce the perception that the executive has an impact on the judiciary.

6. Delays in disposing of cases

Delays in indisposing of cases have become a source of concern to the government and the general citizens of Zambia. A number of people have been reluctant to take their grievances to the courts because of taking too long in delivering judgments. Consequently, for the maxim “justice delayed is justice denied” to be respected it is suggested that a court should deliver the judgment within the shortest period of time such as within 30 days after the conclusion of the trial. In this way, confidence in the judiciary will be rekindled. Unlike the current situation where political cases become of academic exercise because of taking long. This will reduce the suspicion that the

¹ Derrick Chitala v. Attorney General where the presiding judge stated that reasons for the judgment will be given later which up to now have not been.

executive make unnecessary delays in disposing of political cases, for example the presidential petition.

7. The fifth constitution (The Willa Mung'omba)

With regard to the current constitutional Review Commission going on it can be noted that the judiciary is one of the most important of the three arms of government in Zambia. It performs an important role in providing the necessary checks and balances to ensure that neither the legislature nor the executive acts unconstitutionally at any time. Therefore, to perform this function, the judiciary should be independent. Its independence must be enshrined in the constitution, which is the Supreme Law of the land.³

Therefore, it is of great concern to the people of Zambia that the future constitution should consolidate further the independence and autonomy of the judiciary. Indeed, democracy would certainly fail if in the future constitution the executive are allowed to exert undue influence on the judiciary. For in a democracy there are constitutional limits to the powers of the executive. Equally there are limits to the powers of the legislature. Experience in old democracies has shown that there is no way of making these limits effective or enforcing the guarantees they provide except to entrust their enforcement to courts of law. This important task is performed by the judges.⁴

Finally for democracy to thrive and for peace, social and economic development to be achieved, a free, impartial and independent judicial system is necessary. Therefore,

³ John Mwanakatwe "Constitution making process" the post, October 2, 2004 p. 7

⁴ *ibid*

the constitution should spell out clearly that the judiciary shall be independent, impartial and subject only to the constitution and the law and not the executive or legislature. It should spell out clearly that no person and no organ of state should interfere with judges and other judicial officers in the performance of their functions. Furthermore, the constitution should reaffirm the autonomy of the courts of law. Otherwise existing constitutional provisions for the appointment of judges and for security of tenure of office are adequate. However, if a judge's behaviour or incompetence necessitates his or her removal from office, the constitution should vest the power to remove a judge from office in the National Assembly,⁵ and other stakeholders such as LAZ, the Church, NGOs and individuals.

8. Unrestrained criticism

The executive should desist from commenting on matters that are before the courts especially condemning judges in public. For instance the president and his ministers are fond of accusing the courts for not convicting people accused of plundering national resources. The courts do not convict people on the basis of public trial but the due process of the law must take its own course. If such kind of criticism continues some judges may start convicting these people without following the law and the evidence presented before the court in order to please the president who in turn may promote them to high judicial offices. This will later undermine the principal of rule of law which the president is fond of advocating and the rules of natural justice.

⁵ Ibid

9. Appointment to other judicial offices

The executive should stop appointing judges to other departments, as this will compromise the independence of the judiciary. In that some judges will be varying for such positions hence they may be passing judgments in political cases that will impress the executive. Therefore judges should not be appointed to positions like Justice Bobby Bwalya who was chairman of the Electoral Commission of Zambia.

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