

**AN EVALUATION OF THE EFFECTIVENESS OF JUDICIAL REVIEW AND ITS
IMPACT ON THE SYSTEM OF CHECKS AND BALANCES IN ZAMBIA.**

BY



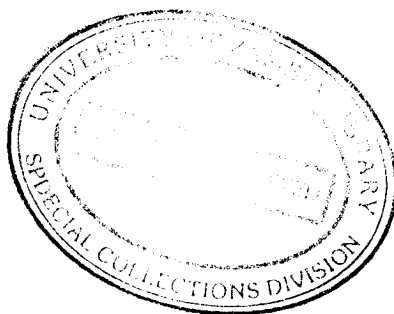
MSIMUKO TENNYSON

A paper presented in partial fulfilment of the requirements for the Award of the Degree of Bachelor of Laws of the University of Zambia.

DECLARATION

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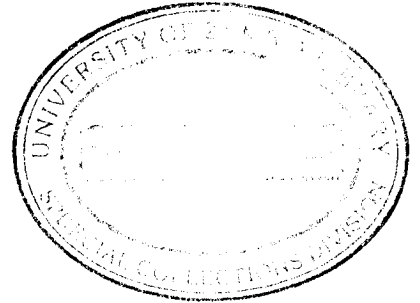
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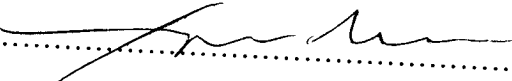
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Date: 14/05/12

ABSTRACT

This research evaluated the effectiveness of the Judicial Review system and its impact on the system of checks and balances in Zambia. The objectives of the research were to evaluate the Judicial Review system and identify possible areas of improvement and also to identify pragmatic measures to improve the impact of Judicial Review on the system of checks and balances. The research was mainly qualitative and based on secondary information, namely; cases, statutes, text books, journals, articles, paper presentations and student obligatory essays.

The dissertation examined the basis of the source of the Court's power to review administrative action. The research also examined the law that regulates Judicial Review in Zambia. The research, through case analysis found that the Zambian Judicial Review system is moderately functioning and there is need for improvement. The research identified the following areas in the Judicial Review system that are lagging behind in terms of operational status: the inadequacy of the available remedies, archaic grounds for review, the lack of express constitutional recognition of the High Court's power of review and the lack of local legislation to govern the procedural and substantive aspects of Judicial Review.

The dissertation also analysed the impact of Judicial Review on the system of Checks and Balances in the Zambian context. In furtherance of this objective the research identified several factors such as the constitutional and legislative framework, the budgetary structure of the judiciary and independence of the judiciary that limit the impact of Judicial Review on the system of checks and balances.

Some of the important recommendations to improve the effectiveness of Judicial Review enclosed by the research include: Adoption of a local legislation to provide for Judicial Review, widening the scope of sufficient interest to commence an action for Judicial Review, forming clear set of rules in making a determination in an application for leave and making provision for adequate remedies to the successful applicant in a matter against the State. While measures that can improve the impact of Judicial Review on the system of Checks and balances include: making provision in the Constitution to expressly state and reflect the power of the High Court to entertain Judicial Review proceedings and also the constitution to provide proviso for the doctrine checks and balances; enabling the Judiciary to be independent to review the action of the other two branches of government; and coordination between the executive, legislature and the judiciary in the appointment of judges.

ACKNOWLEDGEMENTS

I would like to thank my Supervisor, Mr. F. S. Mudenda, for his supervision and guidance without which, it would not have been possible to complete this work. His standards are high, one can only aspire to fill his shoes. I have learned a lot from him. Thanks! Many thanks also go to, Rita Chuulu and Betty Msimuko and 'Mbuli' Billiard Tinta for proof reading and all the assistance rendered during the research period. My stay at UNZA will be incomplete without thanking Oscar Mwizyo Msimuko, Maxwell Dick Mbewe and Mark Musanide Chewe for their support.

DEDICATION

To my loving parents one Tenson Msumuko and Rita Chuulu and my sisters, one Betty Msimuko and Abigail Msimuko for having faith in me even when I doubted myself. God bless you all! I would certainly not be here without your support.

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CHAPTER ONE

1.0 GENERAL INTRODUCTION TO JUDICIAL REVIEW AND ITS OPERATION IN ZAMBIA

1.1 INTRODUCTION

The theme for this research pertains to Judicial Review over administrative action in Zambia and its impact on the system of checks and balances. The field of administrative law is broadly identified as the law relating to the control of executive powers¹. Judicial Review cannot be readily studied in water-tight compartments and needs a working knowledge of many principles, precedents and statutes². The main premise being that the functioning of the various agencies and instrumentalities of the state should demonstrate a clear commitment to fairness, impartiality and proportionality while maintaining effective checks against arbitrariness and discrimination. While the abstract premises of fairness, impartiality and proportionality may lend an air of uncertainty, the courts are frequently called in to give them practical shape when they exercise 'judicial review' over the decisions of government departments, administrative agencies, statutory corporations, regulatory authorities and quasi-judicial authorities among others³.

1.2 THE REMEDY OF JUDICIAL REVIEW.

Judicial Review is a broader part of Administrative law. To understand the concept of Judicial Review it is necessary first to define Administrative law in the broader context. Justice Breyer defined administrative law in four parts. Namely, the legal rules and principles that: (1) define the authority and structure of administrative agencies; (2) specify the procedural formalities

¹ Cane, P. *Administrative Tribunals and Adjudication* (Oxford: Hart Publishing, 2009) : 2

² Cane, P. *Administrative Tribunals and Adjudication* (Oxford: Hart Publishing, 2009) : 10

³ Prakash, Saikrishna. *The Origins of Judicial Review*. (Chicago: University of Chicago Law Review 70. 2003) 887-982.

employed by agencies; (3) determine the validity of agency decisions; and (4) define the role of reviewing courts and other governmental entities in relation to administrative agencies.⁴

Administrative law is generally concerned with the legitimate use of administrative power or discretion by the administrators that is to say to curb excessive, abusive and arbitrary elements in decision making as far public policy is concerned, this resonates in Wade and Forsyth's thinking when they states that the primary purpose of administrative law:

is to keep the powers of government within their legal bounds, so as to protect the citizen against their abuse. The powerful engines of authority must be prevented from running amok.⁵

Judicial Review is a component of Administrative law that focuses on challenging administrative actions. It allows individuals, businesses or groups to challenge in court the lawfulness of decisions taken by public bodies.

Fundamentally Judicial Review is a specialised remedy in public law by which the High Court exercises a supervisory jurisdiction over inferior courts, tribunals or other public bodies,⁶ while Justice Simon Brown observed that;

Judicial Review is the exercise of the court's inherent power at common law to determine whether action is lawful or not; in a word to uphold the rule of law.⁷

From the above definitions of Judicial Review several factors emerge and these are: (a) Judicial Review is a High Court remedy. The High Court is the first court of instance and is not available the lower courts⁸ and secondly (b) the scope of Judicial Review is broad in that it covers inferior courts, tribunals and other public bodies that exercise public functions. Perhaps the apposite working definition can be found in Black's Law Dictionary which defines Judicial Review as "a

⁴ Breyer, Stephen. *Administrative Law & Regulatory Policy*, 5th Edition, (Canterbury: Aspen Pub, 2001) 3.

⁵ Wade & Forsyth. *Administrative Law*, 9th Edition, (London: Oxford, 2004) 5.

⁶ Richard Gordon Q. C *Judicial Review: Law and Procedure*. 2nd ed. (London: Sweet & Maxwell, 1996) 1.

⁷ In the case of R v HM the Queen in Council, ex parte Vijayatunga [1988] QB 322

⁸ Order 53 of the White Book (1999 edition)

court's power to review the actions of other branches of government, especially the court's power to invalidate legislative and executive actions as being unconstitutional.”⁹

The origin of the concept of Judicial Review has itself been contentious. Bickel¹⁰ concedes that the concept is an American invention. Prior to the early 1800s, no country in the world gave its judicial branch such authority. Some scholars trace the origin to the American case of *Marbury v Madison*¹¹ while some trace it to the pre *Marbury* cases. Larry Kramer argued that the power of the court to review executive actions existed before *Marbury* case but was rarely exercised unless it expressly violated the constitution¹². William Treanor is however of the view that Judicial Review was commonly practiced before *Marbury's* case and was not limited to express constitutional violations¹³.

Today, in the wake of a global “wave” of democratization, Judicial Review has expanded beyond its homeland in the United States and has made strong inroads in those systems where it was previously alleged to be anathema¹⁴. The world is in the midst of a “global expansion of judicial power,” and the most visible and important power of judges is that of Judicial Review.¹⁵

In Zambia the source and legitimacy of the High Court's power of Judicial Review is well established and rarely questioned. The Constitution is the supreme law of the land¹⁶ and in resonating with democratic governance the Constitution distributes governmental powers to three

⁹ Black's Law Dictionary, 8th ed (London: Sweet and Maxwell 2002) : 864

¹⁰ Bickel. *The Least Dangerous Branch*. (USA: West Publishing Co. 2004.) 23

¹¹ 5 U.S. (1 Cranch) 137, 2 L. Ed. 60,

¹² Larry Kramer. *The People Themselves: Popular Constitutionalism and Judicial Review* (New York: Oxford University Press, 2004) 38–9.

¹³ William, M. Treanor, *Judicial Review before Marbury*. (58 Stan. L. Rev. 2005) 455: 457-8.

¹⁴ Shamrahayu, A and Sambo. *Internal Affairs of Political Parties and Judicial Review: An Expository Study of the Experience in Nigeria and Malaysia*. Journal of Applied Sciences Research. (2011) 16.

¹⁵ Neal Tate. *The Global Expansion of Judicial Power* (1995) 31

¹⁶ Article 1 (3) provides “This Constitution is the supreme law of Zambia and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void.”

separate branches, the legislative, executive and judicial and prohibits any overlapping between these branches. To achieve this end the Constitution employs certain democratic principles such as Constitutionalism and Judicial Review. For instance Sir John Quick and Sir Robert R. Garran, writing in 1901, explained:

It is a duty cast upon the courts by the very nature of the judicial function. Parliaments are not sovereign bodies; they are legislatures with limited powers, and any law which they attempt to pass in excess of those powers is no law at all it is simply a nullity, entitled to no obedience. The question whether those powers have in any instance been exceeded is, when it arises in a case between parties, a purely judicial question, on which the courts must pronounce. This doctrine was settled in the United States in 1803 by the great case of *Marbury v. Madison*.¹⁷

1.3 THE GENERAL NATURE AND SCOPE OF JUDICIAL REVIEW

From the above cited definitions the nature and scope of Judicial Review can be summarised as follows; (a) Judicial Review is mainly concerned with exercise of public powers and (b) according to Lord Diplock¹⁸, the subject matter of every judicial review is a decision made by some person or (body of persons) whom I shall call the 'decision maker' or else a refusal by him to make a decision and (c) The remedy of Judicial Review is concerned with reviewing, not the merits of the decision in respect of which the application for judicial review is made, but the decision-making process itself,¹⁹ therefore the High Court will not reconsider the whole decision but will only be concerned with ensuring that legal standards are complied with when making the decision.

1.4 DECISIONS THAT CAN BE JUDICIALLY REVIEWED

All bodies exercising functions of a public law nature are susceptible to a challenge by way of Judicial Review, however, there has been a recurring debate on whether Judicial Review can be

⁷ Sir J. Quick & Sir R. Garran, *The Annotated Constitution of The Australian Commonwealth* (1901), 791

⁸ *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374

⁹ White Book (1999 edition) Order 53/1-14/6

instituted against a Private body exercising a public function.²⁰ The boundary between public bodies, some of whose decisions are amenable to Judicial Review and the private sector is ill-defined and constantly evolving. Following *Ludwig Sondashi v Brigadier General Godfrey Miyanda*²¹, the Supreme Court held that the respondent being a society dealing with private matters was not an appropriate case for judicial review. Judicial review will not lie against a person or body carrying out private law functions. Conversely in *Zambia Democratic Congress v Attorney General*²² the Supreme Court held inter alia that the distinction between judicial and administrative activities has been swept away and as a general proposition Judicial Review now lies against inferior courts and tribunals and against any persons or bodies which perform public duties or functions.

1.5 THE SOURCE AND LAW GOVERNING JUDICIAL REVIEW IN ZAMBIA

The Zambian concept of Judicial Review is based on the British model, this is because of the colonial linkage between Zambia and Britain, however the principal source of the High Court's power to review the actions of public bodies is based on article 94 of the Constitution²³ which provides:

there shall be a High Court for the Republic which shall have, except as to the proceedings in which the Industrial Relations Court has exclusive jurisdiction under the Industrial and Labour Relations Act, unlimited and original jurisdiction to hear and determine any civil or criminal proceedings under any law and such jurisdiction and powers as may be conferred on it by this Constitution or any other law.

The scope of Judicial Review by the High Court is unlimited in Zambia, except for matters expressly reserved for the Industrial Relations Court. It follows therefore that the High Court can hear and determine any complaint against anyone in Zambia and adjudicate on it as provided by the law. In the Supreme Court Case of *The Attorney-General v The Speaker of The National*

²⁰ R v Panel on Takeovers and Mergers, ex parte Datafin plc [1987] QB 815, at paras 847-9 (per Lloyd LJ)

²¹ (1995) Z. R. 1

²² (1999.) Z R 37

²³ Chapter 1 of the Laws of Zambia

*Assembly and Dr Ludwig Sondashi*²⁴, the court held the High Court of Zambia has Constitutional Jurisdiction to hear applications for Judicial Review in matters involving parliament.

Furthermore section 9 of the High Court Act²⁵ provides

the Court shall be a Superior Court of Record, and, in addition to any other jurisdiction conferred by the Constitution and by this or any other written law, shall, within the limits and subject as in this Act mentioned, possess and exercise all the jurisdiction, powers and authorities vested in the High Court of Justice in England...” and section 10 of the High Court Act provides “as regards practice and procedure, be exercised in the manner provided by this Act and the Criminal Procedure Code, or by any other written law, or by such rules, order or directions of the Court as may be made under this Act, or the said Code, or such written law, and in default thereof in substantial conformity with the law and practice for the time being observed in England in the High Court of Justice.

In accordance with these two sections the Zambian courts adopted the Supreme Court of England rules (White Book 1999 edition) which provides in Order 53 the procedural law regulating Judicial Review in Zambia.

Worth mentioning is the fact that although article 94 of the Constitution prescribes unlimited jurisdiction of powers of review by the High Court, the scope of Judicial Review in administrative law is largely linked to the development of the ancient prerogative remedies and the circumstances in which the remedies are available at common law.²⁶

1.6 PROCEDURAL ASPECTS OF JUDICIAL REVIEW AND SUFFICIENT INTEREST

No application for Judicial Review can be made unless leave to apply for judicial review has been obtained.²⁷ The procedure for applying for leave is provided for in Rule 3 of Order 53 of the Supreme Court Rules (The White Book 1999 edition). The purpose of the requirement of leave is: (a) to eliminate frivolous, vexatious or hopeless applications for judicial review without

²⁴ (2003) Z R 6

²⁵ Chapter 27 of the Laws of Zambia

²⁶ Kapilima, Simon. *Judicial Review and The Protection Of Human Rights In Zambia*. University of Zambia (obligatory research paper) 2003

²⁷ Order.53, rule 3 of The White Book 1999 Edition

the need for a substantive inter parties Judicial Review hearing; and (b) to ensure that an applicant is only allowed to proceed to a substantive hearing if the court is satisfied that there is a case fit for further investigation at a full inter parties hearing.²⁸

To be entitled to apply for judicial review of a decision, a person must have a "sufficient interest" (or standing) in the matter in question. Standing has previously been referred to as *locus standi*. The overriding rule governing the standing of the applicant to apply for judicial review is that the court must consider that he "has a sufficient interest in the matter to which the application relates."²⁹ If the applicant has a direct personal interest in the relief which he is seeking, he will very likely be considered as having a sufficient interest in the matter to which the application relates. If, however, his interest in the matter is not direct or personal, but is a general or public interest, it will be for the court to determine whether he has the requisite standing to apply for judicial relief. Sufficient interest a question of fact and degree and the relationship between the applicant and the matter to which the application relates, having regard to all the circumstances of the case.³⁰

Order 53 rule 4 (1) of the White book (1999 edition) provides that applications must generally be made within 3 months of the event or decision been rendered. This is to prevent applicants impugning the actions of the authorities long after the event. The court has discretion to extend the limit but this is very rare.³¹ In the same regard, it is a cardinal principle that, save in the most

²⁸ Order 53, rule 3 of The White Book 1999 Edition

²⁹ Order 53, rule 3(7) of The White Book 1999 Edition

³⁰ Lord Roskill in *R. v. Inland Revenue Commissioners and Small Businesses Ltd* [1982] A.C. 617,

³¹ *R v Dairy Produce Quota Tribunal ex parte Caswell* [1990] 2 All ER 434.

exceptional circumstances the jurisdiction to grant judicial review will not be exercised where other remedies were available and have not been used.³²

The process of applying for Judicial Review is a technical and extensive one, it requires that all the above requirements have been complied with. Technical in the sense that first and foremost the High Court will determine if the application has merit, this is the application for leave stage to warrant its consideration for the next stage. The next step is to determine if the applicant has sufficient interest in the matter at hand. The Court will then consider the time frame factor and determine if the applicant has exhausted all the available remedies at their disposal before the application for Judicial Review is considered.

1.7 STATEMENT OF THE PROBLEM

Judicial Review is an important part of every legal system that ascribes to democratic governance, embraces the democratic principles of separation of power and the limitation of public bodies and officials³³. However to achieve these goals the Judicial Review system has to be impeccable. The effects of an archaic Judicial Review system are far-reaching on delivering social, political justice and upholding of the doctrines of supremacy of the constitution, rule of law and the concept of separation of power all of which are embraced by the Zambian constitution.³⁴

³²R. v. Epping and Harlow General Commissioners, ex p. Goldstraw [1983] 3 All E.R. 257, p. 262, per Sir John Donaldson M.R/ Order 53 rule 13 of the White book (1999 edition)

³³ Honorable Mr. K.G. Balakrishnan, Chief Justice of India Seminar on '*Judicial Review of Administrative Action*' New Delhi – August 24, 2009. Journal of Applied Sciences Research, 7(13): 2257-2265, (2009) :6

³⁴ Article 1 (4) Cap 1 of the Laws of Zambia provides "This Constitution shall bind all persons in the Republic of Zambia and all Legislative, Executive and Judicial organs of the State at all levels"

Considering the increase in the number of cases for Judicial Review and its vital role in keeping the powers of public officials and bodies performing public in check it is important that the Judicial Review system is analysed periodically to determine if it is achieving its intended objectives. This research is undertaken with the above reasoning forming the basis of the research.

Without an effective Judicial Review the concept of democratic governance and accountability is nothing more than an analgesic illusion³⁵. The law is not a stagnate concept; it is a dynamic and living concept.³⁶ In order for it to be feasible it has to undergo change reflecting the political and social changes in society otherwise it will be obsolete. Since the adoption of the White book (1999 edition) in 2002 by Act No 14 of 2002³⁷, there has been no innovative change to the law regulating the remedies, standing to institute an action and grounds upon which an action can be instituted in Judicial Review proceedings. For instance in the United Kingdom new grounds upon which an individual can commence Judicial Review proceedings have been formulated, grounds such as Legitimate Expectation and claims under the Human Rights of 1998.³⁸ In Nigeria due to the important role that political parties play in a democratic setting Judicial Review is attainable against such a private body.³⁹ There arises a need to address the lack change to reflect society's progress in Zambia and in this regard the research paper is devised to stimulate critical thinking and also as a genesis for reforms on the subject.

1.8 OBJECTIVES OF THE STUDY

³⁵ Fordham. Wiley, *Administrative Law Case Digest*. M. Chancery Law Publishing (1994), 19

³⁶ Anyangwe. C, *An Outline of the Study of Jurisprudence* (Lusaka: Unza Press. 2005),241

³⁷ Section 2 of the English Law (Extent of Application Amendment) Act Cap 11/Affirmed in Ruth Kumbi v Robinson Zulu SCZ 19 of 2009

³⁸ *Judicial Review: A short guide to claims in the Administrative Court*. Research Paper 06/44 (28th September 2006) 14

³⁹ *Internal Affairs of Political Parties and Judicial Review: An Expository Study of the Experience in Nigeria and Malaysia*, Journal of Applied Sciences Research.(2011) :1

The main objective of this research is to provide a critical evaluation of Judicial Review and its impact on the system of checks and balance in Zambia. To achieve this task, formulation of specific objectives is necessary and fundamental as they set the parameters of the research.

These specific objectives include the following.

- (a) To evaluate the Judicial Review system in Zambia and its functioning capability
- (b) To identify the flaws in the Zambian Judicial Review system.
- (c) To compare and contrast Judicial Review in Zambia and United Kingdom, United States of America and South Africa.
- (d) To come up with possible and working (pragmatic) solutions to counter the identified weaknesses.
- (e) To scrutinize the impact of the Judicial Review system on the system of checks and balances.

1.9 RESEARCH QUESTIONS

The following are the research questions:

- (a) Is the Zambian system for Judicial Review aptly functioning?
- (b) Is there need for Reform and if so what reforms need to be introduced?
- (c) What are the prevailing trends in other jurisdiction and can these trends be introduced into the Zambian context?
- (d) Is Judicial Review having the desired effect as a system employed to curb excess executive and executive actions?

1.10 RESEARCH METHODOLOGY

The research will mainly be qualitative and based on secondary information, namely; cases, statues, text books, journals, articles, paper presentations and student obligatory essays. Personal interviews were appropriate will be conducted with persons knowledgeable in Judicial Review.

CONCLUSION

This chapter introduced the concept of Judicial Review, it outlined the historical foundation and the general nature of the concept. The procedural aspects of Judicial Review such as the need to apply for leave for Judicial Review and the issue of standing were also espoused in the main context of the Chapter. The chapter also outlined the objectives of the research, the methodology and the the research questions adopted by the research. The next chapter focuses on the functionality/operation of Judicial Review with special emphasis on the grounds and remedies available in Judicial Review proceedings. The chapter also identifies the shortcomings of the Judicial Review system in Zambia.

CHAPTER TWO

2.0 THE COMPONENTS AND CHARACTERISTICS OF THE ZAMBIAN SYSTEM OF JUDICIAL REVIEW

2.1 INTRODUCTION

This chapter will focus on the following areas: (a) the rationale for having Judicial Review, (b) the Substantive aspect of Judicial Review that is the grounds for review and the remedies available to the successful applicant and (c) the specific nature of the Zambian Judicial Review system.

2.2 THE RATIONALE FOR JUDICIAL REVIEW.

To adequately determine if the Judicial Review system is functioning appropriately it is important to understand what the system is supposed to achieve in the first place and how it is supposed to accomplish that purpose. In this vein it is imperative to consider the basis for Judicial Review.

The Supreme Court Practice, 1999 edition, under Order 53/14/19 provides:

The remedy of judicial review is concerned with reviewing, not the merits of the decision in respect of which the application for judicial review is made, but the decision-making process itself. 'It is important to remember in every case that the purpose of [the remedy of judicial review] is to ensure that the individual is given fair treatment by the authority to which he has been subject and that it is not part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question.'. Thus, a decision of an inferior court or a public authority may be quashed (by an order of certiorari) where that court or authority acted without jurisdiction, or exceeded its jurisdiction, or failed to comply with the rules of natural justice in a case where those rules are applicable. The court will not, however, on a judicial review application act as a 'court of appeal' from the body concerned; nor will the court interfere in any way with the exercise of any power or discretion which has been conferred on that body, unless it has been exercised in a way which is not within that body's jurisdiction, or the decision is Wednesbury unreasonable. The function of the court is to see that lawful authority is not abused by

unfair treatment. If the court were to attempt itself the task entrusted to that authority by the law, the court would, under the guise of preventing the abuse of power, be guilty itself of usurping power.¹

The basis of the power of the High Court to review decisions of inferior courts, or public bodies or tribunals is that it can make such bodies do their duty and stop them doing things which they have no power to do. Thus, the High Court cannot determine, in an application for judicial review, whether the decisions by such bodies are right or wrong on their merits.

Accordingly in *Chiluba v The Attorney General*² the Supreme Court observed that the purpose of Judicial Review is not to provide an appeal procedure against decisions of public bodies on their merits, but to control the jurisdiction of public bodies by ensuring that they comply with their duties or by keeping them within the limits of their powers. For instance, when the High Court is reviewing a decision of a public body it will not admit evidence which is relevant to whether the decision is a reasonable one; but it will permit evidence which is relevant to whether the decision is one which the body had power to make or whether it was made in circumstances in which a reasonable body could have made it³. In *Sablehand Zambia Limited v Zambia Revenue Authority*⁴ the Supreme Court held that the Judicial Review remedy is not concerned with merits of the decision, but with the decision making process.

Chief Constable of North Wales Police -v- Evans [1982] 1 W.L.R. 1155 at 1173; [1982] 3 ALL.E.R. 141 at 154, per Lord Brightman.
(2003) Z. R. 22
SAKALA, CJ, in *Chiluba v The Attorney General* (2003) Z R 22
(2005) Z.R. 109

2.3 THE PRINCIPAL ASPECTS OF JUDICIAL REVIEW: THE GROUNDS AND THE REMEDIES AVAILABLE FOR JUDICIAL REVIEW.

2.3.1. THE GROUNDS FOR JUDICIAL REVIEW

In the case of *Council of Civil Service Unions v Minister for the Civil Service*⁵ Lord Diplock attempted to set out the main grounds for Judicial Review in a modern way:

Judicial review has I think developed to a stage today when, without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'. That is not to say that further development on a case by case basis may not in the course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of 'proportionality' which is recognised in the administrative law of several of our fellow members of the European Economic Community.

Aligning the grounds for judicial review into the above categories, further subcategories emerge.

Grounds that are now considered acceptable to bring claims for Judicial Review include:

2.3.1.1 ILLEGALITY

Lord Diplock confirmed that "by illegality as a ground for Judicial Review I mean that the decision maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question".⁶ Basically illegality means want or excess of jurisdiction. If an inferior court or tribunal or a public authority charged with a public duty acts without jurisdiction or exceeds its jurisdiction Judicial Review will lie. Where the decision of an administrative authority or tribunal is founded, wholly or partly, on an error of law, the authority or tribunal has acted outside its jurisdiction and accordingly its decision is liable to be quashed⁷.

⁵ [1985] A. C. 374 at 410.

⁶ *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374

⁷ *Anisminic Ltd v. Foreign Compensation Commission* [1969] 2 A.C. 147

The ground for Illegality can be invoked in the following circumstances: (i) Decision maker acting ultra vires⁸, (ii) Unlawfully delegating power or fettering discretion⁹ or the decision maker taking into account irrelevant considerations.

2.3.1.2 IRRATIONALITY/ THE WEDNESBURY PRINCIPLE:

Decisions of persons or bodies which perform public duties or functions will be liable to be quashed or otherwise dealt with by an appropriate order in Judicial Review proceedings where the court concludes that the decision is such that no such person or body properly directing itself on the relevant law and acting reasonably could have reached that decision.¹⁰ Lord Greene provided that:-

Wednesbury unreasonableness' [...] it applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system.¹¹

Under this ground the decision maker is obliged to act reasonably in the exercise of his powers, this means that in making the decision he must apply logical or rational principles.

2.3.1.3 PROCEDURAL IMPROPRIETY

The ground for Procedural Impropriety will arise in the following circumstances: (a) Where there is an error of law on the face of the record¹², (b) a failure to comply with the rules of natural justice. Where the rules of natural justice apply and the decision has been reached in breach of

⁸ R v London Boroughs Transport Committee, ex p Freight Transport Association Ltd [1991] 1 WLR 828

⁹ R v Secretary of State for the Home Department, ex p Venables [1998] AC 407

¹⁰ Associated Provincial Picture Houses Limited v. Wednesbury Corporation [1948] 1 K.B. 223

¹¹ Lord Greene in the GCHQ case [1985] AC 374

¹² Baldwin and Francis Limited v. Patents Appeal Tribunal [1959] A.C. 663

those rules judicial review will lie¹³. Broadly the rules of natural justice embody a duty to act fairly. Whether those rules apply and the extent of the duty depends upon the particular type of case concerned. The third instance when the ground can be invoked is when the decision maker fails to give adequate reasons. In *R v Ministry of Defence, ex parte Murray*¹⁴ it was recognised that while the law did not at present recognise a general duty to give reasons, there was a perceptible trend towards an insistence on greater openness in the making of administrative decisions.

2.3.2 REMEDIES AVAILABLE IN JUDICIAL REVIEW PROCEEDINGS

The question of remedies is often critical in Judicial Review proceedings, as it may determine not only whether it is worthwhile bringing a claim, but also whether permission will be granted to bring the claim. A claimant may seek one or more of the six forms of final relief, all of which are discretionary. The following are the remedies available to the successful claimant:

2.3.2.1 CERTIORARI

Certiorari is an order by the High Court for a decision of an inferior court or tribunal or of a public authority to be quashed¹⁵. In *R v Manchester Legal Aid Committee Ex parte R A Brand & Co Ltd*¹⁶ it was held that:

The writ of certiorari is a very old and high prerogative writ drawn up for the purpose of enabling the Court of King's Bench to control the action of inferior courts and to make it certain that they shall not exceed their jurisdiction; and therefore the writ of certiorari is intended to bring into the High Court the decision of the inferior tribunal, in order that the High Court may be certified whether the decision is within the jurisdiction of the inferior court.

¹³ *Ridge v. Baldwin* [1964] A.C. 40

¹⁴ [1998] COD 134

¹⁵ Order 53 rule 19 of the White Book (1999 edition)

¹⁶ [1952] 1 All ER 480

Where in Judicial Review proceedings the court concludes that a decision which has been made by a public authority should be set aside, certiorari would normally be the appropriate form of order¹⁷. Where the court quashes a decision, it has power to remit the matter to the court, tribunal or authority concerned with a direction to reconsider it and to reach a decision in accordance with the judgment given by the court in the judicial review proceedings¹⁸. In *Sablehand Zambia Limited v Zambia Revenue Authority*¹⁹ the Supreme Court held that a decision of an inferior court or public authority may be quashed by an order of certiorari where that court or authority acted:-

- (i) without jurisdiction; or
- (ii) exceeded its jurisdiction; or
- (iii) failed to comply with the rules of natural justice where those rules are applicable; or
- (iv) where there is an error of law on the face of the record; or
- (v) the decision is unreasonable in the *Wednesbury* sense, namely, that it was a decision which no person or body of persons properly directing itself on the relevant law and acting reasonably could reasonably make.

2.3.2.2 MANDAMUS

Mandamus is an order requiring an inferior court or tribunal or a person or body of persons charged with a public duty to carry out its judicial or other public duty²⁰. An order of mandamus cannot be made against the State but it will lie against an officer of the State who is obliged by

¹⁷ Order 53 rule 19 of the White Book (1999 edition)

¹⁸ Order 53, rule 9(4)

¹⁹ (2005) Z.R. 109

²⁰ Order 53/1-14 of the White Book (1999 edition)

statute to do some ministerial or administrative act which affects the rights or interests of the applicant²¹.

2.3.2.3 PROHIBITION

Prohibition is an order restraining an inferior court or tribunal or a public authority from acting outside its jurisdiction²². The granting of an order of prohibition is discretionary.²³

2.3.2.4 DECLARATIONS AND INJUNCTIONS

Declarations and injunctions may only be granted where they are just and convenient in all the circumstances²⁴. On an application for a declaration or injunction the court is given a wide discretion subject to certain specified factors. Under O.53, r.1 (2)²⁵ the court must have regard to the following specified factors, namely;

- (a) the nature of the matters in respect of which relief may be granted by way of a prerogative order,
- (b) the nature of the persons and bodies against whom relief may be granted by way of such an order, and
- (c) all the circumstances of the case.

The above outlined factors suggest that, if the court should conclude that the grant of an appropriate prerogative order will effectively give the applicant the relief he seeks or should have, it would lean against the grant of a declaration or injunction, and simply grant the appropriate prerogative order.

²¹Order 53/1–14/21 of the White Book (1999 edition)

²²Order 53/1–14 of the White Book (1999 edition)

²³Halsbury's laws of England, Vol. 11, 3rd Edition paragraph 122

²⁴Judicial Review: A Short Guide To Claims In The Administrative Court: Research Paper 06/4428 September 2006 p.12

²⁵The White book (1999 edition)

However in Zambia the State Proceedings Act²⁶ prohibits injunctions against the State. Section 16 provides:

(1) In any civil proceedings by or against the State the court shall, subject to the provisions of this Act, have power to make all such orders as it has power to make in proceedings between subjects, and otherwise to give such appropriate relief as the case may require:

Provided that-

(i) where in any proceedings against the State any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties; and

(ii) in any proceedings against the State for the recovery of land or other property, the court shall not make an order for the recovery of the land or the delivery of the property, but may in lieu thereof make an order declaring that the plaintiff is entitled as against the State to the land or property or to the possession thereof.

(2) The court shall not in any civil proceedings grant any injunction or make any order against a public officer if the effect of granting the injunction or making the order would be to give any relief against the State which could not have been obtained in proceedings against the State.²⁷

Therefore in a Judicial Review action against the State the only viable mechanism is to plead for a ruling of *certiorari* (blocking an action) or *mandamus* (obliging action) with regard to a government decision. The case in point for the above proposition is the *Attorney-General v Steven Luguru*,²⁸ when in an action contrary to section 16 of the State Proceedings Act was nullified.

2.3.2.5 DAMAGES

Damages are not available in judicial review proceedings except where another established cause of action is available for which damages may be sought where such a cause of action accrues, the

²⁶ Chapter 71 of the Laws of Zambia/ confirmed in *The Attorney-General v Steven Luguru* (2001) Z. R. 20

²⁷ Section 16 of the State Proceedings Act Chapter 71 of the Laws of Zambia

²⁸ (2001) Z. R. 20

claim for judicial review may include a claim for damages to avoid the need to bring parallel proceedings.²⁹

It is important to note that all the above remedies are discretionary in nature. that is it is up to the court to decide whether to grant the reliefs sought or not, or even to substitute the applied for reliefs with those which the court considers just and appropriate.

2.4 THE MECHANISM OF THE ZAMBIAN JURISPRUDENCE OF JUDICIAL REVIEW.

The Zambian jurisprudence of Judicial Review is basically a duplication of the principles articulated in the British cases nonetheless an analysis of the working capability of the Zambian Judicial Review system will involve scrutinizing how the duplicated principles have been applied in the Zambian context. Some of the cases that illustrate the above proposition include:

2.4.1 Dean Mung'omba and Others V Peter Machungwa and the Attorney General and Ruth Kumbi v Robinson Kaleb Zulu.

Justice Chirwa, in the Supreme Court case of *Dean Mung'omba and others v Peter Machungwa and the Attorney-General*³⁰ observed that:

it is accepted that there is no rule under the High Court Rules under which Judicial Review proceedings can be instituted and conducted and by virtue of section 10 of the High Court Act, Cap 27, the court is guided as to procedure and practice to be adopted.

²⁹ Richard Gordon. *Judicial Review and Crown Office Practice* (London: Sweet & Maxwell, 1999), 56.

³⁰(2003) Z. R. 3

Having accepted that there is no practice and procedure prescribed under our Rules, we follow the practice and procedure for the time being observed in England in the High Court of Justice. The practice and procedure in England is provided for in Order 53 of the Rules of the Supreme Court (RSC). Order 53 is very detailed. In it one will find the law as on what basis judicial review is founded; the parties; how to seek the remedies and what remedies are available. Under the parties, care is taken not only as to who can initially commence the proceedings, but also who can possibly join or be joined. The Order further provides the sort and form of evidence required at the hearing.

The point emanating from Justice Chirwa is that the Zambian law on Judicial Review is based on the British model even before the enactment of local legislation. More recently the Supreme Court in *Ruth Kumbi v Robinson Kaleb Zulu*³¹ expressed that with the insertion of (e) section 2 of the of the English Law (Extent of Application Amendment Act) No. 14 of 2002 the 1999 edition of the White book has been incorporated into the Zambian rules of procedure. Now by statute, the Zambian courts are obliged to follow all rules of practice and procedure as stated in the 1999 edition of the White Book. Although this decision was later reversed by parliament the gist of the submission is that the law regarding Judicial Review in Zambia is based on the White Book (1999 edition).³²

2.4.2 Zambia Democratic Congress v Attorney General.

In *Zambia Democratic Congress v Attorney General*³³ the Supreme Court held that:

The Constitution of Zambia itself gives parliament powers to make laws. Parliament cannot be equated to an inferior tribunal or body when it is exercising its legislative powers, although in appropriate cases, actions but not by Judicial Review, can be commenced against it.

However in *The Attorney-General v The Speaker of The National Assembly*³⁴ a later case the Supreme Court held:

The High Court of Zambia has Constitutional Jurisdiction to hear applications for Judicial Review in matters involving parliament.

³¹(2009) Z. R 19

³² Mulenga, F. 'The application of Foreign Laws in Zambia' Lusaka (unpublished article 2011) : 21

³³ (2002) Z. R 2

³⁴ (2003) Z. R 6

Recourse to the above apparent contradiction can be had by applying the principle of “stare decisis” meaning that in event of two contradicting decisions by the same Court on the same subject matter the most recent decision will prevail³⁵.

2.4.3 New Plast Industries v The Commissioner of Lands and The Attorney-General

Another feature of Judicial Review that the Zambian Courts have emphasised upon is that the reliefs sought does not determine the mode of commencement of the action in question. In *New Plast Industries v Commissioner of Lands and The Attorney-General*³⁶ the Supreme Court dismissed the application on the ground that the application for Judicial Review was irregular. It was held that it is not entirely correct that the mode of commencement of any action largely depends on the reliefs sought. Furthermore in *Access Financial Services Limited and Access Leasing Limited v Bank of Zambia*³⁷ the Supreme Court rejected the argument that Judicial Review Process can be resorted to on grounds that it is wider in terms of remedies.

2.4.4 Frederick Jacob Titus Chiluba V Attorney-General

In *Frederick Jacob Titus Chiluba V Attorney-General*³⁸ the Supreme Court held:

- (1) The hearing of an application for Judicial Review does not start from the day set for the motion. The application starts with notice of application for leave to apply for Judicial Review.
- (2) The remedy of Judicial Review is concerned with reviewing, not the merits of the decision in respect of which the application for Judicial Review is made but the decision-making process itself.
- (3) The purpose of Judicial Review is to ensure that an individual is given fair treatment by the authority to which he has been subjected and that it is not part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question.
- (4) The court will not on Judicial Review application act as a “court of appeal,” from the body concerned, nor will the court interfere in any way with the exercise of any power or discretion which has been conferred on that body, unless it has been exercised

³⁵ *Match Corporation Limited And Development Bank Of Zambia And The Attorney General* (1999) Z. R. 3
³⁶ (2001) Z. R. 8

³⁷ (2008) Z. R. 161

³⁸ (2003) Z. R. 22

in a way which is not within that body's jurisdiction or the decision is *Wednesbury* unreasonable.

(5) When the High Court is reviewing a decision of a public body it will not admit evidence which is relevant whether the decision is reasonable one; but it will permit evidence which is relevant to whether the decision is one which the body had power to make or whether it was made in circumstances in which a reasonable body could have made it.

(6) In all applications for Judicial Review, the principal source of evidence is from affidavits and the only witnesses that may give *viva voce* evidence on applications for Judicial Review, are the deponents of the affidavits on record.

From the above cited cases it can be inferred that the Zambian jurisprudence has reproduced a system of Judicial Review that is simply following the law and jurisprudence as laid down in England with no departure at all.

The beseeching question therefore is: in which area is the Zambian system of Judicial Review lagging behind and how have other jurisdiction resolved this paradox.

CONCLUSION

The first part of this chapter outlined the components and characteristics of the Zambian Judicial Review System. The traditional grounds and remedies were elaborated. The second part of the chapter exemplified the specific nature of the Judicial Review as practiced in Zambia by adopting a decided case analysis. Several factors emerged from the chapter. Firstly the grounds for review are restricted to the original three grounds of illegality, irrationality and procedural impropriety as articulated by Lord Diplock in *Civil Service Unions v Minister for the Civil*. Secondly the remedies available to the successful applicant are discretionary and certain remedies such as injunctions and specific performances are not available against the State. Finally the Zambian Judicial Review jurisprudence is basically a replica of the English

jurisprudence of Judicial Review. The next chapter evaluates in more detail the functioning capability the Judicial Review system.

CHAPTER THREE

3.0 A CRITIQUE OF THE ZAMBIAN SYSTEM OF JUDICIAL REVIEW

3.1 INTRODUCTION

This chapter focuses on identifying areas in the Zambian Judicial Review system that are deficient and how the identified deficiencies have been addressed in other jurisdictions. The following are some of the identified areas where the Zambian law is lagging behind:

3.2 PROCEDURAL ISSUES

The gist of this submission is that the Zambian judicial Review system exhibits certain procedural traits that may have a bearing on the quality of the whole system and these include the following:

3.2.1 THE NEED FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

Rule 3(1) of Order 53¹ provides that:

No application for judicial review shall be made unless the leave of the Court has been obtained in accordance with this rule.

Leave is not granted where the High Court considers that the applicant does not have sufficient interest in the matter, Furthermore leave is not granted if the applicant has not exhausted alternative remedies such as right of appeal available to him.² The High Court has discretion to grant leave. Rule 3 (2)³ provides that an application for leave must be made ex parte to a Judge, further the Judge may determine the application without a hearing, unless a hearing is requested

¹ The White Book (1999 edition)

² 3(7) of Order 53 The White Book (1999 edition)

³ Order 53 the White book (1999 edition)

in the notice of application, and need not sit in open Court. It is submitted that the above rules lack transparency and vest discretion on the Judge in the grant of leave to apply for Judicial Review. It is possible that the High Court will shut out a number of legitimate claims or actions on the leave stage. For instance on the basis of alternative remedies in actions arising out of violations of the constitution and an act of parliament. An aggrieved person has a choice; he may proceed by way of petition under Article 28 of the Constitution or seek Judicial Review. Article 28 provides:

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

Because of the alternative to proceed under Article 28 it is possible that leave can be refused to a legitimate claim. This is because the applicant has an alternative way of seeking redress available to him or her, a requirement under rule 3 of Order 53 is that an applicant must have exhausted all available avenues.

Experiences in Canada, Scotland and New Zealand were no requirement for leave before an application Judicial Review would seem to indicate that the need for leave is not of essence⁴. Not disregarding the valued opinion of the judges it is submitted that the justification for leave is unfounded both in principle and in law. Professor Wade⁵ seems to agree with the above proposition when he stated:

In principle it seems wrong to impose this special requirement on proceedings against the public authority that ought not to be treated more favourable than other litigants.

⁴ Corbett Haselgrove, *Judicial Review Solicitors Journal* SJ Vol. 143 No.35 Spurin (2004): 8

⁵ Wade & Forsyth, *Administrative Law*, 9th ed. (London: Oxford 2004): 5

The solution therefore is to have clear set of rules that should be followed when granting of refusing leave to apply for Judicial Review.

3.2.2 LOCUS STANDI

In *Mwamba v Attorney General*⁶ the Supreme Court noted that in considering sufficient interest there is need to balance two conflicting public interest that and these are (i) desirability of encouraging individuals to participate actively in the enforcement of the law and (ii) undesirability of encouraging meddlesome private citizens to move courts in matters that do not concern them.

Interesting to note that even though Order 53 emphasizes the requisite for sufficient interest it does not provide for a definition of sufficient interest. English case law provide for guidelines.

The government admitted that there restrictive provisions regarding standing in Zambia.⁷

The advantages of not having a fixed sufficient interest principle outweighs the advantages of having a watertight principle because liberal rules on standing means that interest group and other bodies can seek Judicial Review when the individual concerned can not commence litigation owing to various reason such ignorance or poverty.

In Canada the position is such that an individual who may not have a personal or direct interest in a public matter but can still have standing if the issue in contention is justiciable.⁸ It is

⁶ (1993-1994) Z R 10

⁷ *Governance: National Capacity Building Programme for Good Governance in Zambia* (31st March 2000) :78

⁸ *Finlay v Canada (Ministry Finance)* 1956 2 SCR 607/ Solicitors Journal SJ Vol. 143 No.35 Spurin (2004) : 85

submitted that for the application to be heard the deciding factor in determining sufficient interest should be public interest prevailing over procedural requirements.

3.3 APPLICATION OF ENGLISH LAW

As articulated in the previous chapter Order 53⁹ is the principle source of the law on Judicial Review. The White Book has been supplemented and interpreted by English decided cases. Order 53 has been introduced into the Zambian context in its entirety by virtue of section 10 of the High Court which provides:

The jurisdiction vested in the Court shall, as regards practice and procedure, be exercised in the manner provided by this Act and the Criminal Procedure Code, or by any other written law, or by such rules, order or directions of the Court as may be made under this Act, or the said Code, or such written law, and in default thereof in substantial conformity with the law and practice for the time being observed in England in the High Court of Justice.

The courts in Zambia are reluctant to depart from the law contained in order 53 to give effect to justice. For instance in *Derrick Chitala v Attorney General*¹⁰ an appeal against a decision of a Judge in the High Court who had summarily refused to grant leave to bring Judicial Review proceedings because the relief sought was not available against the President and his cabinet. This proposition was upheld by the Supreme Court. The Supreme Court articulated that the decision could not be quashed on the grounds of illegality, irrationality and procedural impropriety. The resulting effect of such a position is that the law becomes very rigid and inflexible to meet the changing needs of society.

⁹ The White Book (1999 edition)

¹⁰ (1995-1997) Z.R. 91.

There have been calls for a local enactment of legislation to regulate Judicial Review in Zambia. For instance in the *Mung'omba Constitution Review Commission Report*¹¹ the Commission recommended that to enhance the effectiveness of the remedy of Judicial Review, it should be explicitly enshrined in the Constitution. The state of affairs is that at present Judicial Review is based on (a) the Supreme Court rules of Procedure (the White Book 1999 edition), (b) Article 94 of the Constitution providing for unlimited jurisdiction of the Court and (c) judicial decisions passed in the United Kingdom. It is submitted that there is no clear express Constitutional or Act of Parliament that give force to Judicial Review proceedings. If Judicial Review were to be given express Constitutional recognition its impact would increase.

3.4 INNOVATIVE GROUNDS FOR JUDICIAL REVIEW

The grounds upon which a claimant can bring a Judicial Review in Zambia is still limited to the grounds formulated by Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service*.¹² It is the author's submissions that the grounds of illegality, irrationality and procedural impropriety can no longer be auspiciously relied upon as the only grounds upon which a claimant can commence Judicial Review proceedings. Contemporary grounds for Judicial Review have been embraced in other jurisdictions. Such grounds include the following:

3.4.1 LEGITIMATE EXPECTATION

The doctrine of 'legitimate expectations' which has traditionally been used in litigation between private parties has also been recognized in the public law setting. This concept made its

¹¹ *The Mung'omba Constitution Review Commission Report*, Lusaka (29th December 2005) 157

¹² *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935, HL.

appearance in *Schmidt v. Secretary of State*.¹³ This doctrine is based on the premise that a person may have an expectation of being treated in certain way by an administrative authority even though he has no legally protected right to receive such treatment¹⁴. In this respect, Wade¹⁵ has emphasized the importance of this doctrine in the following words:

In many cases legal rights are affected, as where property is taken by compulsory purchase or someone is dismissed from a public office. But in other cases, the person affected may have no more than an interest, a liberty or an expectation a 'legitimate expectation' which means reasonable expectation, can equally well be invoked in any of many situations where fairness and good administration justify the right to be heard.

However, the concept is limited in its application in that the legitimacy of a particular expectation and the related claim is a question of fact which can be decided in light of larger public policy related concerns. It is open to the government to frame and reframe its policies, which may result in denying certain individuals or a class of persons the benefits which they had been previously receiving¹⁶.

Although the principle of Legitimate Expectation has been around since the 1970s it has not been incorporated into the Zambian jurisprudence and no local literature on the subject is forthcoming. It is submitted that the lack of recognition of the principle is a disservice to the interest of justice.

3.3.2 PROPORTIONALITY.

¹³[1969] 1 All ER 904

¹⁴ Honorable Mr. K.G. Balakrishnan, Chief Justice of India Seminar on 'Judicial Review of Administrative Action' New Delhi – August 24, 2009. Journal of Applied Sciences Research, 7(13): 2257-2265, (2009) : 8

¹⁵ Wade and Forsyth, *Administrative Law*. 7th ed. (London: Oxford University Press, 1994) : 465

¹⁶ Honorable Mr. K.G. Balakrishnan, Chief Justice of India Seminar on 'Judicial Review of Administrative Action' New Delhi – August 24, 2009. Journal of Applied Sciences Research, 7(13): 2257-2265, (2009) : 9

In *Council of Civil Service Unions v Minister for the Civil Service*¹⁷ an indication was given that further grounds for review, such as proportionality might emerge in due course on a case-by-case basis. The doctrine of proportionality has taken firm roots in the jurisprudence of, for example, the United States of America, Canada and the law of many European countries.¹⁸ Both the European Court of Justice of the European Community (ECJ) and the European Court of Human Rights are increasingly adopting proportionality as a test against which to measure the legality of actions of authorities.

The doctrine of proportionality is one which confines the limits of the exercise of power to means which are proportional to the objective to be pursued. It is a powerful tool used to limit the use of power and prevent its abuse thus introducing a requirement of necessity.

3.5 INADEQUACY OF REMEDIES

It is submitted that the current remedies available to the successful applicant for Judicial Review are inadequate. This is based on the fact that enforcement of coercive orders against the State, local authorities and other public institutions is barred by statute. For instance section 16 (2) of the State Proceedings Act¹⁹ Provides:

The court shall not in any civil proceedings grant any injunction or make any order against a public officer if the effect of granting the injunction or making the order would be to give any relief against the State which could not have been obtained in proceedings against the State.

¹⁷ [1985] AC 374

¹⁸ Corbett Haselgrove, *Judicial Review*. Solicitors Journal SJ Vol. 143 No.35 Spurin (2004) : 5

¹⁹ Chapter 71 of the Laws of Zambia.

The effect of section 16 of the State Proceedings Act is that injunctions and declarations against the State are unattainable. The rationale for the above proposition is that the State cannot be bankrupt and it would pay judgment creditors and most important to protect the State from mischievous disruptions in its discharge of functions²⁰. However, in Zambia, not only has the situation deteriorated to levels where the immunity has been abused excessively, thus, contributing to high levels of domestic debt but it has also resulted in loss of confidence by suppliers in the State and other public institutions²¹. This immunity may be inconsistent with the fundamental right and interests of individuals and institutions that cannot enjoy the fruits of court judgments.

In relation to remedies it is worth mentioning that damages are not available in Judicial Review proceedings except where damages are available in a parallel cause of action.²² Therefore in action for Judicial Review against the State where only an injunction or an award for damage will do justice less effective remedies will be granted to the successful applicant.

3.6 ATTEMPTS TO EXCLUDE JUDICIAL REVIEW

The Zambian jurisprudence on Judicial Review is also characterized by attempts to exclude the jurisdiction of the Courts by the executive and legislature through introducing legislation that attempt to exclude or oust the possibility of Judicial Review.

²⁰ *The Mung'omba Constitution Review Commission Report*, (29th December 2005) : 158

²¹ *The Mung'omba Constitution Review Commission Report*, (29th December 2005) : 159

²² Richard Gordon QC, *Judicial Review and Crown Office Practice*, (London : Sweet & Maxwell, 1999). P. 56

The case in point for the above proposition is *ZNPF BOARD v Attorney General*.²³ The High Court held:

- (i) Section 101 (3) of the Industrial Relations Act is an effective ouster clause.
- (ii) Section 101 (3) of the Industrial Relations Act-excludes the power of the High Court to issue orders of certiorari removing the proceedings or decisions of the Industrial Relations Court into the High Court for purposes of quashing the same.

More recently in *Sondashi v Attorney General*²⁴ the Supreme Court held:

(i) In terms of Section 26(2) of the Firearms Act, Cap 110, of the Laws of Zambia, the Registrar of Firearms has powers vested in him to either register an applicant or refuse to register an applicant without giving any reason for such refusal. However, the proviso to Section 26(2) aforesaid circumscribes the discretion of the Registrar.

(ii) Where the legislature has decided that certain matters should be solely for the executive, the court has no role to play as such issues contain no legal issues to be resolved.

The true position in Zambia regarding ouster clauses is unclear more if one bears in mind Article 94 of the Constitution granting unlimited jurisdiction to the High Court and the holding in *Zambia National Holdings Limited And United National Independence Party v. The Attorney-General*²⁵ that although Article 94 of the constitution gives the High Court unlimited jurisdiction that court is bound by all the laws which govern the exercise of such jurisdiction.

The effect of ouster clauses is that they deny Courts their Constitutional role of policing the decision of public bodies. It is for this reason that exclusions should be construed by the court in a restrictive fashion, so as not to deprive the courts of their ability to exercise a supervisory jurisdiction. According to Corbett²⁶ ouster clauses have not been too successful since the courts seek to retain jurisdiction wherever possible and will adopt a narrow meaning of ouster clauses.

²³ (1983) Z.R. 140

²⁴ (2000) Z R 27

²⁵ (1994) Z R 22

²⁶ Corbett Haselgrove, *Judicial Review*, Solicitors Journal SJ Vol. 143 No.35 Spurin (2004): 8

The presumption unless clearly stated to the contrary is that an ouster clause prevents appeals mechanisms but does not prevent Judicial Review²⁷. What is desirable is not the complete ouster of jurisdiction but setting a time limit when actions can be commenced.

Other attempts to exclude the High Court's jurisdiction to entertain Judicial Review proceedings include repetitious assertions by the National Assembly that it is not subject to Judicial Review. For instance in *Re Nalumino Mundia*,²⁸ the main thrust of the case was that the petitioner applied to the High Court for an order of certiorari directed to the Chairman of the Standing Orders Committee of the National Assembly of the Republic of Zambia requiring him to remove into court, for the purpose of having it quashed, an order suspending the applicant from the National Assembly in violation of its own standing orders. The High Court held that it does not have power to interfere with the exercise of the jurisdiction of the National Assembly in the conduct of its own internal proceedings.

However the Supreme has on occasion held a narrow interpretation of the above principle by holding that where a duty is created by the Constitution, the Speaker of the National Assembly is subject to the supervisory jurisdiction of the Court for failure to perform such a duty.²⁹ Furthermore in *Fred M'membe v The National Assembly*³⁰ and in *Dr. Ludwig Sondashi v The Attorney General and the Speaker of the National Assembly*³¹ the High Court in both cases held that the National Assembly was subject to Judicial Review by the High Court.

²⁷ Corbett Haselgrove, *Judicial Review*, Solicitors Journal SJ Vol. 143 No.35 Spurin (2004): 8

²⁸ (1971) Z.R. 70

²⁹ in *The People v The Speaker of The National Assembly* (1970) ZR 70

³⁰ (1995-1997) Z R 38

³¹ (1998) Z R 111

From the above discourse the need for reform in the Judicial Review system is undeniable and overdue. However the above reforms cannot in be implemented in isolation. An important precondition for an effective Judicial Review system is the concept of an independent judiciary. The importance of the concept of the independence of the Judiciary has been internationally recognised, as is shown by United Nations Basic Principles of the Independence of the Judiciary³². Article 2 provides that:

The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influence, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

The importance and relationship of an independent Judiciary to the principle of Judicial Review and checks and balances will be discussed in the next Chapter.

CONCLUSION

This chapter identified and analyzed the areas in the *Zambian Judicial Review* system that could be improved upon. There areas included procedural issues such as the need to obtain leave before application for Judicial Review, the enactment of an Act of parliament for regulating Judicial Review and the history and current position of ouster clauses. The inevitable conclusion is that the Judicial Review system in Zambia is far from perfect. Until the concerns raised in the chapter

³² United Nations Basic Principles of the Independence of the Judiciary (1985)

are addressed the system will continue operating moderately. The next chapter will focus on evaluating the impact of the Judicial Review on the system of checks and balances in Zambia.

CHAPTER FOUR

4.0 THE IMPACT OF JUDICIAL REVIEW ON THE SYSTEM OF CHECKS AND BALANCES IN ZAMBIA

4.1 INTRODUCTION

This chapter analyzes the impact of the Zambian Judicial Review system on the system of checks and balances. The chapter firstly defines the concept of checks and balances. An assessment of the impact is discussed followed by an outline of the independence of the Judiciary. The conclusion to the chapter will highlight the main points of the chapter.

4.2 SYSTEM OF CHECKS AND BALANCES

The system of checks and balances is a component of the principle of separation of powers. Separation of power means that the powers of government are divided into three branches: a legislature for making the laws, an executive for enforcing the laws, and a judiciary for deciding cases under the laws.¹ Chipman in justifying the principle of separation articulated:

There are very obvious reasons, why these powers should be committed to separate departments in the state, and not be entrusted unitedly to one man, or body of men. Different abilities are necessary for the making, judging, and executing of laws. . . . To commit their exercise to a single man, or body of men, essentially constitutes a monarchy, or aristocracy. They have it in their power, either in the enacting, the interpretation, or the execution of the laws, to skreen [screen] themselves, and every member of their body, from account or punishment. The situation itself suggests to them, views and interests, different from those of the people, and leaves no common judge between them. It places them, in respect to the people, in that state of independence, which is often called a state of nature. In such case, the people, hopeless under oppression [domination], sink into a state of abject [hopeless] slavery, or roused

¹ Volkmer, Walter E. *American Government*. 8th ed. (Upper Saddle River, New Jersey: Prentice Hall, 1998) : 9

to a sense of their injuries, assume their natural right, in such situation, oppose violence to violence, and take exemplary [appropriate] vengeance of their oppressors.²

The system of checks and balances is one of the ways in through which the principle of separation of power is realised. Essentially checks and balances are essentially measures and mechanisms calculated to inhibit the tendencies for the excessive use of power and regulate the exercise of discretionary authority of the institutions of governance within the constitutional provisions and political culture of a country³. Checks and balances are, moreover, intended to constrain the dominance of one institution, over the other institutions and agents of governance. In a democracy good governance requires enduring and dynamic checks and balances between all the major institutions of government and their respective agencies⁴.

In a constitutional democracy like Zambia, the principle of separation of powers is essential in ensuring equitable distribution of power and effective checks and balances among the three organs of the state which, in turn, enhances good governance and accountability.⁵ Separation of powers does not mean that the three organs of the state should be wholly separated from each other. Rather, it implies that they should operate in concert, but with “checks and balances” that ensure that none of them encroaches on the legitimate domain of the other.⁶

The doctrine of Separation of Powers is not explicitly enshrined in the constitution of the Republic of Zambia. However, there are several constitutional and legislative provisions which give effect to the doctrine.

² Volkomer, Walter E. *American Government*. 8th ed. (Upper Saddle River, NJ: Prentice Hall, 1998) : 12

³ Bratton, Michael. *Democratic Experiments in Africa: Regime Transitions in Comparative Perspective*. (New York, NY: Cambridge University Press, 1997) 1.

⁴ Bratton, Michael. *Democratic Experiments in Africa: Regime Transitions in Comparative Perspective*. (New York: Cambridge University Press, 1997) : 12.

⁵ Republic of Zambia *The Mung'omba Constitution Review Commission Report*. Lusaka. (29th March 2005) : 247.

⁶ Republic of Zambia *The Mung'omba Constitution Review Commission Report*. Lusaka. (29th March 2005) :434.

The Constitution⁷ which is the supreme law of the land provides in Article 1 (3) that:

This Constitution shall bind all persons in the Republic of Zambia and all Legislative, Executive and Judicial organs of the State at all levels.

This means that the constitution embodies principle of separation of power. Zambia is a constitutional democracy with three organs of the state, namely, the executive, the legislature and the judiciary. This is further evidenced by Articles 33, 62 and 91 which provide for the executive, legislative and judicial functions of the government clearly among the three organs of government. The above proposition implies that the constitution envisaged the principle of separation of power to be among the democratic tenets embraced by Zambia.

Certain provisions of the Zambian Constitution embrace the doctrine of checks and balances, for instance in checking the executive, the National Assembly is empowered to impeach the President in instances where he violates the constitution or for gross misconduct.⁸ The actions of the executive arm of government are checked by the National Assembly through the oversight role of the National Assembly. For instance Article 55 providing for the appointment of the Attorney General by the President is subject to approval by the National Assembly so are the appointments of High Court and Supreme Court judges.

4.3 ASSESSMENT OF JUDICIAL REVIEW ON CHECKS AND BALANCES

⁷ Chapter 1 of the Laws of Zambia

⁸ Article 37 of the Constitution of Zambia

The Courts through the process of Judicial Review have subjected a number of both executive and legislative decisions to scrutiny hence playing its role in checking the actions of the other branches.

4.3.1 JUDICIAL REVIEW OF EXECUTIVE AND LEGISLATIVE ACTIONS

The principle of Judicial Review of administrative action is firmly established in Zambia.⁹ The courts have dealt with many cases involving the President, Ministers and other executive officials, wherein plaintiffs have alleged abuse of power by the officials concerned. One such case is *Roy Clark v Attorney General*.¹⁰ This was an application against by the Minister of Home Affairs to deport the applicant pursuant to section 26 of the Immigration and Deportation Act. The High Court held that the decision to deport the applicant violated the Constitution and hence quashed. Appeal to this judgment to the Supreme was dismissed.¹¹

In *Fred M'membe v The National Assembly*¹² parliament decided to exercise judicial powers in adjudicating and imposing an infinite prison sentence on journalists that were perceived to have violated its privileges. The journalists wrote a contemptuous article about the conduct of the members of the National Assembly. The High Court held that the National Assembly had no powers of adjudication under the constitution as such powers are constitutionally lodged in the judiciary. In another case, *Dr. Ludwig Sondashi, MP v The Attorney General and the Speaker of*

⁹ John Sangwa. *The Extent of Discretion in Public Law Remedies in Zambia*. Paper presented to a Seminar of Judges held at Manchichi Bay, Siavonga from 12-18th (December 1999) : 5

¹⁰ (2004) Z. R. 03

¹¹ (2008) Z. R. 38

¹² (1996) Z. R. 38

*the National Assembly*¹³ the High Court quashed a decision of the National Assembly to suspend the applicant because of some remarks he had made to the press in the wake of the abortive coup army attempt of October 1997. The Court held that his constitutional right to freedom of expression had been violated.

4.3.2 LIMITATIONS ON THE IMPACT OF JUDICIAL REVIEW SYSTEM ON SYSTEM OF CHECKS AND BALANCES IN ZAMBIA

The effectiveness of the separation of powers and mechanisms for checks and balances in Zambia is not unquestionable. Two reasons can be advanced to support this proposition. Firstly, the current constitutional and legislative framework makes it difficult for both the judiciary and the legislature to provide effective checks and balances on the powers and functions of the executive arm of the state.¹⁴ With regard to the appointment of judges, it can be argued that the fact that judges are appointed by the President of the Republic raises the possibility that judges might not be free to pass a fair judgment against the appointing authority. This is aggravated by the fact that instead of giving effect to the autonomy of the Judiciary as stipulated in Article 91(3) of the Constitution, the Judicature Administration Act¹⁵ clearly and loudly makes the Judiciary subservient to the Presidency in matters related to administration in general, the appointment of certain members of the Judicature and staff, terms and conditions of service, and the exercise of disciplinary powers¹⁶. Further, Section 5 of the Service Commissions Act¹⁷,

¹³ (1998) Z R 111

¹⁴ APRM. *Country Self Assessment Report Zambia APRM*. Lusaka (2010) 97

¹⁵ Chapter 24 of the Laws of Zambia

¹⁶ Dr. Alfred W. Chanda. *National Integrity Systems Country Study Report: Zambia*. Lusaka (2003) : 29

¹⁷ Chapter 259 of the Laws of Zambia

which subjects the Judicial Service Commission to such general directions as the President may consider necessary and requires the Commission to comply, is in direct conflict with the principle of the independence of the judiciary¹⁸.

Secondly in order to achieve independence and autonomy of each of the three organs of the State and to enhance checks and balances, the doctrine of Separation of Powers should be expressly enshrined in the Constitution.¹⁹

4.3.2.1 THE INDEPENDENCE OF THE JUDICIARY

The independence of the Judiciary is specifically provided for in Article 91 of the Constitution. The Article provides that all judges, members, magistrates and justices of the Zambian Courts “shall be independent, impartial and subject only” to the constitution and the law. The Article also provides for the autonomy of the Judicature.²⁰ In addition to Article 91 of the Constitution, provisions aimed at safeguarding the independence and autonomy of the judiciary also exist in the Judicature Administration Act²¹; the Supreme Court Act²²; the High Court Act²³; the Industrial and Labour Relations Act²⁴ and the Local Courts Act²⁵.

In any country, the independence of the judiciary is essential for the impartial administration of justice, the adherence to the rule of law, and for the separation of powers. The judiciary is

¹⁸ Dr. Alfred W. Chanda. *National Integrity Systems Country Study Report Zambia*. (2003) : 30

¹⁹ Republic of Zambia *The Mung'omba Constitution Review Commission Report*. Lusaka. (29th March 2005) : 247

²⁰ Article 91(3) of the Constitution

²¹ Chapter 24 of the Laws of Zambia

²² Chapter 25 of the Laws of Zambia

²³ Chapter 27 of the Laws of Zambia

²⁴ Chapter 269 of the Laws of Zambia

²⁵ Chapter 29 of the Laws of Zambia

considered to be independent only if it is able to interpret the laws of the land fairly and dispense justice impartially, without fear or favour, between individuals or the individual and the State.²⁶ The emphasis placed on the principle of the independence and impartiality of the judiciary entails that although the Judiciary derives its judicial authority from the Constitution, the judicial service should enjoy freedom from interference by the other organs. Checks and balances are assumed to be inherent in the very character of the institution of courts and evidenced in the instruments and processes that define their functions²⁷.

In Zambia, findings from field surveys and assessments provide a mixed picture of the independence of the judiciary. According to the 2008 State of Governance Survey²⁸, 68% of the population in Zambia agrees that the courts of law uphold the rule of law and are impartial. The results further show that 57% of the respondents believe that the courts do not discriminate against electoral candidates regardless of which political party they belong to. These perceptions are in line with the 2009 Legatum prosperity index²⁹, which indicates that 63 % of the population in Zambia approve of the court system, ranking the country in the top 30 worldwide. Given the views above, it is clear that the judiciary in Zambia is to a great extent perceived to be independent. This view is supported by the evidence from the 2008 State of Governance Survey which shows that only 10% of the population had no trust in the judiciary while 11.6 % were not sure of their position. However, this does not mean that there are no issues which cast doubt on the independence of the judiciary in the country.

²⁶ APRM. *Country Self Assessment Report Zambia APRM* (2010) : 99

²⁷ Republic of Zambia *The Mung'omba Constitution Review Commission Report*. Lusaka. (29th March 2005) : 43

²⁸ *The State of Governance Report: Zambia* (2009) : 23

²⁹ APRM. *Country Self Assessment Report Zambia APRM*, (2010) : 164

4.4 MEASURES THAT CAN IMPROVE QUALITY OF CHECKS AND BALANCES AND THE INDEPENDENCE OF THE JUDICIARY.

For the Judiciary to play its role effectively, it is imperative that it should enjoy an entrenched independent status. Its independence is essential in the impartial administration of justice and adherence to the rule of law, and for the separation of powers.³⁰ As the judicial organ of the Government, the Judiciary should inspire confidence in the people it serves. It should, therefore, not only be independent, but should be seen to be independent.³¹

Some of the measures that can improve the quality of checks and balances by the Judiciary through the principle of Judicial Review include the following:

4.4.1 CONSTITUTIONAL PROVISIONS FOR CHECKS AND BALANCES AND THE JUDICIARY.

In order for the principle of separation of power to be more effective the principle should be given express Constitutional recognition. The Constitution should reflect the doctrine of separation of powers through balanced distribution of power and infusion of checks and balances in the exercise of these powers between all the organs of the State. In addition, the Constitution should reflect this doctrine as a policy objective or directive principle of State policy.³²

In addition to Article 91 of the Constitution, the Constitution should further provide:

³⁰ Republic of Zambia *The Mung'omba Constitution Review Commission Report*. Lusaka. (29th March 2005) : 422

³¹ Republic of Zambia *The Mung'omba Constitution Review Commission Report*. Lusaka. (29th March 2005) : 422

³² Republic of Zambia *The Mung'omba Constitution Review Commission Report*. Lusaka. (29th March 2005) : 423

Neither the President nor Parliament nor any person acting under the authority of the President or Parliament nor any other person whatsoever shall interfere with judges or judicial officers or other persons exercising judicial power, in the exercise of their judicial functions; and all organs and agencies of the State shall accord to the courts such as the courts may reasonably require to protect the independence, dignity and effectiveness of the courts, subject to this Constitution.”³³

The effect of the above proviso is that it will ensure the autonomy of the Judiciary on a Constitution level.

The Constitution should also establish a Constitutional Court so that the Court should have jurisdiction to determine disputes between state organs or state institutions at national or local level concerning their powers or functions.³⁴

4.5.2 FINANCIAL INDEPENDENCE OF THE JUDICIARY

Currently the budget of the Judiciary, like that of any other Government institution, is subject to superintendence and prescription by the Ministry responsible for finance before submission of the estimates of revenue and expenditure by the Government to the National Assembly.³⁵

It is submitted that order to ensure and enhance the independence, impartiality, dignity and efficiency of the Judiciary, the budget of the Judiciary should be paid from the national Budget in such a manner as to distinguish the institution as a separate arm of the Government and, in any case, not disadvantage it in proportional terms of the budgetary allocations made to the Legislature and the Executive.³⁶

³³ Article 127 of the Constitution of Ghana.

³⁴ APRM. *Country Self Assessment Report Zambia APRM*, (2010) : 105

³⁵ APRM. *Country Self Assessment Report Zambia APRM*, (2010) : 100

³⁶ APRM. *Country Self Assessment Report Zambia APRM*, (2010) : 97

4.5.3 APPOINTMENT OF CHIEF JUSTICE, DEPUTY CHIEF JUSTICE AND OTHER JUDGES

The Judges of both the Supreme Court and the High Court are appointed by the President subject to ratification by the National Assembly³⁷, a Judge of the Supreme Court, High Court, may be removed from office only for inability to perform the functions of the office, whether arising from infirmity of body or mind, incompetence or misbehaviour and cannot be so removed except on the advice of a tribunal constituted by the President for the purpose of investigating the question of removing such judge.³⁸ The appointing authority is also the disappointing authority therefore it raises the possibility that judges might not be free to pass a fair judgment against the appointing authority.

It is submitted that what is required in order to achieve the desired end, is that the President should not enjoy exclusive or overriding power in the appointment of Judges. To ensure that they have security of tenure and safeguard their independence, impartiality and autonomy the Judicial Service Commission should play an active part in the appointment process.

CONCLUSION

This chapter has attempted to analyse the impact of Judicial Review on the system of checks and balances in Zambia. The highlight of the discussion is that Judicial Review is one of the

³⁷ Articles 93-95 of the Constitution of Zambia Chapter 1 of the Laws of Zambia

³⁸ Article 98 (2), (3) and (4) of the Constitution of Zambia Chapter 1 of the Laws of Zambia

components which the Judiciary uses to check that the actions of both the Legislature and the Executive branches of the government act in compliance the law. In Zambia the system of checks and balances is Constitutionally based. The chapter also proposed that without an independent judiciary it is very difficult to even anticipate a system of check and balances. Independence of the judiciary and maintaining checks and balances are intertwined one cannot effectively exist without the other. The Chapter also provided several recommendation such as expressly providing the concept of checks and balances in the Constitutional, financial independence of the judiciary and coordinated effort in the appointment of judges to the bench. The above measure can improve the quality of checks and balances by promoting an effective system of Judicial Review.

CHAPTER FIVE

5.0 CONCLUSIONS AND RECOMMENDATIONS

5.1 INTRODUCTION

This chapter focuses on summarizing the contents of the previous chapters thereby recapitulating the main points of the research and providing pragmatic recommendations to improve the effectiveness of the Judicial Review system in Zambia. The chapter also makes recommendation on how to improve the impact of Judicial Review on the system of checks and balances in Zambia.

5.2 GENERAL CONCLUSIONS

The main aim objectives of this research were: to evaluate the Judicial Review system in Zambia and its functioning capability; to identify the flaws in the *Zambian* Judicial Review system; to come up with possible and pragmatic solutions to counter the identified weaknesses; and finally to scrutinize the impact of the Judicial Review system on the system of checks and balances in Zambia.

Chapter one of the research introduced the concept of Judicial Review, it outlined the historical foundation and the general nature of the concept on an international scale. The *Zambian* system of Judicial Review was discussed with the following emerging conclusions.

The *Zambian* concept of Judicial Review is based on the British model, this is because of the colonial linkage between Zambia and Britain, however, the principal source of the High Court's power to review the actions of public bodies is based on article 94 of the Constitution. The scope of Judicial Review by the High Court is unlimited in Zambia, except for matters expressly reserved for the Industrial Relations Court. Further sections 9 and 10 of

the High Court Act provide for the application of English law in Zambia. In accordance with these two sections the Zambian courts adopted the Supreme Court of England rules (White Book 1999 edition) which provides in Order 53 the procedural law regulating Judicial Review in Zambia.

Chapter two of the research revealed that the purpose of Judicial Review is not to provide an appeal procedure against decisions of public bodies on their merits, but to control the jurisdiction of public bodies by ensuring that they comply with their duties or by keeping them within the limits of their powers. The Zambian jurisprudence on Judicial Review outlined in the research showed that the Zambian Courts have opted to adopt a replica of the English jurisprudence of Judicial Review with no attempt to fuse in the effects of local circumstances such as the constitutional framework.

Chapter three of the research noted that the remedies available for Judicial Review are Certiorari; Mandamus; Prohibition; Declarations and Injunctions. The chapter concluded that Injunctions and Declarations are not available to the successful applicant against the State by virtue of section 16 of the State Proceedings Act which expressly prohibits the grant of Injunctions and Declaratory reliefs against the State.

Chapter four of the research reveals that although the concept of checks and balances is not expressly provided for in the Constitution, Zambia embraces the system of checks and balances, this is evident by certain provisions in the constitution. For instance Article 37 of the Constitution of Zambia providing for impeachment of the President by the National Assembly for violating the Constitution or gross misconduct and Article 94 of the Constitution providing for unlimited jurisdiction of the High Court to hear and determine matters not exclusively in the domain of the Industrial Labour Relations Court.

Chapter four of the research concluded that Judicial Review is one of the ways in which the High Court checks that both legislative and executive actions of the government are in conformity with the Law. Zambian case law points to the fact that the judiciary have used the power of Judicial Review to invalidate both legislative and executive action as contrary to the law.

Chapter four of the research identified several factors that limit the impact of Judicial Review on the system of checks and balances. Some of the factors identified by the research include: Firstly, the current constitutional and legislative framework makes it intricate for the judiciary to provide effective checks and balances on the powers and functions of the executive arm of the state. This is because judges are appointed by the President of the Republic; it raises the possibility that judges might not be free to pass a fair judgment against the appointing authority.

Secondly, the budgetary structure of the judiciary is such that it is subject to superintendence and prescription by the Ministry responsible for finance before submission of the estimates of revenue and expenditure by the Government to the National Assembly. The current funding mechanism for the judiciary vests too much discretionary power in the Executive (through the Minister responsible for finance) to determine budgetary allocations for the judiciary. This is counterproductive to the system of checks and balances in that the judiciary is not financially independent in its operations.

Furthermore, chapter four concluded that for an effective impact of Judicial Review on the system of checks and balances it necessary to have an independent judiciary so that the judges are not intimidated to review the actions of the other two organs of the government.

5.3 RECOMMENDATIONS

Flowing from the above conclusions the following are the recommendations of the research.

From the discourse the inevitable conclusion is that not having a principal Act regulating Judicial Review in Zambia is a limiting factor on the effectiveness of the Judicial Review system. To support the above proposition the Mung'omba Constitution Review Commission Report¹ recommends that the power of the High Court of Judicial Review should be expressly provided for in the Constitution so as to amplify the effectiveness of Judicial Review. Secondly it is recommended that an Act of Parliament should provide for the procedure, grounds and remedies available to the successful applicant. The proposed Act should encompass flexible rules for application for leave, a wide scope for the principle of sufficient interest and also include new grounds for review such as Legitimate Expectation and Proportionality.

Further in term of remedies to the successful in a Judicial Review application, it is submitted that the Constitution should explicitly provide relief to aggrieved parties against the State in enforcing judgments and that this relief should be extended to local authorities and other public institutions. The Mung'omba Constitution Review Commission² recommends that the State Proceedings Act should be amended so that judgment against the State can be executed after a period of six months.

It is also recommended that the current legal position regarding legislative and executive attempt to exclude the High Court's jurisdiction to review legislative and executive action

¹Republic of Zambia *The Mung'omba Constitution Review Commission Report*. Lusaka, (29th March 2005) : 472

²Republic of Zambia *The Mung'omba Constitution Review Commission Report*. Lusaka, (29th March 2005) : 474

should be clearly articulated so that the Court are given ultimate jurisdiction to entertain even matters that attempt to exclude its jurisdiction.

It is further recommended that to enhance the impact of Judicial Review on the system of checks and balances the following measures should be implemented:

- (a) The Constitution should expressly state and reflect for the doctrine checks and balances through balanced distribution of power in the exercise of these powers between all the organs of the State.
- (b) The independence of the Judiciary is cardinal to the attainment of an effective system of checks and balances and this can be achieved by providing that the budget of the Judiciary should be paid from the national Budget in such a manner as to distinguish the institution as a separate arm of the Government and and, in any case, not disadvantage it in proportional terms of the budgetary allocations made to the Legislature and the Executive.
- (c) It is also recommended that the President should not enjoy exclusive or overriding power in the appointment of Judges. To ensure that they have security of tenure and safeguard their independence, impartiality and autonomy the Judicial Service Commission should play an active part in the appointment process.

In a nutshell for an effective impact of Judicial Review on the system of checks and balances to exist there has to be a judiciary that is truly independent, impartial and this should be reflected in its being explicitly vested with the judicial power of the State, complete delinkage from the Executive, administrative and financial autonomy, and exhibit freedom from political interference.

Conclusion

The importance of Judicial Review as a one of the fundamental concept of democratic governance is unquestionable; the challenge is to ensure that it is functioning to achieve its intended objectives. This research was undertaken with the aim of evaluating the effectiveness of the Judicial Review system and its impact on checks and balances. The research identified certain areas of the Judicial Review system areas in need of improvement. The research also suggested improvements that can be effected in the identified areas. The research also analysed the impact of Judicial Review on the system of checks and balances and draw certain recommendations to improve the quality and impact of the judicial power to check that both legislative and executive action are in conformity with the law.

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