

THE UNIVERSITY OF ZAMBIA
SCHOOL OF LAW

I recommend that the Obligatory Essay prepared under my supervision by

ANNE DESIREE ARMANDA THEOTIS

entitled

**" INDEPENDENCE OF THE JUDICIARY IN ZAMBIA :
COMPARATIVE PERSPECTIVE OF THE THREE REPUBLICS "**

be accepted for examination. I have checked it carefully and I am satisfied that it fulfills the requirements relating to the format as laid down in the regulations governing obligatory essays.

DATE : 9/10/95

SUPERVISOR: 

MR LUKE MULEYA

**" IF WE ARE TO KEEP OUR DEMOCRACY , THERE MUST BE ONE
COMMANDMENT : THOU SHALL NOT RATION JUSTICE "**

- Learned Hand. J

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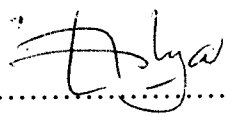
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DEDICATION

I dedicate this paper to my family,

MICHELINE and ARMAND THEOTIS

**for the love and inspiration that they have given me
and also for all they have done for me to be where I am today.**

ACKNOWLEDGEMENTS

Since it is not possible to mention the names of all the persons and institutions whose assistance I have received gratefully, suffice is to mention the following.

I wish to record my appreciation my appreciation to the efforts of my Supervisor, Mr Luke Muleya, in advising and assisting me to put this essay to the required standards.

Out of all my friends, particular people I must give special mention who have been very dear to me and assisted me in the preparation of this essay are Nicola Sharpe, Guy Phiri, Sipho Phiri and Ahmed Bhana.

To all my friends and acquaintances I am greatly indebted.

INTRODUCTION

Judicial Independence is one of the most fundamental elements of democracy. There can be no liberty or freedom to enjoy one's basic fundamental human rights in a society with a Judiciary that is rigidly controlled by political factors. As the International Commission of Jurists put it:

"An independent Judiciary is an indispensable requisite of a free society under the rule of law." 1

It is imperative therefore, in a developing country like Zambia which believes in the implementation of the rule of law, and which is striving towards true democracy, to ensure Judicial Independence.

The term 'judiciary' is often (loosely) used interchangeably with 'judicature' a wider term embracing both the institution (the courts) and the persons (the Judges) who compose it. 2

In this paper however, the term is used to refer to Judges only.

The doctrine of Independence of the Judiciary is closely linked to the doctrine of Separation of Powers and the concept of rule of Law. By definition, Independence of the Judiciary could mean the absence of domination by the Executive, political functionaries or pressure groups. It could also mean that the personnel involved are equipped with the liberty to base their decisions on predetermined normative premises. The execution of Law should be without fear or favour and Judges should not consider the political consequences of their decisions. The Independence of the Judiciary also extends to the appointment and removal of Judges, their tenure of office and their conditions of service.

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According to Chanda, Independence of the Judiciary means:

"(a) that every Judge is free to decide matters before him in accordance with his assessment of the facts and his understanding of the Law without any improper influences, inducements or pressure, direct or indirect, from any quarter or for any reason and,

(b) that the Judiciary is independent of the Executive and Legislature, and has jurisdiction directly or by way or review over all issues of a judicial nature."³

In this paper, Independence of the Judiciary will refer to the various aspects mentioned above.

In order for a discussion of the Independence of the Judiciary to be meaningful, it is essential to explain the concepts of Separation of Powers and the rule of law and their relation to Judicial Independence.

The doctrine of Separation of Powers, as formulated by Montesquieu, a French philosopher of the 18th Century, in his book Esprit de L'oie meant that the three types of governmental functions should be kept separate in order to avoid tyrannical rule and oppressive government. Hence only Legislature should legislate, Judiciary adjudicate and Executive execute the Law. Separation of Powers entails three things. Firstly that the same person should not form part of all three organs. Secondly, that no one organ of the government should control or interfere with the functions of the other organs and lastly, that no one governmental organ should exercise the whole of the function of another.

It is however impossible to implement the doctrine in its pure form as in practice it is very difficult to prevent some overlapping in the functions of the three organs. However, the idea of checks and balances seems to make the doctrine of Separation of Power more effective. By balancing the power of one organ against the other, checks are exercised. The Judiciary in this respect has powers which are referred to as Judicial Review. This is the power to declare a governmental measure either contrary to or in accordance with the law, with the effect of rendering the measure valid or vindicating its validity and so putting it beyond challenge in the court.

This power that the courts have, is very important. It makes sure that there is no abuse of power by persons in authority and ensures that the rights and freedom of citizens are protected.

The idea of Judicial Independence works hand in hand with the concept of the rule of law. This basically means supremacy of the Law. According to the United Nations Universal Declaration of Human Rights:

"It is essential if a man is not to be compelled to have recourse as a last resort to rebellion against tyranny and repression that Human Rights should be protected by the rule of law." 4

The rule of law serves as a buttress to the democratic principle. The doctrine of government according to law demands that a person be able if necessary to challenge the legality of that action in court. Public authority and officials should be subject to effective sanctions if they depart from the law. The most prevalent method in which this done is having the courts declare their actions invalid.

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It is for this reason that the International Commission of Jurists in the Declaration of Delhi, 1959, declared that for the Rule of Law to be operative, delegated Legislature should be subject to independent Judicial control and that a citizen who is wronged should have a remedy against the state.

They further declare that there should be independence of the Judiciary and proper grounds and procedure for removal of Judges.

We can deduce from this that in order to live in a free society, under conditions which will uphold the dignity of man as an individual, there should be an independent Judiciary.

It is quite clear that in Zambia there have been many factors that have impeded the development of a truly independent Judiciary. Amongst these factors, one dominant factor has been political interference. As Professor Nwabueze put it:

" The African politician, uninhibited by the influence of tradition on which respect for the independence of the Judiciary is based in Britain, is also exposed to far greater temptation to interference with the Judiciary ... without an effective constitutional guarantee, a judiciary which frequently gives decisions which have the effect of thwarting government policy is not likely to be tacitly suffered by politicians..." 5

The Question, is whether the third Republican Constitution and institutions as well as other laws could promote Independence of Judiciary in Zambia.

This essay is an attempt to trace - 1924, when the Crown formally took control over Northern Rhodesia (later Zambia) up to the present day - the extent of the independence of the Zambian Judiciary.

(vii)

The First Chapter deals with the Judiciary in Zambia before Independence until the time of the establishment of the One Party State. It also analyses the laws available in that period meant to promote Judicial Independence, and their effectiveness.

The Second Chapter will centre on the Judiciary after the introduction of the One Party State, with factors affecting its Independence being the focus of discussion.

Chapter Three will comprise the main text of the paper as it discusses the Judicial Independence in the Third Republic. It will look at the Laws as well as other factors that have been introduced in an attempt to promote Judicial Independence and the effectiveness of these laws will be analysed.

FOOTNOTES

- 1) I.C.J. The Rule of Law and Human Rights Principles and Definitions (1966) Page 30.
- 2) Nwabueze B.O. Judicialism in Commonwealth Africa (1977) C. Hurst and Company, London in association and Nwamife Publishers, Enugu and Lagos. Page 265
- 3) Chanda A.W. Ph. D Thesis. A Case Study in Human Rights in Commonwealth Africa, Yale University, (19..) Unpublished. Page 358-9
- 4) United Nations Universal Declaration of Human Rights, Paragraphs 3 of the preamble.
- 5) OPCIT page 266-7

Under the Northern Rhodesia Order in Council of 1924, a governor was appointed for the territory. 1 Under the same Order, the High Court 2, Magistrate's Court 3, and Native Commissioner's Court 4 were retained. The power to determine the number of Judges and Magistrates in the territory, and the power to appoint them was vested in the Governor. In the case of Judges, this was subject to instructions the Crown might give as Judges of Superior Courts were members of the larger Legal Service. This was the case in most territories under British Control. These Judges enjoyed no security of tenure as they served at the Crown's pleasure and could be dismissed at any time for any reason.

This was clearly illustrated in the case of Terrel Vs Secretary of State for the Colonies.⁵

Terrel was a Judge in Singapore. Following the Japanese invasion of that territory, he was unable to perform his duties. As no suitable alternative appointment was available in the Colonial Legal Service at the time, it was decided to compulsorily retire him two years before the normal retirement age. He challenged the compulsory retirement, but it was held by GODDARD L.C.J., that he had held office at the pleasure of the Crown.

The judgement in this case was severely criticised and it led to the amendment of the Colonial Regulations which contained the conditions of service of all Crown servants. As a result of this amendment, Judges could only be dismissed following an inquiry by a Judicial Commission appointed by the Crown and referred to the Judicial Committee of the Privy Council. This was one of the very first steps towards the protection of the legal offices of Judges.

After the federation of Rhodesia and Nyasaland in 1953, the Federal Supreme Court was established as the highest court of the federation and it consisted of the Chief Justice as President and Federal Justices who were appointed by the Governor General. The existing courts in the territories continued to exercise their civil and criminal jurisdiction as before.

The constitution of the Federation of Rhodesia and Nyasaland contained the earliest legal provisions specifically intended to protect Judges. It provided for a Judge of the Federal Supreme Court other than a Chief Justice of one of the constituent members of the Federation to retain office until he attained the age of 65. ⁶ A Judge could only be removed from office by the Governor General before attaining that age on an address from the Federal assembly on the ground of misbehavior or in the case of infirmity of body or mind.

This provision did not however benefit the Chief Justice of Northern Rhodesia. He together with the High Court Judges retained only the protection available to them by virtue of the post Terrel Colonial Regulations.

With regard to appointment of Judges, the Judiciary, which was part of the Colonial Legal Service operated largely on the system of promotion.

"It was a career job in which the appointment to a judgeship rested largely on promotion from the Magistracy or from some other position in the judicial or legal departments." ⁷

Such a system is clearly in contradiction with the principle of Judicial Independence since a person's appointment to the Judiciary depends on a certain authority. Such a Judge is more likely to do this utmost to please the authority. As Briggs stated, this system:

"...is bound to induce in the mind of the person expecting that promotion, some kind of fear and respect for the authority which he considers will have to promote him."⁸

This position was further worsened by the existence in the Colonial Judicial Service of a practice where puisne Judges were reported to the Secretary of State through the Governor. Although this practice could justifiably claim to provide information about the competence and reliability of puisne Judges to the Secretary of State, who had the responsibility of their promotions to higher judicial positions, it also served to further undermine Judicial Independence. Judges wishing to be promoted would clearly hesitate to pass a ruling that would cause the Secretary of State to regard them with disfavour.

As the territory advanced towards political independence, there arose a greater need for an independent Judiciary. This emanated from the existence of conflicting interests in the territory, between groups such as the European settlers and African Nationalists. In the event of any disputes, the matter would undoubtedly be taken to court to be resolved. There was an increasing need for legal provisions which would guarantee or strengthen the independence of the Judiciary.

The 1964 Independence Constitution sought to address this need. One of its most important features in this regard was establishing a Judicial Service Commission. ⁹

Before a Judge could be removed from office, however, there was a need under the Independence Constitution to undergo a lengthy procedure. This was to ensure a Judge's removal from office was justified.

Firstly, there had to be an appointment of a special tribunal of three members, all of whom held or had held high Judicial offices. The **president can** only dismiss a Judge on their advice.

LEVEL OF CONFIDENCE IN THE JUDICIARY

In addition to the security of tenure, the level of confidence in a judiciary, by the people, also determined whether or not an independent Judiciary existed.

According to Garner¹² one of the characteristics of the Judicial process is that it is passive. A court cannot interfere in a dispute unless the dispute is referred to it by one or more of the parties.

A person is unlikely to bring his dispute to the attention of the court if there is a general feeling of no confidence in the court's ability to dispense justice.

A perusal through the Law Reports of the country during this period illustrates that very few public cases came before the courts. The bulk of Law Reports constituted Criminal Law cases which were

instituted by the State. Public cases which are usually instituted by individuals were few. One of the reasons why this could be so was because very few people had financial resources to institute legal proceedings.

A more important reason, however, could be that the outcome of the few cases that did end up in court caused the people to lose confidence in its ability to give a fair ruling. This can be shown by a number of examples.

In the case of R Vs Chama ¹³ for instance, the accused who was the National Secretary for the United National Independence Party (UNIP), the main nationalist party, issued a press statement describing the evils of colonial rule. The statement alleged that there was no justice whatsoever under colonial rule anywhere in the world. It stated in part:

"Those of you who have attended the courts while trying your political colleagues must have got the same impression as myself, that is, that the courts are there to rubber stamp oppression and to administer mock justice. As for the Native courts, all of you must have got the impression that they have been recognised administrative officials want to be jailed whether he committed an offense or not. I have witnessed trials myself from the beginning to the end. If I had tears I would shed them."

Although the High Court held that the statement was a seditious publication because it intended to bring into hatred or contempt and to excite dissatisfaction against the administration of justice in the territory for the purpose of promoting UNIP's policy of making the territory ungovernable, it portrayed the general lack of faith in the courts.

This loss of confidence came about as people's repeated search for Justice in the courts were fruitless. The case of Frank Chitambala Vs The Crown¹⁴ illustrates this point clearly:

The appellant, on the leaders of the Nationalist struggle against colonial oppression was convicted by a Native Court on charges of convening a meeting without the permission of the Native Authority. All his appeals to the Native Appeal Court, to the District Commission Court and the high court were dismissed.

This case illustrates that the scope of rights and freedoms which the people of Northern Rhodesia were entitled to in the theory, were in fact very limited in practice.

The case of R Vs De Jager¹⁵ which was decided by the High Court of Northern Rhodesia in 1935, exemplified this point. In this case, a member of the Watch Tower Bible and Tract Society was prosecuted for possessing four books entitled " Deliverance " and one book entitled " Jehovah " which fell into a category of publications banned from Northern Rhodesia under Proclamation Number 9 of 1935, issued by the governor in council. He was convicted by a Magistrate's Court. He appealed to the High Court on two Grounds:

Firstly, that the Proclamation was inconsistent with English Law which recognised freedom of Conscience. Secondly, he argued that the Proclamation was invalid because:

" any act in deprivation of the use of these books by the Natives of this territory is an infringement of, or at least a non compliance with the terms of the Royal Instructions which impose on the Governor a duty to promote religion among Native inhabitants On the first ground, Judge Francis accepted that English Law applied to

Northern Rhodesia, but he held that the application of English Law to a colonial territory did not restrict in any way the

power vested in the local legislature to make laws for the peace, order and good governance of the territory.

It was permissible for the local legislature to pass laws which might not be compatible. The law appropriate in England may not always be expedient in an African Colonial dependency. He cited the case of Rex Vs Crewe (ex parte Seqkome) ¹⁶ decided by the privy council as authority. In that case, Farwell L.J. held that a local enactment may be repugnant to English Law, but that such enactment would not be treated as invalid except in so far as such repugnancy was not contrary to some principle of Natural Justice or some imperial statute.

Francis J. held that religious matters were subject to the control of the Legislature if in its view, such matters required some control. He drew a distinction between matters that were so fundamental to freedom of worship like the Holy Scriptures, and those that did not go to the root of the act of worship, whose curtailment would not diminish the enjoyment of the freedom

" When however, the case involves books containing politico-religious teachings of a kind noticeable in those under review, the matter assumes a different complexion. Politico-religious discussion among the educated invariably excites controversy and its propaganda among primitive people may lead quite feasibly to misconception. Consequently, I'm not prepared to say that the deprivation of literate of this order is an interference with any principle of Natural Justice. "

As regards the second ground pertaining to the proclamation's alleged incompatibility with the Royal Instructions, Francis J. held that the prohibition of ' politico-religious teaching ' was justified as such teaching had the potential to undermine peace and order in the territory. He concluded

that the proclamation was valid and was within the power and duties entrusted to the Government.

This case illustrates that Africans could not rely on the courts to protect them, more often than not the Judiciary sided with the ruling authorities and this was often reflected in their rulings.

As Dr Chanda said :

" The De Jager case served to confirm the fact that Natives in Northern Rhodesia could not expect to enjoy individual rights and freedoms to the same extent as the people of England. Their rights were subordinated to the overriding need to preserve law and order which was the principal preoccupation of the colonial government. Hence any challenge to the Status Quo was considered subversive and severely dealt with. " 17

This situation persisted even after the country gained independence in 1964. The case of Nkumbula Vs The Attorney-General¹⁸, shows the Courts' tendency to put political interest before individual rights.

On the 25th February 1972, the then president of Zambia, Dr Kenneth David Kaunda, announced that the Cabinet had decided that the future Constitution of Zambia should provide for a One- Party democracy, and that a commission would be set up with the task of determining the form which that one-party democracy should take.

It's terms of reference were to consider the changes in the constitution of Zambia, the practices and procedures of the Government of the day. This commission was appointed on 1st March 1972. public and the Constitution of UNIP, necessary to establish a One-Party Participatory democracy in Zambia.

The President also set out a number of principles which the commission had to adhere to in it's

consideration of the matter. One of these principles was that the fundamental rights and freedom of the individual should be protected as was then provided under Chapter III of the Constitution.

In the Nkumbula case the applicant Mr Harry Nkumbula, then President of the opposing African Nationalist Party, sought a declaration from the High Court to the effect that the introduction of a One-Party State was 'likely' to infringe fundamental rights guaranteed to him by the Constitution as it existed at that time, that is other persons as member, and as leader of the ANC, the right to express and receive opinion, and freedom from discrimination on the grounds of political opinion.

Doyle C.J. who handled the case in the High court dismissed Nkumbula's application. Clearly dissatisfied with this holding, Nkumbula took the matter to the Court of Appeal. His first ground of appeal was that the setting up of the commission could not be for the public welfare within the meaning of the Inquiries Act 19, under which the commission was appointed because:

"it cannot in law be for the public welfare to prepare to deprive a citizen of any of the fundamental rights protected by the existing constitution."

The Inquiries Act vested in the President a discretionary power to appoint a commission to inquire into any matter in which an inquiry would in the opinion of the President, be for the public welfare.²⁰ This made it a matter for the subjective decision of the President to say which subjects were for the public welfare, calling for an inquiry by the commissioner. The exercise of such power was beyond challenge in a court of law, unless it was alleged that the

President acted in bad faith or from improper motives or an extraneous consideration or under a view of facts or law which could not reasonably be entertained.

The question to be determined in this case therefore, was what constituted 'public welfare'. In Nkumbula's view, it meant the welfare of the individuals comprising the public, so that to derogate from individual rights and freedom cannot be for their welfare.

The court refused to accept this interpretation and held that the meaning of 'public' as used in the Act is 'the community in general, as an aggregate, the people as a whole'. In the courts' opinion:

"What is the public interest or for the public benefit is a question of balance, the interest of the society at large must be balanced against the interests of the particular section of or the individual whose rights or interests are in issue, and if the interests of the society are regarded as sufficiently important to override the individual interests, then the actions in question must be held to be in the public interest or for the public benefit."

The Court accordingly found that the setting up of the Commission was within the powers of the President under the Inquires Act and therefore lawful.

On the second ground of appeal the appellant argued that the court below had erred in holding that his rights had not yet been infringed upon unless and until the Constitution was amended, and the One-party State established. He asserted that he did not have to show that his rights under the Bill of Rights after the introduction of a One party State was likely to be contravened in relation to him, but that it was sufficient for him to show that the introduction of a One party State would infringe his rights under the constitution as it then was.

CONCLUSION

The period 1924 - 1972 shows various attempts by the legislators to increase the independence of the Judiciary in this territory. The most important attempt being the provisions in the Independence Constitution. Before the changes introduced by this Constitution, Judges lacked the security to decide objectively on controversial issues.

However, even after the country gained independence, and the position of Judges improved, the manner in which the courts conducted their business was viewed by most as biased in favour of the ruling authorities. This led to an increasing loss of confidence in the courts' ability to dispense justice fairly.

From this, we can conclude that the Judiciary in Zambia during this period was clearly not independent, and the fact that there was no major conflict between the Judiciary and the Executive cannot be used to state otherwise.

FOOTNOTES

1. Northern Rhodesia Order in Council (1924), Article 6
2. Article 21 (i)
3. Article 32
4. Article 35
5. (1953) 2 QB, 482
6. Constitution of the Federation of Rhodesia and Nyasaland, Section 47 (i)
7. Nwabueze, B.O. Judicialism in Commonwealth Africa (1977) C. Hurst and Company, London, pg 265
8. Ibid, As per Mr Briggs, House or Representatives Debates, 16th April 1963, Col 1392 (Nigeria)
9. 1964 Constitution, Section 104.
10. Section 100 (1)
11. Section 100 (2)
12. Garner, Administrative Law, (19),5th Edition, pg 13
13. (1962) R&NLR 344
14. (1955) 6 LRNR
15. (1935) LRNR 13
16. (1910) 2 KBD 576
17. Chanda, PhD Thesis A Case Study In Human Rights In Commonwealth Africa, Yale University, (1992) , Unpublished. pg 60-61
18. (1972) ZLR III
19. Cap 181 of the Laws of Zambia, 1972 edition
20. Section 2

CHAPTER TWO

JUDICIAL INDEPENDENCE DURING ONE PARTY ERA

"The African politician, uninhibited by the influence of tradition on which respect for the independence of the Judiciary is based in Britain, is also exposed to far greater temptation to interfere with the judiciary..." 1

The then President of Zambia, Dr Kenneth David Kaunda, was no different from his counterparts in this respect. As President of the newly independent State of Zambia, he professed on several occasions his support for and belief in an independent Judiciary.

At the Legislative Assembly of 1963 he said;

"The question of independence of the Judiciary is something which we ourselves need no one to remind us of....We intend to use in this Country an independent Judiciary as a mirror from which government will be able to find out whether or not government itself is behaving properly." 2

In 1970, he expressed the same sentiment when he said:

"The independence of the Judiciary ... is a fundamental principle of the rule of law and one which we in Zambia are committed and determined to uphold," 3

Despite these assurances, it was quite clear that in actual fact, Kaunda wanted to have a Judiciary over which he could exert a certain degree of control. This was evident from his comment on the remarks made by a High Court Judge, Justice Ivor Evans, in 1969, when freeing two Portuguese soldiers, jailed for entering Zambia in uniform of a foreign country.

"The Judiciary is part and parcel of this society and I expect it to behave accordingly. Anything else is not acceptable in Zambia". 4

This was not the first time that the President was perceived to have interfered with the

independence of the Judiciary. In 1967, he exercised his prerogative of mercy and pardoned a member of his ruling party, who had been sentenced to twelve months imprisonment for contempt of Court. The member had made a statement which seriously undermined the rule of law. 5 This was regarded by the High Court Judges as political interference in their functions.

These incidences were a clear indication of Kaunda's expectation the Judicial decisions should meet his approval. A lot of expatriate Judges were displeased with this interference in their duties and resigned from the offices. An example of one such Judge was Justice Evans.

Evidently, this seemed to be what Kaunda had desired all along. He announced his intention to Zambianize the Judiciary and this decision was implemented in 1970 when the legal requirement for the length of legal experience to qualify for appointment to Bench was reduced from seven 6 to five years. 7 In addition to this the President and the Judicial Service Commission were given the discretion to dispense with the requirement for five years experience in a case where a person held one of the 'special qualifications' (that is academic and professional qualifications such as a law degree and the bar examinations as opposed to professional qualifications 8) and was 'worthy, capable and suitable' to be appointed as a Judge.

These changes gave the President a greater degree of control over the Judiciary but this was clearly not enough. The One Party State era introduced more changes which increased the Presidents's control over the Judiciary.

This Chapter will look at the changes brought about by the One Party State Constitution and the effect of these changes on Judicial independence. Other factors that affected the independence of the Judiciary will also be examined.

POSITION OF JUDGES UNDER ONE PARTY CONSTITUTION

The One Party State Constitution which repealed the Zambia Independence Act of 1964 provided that Judges of the Supreme Court shall consist of the Chief Justice, the Deputy Chief Justice and two Supreme Court Judges or such greater number as may be prescribed by Parliament. 9

Subsection 3 of the same section provided as follows:

"The office of the Deputy Chief Justice or of a Supreme Court Judge shall not be abolished while there is a substantive holder thereof."

Section 109 (3) has a similar provision pertaining to the office of Puisne Judges. These provisions were intended as a means of providing security of tenure for these offices. However, the effect of this provision was undermined by Section 108, which empowered the President to appoint the Chief Justice and the other Judges of the Supreme Court. He could do this at his own discretion and did not require the advice of the Judicial Service Commission. This constituted a serious threat to the independence of the Judiciary as it gave the President too much control over the Judges.

Prior to 1970, it was only the Chief Justice who was appointed by the President at his discretion. The Judges of the Court of Appeal and the puisne Judges of the High Court were appointed by

him on the advice of the Judicial Service Commission.

The decision to give the President absolute discretion in these appointments was met with severe criticisms even then especially by the opposition party, the African National Congress (hereinafter referred to as ANC). These saw the danger of giving the President too much control over the Judiciary. They feared the President would only appoint persons who were sympathetic to the Government of the day. In fact, at the legislative debates prior to the introduction of this amendment¹¹ to the Constitution, one member of the ANC said:

"I call this Bill... a dangerous Bill, because it is aimed at destroying the normal structure of Justice...what is the background of this. I am suspicious...Zambia is following exactly what Dr Nkrumah of Ghana was doing. In future, if this becomes law, the President will appoint anybody and you will find that if a member of the ANC commits an offense and the case is brought before the Court of Appeal ... they (Judges) will favour the State. This is going to happen because these people will be appointed politically."

However, the Attorney General speaking in favour of the amendment said:

"All over the world, Judges of Superior Courts are appointed either by the Queen or by the President of the United States, or by the Head of State of that country and there is no advice of anybody. In fact, if there was any advice to the Queen in England, it was by the Lord Chancellor and the Lord Chancellor is a politician sitting the House of Parliament.... At present the Constitution empowers the Head of State to appoint the Chief Justice. It is purely an addition of two Judges of the Court of Appeal; who shall be appointed by the President and there is no question of anything mischievous...."

This amendment was in fact effected and the fears of the ANC were realised and this was especially so during the Second Republic under the One Party rule.

With regard to Puisne Judges and High Court Commissioners, these were appointed by the

P r e s i d e n t

acting in accordance with the advice of the Judicial Service Commission. ¹²

This requirement for the advice of the Judicial Service Commission was however not in itself a check on the President's power to appoint Judges. This was due to the fact that under the One Party Constitution, the Judicial Service Commission had ceased to be a truly independent body as its composition was changed by a constitutional amendment. ¹³

In addition to the Chief Justice ¹⁴ and the Chairman of the Public Service Commission, ¹⁵ the Attorney General ¹⁶ was included as a member of the Commission. The Puisne Judges appointed by the Chief Justice was replaced by the Secretary of the Cabinet. ¹⁷

Furthermore, the Presidential Appointee ¹⁸ was no longer required to be qualified to be a High Court Judge.

As a result of these changes, the Commission consisted mostly of Political Appointees and not Judges. Hence in exercising their functions they had a great deal of regard to Political considerations.

Since most of the members were appointed by the President, this gave him a great degree of control over the Commission.

The President thus had an overwhelming dominance in the appointment of Judges and this greatly diminished the Independence of the Judiciary as political considerations played a greater role in the selection of Judges than merit and integrity.

Probably, the most important reason why the President desired to have such a great say in the

appointment of Judges lay in the fact that, it was still difficult to remove a Judge from office once he had been appointed. Rigid procedures had to be followed before this could be done. 19

In fact, only one Judge was ever removed from office using these procedures. This was in the case of Judge Batholomew Mumba of the Kitwe High Court, whose services were terminated with effect from November 14th, 1985, in accordance with the terms of Article 113 (4) of the then Constitution.²⁰

As the procedures for the removal of a Judge were quite difficult, the President wanted to ensure that he would have no cause for desiring the removal of Judges once they had been appointed.

Another serious erosion of the Independence of the Judiciary was the lack of tenure of High Court Commissioners.

These, although their jurisdiction, powers, privileges and functions were the same as those of Pusine Judges, they had no security of tenure as they served at the President's pleasure. This rendered it unlikely for them to pass any judgements which might annoy the appointing authority.

As such, High Court Commissioners had a strong incentive to favour the Executive in the hope that they would eventually be elevated to the position of Pusine Judge and ultimately Supreme Court Judge.

Another problem with the High Court Commissioners was that these Commissioners, who were part time Judges, were also in fact full time Legal Practitioners who in the course of their work as

Advocates appeared before High Court Judges.

This was clearly a threat to the principles of impartiality and to the independence of the Judiciary as it was obviously difficult for a person who on one occasion appears before a judge and on another occasion shares the bench with the same Judge to be impartial. ²¹ It has been rightly contended that one of the serious constraints on Judicial Independence prior to 1991, was that the Judiciary lacked autonomy as it was just a department within the Ministry of Legal affairs. ²² This meant, for example, that its estimates of expenditure had to be approved by the Minister of Legal affairs, thereby denying it control over funds.

As can be seen, there was a serious erosion of Judicial Independence in this period. The Judiciary in this time was used by the President as a mere tool with which to advance his policies and he had a great degree of control over it.

In this case, the applicants applied for a declaration that the Party Constitution purporting to have been amended by the general conference of the Party on or about 8th September, 1978, was validly amended and was therefore not the lawful constitution of the party. Further or in the alternative, the applicants applied for a declaration and an Order against the Party and the Central Committee, purported to have been held on or about 11th September 1978, were not lawful and was thus null and void.

The High Court dismissed the application and the appellants appealed to the Supreme Court. Their appeal was based on various grounds.

Firstly, notice of the proposed amendment to the party Constitution had not been circulated to all the members of the National Conference at least one month before as required by Article 38 of the UNIP Constitution. The only notice of the proposed amendment was released a week before the Party Conference. In fact, some members, notably representatives of Zambian Mission abroad and Nkumbula had not been given notice of the proposed amendments.

The Supreme Court held that this constituted a breach of Article 38 of the 1973 Party Constitution and that the requirement as to notice was mandatory. Gardner, the then acting Deputy Chief Justice, who delivered the Supreme Court Judgement stated that :

" I cannot agree that the requirements of giving notice are no more than directory. In my opinion, the general law relating to the necessity for associations of any kind to observe their own regulations applies to UNIP, and the failure to observe the strict letter of the law in the matter of giving notice was a breach of the Party's own rules."

Secondly, the appellants argued that the amendment of the Constitution by acclamation was invalid because Article 38 (b) required a two-thirds majority of the general conference to approve the amendments.

The appellants argue that at such a large conference, it would not have been possible for the chairman to observe the reaction of each and every delegate. They argued further that Article 32 (4) of the Party Constitution which required that all voting at a general Conference must be by way of secret ballot, had not been complied with.

The Supreme Court, however, agreed with the High Court on this issue, in that there was by

acclamation, a unanimous adoption of the amendment and that since no delegate had insisted on a vote, the necessity for a secret ballot had not arisen.

Thirdly, the appellants contended that the method used by the Central Committee in purporting to amend the Constitution showed bad faith. They argued that the Central committee in putting forward a new constitution, containing no new restrictions on the qualifications of President and subsequently amending such proposals after the applicants had announced their intention to contest by including new restrictions on qualifications indicated that the Central Committee was trying to have the new proposals swept through at the general conference without the interested parties having a opportunity to consider the proposals and make representations against them.

The Supreme Court held that there was ample evidence to show that the Central Committee was acting in good faith because although the letter of the law as to the giving of notice had not been adhered to, **"every effort was made to ensure that all interested parties had received notice of the proposed amendments."** The appellant's contention would have been enhanced had the evidence of the appellants and their witnesses as to being molested and prevented from exceeding their rights had been accepted by the court.

Lastly, the appellants argued that because the republican constitution laid down qualifications for Presidential candidates, any attempt to impose further restrictions on such qualifications amounted to an attempt to amend the republican constitution and was therefore ultra-vires.

Thirdly, its opinion that the Central committee had acted in good faith was an obvious effort on its part to side with their actions. This can be seen because the Central Committee's amendment of the Party Constitution was a deliberate move to prevent Nkumbula, Kapwepwe and Chilwe from contesting Kaunda for the Presidential post. This was obvious from the amendments made. One such amendment was that:

Prospective candidates must be a member of the party for at least five years.

The first amendment was intended to exclude Kapwepwe from qualifying as he had only been in the Party for 2 years prior to elections. The second amendment made it more difficult for one to qualify as they now needed the support of at least 180 delegates instead of 10 as it was before the amendment. The last amendment, together with the second, made it impossible for Chilwe and Nkumbula to contest the election since conference delegates were selected on the basis of their loyalty to Kaunda. This was obviously done *mal fides* with the intention of making sure that no one would be able to challenge Kaunda.

As can be seen, the decision in this case was obviously biased. A decision in favour of the applicants would have culminated in a confrontation between the Judiciary and the Executive which the former would have lost given the uneven balance of power between the two organs.

Another case in which the obvious bias of the Courts towards the State can be seen is the case of **Shilling Bob Zinka Vs Attorney General**²⁵ where following the promulgation of the Emergency (Essential Supplies and Services) Regulations, 26 and the taking over of business undertakings,

Mr Zinka a Mufulira businessman challenged the State over the revocation of his trading license in the Ndola High Court, and later when this action failed, in the Supreme Court.

On March 7th, 1988, the applicant brought a petition before the Ndola high Court against the State on the Grounds that the Emergency Regulations were illegal and that they be declared void. The Court however, found for the State and being unsatisfied with the decision of the High Court, the petitioner appealed to the Supreme Court.

His ground of appeal in the Supreme Court was that the trial Judge erred in holding that the Emergency (Essential Supplies and Services) Regulations which were made under Section 3 of the Emergency Powers Act were unlawful and unconstitutional for the reason that the President had not at all issued a proclamation declaring that a state of Public emergency existed under Article 30(1) (a) of the Constitution as the said proclamation was a mandatory requirement. However, the court held on this ground that:

"while conceding that the President's reference to the Emergency Powers Act was wrong, as the President's exercise of his power was traceable to a legitimate source, the fact that he purportedly exercised the power under a wrong source does not invalidate his action."

The Shilling bob Zinka case is an example of the extremes the courts were sometime prepared to go through to side with the State. The President's action in this case was clearly ultra vires his powers but the courts were willing to bend the law so as to legitimise his actions.

This was not the only case in which the Executive used the Judiciary as a shield behind which to

hide their abuse of power and disregard for human rights. A number of detention cases which came up during the Second Republic and in which the Judiciary sided with the Executive are illustrative of this tendency of the Courts to side with the State, often at the expense of individual rights.

The Preservation of Public Security Act 27 and the Emergency Powers Act 28 empower the President to detain persons without trial in order to preserve 'public security'. Section 2 of the Preservation of Public Security Act defines Public Security as including:

"the security or safety of persons, the maintenance of supplies and services essential to the life of the community, the prevention and suppression of violence, intimidation, disorder and crime, the prevention and suppression of rebellion and concerted defiance of and disobedience to the law and lawful authority and the maintenance of administration of justice."

As this definition is not very explicit, it is up to the Judge's discretion to determine if an offense amounts to a danger to Public Security. Zambian Judges have tended to use their discretion to give the definition of 'public security' a much wider meaning than must have been intended by Parliament when enacting these laws.

In the case of Mudenda vs Attorney General²⁹ Silungwe C.J. said that the definition of Public Security in the Preservation of Public Security Act is not 'exhaustive' but merely 'illustrative'. This view was taken up by Sakala J. in **Chibwe Vs Attorney General**³⁰ where he said that the expression public Security is 'inclusive' not 'exclusive'.

This wide construction of the term Public Security gave the executive unfettered power to use the Act for purposes which could not reasonably be said to fall under Public Security and it resulted in a gross abuse of Security powers.

The President used this power a great deal in the Second Republic to detain without trial political opponents as well as a lot of other people suspected of various crimes.

It was only Cullinan J. in the case of Kaira Vs Attorney General ³¹ who attempted to give a more useful and fair definition of Public Security by breaking up its definition as set out in Section 2 of the Preservation of Public Security Act, as follows:

- (i) the securing of the safety of persons and property;
- (ii) the maintenance of supplies and services essential to the life of the community;
- (iii) the maintenance of public order;
- (iv) the maintenance of the administration of lawful authority; and
- (v) the maintenance of the administration of justice.

This division of the term Public Security into definite categories, by Cullinan J., tended to restrict the Executive's use of their powers to detain under these Acts. As Cullinan J. was an expatriate, he was less intimidated by the Executive than were Zambian Judges. This was one of the reasons why Kaunda had wanted to Zambianize the Judiciary.

Despite the overwhelming control of the Executive over the Judiciary, there were still some Judges during this period who refused to be intimidated. there were a number of cases in which the rulings

of Judges were clearly not in favour of the Executive. This can be seen in the

case of Chipango and others Vs Attorney General.³²

The Supreme Court conceded that substantively, there was no doubt that treason had been committed. Baron D.C.J. said:

"The picture that has emerged from the evidence in this case is of a well organised campaign to recruit men for military training in a foreign country with the object of overthrowing the Government of Zambia by force. That this recruitment and training took place is common cause. The evidence is overwhelming that the men were willing recruits."

However, the Supreme Court in a unanimous decision quashed the conviction and sentence saying:

"The decision in this case does not depend on the failure of the learned trial Judge to regard the recruits as accomplices or as witnesses with a possible interest. The decision rests on the thoroughly unsatisfactory evidence given by the prosecution witness, on a deep suspicion attaching to the investigation and in particular on the fact that repeated use of physical assaults and coercion by the police was proved, and the fact that the trial was manifestly unfair."

This decision showed a Judiciary that was unafraid of the Executive. According to Mumba 33

"It is relevant to mention that during that period, the security of Zambia was precarious. The war in the then Southern Rhodesia had reached its climax and was affecting Zambia in many ways. Furthermore, the dispute over the presence of South Africans in South West Africa, in defiance of UN resolutions and International Court of Justice decisions, had already deteriorated into a war and the Zambians Government was constantly complaining to the UN that South African soldiers were repeatedly violating her territory and attacking Zambians on the pretext of seeking out members of the South West Africa People's Organisation. Many people were being detained by the President under the Preservation of Public Security Act (CAP 106) for allegedly assisting or seeking the assistance of the enemies of Zambia ... in committing acts which threatened public security in Zambia.

In those circumstances, it must be conceded that the Judiciary, which acquitted people accused of treason, after stating that the crime had been committed but had not been prosecuted in the court with slavish adherence to the finer points of the legal process could hardly be accused of weakness,"

It should be noted however that Baron D.C.J. , who presided over this case, was an expatriate who like the other expatriate Judges of this time were less intimidated by the Executive than the other Judges.

Kaunda, however, soon found a way in which to deal with those Judges whose rulings or philosophies he found unacceptable. he started the practice of transferring Judges from the Judiciary to other government departments or the parastatal sector. Once a Judge accepted such appointments, he lost his security of tenure as he could easily be removed from his new job.

There are many examples of instances where the President used this device. For example, Frederick Chamba was appointed Minister of Legal Affairs while he was a sitting Supreme Court Judge. Supreme Court Justice, Brendan Cullinan was appointed Managing Director of Legal Services Corporation, Supreme Court Justice Bruce - Lyle was appointed Director of the Anti-Corruption Commission; former Chief Justice Annel Silungwe was appointed Minister of Legal Affairs and Attorney General while he was a Judge of Supreme Court. He was later re-appointed to the bench. The Supreme Court Justice Leo Baron was appointed Chairman of the Law Development Commission.³⁴

CONCLUSION

The phrase 'independence of Judiciary' in the Second Republic was clearly a mockery. This period shows a number of Constitutional changes which effectively increased Executive control not only over the Judiciary but also over the Judicial Service Commission which was supposed to have a say in the appointment of Judges.

Judges in this period were clearly petrified of displeasing the Executive with their rulings and the few

FOOTNOTES

1. Nwabueze, B.O.. Judicialism in Commonwealth Africa, (1977), C Hurst and Company, London p 267.
2. Northern Rhodesia, Legislative Assembly Debates, 20th March, (1964), Col. 420
3. Kaunda, The functions of a lawyer Today, 3 &4, ZLJ 3, 1 - 4, (1971 -1972) p 3
4. Times of Zambia, 15th July 1969
5. Banda Vs Ottino (1967) ZR
6. Constitution of Zambia (1964) Article 99 (3) (a)
7. Constitution of Zambia (Amendment No. 2) Act 1970, No. 58 of 1970, Section 8
8. Legal Practitioners Act (1973) No.22 of 1973
9. Constitution of Zambia (1973) Article 107 (2)
10. 1964 Constitution, Op. cit. Article 99
11. Constitution (Amendment) No.2 Bill 1970
12. 1973 Constitution Op. cit. Article 110
13. Ibid. no 18 of 1974
14. Ibid., Section 115 (i) (a)
15. Ibid., Subsection (c)
16. Ibid., Subsection (b)
17. Ibid., subsection (d)
18. Ibid., Subsection (e)
19. Ibid Section 113 (3)
20. Times of Zambia, December 20th, 1985.
21. Mumba, SKC. Ph.D. Thesis, Judicial Control of Administrative Powers in Zambia, unpublished p.363
22. Ibid. Section 125 (5)
23. Chanda, A.W. Ph D. Thesis, A Case Study in Human Rights, unpublished, p
24. (1979) ZR 267
25. SCJ / 9 / 1991
26. No. 38 of 1988
27. CAP 106
28. CAP 108
29. (1979) ZR 240 at 248
30. (1980) ZR 10 at 35
31. (1980) ZR 65
32. (1978) ZR 378
33. Op.cit. N^o 21, p. 355-6
34. Chanda, A.W. Op. cit. p 363 - 4

CHAPTER THREE

JUDICIARY IN THE THIRD REPUBLIC

The coming into power of the Movement for Multi-party Democracy (MMD) and the introduction of a Multi-party system of government on November, 1991, raised a lot of hope among the people of Zambia for a better future. A lot of change was expected from the dictatorship kind of rule they had endured during the Second Republic. Among the changes expected was the freedom of the Judiciary from Political and other concerns.

The new Government realised that there was a need for a truly independent Judiciary in order for a democratic society to exist. Their intention to promote Judiciary independence is reflected in the number of changes concerning the Judiciary that are included in the new constitution and other Statutes.

This chapter will discuss these changes, the extent to which they have been implemented and their effect on the independence of the Judiciary in the third Republic.

New legal Provisions relating to the Judiciary.

The 1991 Constitution contains a number of new provisions and changes from the 1973 Constitution that are aimed at promoting the independence of the Judiciary.

The proponents of the 1991 Constitution recognised the need for an independent Judiciary and

realised that this could only be achieved by making sure that Judges were answerable to no-one and that they were subject only to the constitution and other laws from which they derived their powers. This is provided for in Article 91 (2) which states that:

" The Judges of the courts mentioned in clause (1) shall be independent, impartial and subject only to this Constitution and the law. "

As was seen in Chapter 2, Judges in the Second Republic lacked autonomy, and this was a serious constraint on Judicial independence. The 1991 Constitution aimed at redressing this situation by making provision for an autonomous Judiciary. 1

The threat to Judicial Independence that existed in the Second republic of giving the President absolute control in the appointment of the Chief Justice and other Supreme Court Judges was considerably reduced by the 1991 Constitution. Under it, the appointment of the Chief Justice 2 and the other Supreme Court Judges 3 by the President, are subject to ratification by the National Assembly. Thus the President no longer has absolute control in the appointment of Supreme Court Judges.

Similarly, in the case of the High Court or Pusine Judges, although they are still appointed by the President on the advise of the Judicial Service Commission, their appointment are now subject to ratification by the National Assembly. 4

Another major change that occurred with the advent of the Third Republic is related to the composition of the Judicial Service Commission which exists by virtue of Article 109 (1) of the Constitution.

According to Section 3 (1) of the Service Commission Act, 5 the Judicial Service Commission is now

composed of the Chief Justice, who is the chairman, the Attorney General, the Chairman of the Public Service Commission, Secretary to the Cabinet, a Judge nominated by the Chief Justice, the Solicitor General, one Member of Parliament appointed by the speaker of the National Assembly, a representative of the Law Association of Zambia, who is nominated by the members of the association and appointed by the President, the Déan of the School of Law (UNZA) and another member appointed by the President.

This change was intended to return to the Commission some of the control over Judicial matters that it had lost during the Second Republic.

The question that needs to be posed now, is how these changes have affected the independence of the Judiciary.

With regard to the Judicial Service Commission, we can see that it has now much more control over Judicial issues than before. Apart from the general directions that it may be given by the President ⁶ the Judicial Service Commission is not subject to the control or direction of any person in authority in the exercise of its functions. ⁷

In addition to the functions conferred to the Judicial Service Commission by the Constitution, ⁸ it has the power to appoint the Masters and Deputy Master of the Supreme Court, Registrar and Deputy Registrar or Assistant Master of the High Court, Principal Resident, Magistrate, Senior Resident Magistrate, Presiding officer or any other member of the Subordinate Court, any other

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22. Ibid. Section 125 (5)
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member of any court of law or connected with any court of law. 9

Furthermore, it has the power to confirm appointments, to exercise disciplinary control and to remove

persons or officers stipulated in Section 4 of the Service Commissioners Act from their offices in the name and on behalf of the President.

Presidential control over the Commission has been greatly reduced. It is only the law Association of Zambia representatives and the presidential appointee that can be removed from office by the President before they have served their two year term, for inability to perform their functions on account of infirmity of mind or body or for their misbehavior. 10 The President does not have such powers with regard to the other members of the Commission.

This has been a big step in the move towards an independent Judiciary. The President no longer has an overwhelming control over the Judiciary as his appointment of Judges have to be on the advice of the Judicial Service Commission over which he no longer predominantly controls. Since the Commission is no longer comprised mainly of political appointees, it can now once again concentrates on Judicial concerns.

As regards the autonomy of the Judiciary, there was a very long delay before the Autonomy Act provided by Article 91 (3) of the Constitution was enacted by Parliament. The delay by the Government to enact an Autonomy Act seems to indicate that they were reluctant to have an autonomous Judiciary. They seemed to fear that Judicial Autonomy would lead to loss or reduction of whatever influence politicians had over the Judiciary.

In fact, the president has in the past defended the huge salaries and benefits awarded to ministers and Parliamentarians explaining that they were meant to reduce corruption, without explaining why the same benefits were not extended to the Judicial sector which is also an organ of the Government.

This gave rise to a lot of complaints from members of the Judiciary including the Chief Justice, Matthew Ngulube who said :

" the autonomy which we had been promised has not yet come. We are still looking to the future, and one only hopes the executive will stop dragging it's feet over this matter and present the Autonomy Act to parliament so that the autonomy we have all been yearning for is made a reality. "11

The only thing that had been by the end of 1993, was the appointment of President Chiluba of a Permanent Secretary based at the High Court, specifically to prepare the Judiciary for autonomy.

For a long time, the Judiciary suffered from inadequate funding and had to resort to donor funding for the training of Judges and Magistrates both locally and abroad. 12

However, the autonomy of the Judiciary was a crucial issue which the Government could not side step or ignore especially with the increase of Constitutional and Political cases before the courts of Law. Hence in December 1994, after a lot of pressure from the Judicial Sector, the Judicature Act was enacted.

The Act provides for a Chief Administrator of the Judicature, who is appointed by the President on the recommendations of the Judicial Service Commission. 13 Under the Act, the Chief Administrator

is responsible for the day to day administration of the Judiciary and for the implementation of resolutions made by the Commission in respect of the administration. 14

In addition to this, the Chief Administrator is deemed to be the controlling officer in relation to the expenditure of the Judiciary. 15 The salaries and allowances of the members of the Judiciary shall be paid out of the Judicature's Funds, 16 which apart from the monies appropriated to it by Parliament, 17 shall consist also of Court fees and grants . 18 At present the Judiciary is being funded by the World Bank.

It is hoped that the Judicature Act will provide the necessary footing that the Judiciary needs to enable it's smooth and independent operation.

REVIEW OF CASES

In order to determine the effect the changes brought about in the third Republic, has on Judicial independence , it is necessary to look at some of the cases decided during this period.

The first major controversial case that came up in the third Republic was the appeal case of Kambarage Kaunda, who had been tried and convicted for the murder of Taboth Mwanza. The Supreme Court acquitted him and this decision caused an uproar among the legal Society as well as the public in general.

Legal Practitioners in Lusaka questioned the then Chief Justice Annel Silungwe's involvement in the case. It was argued that he was a close associate of the former President Kenneth Kaunda, Kambarage's father. He was a member of the board of trustees from Kaunda David Universal Temple. Apart from this Annel Silungwe is also related to Kambarage through marriage. His wife and the wife of Kambarage's brother, are first cousins.

Apart from this association, there were a number of inconsistencies in the handling of the case which raised eyebrows.

In the first place, he is said to have excluded his Deputy, Justice Matthew Ngulube from selecting the Kambarage appeal panel. Ngulube, as President of the Supreme court was supposed to have selected the judges to hear the appeal. It was, however, alleged that Silungwe single handedly selected the panel which included himself as chairman,

Secondly, he was said to have personally taken charge of the preparation of court records, done at defense lawyer, Richard Ngenda's office instead of the High Court.

Another inconsistency in this case was the speed with which it was disposed of by the Supreme Court. Several lawyers argued that the Supreme Court normally took longer to dispose of cases and they cited the example of the case of William Chipango and Others, which came before the High Court in June 1976 and was only disposed of by the Supreme Court in September 1978. Another example cited was the Edward Shamwana and Others case, which came before the High Court in January 1983

and was disposed of by the Supreme Court in early 1985. 19

The ruling in this case was obviously biased. In the opinion of Lusaka High Court Judge, Kabingo Chanda, the Supreme Court erred in its judgement and in dismissing the prosecution witnesses on the grounds that they were close to the deceased. According to him, in many cases in the past, the Supreme Court had accepted evidence given by spouses and children of the complainant. 20

The trial Judge had established that the accused did not murder in self defense because there was not a single piece of evidence to show that his life had been in danger. However, the Supreme Court went ahead to acquit Kambarage on the ground that he had acted in self defense.

However, when looking at this case, one has to bear in mind the fact that it came up shortly after the end of the One Party era. The presiding Chief Justice had been in office for about 17 years during the Second Republic and was closely associated with the former President Kambarage's father.

The decision taken in this case was clearly not in line with the concept of Judicial independence which entails that a Judge should have regard only to the facts of the case and the relevant laws, when making judgment, and not to any other considerations.

The outcome of the Kambarage case caused so much controversy that the Chief Justice Annel Silungwe was forced to resign after enormous pressure, especially from MMD supporters who did not want to have anyone linked with the former President in such a high post.

This situation closely resembled what followed after the case of the Portuguese soldiers in the Kaunda days, that is, where a number of expatriate Judges were forced to resign due to pressure from UNIP supporters who were displeased with the outcome of that case.

That the Chief Justice felt obliged to resign was contrary to the spirit of judicial independence. Had the President felt the need to remove him from office, he should have done so in accordance with the provisions of Article 98 (30) of the Constitution, which lays down the procedure for the removal of Supreme and High Court Judges for 'misbehavior'.

Another case which caused a lot of controversy was the case of **Fabian Kasonde and others Vs the Attorney General** 21 . In this case, five members of Parliament resigned from the MMD and the Speaker of the National Assembly consequently notified them officially that by virtue of Article 71 (2) (c) of the Constitution, they had ceased to be Members of Parliament with effect from the date of their resignation.

Article 71 (2) (c) of the constitution states:

"member of the National Assembly shall vacate his seat in the Assembly ... in the case of an elected member, if he becomes a member of a political party other than the party of which he was an authorised candidate when he was elected to the national Assembly or, if having been an independent candidate, he joins a political party:"

The Members of Parliament in question, contested this dismissal from Parliament in the High Court, contending that they had not yet joined another political party and hence should be allowed to retain their seats in Parliament.

Mambilima J. who presided in this case found that by their own declaration, the Petitioners were going to form and belong to the National Party. Hence, they were caught by the provisions of Article 71 (2) (c) and that in the terms of this Article, they vacated their seats when their Party came into existence on 10th September 1993.

The learned Judge further held on the interpretation of Article 71 (2) (c), that if a Member of Parliament leaves the Party on whose ticket he or she was elected into Parliament but does not join any political party, that person retains the seat as an independent.

The High Court ruling in this case caused a lot of concern especially in the Government who appealed to the Supreme Court on the ground that the trial Judge had erred in construing the provisions of that Article using the literal rule of Statutory interpretation. They contended that the Judge should have used the purposive rule of Statutory interpretation which looks at the intention of Parliament when enacting the law.

The Supreme Court ruled in favour of the State saying:

"It follows, therefore, that whenever the strict interpretation of a statute gives rise to an unreasonable and unjust situation, it is our view that Judges can and should use their good common sense to remedy it - that is by reading words in if necessary - so as to do what Parliament would have done had they had the situation in mind.

We therefore propose to remedy the situation in this case by adding the necessary words so as to make the constitutional provision fair and undiscriminatory. Hence Article 71 (2) (c) should now read.....

A member of the National Assembly shall vacate his seat in the Assembly - (c) in the case of an elected member, if he becomes a member of a political party other than the party of which he was an authorised candidate when he was elected to the National Assembly or, if having been an independent candidate, he joins a political party or vice versa."

This action taken by the Supreme Court in this case has been severely criticised. It would seem that Judges are willing to go to great lengths to support the Government. The action taken by the Court in this case was clearly ultra vires. They have no constitutional right to amend the constitution.

The concern expressed by the Government over the High Court ruling can be understood. If for some reason, all the members of the ruling party in the National Assembly resigned, one can see the hardships which the President and his Government can face. The Country can become virtually ungovernable.

However, it is up to Parliament and not the Courts, to fill loopholes in the law. If the Courts are given such leeway, they may use it to give unreasonable interpretations which is not in line with their duty to dispense justice fairly and is clearly not a trait of an independent Judiciary.

CONCLUSION

With the coming of the third Republic, and the new Republican Constitution, a number of fundamental changes were made with regard to the Judiciary in an attempt to promote its independence. The most important change is the constitutional provision for an autonomous Judiciary.

However, it took the Government of the day a considerable time to implement some of these changes. A review of some of the cases that have come up in the third Republic has revealed that the Judiciary still has a long way to go to become independent.

Since the Judicature Act which give the Judiciary autonomy was only enacted in December, 1994, we have yet to see if it will improve the situation as far as Judicial Independence is concerned. It is hoped that with a Judiciary that is autonomous, Judges will be better able to perform their duties without having regard to outside influence.

FOOTNOTES

1. 1991 Constitution, Article 91 (3)
2. Ibid. Article 93 (1)
3. Ibid, Subsection (2)
4. Ibid, Subsection (1)
5. No. 24 of 1991.
6. Ibid., Section 5
7. Ibid, Section 6
8. 1991 Constitution, Article 95.
9. Service Commissions Act, No. 24 of 1991., Section 4.
10. Ibid, Section 3 (2) (b)
11. Weekly Post, December 28th, 1993
12. Ibid
13. Judicature Act, Section 3 (i)
14. Ibid Section 3 (2) (a)
15. Ibid subsection (c)
16. Ibid Section 6 (3) (a)
17. Ibid Section 6 (i) (a)
18. Ibid Subsection (b)
19. Weekly Post, March 27th, - April 2, 1992
20. Ibid April 10 - 16, 1992
21. SCZ/08/57/1993

CHAPTER FOUR

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CONCLUSIONARY REMARK AND PROPOSALS FOR REFORM

As we have seen from this essay, the study of the history of the Zambian Judiciary has revealed that over the years the Judiciary and its independence has been seriously affected by a number of factors.

In the period 1924 -1972, this was because at first judges had no security of tenure. Over the years however, there was a gradual development in the law aimed at securing the tenure of Judges. Despite this development in the law, the Judiciary still lacked independence for various reasons.

In the One Party era, the most significant constraint on Judicial independence was political interference. During this period, the Judiciary was practically run by the President.

Despite the many changes, brought about by the third Republican Constitution with respect to the Judiciary, we have seen that to some extent it still lacks independence and this has been mainly because the executive arm of the government has been reluctant to provide the necessary environment for an independent Judiciary.

PROPOSED REFORM

The draft Constitution for 1995 compiled by the Constitutional Review Commission contains a number of changes with respect to the Judiciary. These changes are aimed at redressing some of the problems that have existed in the past in relation to Judicial Independence.

Article 169 (2) provided that no person or authority shall interfere with the courts or judicial officers in the exercise of their Judicial functions. The same provision goes on to say that no judge or other judicial officer shall be appointed to any office which is inconsistent with his or

her functions or which subjects him to different tenure or other conditions.

This section is very important as far as Judicial independence is concerned. It not only expressly forbids any interference, political or otherwise with the Judicial function, but also ensures that the system Kaunda used in the Second Republic to get rid of Judges by appointing them to other posts, shall no longer be possible.

For the first time in Zambian history, there shall be a constitutional provision which protects Judges against law suits for any act or omission done in good faith, while exercising their judicial powers.¹

Article 170 (3) provides that a court shall deliver judgments within 30 days after the conclusion of the trial. This is quite an important provision in that a number of people have been reluctant to take their grievance to the courts in the past because of the delay in getting judgments. Sometimes by the time the Judgement is received, it is too late to do any good to the aggrieved party. Such a provision, if effective will tend to raise people's confidence in the courts which is another important aspect of Judicial Independence.

Section 171 (3) provides that the offices of Chief Justice and Deputy Chief Justice shall become vacant upon assumption by any person the office of President. This provision is intended to make sure that what happened in the case of Chief Justice Annel Silungwe, who was deemed to have held office for too long, does not recur.

The draft Constitution also provides for a Constitutional Court² which shall have the jurisdiction to deal with any dispute of a constitutional nature. it shall have exclusive original jurisdiction over any alleged violation or threaten violation of any fundamental right or freedom granted by the Constitution.³ This provision is intended to ensure that what happened in the case of Nkumbula Vs Attorney General⁴ doesn't recur.

The Constitutional Court will also be able to preside over disputes relating to a threatened violation of a fundamental right even if the dispute is over the constitutionality of a bill before the National Assembly. However, this is subject to Article 176 (8) which states that the court shall only exercise its jurisdiction in this case at the request of the Speaker of the national Assembly. There is a further provision that the Constitutional Court may in the interest of Justice and good government, require the National Assembly, or any other competent authority to correct a defect in a legal provision that it has found to be inconsistent with the Constitution and hence valid.

This provision extends in our opinion, too much power to the courts. They no longer have to take it upon themselves to amend a constitutional provision as was the case in Fabian Kasonde and Others VS Attorney General 6 but they can get the National Assembly to make the amendment. There is no guarantee that this power will not be misused by some Judges.

The Judges of the Constitutional court shall be nominated by the Judicial Service Commission, appointed by the President, subject to the ratification by the National Assembly.⁷

This provision ensures that the Judges of the Constitutional Court shall be able to perform their functions without fear from the political sector since their appointments are not purely political.

The Draft Constitution further provided that a Judge shall not exercise the duties of his or her office unless he or she has taken an oath of allegiance.⁸

With regard to the Judicial Service Commission, Article 225 provides that it shall be independent and impartial and shall not be subject to the direction or control of any person or authority. This will ensure that it can concentrate on its functions without having regard to non judicial concerns.

On the whole, the draft Constitution, if effected, will do a lot to promote Judicial Independence. However, as we can see from the past, legal provisions alone are not enough to ensure Judicial independence. There is much more that need to be done in order for this to be achieved.

RECOMMENDATIONS

One of the most important changes that needs to come about is from the Judges themselves. A judge should not allow his own personal sentiments to cloud his judgments when dealing with applications before him. As one High Court Justice said:

" The courts should desist from being sentimental to avoid clouding their minds and consider the application by its own merits and not other extraneous considerations"⁹

Another factor that need to be changed is the attitude of the Executive. In order to carry out their duties effectively, the Judiciary needs an executive which has the political will to allow for the existence of an independent Judiciary. This is because the desires and commitment by the Judiciary to be independent can very easily be compromised by lack of support from the executive who are in charge of allocating resources. this is exactly what happened in the Zambian case as can be seen by the delay of the Government to enact an autonomy Act for the Judicature.

Hence, the Executive should ensure that other organs of the Government are not more favoured than the Judiciary when it comes to funding.

At a Commonwealth African Human Rights Conference in Harare, Zimbabwe, it was noted that a trend had emerged of departing from the Common law practice of appointing to bench senior members of the bar, and judges are now being appointed from the Magistracy and other institutions.¹⁰

The result of this is a class of Judges with not enough experience especially to deal with civil cases, as most of the cases handled in Magistrate Courts are of a criminal nature. Hence this practice should be stopped if the Judiciary is to be strengthened.

Judicial independence may also be promoted by improving the performance of Judges. This could be done by adopting the American system of clerking law students from UNZA to assist Judges with research required for judgments. This would enable judges to deliver their judgments sooner.

Furthermore, there is a need for law reports and journals to be published in Zambia, on a regular basis. There has been no law report published in Zambia in the past 9 years and the last Law Journal was published in 1986. This has resulted in Judges being lax and hiding behind unexamined cases known by very few people. If law reports were published regularly, judges being aware that their ruling would be open to scrutiny, will be more likely to deliver fair judgments that have been well researched.

Judicial independence can also be enhanced by an exchange of law reports with other countries especially within the commonwealth. At present, the law libraries in the country are quite inadequate. Books are out dated and in bad shape. Judges need to keep in touch with what is going on around the world so that they can have a broader perspective when dealing with cases in our rapidly changing society.

The media can also play an important part in promoting the independence of the Judiciary. By publicising the rulings in controversial cases and offering constructive criticisms, they will encourage judges to be more careful when passing judgments.

However, all these factors alone can not cause the Judiciary to be independent. As one author put it, only the Spirit of independence which comes from within the Judge can,

FOOTNOTES

1. Draft Constution, Article 169 (4)
2. Ibid, Article 168 (5)
3. Ibid, Article 176 (3)
4. (1972) Z R
5. Draft Constitution, Article 176. (3) (c)
6. SCZ / 08 / 57 / 1993
7. Draft Constitution, Article 177 (2)
8. Ibid Article 189
9. Justice James Mutale, Weekly Post, October 15 - 21, 1993
10. Sangwa J, Independent Judiciary needs Strengthening, Weekly Post, Jan 24 - 30, 1992

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5. Kaira vs Attorney General (1980) ZR 6s
6. Mudenda vs Attorney General (1979) ZR
7. Nkumbula vs Attorney General (1972) ZR
8. Nkumbula & Kapwepwe vs Attorney General (1978) ZR
9. R vs Chama (1962) R & NLR 3&4
10. R vs De Jager (1935) R & NLR
11. Rex us Crewe Cexparte Seqkome (1910) 2 KBD 576
12. Shilling Bob Zinka vs Attorney General SCJ / 9 / 1991
13. Terrel vs Secretary of State for the Colonies (1953) 2 QB 4H2

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3. Constitution of Zambia (1964)
4. Constitution of Zambia (1973)
5. Constitution of Zambia (1991)
6. Inquiries Act
7. Preservation of Public Surecity Act, Cap 106 Laws of Zambia
8. Emergency Powers Act, Cap 108 Laws of Zambia
9. Judicature Act (1994)
10. Service Commissions Act, No. 24 of 1991.