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**A COMPARATIVE ANALYSIS OF JUDICIAL INDEPENDENCE IN ZAMBIA AND
SOUTH AFRICA: SECURITY OF TENURE, APPOINTMENT AND REMOVAL
PROCEDURES**

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DECLARATION

I, **Bubala Chibbonta**, hereby declare that this dissertation is original and has never been presented to any other University or Institution. I also declare that any secondary information used has been duly acknowledged in this dissertation.

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DEDICATION

This dissertation is dedicated to my parents Mr Coillard Chilala Chibbonta and Mrs Caroline Neady Mushitu Chibbonta. Thank you so much for everything you have done for me. I owe my success to you.

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List of Abbreviations

ANC	Africa National Congress
FBI	The Federal Bureau of Investigations
ICJ	International Commission of Jurists
CSA	Constitution of South Africa
IRC	Industrial Relations Court
JC	Judicial Committee
JSC	Judicial Service Commission
LAZ	Law Association of Zambia
UN	United Nations
UNIP	United National Independence Party
USA	United States of America

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CHAPTER ONE

INTRODUCTION

1.1 Background to the Study

The principle of judicial independence has been described in the case of *Law Society of Lesotho v The Prime Minister and Another*,¹ as requiring judicial officers to be free to make their decisions without depending on the influence of another or any external pressure. The judiciary only owes its loyalty to the constitution and the law in the way it dispenses with justice. One of the requirements of the principle of judicial independence is appointing judicial officers in an open and transparent manner.² Those appointed should be men and women of dignity and integrity who are able to hold the executive, the powerful, the rich and the poor accountable if they contravene the prescription of the law.³

The concept of the independence of the judiciary stems from the doctrine of rule of law and separation of powers which requires the law to be upheld and the division of the state governance into the executive, judiciary and the legislature.⁴ The doctrine of separation of powers is usually entrenched in a written constitution and it ensures that all the three arms of government are independent from each other in the way they discharge their duties to the public and any accountability to any of the arms of government would affront the principle of separation of powers.⁵

There are a range of measures in the form of guidelines and principles that have been adopted at both the international and regional level in order to secure judicial independence, security of tenure, appointment and removal procedures of judicial officers.⁶ However, despite the measures adopted, the independence of the judiciary is one of the biggest challenges in the democratisation process in Southern Africa. In Africa, judicial independence is usually compromised by the executive. The lack of the executives' commitment 'to observe the independence of the judiciary has made the position of the

¹LSCA (1985-1989) 129.

²M Oliver 'The appointment of acting judges in South Africa and Lesotho' (2006) 27 *Obiter Journal* 555.

³*Attorney General of Lesotho and Another v Swissbourgh Diamond Mine* LSCA (1985-1989) 129.

⁴RB Mzikanda 'The role of the judiciary in safeguarding the principle of separation of powers in a democratic state' 2006 5; JB Sakala 'The role of the judiciary in the enforcement of human rights in Zambia' unpublished PhD thesis, University of Zambia, 1999 321.

⁵NJ McNally 'Addressing the tension between judicial independence and judicial accountability' 2010 3; PA Gerangelos *The Separation of powers and legislative interference in judicial process: Constitutional principles and limitations* (2009) 30.

⁶LVD Vijver (ed) *The judicial institutions in Southern Africa: A comparative study of common law jurisdictions* (2006) 1; see also the International Commission of Jurists (ICJ) *International principles on the independence and accountability of judges, lawyers and prosecutors: A practitioners' guide* (2004). The international standards are discussed in detail in chapter two.

judiciary relative to the other two branches of government fragile and constantly in need of nurturing.⁷ If the judiciary is in a fragile state, there will be lack of checks on the other arms of government to ensure that they do not transgress the prescription of the law. The calibre of the people being appointed as judicial officers is also being questioned as deteriorating and undermining the principle of judicial independence. Judicial independence is the fight that the judiciary has to win over and over in order to ensure the dispensation of justice.

This study has been inspired by the fact that recently in Zambia and South Africa, the independence of the judiciary has emerged as one of the main issues in the democratisation process. There have been controversies in respect of security of tenure, appointment and removal procedures of judicial officers which might have a threat of undermining judicial independence. While the constitutions in these jurisdictions affirm the historical principles of judicial independence, separation of powers and the rule of law, the practices especially by political authorities, judicial officers themselves and the public point to a totally different direction.

In South Africa for Instance, President Jacob Zuma's nomination and appointment of the Chief Justice Sandile Ngcobo in 2009 raised a lot of controversies among the opposition political parties and the public alleging the President's failure to consult the opposition parties as required by the Constitution.⁸ In the same year, removal procedures investigations commenced against Judge Hlophe, a Western Cape Judge President of the High Court in South Africa by the Judicial Service Commission (JSC) for allegedly attempting to influence two Constitutional Court judges in matters regarding the corruption charges against President Zuma.⁹ In Zambia, the Chief Justice, Ernest Sakala, was challenged in court in the year 2009 as to the legality of his extended contract.¹⁰ Flowing from this discussion is the need to secure judicial independence in order to enhance democracy. It is worth noting that the illustrations cited above are discussed in detail in chapter four.

1.2 Statement of the research problem

Problems have arisen relating to security of tenure, appointment and removal procedures of judicial officers in Zambia and South Africa which calls for further research in this area.

⁷M Malila 'The jurisprudence of the African Commission relating to the independence of the judiciary' 2010 2.

⁸Zuma and the chief justice: A tragic comedy of errors' *Politicsweb* 11 August 2010

<http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71619?oid=139214&sn=Detail&pid=71619> (accessed 29 May 2010).

⁹SA judge asked to quit over influence' *Afro news* <http://www.afrol.com/articles/29183> (accessed 29 May 2010); Legal brief today <http://www.legalbrief.co.za/index.php?page=HlopheDebate> (accessed 29 May 2010).

¹⁰Zambia: Petition to remove chief justice Ernest Sakala thrown out' *Lusaka times* 17 September 2009 <http://www.lusakatimes.com/?p=17907> (accessed 29 May 2010).

There is no doubt that the concepts of judicial independence, security of tenure, appointment and removal procedures of judicial officers are immense and intricate. The premise of this study is that the security of tenure, appointment and removal procedures of judicial officers in Zambia has many flaws and is not inline with international law and standards. Due to the flaws and failure of the appointment procedures to conform to international standards, there is a high probability that individuals who lack dignity and integrity end up on the bench. There is then the potential that such individuals misuse their positions for political and personal advancement. It is against this background that the study examines three pertinent questions.

1. Are judicial officers' security of tenure, appointment and removal procedures in Zambia and South Africa consistent with the notion of judicial independence and international standards?
2. What are the best practices in securing the tenure of judicial officers, appointment and removal procedures of judicial officers in Africa and globally?
3. What legal and other measures can be taken to support security of tenure, appointment and removal procedures?

1.3 Objectives of the study

The study has the following objectives;

1. To analyse what judicial independence means and how it can be achieved.
2. To critically examine the constitutional provisions of Zambia and South Africa that deal with security of tenure, appointment and removal procedures, the procedures if any adopted by the respective JSC as well as the actual practice on the ground.
3. To indentify and discuss some of the flaws in respect of security of tenure, appointment and removal procedures of judicial officers.
4. To discuss the best practices from South Africa and other jurisdictions that would improve security of tenure, appointment and removal procedures of judicial officers in Zambia and the rest of Africa.

1.4 Significance of the study

The study is significant because it tries to establish the best practices in appointments and removal procedures of judicial officers as well as security of tenure. These practices if adopted have the potential of alleviating some of the problems that are being experienced in these processes. The study also tries to establish whether security of tenure, appointment

and removal procedures of judicial officers in Zambia and South Africa are inline with international law and standards.

1.5 Research methodology

This research adopts a library, desk and comparative approach. A review will be done of published as well as unpublished materials such as books, journal articles, research papers, reports, internet sources, newspapers and constitutions of Zambia and South Africa. Research is also done through email interviews.

1.6 Scope of the study

This dissertation focuses solely on one aspect of judicial independence, being security of tenure, appointment and removal procedures of judicial officers. In this regard, the dissertation does not examine and provide an in-depth analysis of the other factors that undermine judicial independence. The dissertation also focuses on two selected Southern African countries: Zambia and South Africa. The inspiration for selecting Zambia is two fold. Firstly, it is for the reason that Zambia has had its on challenges and problems relating to security of tenure and appointment procedures of judicial officers. Secondly, Zambia is currently going through a constitutional review process and comments are being invited from interested parties on the draft Constitution bill. This dissertation will inform the current draft Constitution bill on provisions relating to security of tenure, appointment and removal procedures of judicial officers. South Africa has been selected because it has also experienced problems with appointment and removal procedures of judicial officers. However, South Africa comes into the study to contrast with Zambia because it provides better provisions of security of tenure, appointment and removal procedures of judicial officers from which Zambia can benefit from. South Africa's JSC procedures of appointment of judicial officers are also more advanced than the procedures of Zambia's JSC.

1.7 Literature review

The notion of judicial independence has attracted a lot of interest among legal and political scholars. There is an extensive amount of literature ranging from books, judicial decisions, reports, papers, articles and commentaries. However there is very little literature on a comparative analysis of Zambia and South Africa specifically focusing on the best practices of security of tenure, appointment and removal procedures of judicial officers. This study seeks to expand and update on the literature that is available and build on some of the best

practices that would be a guide for security of tenure, appointment and removal procedures of judicial officers in order to realise judicial independence.

Linda Van De Vijver,¹¹ looks at a comparative study of the judicial institutions in Southern Africa. The book discusses the superior courts in Botswana, Kenya, Lesotho, Malawi, Namibia, South Africa, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe. It focuses among other things on the constitutional and statutory provisions affecting the judiciary, the process for appointment of judges, their security of tenure and conditions of service. The book also looks at some of the cases, incidents or crises that have occurred in the different countries relating to judicial independence as at 2006. The work however, lacks an in-depth analysis of the flaws of the constitutional provisions of security of tenure, appointment and removal procedures, the procedures adopted by the respective JSC as well as the actual practice on the ground of the countries it discusses. The work merely states the way appointments and removal procedures are conducted and how security of tenure is secured.

Bola Ajibola and Deon Van Zyl,¹² focus on the judicial independence in Africa in general. The work discusses issues of judicial independence inline with the appointments of judges in selected African countries and how the judiciary is under threat. This work fails to show the best practices that can ensure judicial independence in respect of security of tenure, appointment and removal procedures of judicial officers.

DM Davis¹³ focuses on South Africa's appointment procedures by the JSC. Amy Gordon and David Bruce,¹⁴ focuses on how judicial independence has transformed in South Africa from the time of the apartheid legal order to the year 2008. The report also outlines how judicial officers are appointed presently in South Africa. Siri Gloppen¹⁵ focuses on the accountability function of the courts in Zambia as at 2004. This work looks at security of tenure and appointment procedures of judicial officers in Zambia. Julius Bikoloni Sakala's¹⁶ work also discusses security of tenure, appointment and removal procedures of judicial officers in Zambia. It is worth noting that all these works fail to provide the best practices and an in-depth analysis of whether security of tenure, appointment and removal procedures of judicial officers in Zambia and South Africa are inline with international law.

¹¹Vijver (n 6 above).

¹²B Ajibola & D V Zyl (eds) *The judiciary in Africa* (1998).

¹³DM Davis 'Judicial appointments in South Africa: Conference of the middle temple' 2010 http://www.middletemple.org.uk/Downloads/6c_%20-%20Deanis%20Davis%20Davis20-%20JUDICIAL%20APPOINTMENT (accessed 11 August 2010).

¹⁴A Gordon & D Bruce 'Transformation and the independence of the judiciary in South Africa' 2007 <http://www.csvr.org.za/docs/transition/3.pdf> (accessed 23 September 2010).

¹⁵S Gloppen 'The accountability function of the courts in Tanzania and Zambia' in S Gloppen, R Gargarella & E Skaar (eds) *Democratization and the Judiciary* 2004.

¹⁶Sakala (n 4 above).

1.8 Overview of chapters

This work is divided into five chapters. Chapter one presents the background to the study and the statement of the research problem. It outlines the objective, significance, methodology and the scope of the study. The literature review and an overview of the chapters are also outlined. Chapter two lays the conceptual foundation of the dissertation. The concepts of judicial independence, separation of powers, and rule of law are described. International standards in respect of security of tenure, appointment and removal procedures of judicial officers are also outlined. In addition, judicial independence is critically examined with regard to its importance in the democratisation process. Chapter three contextualises judicial independence of both Zambia and South Africa.

Chapter four is a comparative analysis of Zambia and South Africa in respect of security of tenure, appointment and removal procedures of judicial officers. It examines the constitutional provisions of Zambia and South Africa with regard to security of tenure, appointment and removal procedures, the procedures if any adopted by the JSC as well as the actual practice on the ground. The chapter further examines whether these procedures are inline with international standards and judicial independence. The chapter uses South Africa as the country with the best practice from which Zambia can learn from. Where South Africa falls short, the chapter suggests best practices from other jurisdictions. Chapter five brings the work to a conclusion and provides recommendations that would secure security of tenure, appointment and removal procedures of judicial officers to achieve at least a minimum of judicial independence.

CHAPTER TWO

THE ROLE OF JUDICIAL INDEPENDENCE IN SOCIETY

2.1 Introduction

This chapter looks at the role of the judiciary in society. The chapter discusses the importance of judicial independence inline with separation of powers, the rule of law and democracy. The chapter also discusses international standards relating to security of tenure, appointment and removal procedures of judicial officers.

2.2 The role of the Judiciary in society

The judiciary has a fundamental role in the administration of justice and particularly in guarding, supporting and enforcing of human rights in a democratic society.¹⁷ The judiciary plays a key role in ensuring that violators of human rights are brought before the court, those whose rights have been violated seek redress that is effective, impending victims of human rights violations are protected and a fair trial is received by all those charged with a criminal offence.¹⁸ It is worth noting that the role of the judiciary is not only restricted to what has been stated, its role is very broad in society. It is therefore important that a society should have a judiciary that is free from any form of interferences or pressures so that the fundamental rights and freedoms of the individuals are better protected.¹⁹ This requires judicial officers that can exercise their duties in an independent, impartial, competent manner without fear and favour.²⁰

Judicial independence has countless definitions.²¹ However, two principles stand out that embody the concept.²² At the outset, judicial officers should apply themselves freely according to their understanding of the facts and law presented before them and they should exercise impartiality.²³ Secondly, the judicial officers should conduct their work independent of the other arms of government.²⁴ The first principle embodies the concept of rule of law while the second principle embodies the doctrine of separation of powers. These two principles and their relevance are discussed in this chapter in detail.

¹⁷ICJ (n 6 above) 1.

¹⁸ICJ (n 6 above) 1.

¹⁹Sakala (n 4 above) 300.

²⁰As above.

²¹Olivier (n 2 above) 27.

²²Sakala (n 4 above) 300.

²³As above.

²⁴Sakala (n 4 above) 300.

For the judiciary to be referred to as independent, a number of requirements have to be satisfied.²⁵ The judicial officers must be appointed in a manner that is open and transparent and an independent body like the JSC should administer the entire process; the judicial officers' security of tenure must be guaranteed and special provisions for conditions of service must be made.²⁶ There are several problems that contain the full realisation of the independence of the judiciary and when examined closely, these revolve around and stem from one or more of the above stated requirements.²⁷

Judicial independence is normally entrenched and guaranteed in the constitution. For instance, the Constitution of South Africa (CSA) provides under section 165 for the independence of the judiciary and allows the courts only to be subject to the law and the Constitution when exercising their duties which should be done with impartiality without fear, favour or prejudice. The state is permitted to assist the courts in protecting and ensuring the independence of the judiciary through legislative and other measures.²⁸ The CSA does not allow any organ of the state or persons to interfere with the functions of the courts.²⁹

The Constitution of Zambia also has a provision that affirms the independence of the judiciary. Article 91(2) of the Constitution of Zambia emphasises on judicial officers to be subject only to the Constitution and should be independent and impartial. It is worth noting that the Constitution of Zambia does not have any provision that explicitly prohibits any organ of the state or persons from interfering with the independence of the judiciary as provided for under the CSA. There is also no provision that places an obligation on the state to assist and protect the judiciary in ensuring the independence, impartiality, dignity and effectiveness of the judiciary. The draft Constitution bill however, has a provision that provides that when the judiciary requires assistance in ensuring judicial independence, dignity and effectiveness, all the other state organs and institutions shall render the assistance required.³⁰ It is one thing to have provisions in the constitution that are sufficient in affirming the independence of the judiciary and another in ensuring that the independence of the judiciary is respected.

²⁵Olivier (n 2 above) 555.

²⁶Olivier (n 2 above) 555; see also K Eso 'Judicial independence in the post-colonial era' in Ajibola & Zyl (n 12 above) 120.

²⁷BA Ajibola 'judicial independence under colonial rule' in Ajibola & Zyl (n 12 above) 108.

²⁸Section 165(4) CSA.

²⁹Section 165(3) CSA.

³⁰Article 198(3) Zambia draft Constitution bill http://www.zambia.co.zm/downloads/draft_constitution.pdf (accessed 23 September 2010).

2.3 Separation of powers and rule of law

Separation of powers is one of the two fundamental doctrines from which the principle of judicial independence is traceable.³¹ The doctrine dates back to the ancient Greece during the days of Aristotle and the Roman Empire.³² In 1690, a publication by John Locke an English political philosopher 'The Second Treaties of Civil Government' further developed the doctrine.³³ His publication was as results of growing concerns in England were it was noted that temptations of dishonesty subsisted if those entrusted with making the laws also executed them.³⁴

In 1748, a French political and legal philosopher Baron de Montesquieu published his famous book 'The Spirit of Laws' which gave the impulsion to the doctrine of separation of powers.³⁵ His theory was that there should be separation of powers between the three organs of the state to ensure that one organ checks on the others so as to prevent abuse of power.³⁶ If this is not observed, it will be the end of everything as laws that are oppressive will be approved and this will lead to tyranny and arbitrary rule.³⁷ It was Baron's publication that made him to be popularly attributed to the doctrine of separation of powers to date.³⁸

The doctrine of separation of powers is usually provided for in most constitutions although some do not and it has to be implied.³⁹ The rationale underlying the doctrine of separation of powers is to avoid power being concentrated in an individual or group of persons and also to prevent tyrannical or arbitrary rule.⁴⁰ A person or groups of persons are therefore prevented from being judges in their own cause.⁴¹ Separation of powers ensures that those entrusted to draft the laws are different from those who interpret, apply and put them into effect.⁴² This enables the formulators of the laws to be subject to the same laws they formulate.⁴³ It serves

³¹ Sakala (n 4 above) 321.

³² Sakala (n 4 above) 321; Mzikamanda (n 4 above) 5.

³³ Sakala (n 4 above) 321; Mzikamanda (n 4 above) 5.

³⁴ Mzikamanda (n 4 above) 5.

³⁵ Sakala (n 4 above) 321; see also Mzikanda (n 4 above) 6.

³⁶ Sakala (n 4 above) 321.

³⁷ As above.

³⁸ Sakala (n 4 above) 321.

³⁹ Mzikamanda (n 4 above) 6.

⁴⁰ Mzikamanda (n 4 above) 7.

⁴¹ R Bellamy(ed) *The rule of law and the separation of powers* (2004) 254.

⁴² Bellamy (n 41 above) 255.

⁴³ As above.

as a spur to the legislature to formulate laws in general terms applicable to all and avoid self-centred legislation.⁴⁴

A pure doctrine of separation of powers can be achieved if three components are met.⁴⁵ Firstly, there must be a division of the government into three organs of government namely: the legislature, the executive and the judiciary.⁴⁶ These three organs should be kept distinct from each other.⁴⁷ Secondly, there must be a distinction that should exist between the legislature, executive and the judiciary with respect to their functions.⁴⁸ Thirdly, the personal of the legislature, executive and the judiciary should not overlap.⁴⁹

The pure doctrine of separation of power however is really too complex to achieve in the modern world.⁵⁰ It is desirable that there is some form of overlapping of one or more of the three organs of government to prevent uncertainty and tyranny.⁵¹ The overlap must be balanced so that no organ of the government usurps the powers of the other organs.⁵² The overlap is usually in the form of interrelationships between the three organs of the government with each organ being independent of each other.⁵³ There must be checks and balances within the three organs of the government to perform the function of questioning and controlling for the benefit of the individuals and society.⁵⁴ This allows the government to function as a unit.⁵⁵

The judiciary has a major role to play in the doctrine of separation of powers because of the checks and balances on the executive and the legislature. It ensures that all the laws drafted and passed by the legislature and the activities of the executive are in conformity with the law.⁵⁶

The principle of judicial independence can also be traced from the concept of rule of law.⁵⁷ It is a concept that is ever evolving and wide-ranging.⁵⁸ According to Dicey, the supremacy of the rule of law has two meanings.⁵⁹ Firstly, the ordinary law of the land should predominate

⁴⁴Bellamy (n 41 above) 255.

⁴⁵Bellamy (n 41 above) 254.

⁴⁶As above.

⁴⁷Bellamy (n 41 above) 254. Bellamy bases the 3 requirements on the classical study of Maurice Vile.

⁴⁸Bellamy (n 41 above) 254.

⁴⁹Bellamy (n 41 above) 254.

⁵⁰Sakala (n 4 above) 322; Mzikamanda (n 4 above) 8.

⁵¹Sakala (n 4 above) 322; Mzikamanda (n 4 above) 8.

⁵²Sakala (n 4 above 322.

⁵³As above.

⁵⁴Sakala (n 4 above) 322.

⁵⁵As above.

⁵⁶ICJ (n 6 above) 1.

⁵⁷Ajibola (n 27 above) 107.

⁵⁸As above.

⁵⁹Ajibola (n 27 above) 107.

in any society.⁶⁰ Secondly, all people must be equal before the law.⁶¹ Everyone without an exception is subject to the law and amenable to the jurisdiction of the ordinary courts because no man is above the law.⁶² Rule of law is premised on the conception that the activities and the powers of the government must be in accordance with the laid down laws and procedures.⁶³ Power must be legitimately exercised and traceable to written laws and procedures that are applicable at that time.⁶⁴ This is intended to protect against any abuse of powers, tyranny, arbitrary rule and it serves as a restriction on the powers of the state.⁶⁵ Any public office bearer or private individual should be held accountable for acts done outside the prescribed law.⁶⁶ Rule of law also ensures that there is predictability.⁶⁷ People are able to predict the consequences of their actions and subsequently plan their lives.⁶⁸

The judiciary plays a crucial role in the concept of rule of law. It is the upholder of the law and should therefore not be influenced by the executive branch of government, the public or the members of the judiciary. The rule of law gives the judiciary 'authority to determine the state of the law in a given case, to pass sentence and to review legislation for its compatibility with the prevailing legal norms, including constitutional rights.'⁶⁹ The legislature should therefore pass laws in accordance with the due formalities which should be obeyed by society.⁷⁰ It should however be noted that even when the laws meet the due formalities, they will be interpreted and acted upon by the judicial officers⁷¹. This is because an 'absolute application of even the best drafted laws is virtually impossible.'⁷² There will always be problems of understanding what the laws imply no matter how specific the laws passed by legislation maybe.

⁶⁰As above.

⁶¹Ajibola (n 27 above) 107.

⁶²As above.

⁶³P Shivute 'The rule of law in Sub-Saharan Africa- An overview' in N Horn & A Bosl (eds) *Human rights and the rule of law in Namibia* (2009) 225.

⁶⁴As above.

⁶⁵Shivute (n 63 above) 225.

⁶⁶As above.

⁶⁷JM Maravall & A Przeworski (eds) *Democracy and the rule of law* (2003) 2.

⁶⁸As above.

⁶⁹Bellamy (n 41 above) 1.

⁷⁰Maravall & Przeworski (n 67 above) 1.

⁷¹Bellamy (n 41 above) 35.

⁷²As above.

2.4 International standards of judicial appointment, security of tenure and removal procedures

The appointment procedure for judicial officers is critical in securing the independence of the judiciary.⁷³ Those appointed should be individuals who are brave to make decisions that may affect the executive provided the facts and the laws are applied appropriately. Judicial officers should be people of dignity, integrity and should not tolerate any interference from members of the judiciary or the other arms of government. Only when such individuals are appointed will judicial independence be secured. A judicial officer may be brilliant; however, if his or her appointment was cloaked in contention, she or he will never earn the approbation of the public.⁷⁴ Judicial officers should therefore be appointed in a manner that is transparent and leaves no room for the public to lose confidence in the judiciary.

There are no agreed procedures and standards of appointing judicial officers both at the regional and international level.⁷⁵ Indeed, the international standards leave some discretion to each state to design its own procedures of how to appoint judicial officers.⁷⁶ The standards however, emphasise that whatever the state adopts as its appointment procedures, they should be conducted in a manner that is very clear, transparent and very strict in order to attain judicial independence and impartiality.⁷⁷ Each state should have clear guidelines that should stipulate the criterion that is followed when appointing judicial officers.⁷⁸ International standards prohibit appointing judicial officers based on their race, sex, colour or their political views because such criteria are irrelevant to the performance of judicial duties and they can undermine judicial independence.⁷⁹

Selection and appointment of judicial officers should be based on the individuals' qualifications and his or her ability to perform his or her functions in an efficient manner.⁸⁰ Individuals can also be appointed on grounds that they are a national of the country concerned and it is not considered as discriminatory in international law.⁸¹ For instance, in

⁷³ J Straw 'The governance of Britain: Judicial appointments' 2007 16 <http://www.justice.gov.uk/docs/cp2507.pdf> (accessed 2 September 2010).

⁷⁴ M Firozee 'Appointment of judges in the supreme court: Fresh approach called for' 2008 1 <http://nation.ittefaq.com/issues/2008/03/08/news0663.htm> (accessed 23 September 2010).

⁷⁵ ICJ (n 6 above) 38.

⁷⁶ As above.

⁷⁷ ICJ (n 6 above) 38; see also Principle A para 4(h) of the African Principles and Guidelines on the Right to a Fair Trial and Legal Assistance; see also article 9 of the Universal Charter of the Judge <http://www.hijpc.ba/dc/pdf/The%20UNIVERSAL%20CHARTER%20OF%20THE%20JUDGE.pdf> (accessed 23 September 2010).

⁷⁸ ICJ (n 6 above) 38.

⁷⁹ As above.

⁸⁰ ICJ (n 6 above) 39.

⁸¹ Principle 10 of the United Nations Basic Principles on the Independence of the Judiciary (UN Basic Principles) <http://www2.ohchr.org/english/law/indjudiciary.htm> (accessed 19 August 2010); ICJ (n 6 above) 39.

South Africa, for an individual to be appointed as a judge of the Constitutional Court, he or she must be a South African citizen.⁸²

Most African states have given the responsibility of appointing judicial officers to independent bodies and an example of such a body is the JSC. The African Principles and Guidelines on the Right to a Fair trial and Legal Assistance (African Principles) and the Commonwealth Principles on the Accountability of and Relationship on the Three Branches of Government (Latimer House Principles) also encourage the appointment of judicial officers to be left in the authority of an independent body.⁸³ Standards at the international level do not expressly state the specific body that should be given the responsibility of appointing judicial officers, the composition of such a body or the procedures that the body should adopt.⁸⁴ Nonetheless, international standards demand that whatever procedures the independent body adopts, they should be clear, strict and transparent.⁸⁵ The independent body has the responsibility of identifying and selecting people who are capable of upholding judicial independence. It is also worth noting that international standards do not prohibit the other two arms of government from appointing judicial officers though the most advocated for method of appointments is through an independent body.⁸⁶ This method is encouraged so that the executive does not appoint judicial officers for improper motives such as advancing its political agenda.⁸⁷

Another important factor to consider when discussing the appointment procedures is security of tenure of judicial officers. Non renewable or long term security of tenure is a more preferred form by international standards in order to ensure that the judicial officers are protected.⁸⁸ This helps judicial officers not to undermine their independence by yielding to political pressure to have their contracts renewed especially in countries where the executive plays a major role in the appointment procedures.⁸⁹ International standards encourage that the security of tenure of judicial officers should be guaranteed by states and there should be legislation put in place that should secure it.⁹⁰

⁸²Section 174(1) CSA.

⁸³Principle A para 4(h) of the African principles adopted in 2001 by the African Commission on Human and Peoples' Rights <http://www.afrimap.org/standards.php> (accessed 20 August 2010); see also guideline II (1) of the Latimer House Principles which were adopted in 2003 in Abuja, Nigeria http://www.thecommonwealth.org/speech/34293/35178/181324/sg_sharma_latimer_house_colloquium.htm (accessed 20 August 2010).

⁸⁴ICJ (n 6 above) 44.

⁸⁵As above.

⁸⁶ICJ (n 6 above) 44.

⁸⁷As above.

⁸⁸An example of long term security of tenure is appointing judicial officers to hold office for life or permanently. See for instance article 8 of the Universal Charter of the Judge, guideline 11(1) of the Latimer House Principles.

⁸⁹ICJ (n 6 above) 47.

⁹⁰See for instance Principle 11 of the UN Basic Principles, Principle A paras 4(1) & (m) of the African Principles.

A discussion of appointment of judicial officers will be incomplete if removal procedures are not considered. It is the duty of every state to ensure that removal procedures are clear and the grounds for such removal must be explicitly provided.⁹¹ There is a general rule concerning the grounds on which a judicial officer can be removed from his duties and these are when there is 'serious misconduct, disciplinary or criminal offence or incapacity that renders them unable to discharge their functions.'⁹² Where there are allegations that a judicial officer's behaviour amounts to one of the grounds that satisfies removal from his or her duties, the judicial officer is entitled to be informed of the charges and a fair hearing should be conducted by a body that is independent and impartial which should give the judicial officer the right to a defence.⁹³ The removal procedures of the judicial officers should be such that they cannot be easily abused by the other arms of government.

2.5 Judicial independence and democratic governance

The concept of democracy is too broad to define and it has been defined differently by various scholars. It has no single precise and agreed meaning.⁹⁴ There are different classifications, categories and typologies of democracies. Literature shows that they are radical, liberal, pluralist, one party, socialist, deliberative, equilibrium democracies, elitist democracy and many other.⁹⁵ It is clear from the different classifications of democracy, that it is a complex phenomenon. It does not 'signify only a form of government or of choosing a government, it maybe a term applied to a whole society.'⁹⁶

Democracy in practice terms the governing by the representative of a majority of the people.⁹⁷ It should not only be equated with the ritual of voting and elections, but it should go further than that.⁹⁸ It also 'involves the coexistence of a plurality of opinions guaranteed by the freedom of expression under the rule of the majority, the rulers being basically

⁹¹ICJ (n 6 above) 54.

⁹²ICJ (n 6above) 53; see also Principle 18 of the UN Basic Principles which provides for 2 grounds upon which judicial officers can be removed from their duties and these are incapacity or judicial officer's behaviour ; see also Principle A para 4(p) of the African Principles which also gives grounds upon which judicial officers can be removed; Guideline V(1) para (a)(A) & (B) of the Latimer House Guideline cites serious misconduct and incapacity to perform duties as grounds for removal.

⁹³ICJ (n 6 above) 54; Principle 17 of the UN Basic Principles which provides for judicial authorities to be given a fair hearing as of right; Principle A para 4(q) of the African Principles also provides for fair hearing for judicial authorities who are entitled as of right to choose their own legal representative; Guideline V(1) para (a)(i) of the Latimer House Guidelines requires that a fair hearing be given to the judicial authority by an independent and impartial body.

⁹⁴A Arblaster *Democracy* (1994) 3.

⁹⁵A Weale *Democracy* (1999) 19; D Acemoglu & JA Robinson *Economy of dictatorship and democracy* (2009) 51.

⁹⁶Arblaster (n 94 above) 9.

⁹⁷Weale (n 95 above) 84; Arblaster (n 94 above) 4.

⁹⁸D Ronen *Democracy and pluralism in Africa* (1986) 35.

accountable for their action to this majority.⁹⁹ Democracy requires that every citizen has the right to equal and free participation in the political process of the state and political leaders should be elected through constitutional means.¹⁰⁰

Most African States have adopted what is known as constitutional democracy.¹⁰¹ This form of democracy upholds the constitution as the supreme law of the land. There is emphasise on the guarantee of individual rights, rule of law and separation of powers to ensure limitation of powers on the government and popular elections as a means of a political party getting into government.¹⁰² It must be stated that democracy is not easy to achieve. There are certain requirements that have been suggested that should be present in a democratic society.¹⁰³ These are popular participation and free and fair elections, popular pluralism, transparency and accountability, rule of law, responsive and inclusive government and an active civil society.¹⁰⁴ Other requirements include separation of powers, respect for the citizens, equals rights among citizens and the independence of the judiciary.¹⁰⁵

The independence of the judiciary can only be fully achieved in a democratic state.¹⁰⁶ It is plausible to state therefore that, in a non democratic state, there can never be judicial independence. The judiciary is 'important for the working and consolidation of democratic regimes.'¹⁰⁷ It facilitates in ensuring that democratic rules such as protection of human rights as established in constitutions, conventions and laws are upheld by power holders and they are held accountable for any breach of the rules.¹⁰⁸ It is very important that the judiciary is well functioning to help in the democratisation process by ensuring that there is transparency in the way the affairs of the government are conducted.¹⁰⁹ States that respect the independence of the judiciary enjoy stable democracy.¹¹⁰

⁹⁹Ronen (n 98 above) 35.

¹⁰⁰As above.

¹⁰¹Mzikamanda (n 4 above) 3.

¹⁰²As above.

¹⁰³Mzikamanda (n 4 above) 4.

¹⁰⁴UN Guidance Note of the Secretary General on Democracy

<http://un.org/democracyfund/Docs/UNSG%20Guidance%20Note%20on%20Democracy.pdf> (accessed 30 August 2010).

¹⁰⁵Mzikamanda (n 4 above) 4.

¹⁰⁶FW Jjuuko, 'The independence of the judiciary' in FW, Jjuuko, (ed) *The independence of the judiciary and the rule of law: strengthening constitutional activism in East Africa* (2005) 2.

¹⁰⁷S Gloppen, R Gargarella & E Skaar *Democratisation and the judiciary: The accountability function of courts in new democracies* (2004) 1.

¹⁰⁸Gloppen, Gargarella & Skaar (n 107 above) 1.

¹⁰⁹As above.

¹¹⁰Sakala (n 4 above) 333.

2.6 Conclusion

This chapter has attempted to discuss what judicial independence is and the role judicial officers play in ensuring judicial independence through separation of powers and rule of law. The chapter has set out international standards in respect of security of tenure, appointment and removal procedures of judicial officers. The chapter has also set out the link between judicial independence and democratic governance.

CHAPTER THREE

JUDICIAL INDEPENDENCE IN ZAMBIA AND SOUTH AFRICA IN A CONTEXT

3.1 Introduction

This chapter contextualises judicial independence in Zambia and South Africa. The chapter begins by looking at the historical background of judicial independence of Zambia from the time the country became independent in 1964. South Africa historical background is also discussed from the time the country became a union in 1910. This is important because some of the challenges that the judiciaries of the two countries face are historically rooted.

3.2 The Zambia context

Zambia got its independence from the British on 24 October 1964 ending direct British control which had endured from 1924. Kenneth Kaunda who founded the United National Independent Party (UNIP) in the late 1950 became the President of Zambia. The 1964 independence Constitution was as a result of negotiations between the British colonial power and UNIP at Lancaster House in the United Kingdom in May 1964.¹¹¹

At independence, Zambia started off as a democratic state because the 1964 independence Constitution allowed different political parties to participate in the democratic system.¹¹² Among the major political parties were UNIP, the United Party, the African National Congress and United Progressive Party.¹¹³ However, the different opposition political parties were short lived because they were banned when Zambia was declared a one party state in February 1972.¹¹⁴ The only sole legal political party recognised in the country at that time was UNIP.¹¹⁵

There were various reasons advanced to justify why Zambia should become a one party state. One of the reasons advanced was that the country needed to unite for economic development.¹¹⁶ This reason was supported by the argument that Zambia had a lot of ethnic groupings and economic development could not be achieved because the ethnic groups

¹¹¹SV Mubako 'Zambia's single party constitution: A search for unity and development' (1973) quoted in M Wamunyima 'Constitution making in Zambia: The need for a new perspective' unpublished dissertation, University of Pretoria, 2006 25.

¹¹²G Erdmann & N Simutanyi 'Transition in Zambia: The hybridisation of the third republic' 2003 3 http://www.kas.de/db_files/document/7_dokument_dok_pdf_4026_2.pdf (accessed 11 October 2010).

¹¹³Erdmann & Simutanyi (n 112 above) 3.

¹¹⁴As above.

¹¹⁵'Politics of Zambia' http://www.fact-index.com/p/po/politics_of_zambia.html (accessed 11 October 2010).

¹¹⁶L Shimba 'The origins of a one party state in Commonwealth Africa' in M Ndulo *Law in Zambia* (1984) quoted in Wamunyima (n 111 above).

were fragmented.¹¹⁷ Opposition political party leaders were seen as a danger because they would seek refuge in the ethnic groups to gain support that would generate tension among the ethnic groups leading to the obliteration of the country.¹¹⁸ Another reason advanced was that the 1964 independence Constitution was a product of colonial trace.¹¹⁹ It was therefore necessary that a constitution that expressed the aspirations of the people and the economic development of the country be developed.¹²⁰

It is worth noting that the 1964 independence Constitution provided for the independence of the judiciary.¹²¹ In my opinion, in spite of this, the executive did not respect and adhere to the principle. For instance, in 1969 two Portuguese soldiers from Angola were patrolling on their boarder.¹²² They saw an immigration officer making gestures at them.¹²³ They decided to go and have a chat with him and to their surprise they were arrested and a magistrate convicted them for entering Zambia illegally.¹²⁴ When the matter went for appeal to the Zambian High Court, Justice Evans reversed the decisions and quashed the convictions.¹²⁵ This decision brought so much anger among the black people because the Portuguese had killed a number of Zambian people in the villages through their bombing in targeting the guerrillas.¹²⁶

Kaunda accused the High Court that was composed of only white judges as looking down on the people of Zambia.¹²⁷ The President argued that the High Court saw itself as an organisation from heaven entertaining the Zambian people being killed by the Portuguese.¹²⁸ An explanation was demanded by Kaunda from the Chief Justice James Skinner for Justice Evans judgment; however, the Chief Justice supported Justice Evan's reasoning basing it on the principle of judicial independence.¹²⁹ This angered Kaunda and there was a statement released from his office stating that he would find a way of dealing with the matter because he now knew where the judiciary's loyalty lay.¹³⁰ The following day they were mass demonstrations in most parts of the country and the Lusaka High Court was stormed while

¹¹⁷Wamunyima (n 111 above) 25.

¹¹⁸R Molteno 'Cleavage and conflict in Zambian politics: A study in sectionalism' in W Tordoff & I Scott (eds) *politics in Zambia* (1974) quoted in Wamunyima (n 111 above) 26.

¹¹⁹As above.

¹²⁰Wamunyima (n 111 above) 26.

¹²¹S Gloppen et al (n 107 above) 119.

¹²²'Zambia: Justice on trial' 15 August 1969 <http://www.time.com/time/magazine/article/0,9171,901234-1,00> (accessed 11 October 2010).

¹²³As above.

¹²⁴n 122 above.

¹²⁵n 122 above.

¹²⁶n 122 above.

¹²⁷n 122 above.

¹²⁸n 122 above.

¹²⁹n 122 above.

¹³⁰n 122 above.

the Chief Justice Skinner and Justice Evans locked themselves in an office.¹³¹ The two judges subsequently fled the country.¹³²

During the one party state, the President was dominant¹³³ and they were meagre conditions for judicial independence.¹³⁴ An illustration of the president's predominant power was seen when the President declared a state of emergency from 1964 to 1991 when his term of office came to an end.¹³⁵ Human rights violations were reported especially during the one party state from 1972 until 1991.¹³⁶

The advent of the multi party elections in 1991 that were won by the Movement for Multi Party Democracy under the leadership of Fredrick Chiluba raised expectation for change which would among other things protect the principle of judicial independence.¹³⁷ Mathew Ngulube was subsequently appointed as the new Chief Justice by Chiluba.¹³⁸ The Chief Justice was highly praised by the public for some of the exceptional judgments he delivered especially the ones that went against the wishes of the executive.¹³⁹ One distinguished judgment handed down by the Chief Justice was *Christine Mulundika and 7 others*¹⁴⁰ that declared unconstitutional section 5 of the Public Order Act which required anyone who wished to hold a public meeting or a demonstration to apply for a permit from the police.

This judgment attracted a lot of rage from the government and callous oratory in parliament.¹⁴¹ Campaigns were instigated against the Chief Justice that included rape allegations and his lack of credibility, fortunately they all died out.¹⁴² In spite of this, the Chief Justice was later accused of becoming pro-government and dancing to the President's tune.¹⁴³ In 2002, the Chief Justice was accused of secretly receiving money from the government.¹⁴⁴ US\$ 184,000 was the money that was revealed by a renowned newspaper, *The Post* as having been received by the Chief Justice from the start of 1997.¹⁴⁵ This

¹³¹ n 122 above.

¹³² n 122 above.

¹³³ Erdmann & Simutanyi (n 112 above) 4.

¹³⁴ Gloppen et al (n 107 above) 119.

¹³⁵ Erdmann & Simutanyi (n 112 above) 4.

¹³⁶ Erdmann & Simutanyi (n 112 above) 7.

¹³⁷ Gloppen et al (n 107 above) 119.

¹³⁸ As above.

¹³⁹ Gloppen et al (n 107 above) 119.

¹⁴⁰ (1995) SCZ 25.

¹⁴¹ Gloppen et al (n 107 above) 121.

¹⁴² As above.

¹⁴³ Gloppen et al (n 107 above) 119.

¹⁴⁴ Gloppen et al (n 107 above) 119.

¹⁴⁵ *The Post* 27 June 2002 quoted in Gloppen et al (n 107 above) 119.

instigated campaigns against him.¹⁴⁶ Following these allegations, the Chief Justice resigned in June 2002.¹⁴⁷ These events affected the perception of the judiciary in Zambia.

An increase was registered in the number of election petitions following the 1996 and 2001 elections.¹⁴⁸ In these cases, various petitioners were alleging electoral misconduct against the sitting government.¹⁴⁹ Disappointingly, however, a number of petitions including presidential petitions took long to be decided which cast doubt on the independence of the judiciary.¹⁵⁰ Yet when judgments were handed down they failed to hold the executive accountable even when the court found that they were some instances of flaws and irregularities in the elections.¹⁵¹ For instance, in the presidential election petition of *Lewanika and others v Frederick Titus Jacob Chiluba*,¹⁵² the court failed to nullify the elections after having found that there were some flaws and irregularities in the elections that were conducive for malpractice.¹⁵³ The reasoning of the court was that the flaws and irregularities in the elections did not fatally affect the results to justify nullifying the elections.¹⁵⁴

It is worth noting that since independence, the judiciary hardly ever hands down judgments that considerably inconvenience the ruling government.¹⁵⁵ One of the reasons advanced for this is the legal culture of the country.¹⁵⁶ Most judicial officers though resolute to adhere to judicial independence categorize themselves as part of the British common law where 'courts are reactive rather than proactive, and can only decide matters brought before them.'¹⁵⁷ Some of the judicial officers deem that they cannot check the actions of government because there are strict limits on the execution of their duties and that separation of powers requires them not to intrude in the dealing of the other arms of government.¹⁵⁸ However, the introduction of multi party democracy has seen some improvement in the adherence of judicial independence in comparison to the one party state.¹⁵⁹

¹⁴⁶Gloppen et al (n 107 above) 121.

¹⁴⁷Gloppen et al (n 107 above) 119.

¹⁴⁸As above.

¹⁴⁹FM Ng'andu & KC Chanda 'The role of the judiciary in promoting transparency and honesty in the Zambian electoral process' 2002 quoted in Gloppen et al (n 107 above) 120.

¹⁵⁰As above.

¹⁵¹Gloppen et al (n 107 above) 120.

¹⁵²(1998) SCZ 14.

¹⁵³As above; see also Gloppen et al (n 107 above) 120.

¹⁵⁴As above.

¹⁵⁵Gloppen et al (n 107 above) 118.

¹⁵⁶Gloppen et al (n 107 above) 122.

¹⁵⁷As above.

¹⁵⁸Gloppen et al (n 107 above) 122 & 123.

¹⁵⁹Gloppen et al (n 107 above) 121.

3.2.1 The appointment of judicial officers

In respect of appointment procedures of judicial officers, in spite of having reviewed the Constitution a couple of times, Zambia has not reviewed these procedures. The appointment procedures to date are almost a replica of the 1964 independence Constitution that inherited colonial features because it was negotiated by the colonial powers. For instance, under article 99 of the 1964 independence Constitution, the President appointed the Chief Justice and all the judges of the Court of Appeal which is the equivalent of the Supreme Court of Zambia today without consultation. This procedure still exists in the current Constitution; the only slight change to all the constitutions reviewed is that the national assembly has to ratify the appointments.¹⁶⁰ Puisne judges under article 99A of the 1964 independence Constitution were appointed by the President acting in accordance with the advice of the JSC. A slight requirement also of ratification by the national assembly to the appointment procedures of puisne judges was added and everything else has been maintained through all the constitutional review processes.¹⁶¹ With the constitution review process currently going on in Zambia, there is a lot that Zambia can learn from South Africa with how its appointment provisions under the Constitution are worded and how the procedures have transformed. The current appointment procedures of judicial officers in both Zambia and South Africa are the subject of discussion in chapter four.

3.3 The South Africa context

South Africa had four colonies prior to 1910 namely: The Orange Free State, Transvaal, Cape Colony and Natal.¹⁶² 1910 when the four colonies united as single union marked the formal beginning of parliamentary supremacy in the country.¹⁶³ A Westminster system of government was created.¹⁶⁴ The various constitutions adopted and amendments made beginning 1910 to the end of the apartheid regime in 1994 upheld parliamentary supremacy.¹⁶⁵ This meant that the legislature could pass any laws they considered necessary without the possibility of being checked by the judiciary.¹⁶⁶ During this period, in a purely positivist manner, the powers of the judiciary were largely confined to interpreting the

¹⁶⁰ See article 93 of the 1991 Constitution and article 93 of the 1996 Constitution.

¹⁶¹ See article 95 of the 1991 Constitution and article 95 of the 1996 Constitution.

¹⁶² Vijver (n 6 above) 114.

¹⁶³ Gordon & Bruce (n 14 above) 12.

¹⁶⁴ As above.

¹⁶⁵ MG Cowling 'Judges and the protection of human rights in South Africa: Articulating the inarticulate premises' (1987) quoted in Gordon & Bruce (n 14 above) 12.

¹⁶⁶ Gordon & Bruce (n 14 above) 12.

laws in order to give effect to the will of parliament.¹⁶⁷ The judiciary did not enjoy powers of judicial review.¹⁶⁸

Even before the formal ushering of the parliamentary supremacy, there were instances that indicated that South Africa was headed to the Westminster system of government. For instance, in about 1897, Chief Justice JG Kotze handed down a judgment that stated that the court had the duty to invalidate any law that was inconsistent with the fundamental law.¹⁶⁹ Legislation was subsequently adopted rejecting the judiciary's powers of judicial review by the legislative assembly of the Boer republics.¹⁷⁰ Following the adoption of the legislation, the Chief Justice was fired by the President for insisting on the courts powers of judicial review.¹⁷¹ A new Chief Justice was appointed by the president and at his inauguration, the president cautioned the judicial officers not to follow the courts powers of judicial review as he saw it as evil.¹⁷²

It is important to note that supremacy of parliament is considered to function properly in a country where the legislative branch of government is representative of the majority of the people.¹⁷³ However, this was not the case in South Africa from 1910 because parliament had no representation of the black people who were in the majority.¹⁷⁴ The political power was controlled by the white Afrikaners who were in the minority.¹⁷⁵ Race and colour were important factors in determining the way the government treated people and black people were discriminated against and segregated in a number of issues.

There was no true judicial independence during the whole period of the apartheid regime.¹⁷⁶ The judiciary enjoyed the principle of judicial independence in modest, often the other branches of government interfered with the principle of judicial independence.¹⁷⁷ For instance, in 1952, a matter was brought before the Appellant Division Court which was the highest court of appeal at the time challenging the constitutionality of two Acts of parliament that wanted to take out the male coloured voters from the common voters roll and place them on a different voters roll.¹⁷⁸ The court found that the Act was invalid for the reason that

¹⁶⁷ J Dugard 'The journal process, positivism and civil liberty' (1971) quoted in Gordon & Bruce (n 14 above) 12..

¹⁶⁸ Gordon & Bruce (n 14 above) 14.

¹⁶⁹ *Brown v Leyds* 1897 4 OR 17 quoted in M Chaskalson et al *Constitutional law of South Africa* 1999 1.

¹⁷⁰ Chaskalson (n 169 above) 2.

¹⁷¹ As above.

¹⁷² Chaskalson (n 169 above) 2.

¹⁷³ Gordon & Bruce (n 14 above) 13.

¹⁷⁴ As above.

¹⁷⁵ Gordon & Bruce (n 14 above) 13.

¹⁷⁶ Gordon & Bruce (n 14 above) 11.

¹⁷⁷ Gordon & Bruce (n 14 above) 11.

¹⁷⁸ *Harris v Minister of Interior* 1952 2 SA 428 (AD) quoted in Vijver (n 6 above) 115.

the legislature did not follow the right procedures when passing the Act.¹⁷⁹ The government in order to frustrate judicial independence, reacted by passing the High Court of Parliament Act which created a court in parliament that would re-examine the decisions of the judiciary every time an Act of Parliament was declared invalid.¹⁸⁰ Fortunately, the Act was challenged and invalidated.¹⁸¹

It has been reported that the government maintained that the country had judicial independence during the apartheid reign in order to give legality to the apartheid government.¹⁸² However, the judiciary was during the reign of the apartheid government seen as an arm of government that advanced the political agenda of the government. In many cases the judiciary continually upheld discriminatory and repressive laws.¹⁸³ The ruling party undermined judicial independence and most judicial officers appointed were individuals who were seen to be lenient towards the government and would approve or allow apartheid laws.¹⁸⁴ There are various examples of such appointments. For instance, the appointment of Pierre Rabie in 1987 as acting Chief Justice after his retirement age when there was no provision in the Constitution that allowed for appointment of acting judges.¹⁸⁵ This illustrated the ruling government's intention to keep individuals who were sympathetic with the government and could apply apartheid laws.¹⁸⁶ Another case in point is the appointment of HA Fagan in 1957 as Chief Justice.¹⁸⁷ The Senior Judge of Appeal used to be the one elevated to the position of Chief Justice since 1914 if the office fell vacant.¹⁸⁸ However, in 1957 when the office of the Chief Justice fell vacant, OD Schreiner who was the senior judge of appeal should have been appointed following the standard that had existed since 1914, but he was never appointed and Fagan was instead appointed.¹⁸⁹ It is believed that Schreiner was not appointed as Chief Justice because he believed in equality before the law and he persevered in opposing the exclusion of the male coloureds from the common voters roll.¹⁹⁰

¹⁷⁹As above.

¹⁸⁰Gordon & Bruce (n 14 above) 12.

¹⁸¹J Dugard *Human rights and the South African legal order* (1978) quoted in Gordon and Bruce (n 14 above) 12.

¹⁸²The Truth and Reconciliation Commission's report on the legal hearings 1998 quoted in Gordon & Bruce (n 14 above) 11.

¹⁸³Dugard (n 181 above) quoted in Gordon & Bruce (n 14 above) 14.

¹⁸⁴Gordon & Bruce (n 14 above) 15 & 16.

¹⁸⁵As above.

¹⁸⁶Gordon & Bruce (n 14 above) 17.

¹⁸⁷Dugard (n 181 above) quoted in Gordon & Bruce (n 14 above) 16.

¹⁸⁸As above.

¹⁸⁹Dugard (n 181 above) quoted in Gordon & Bruce (n 14 above) 16.

¹⁹⁰As above.

On 27 April 1994, the apartheid government came to an end and South Africa became a constitutional democracy.¹⁹¹ For the first time, elections were carried out on the foundation of universal adult suffrage and the Africa National Congress (ANC) won the elections under the leadership of President Nelson Mandela.¹⁹² Parliamentary supremacy was done away with and the Constitution is now the supreme law of the country.¹⁹³ With the introduction of democracy in the country, there was need for judicial transformation in the judicial system especially with issues of racial and gender inequalities because the apartheid judiciary was overwhelming composed of predominantly white male judicial officers.¹⁹⁴ There was also need to appoint judicial officers who were dedicated to guarding and supporting the new democracy.¹⁹⁵ South Africa has undergone judicial transformation to address the issues that have been stated. The 1996 Constitution now provides for an independent judiciary which has powers to review the acts of the other arms of government.¹⁹⁶

Judicial independence has been upheld by the government since 1994 and judgments have been handed down by the judiciary that clash with the preferences of the executive.¹⁹⁷ Nonetheless, tensions have also been seen to exist between the judiciary and the executive.¹⁹⁸ A case in point is on 8 January 2005, the ANC made a statement at its 93 anniversary celebration that attracted a lot of criticism from the lawyers, academics and members of the public as trying to undermine judicial independence.¹⁹⁹ The statement made reference to the challenges the ANC was facing in changing the frame of mind of the judiciary so as to be inline with the objectives of the millions of people who were involved in the liberation struggle.²⁰⁰

In an attempt to reform the judiciary, in 2005, five bills were introduced by the minister of justice.²⁰¹ These were: The National Justice College Bill, the Superior Courts Bill, the judicial Conduct Tribunal bills, The Judicial Service Commission Amendment Bill and the Constitutional Amendment Bill.²⁰² The bills raised controversies among the judicial officers, legal profession, civil society organisations and the public.²⁰³ Allegations were made that the bills would undermine judicial independence as they intended to give the executive further

¹⁹¹Vijver (n 6 above) 115.

¹⁹²Vijver (n 6 above) 115.

¹⁹³Section 2 CSA.

¹⁹⁴Gordon & Bruce (n 14 above) 20.

¹⁹⁵As above.

¹⁹⁶Section 172 CSA.

¹⁹⁷Gordon & Bruce (n 14 above) 32.

¹⁹⁸As above.

¹⁹⁹Gordon & Bruce (n 14 above) 32.

²⁰⁰As above.

²⁰¹Vijver (n 6 above) 152

²⁰²As above.

²⁰³Gordon & Bruce (n 14 above) 34 & 35.

control over the judiciary.²⁰⁴ The minister of justice was also condemned by the judicial officers for failure to confer with them in the whole process of drafting the bills.²⁰⁵ The Constitutional Amendment Bill and the Superior Courts Bill were the two most controversial bills.²⁰⁶ The minister of justice was given power by the Superior Courts Bill to run certain operations of the courts and also to make rules for the courts while the Constitutional Amendment Bill gave the President further powers to appoint acting judges.²⁰⁷ Following the controversy, some of the bills have since been withdrawn and replaced by others while others have been combined.²⁰⁸

As stated earlier, the government has upheld judicial independence; however, the government has been slow and inefficient in abiding with the orders of the court.²⁰⁹ For instance, in the case of *The Government of the Republic of South Africa & Others v Grootboom & Others*,²¹⁰ the decision of the court has not been fulfilled by the government.²¹¹ This is a case where the Constitutional Court held that section 26 of the Constitution imposed an obligation on the state to provide housing to ameliorate conditions for people living in intolerable or crisis conditions.²¹² The court order required the state to act so as to meet the obligations imposed by section 26 of the Constitution.²¹³

3.4 Conclusion

This chapter has attempted to contextualise judicial independence of both Zambia and South Africa. The chapter focused on the kind of government both countries have experienced and the government's attitude towards judicial independence. The chapter has also attempted to show how judicial officers operate and the challenges they have faced in upholding judicial independence.

²⁰⁴Gordon & Bruce (n 14 above) 35.

²⁰⁵As above.

²⁰⁶Gordon & Bruce (n 14 above) 35.

²⁰⁷Gordon & Bruce (n 14 above) 36.

²⁰⁸Gordon & Bruce (n 14 above) 35.

²⁰⁹Gordon & Bruce (n 14 above) 33.

²¹⁰2000 11 BCLR 1169 (CC)

²¹¹AfriMAP and Open Society Foundation of South Africa 'South Africa: Justice sector and the rule of law' quoted in Gordon & Bruce (n 14 above) 33.

²¹²Grootboom (n 210 above).

²¹³As above.

CHAPTER FOUR

SECURITY OF TENURE, APPOINTMENT AND REMOVAL PROCEDURES

4.1 Introduction

This chapter undertakes a comparative analysis of appointment procedures, security of tenure and removal procedures for judicial officers in Zambia and South Africa. The chapter begins by looking at the composition of the JSC in Zambia and South Africa. The appointment and removal procedures of judicial officers in Zambia and South Africa are also analysed with a view to determining whether or not they are in line with international standards. The chapter also discusses security of tenure. The focus is not only on the constitutional provisions but also on the procedures adopted by the respective JSC and the practice on the ground. South Africa is used as the country with the best practices from which Zambia can learn from. Where flaws are identified in South Africa, procedures are suggested from other jurisdictions with the best practices.

4.2 Composition of the JSC

As a matter of fact, most countries have constituted JSCs as the bodies through which judicial officers are appointed and in some cases disciplined. Zambia and South Africa have not been an exception in this regard. As indicated in chapter two, the JSC is the body charged with the responsibility of identifying and selecting judicial officers who are capable of upholding judicial independence. It is therefore imperative that the JSC has representation from different sectors of society and is vibrant to ensure that all the candidates to be appointed as judicial officers are strictly scrutinised.

4.2.1 Composition of the JSC of Zambia

Zambia's Constitution has no provision relating to the composition and functions of the JSC. Instead, this aspect is regulated by the Service Commission Act.²¹⁴ This Act provides that that members of the JSC consists of the Chief Justice who is the chairman of the JSC,²¹⁵ a judge who is nominated by the Chief Justice,²¹⁶ the Attorney General,²¹⁷ the Solicitor General,²¹⁸ the Secretary to the Cabinet,²¹⁹ the Chairman of the Public Service

²¹⁴Chapter 259 of the laws of Zambia.

²¹⁵Section 3(1)(a) Chapter 259.

²¹⁶Section 3(1)(f) Chapter 259.

²¹⁷Section 3(1)(b) Chapter 259.

²¹⁸Section 3(1)(c) Chapter 259.

²¹⁹Section 3(1)(e) Chapter 259.

Commission,²²⁰ the Dean of the Law School of the University of Zambia²²¹ a member representing and nominated by the Law Association of Zambia (LAZ) who is appointed by the President,²²² one member of the national assembly appointed by the speaker of the national assembly,²²³ and one member who still holds or has held high judicial office appointed by the President.²²⁴ The JSC determines its own procedures when appointing judicial officers.²²⁵

The draft Constitution bill incorporates the composition and the functions of the JSC and the numbers of the members has increased by three.²²⁶ However, even with the increase in the number of members of the JSC by the draft Constitution bill, the representation still falls short. Zambia has many opposition parties represented in the national assembly,²²⁷ and it would be ideal if members of the opposition are placed on the JSC like in the case of South Africa. Civil societies should also be made members of the JSC to have a voice that will be able to challenge selection of candidates that would undermine judicial independence.

4.2.2 Composition of the JSC of South Africa

The JSC of South Africa is established under section 178 of the CSA. The meetings of the JSC are presided over by the Chief Justice.²²⁸ The members of the JSC consists of the Chief Justice,²²⁹ the Supreme Court of Appeal President,²³⁰ a judge President selected by all the judges President,²³¹ the Minister of Justice or his or her substitute selected by the Minister of Justice,²³² two practising advocates appointed by the President of South Africa who should first be nominated from inside the advocates' profession,²³³ two practising attorneys appointed by the president of South Africa who should be nominated from inside the attorneys' profession,²³⁴ a teacher of law selected by the teachers of law from a South African university,²³⁵ six members selected from the national assembly, three of which must

²²⁰Section 3(1)(d) Chapter 259.

²²¹Section 3(1)(i) Chapter 259.

²²²Section 3(1)(g) Chapter 259.

²²³Section 3(1)(h) Chapter 259.

²²⁴Section 3(1)(j).

²²⁵Regulation 15 Chapter 259.

²²⁶Article 228 draft Constitution bill.

²²⁷Zambia has about 7 opposition parties represented in the national assembly and there also members who also do not belong to any political party and they individual representative

http://www.parliament.gov.zm/index.php?itemid=100&id=349&option=com_content&q=&search=go&task=view (accessed 23 September 2010).

²²⁸Section 178(a) CSA.

²²⁹Section 178(a) CSA.

²³⁰Section 178(b) CSA.

²³¹Section 178(c) CSA.

²³²Section 178(d) CSA.

²³³Section 178(e) CSA.

²³⁴Section 178(f) CSA.

²³⁵Section 178(g) CSA.

be members representing the opposition parties in the national assembly,²³⁶ four permanent national council of provinces delegates selected mutually by the council which should have supporting votes at slightest of six provinces,²³⁷ four people selected by the president in consultation with the leaders of the parties in the national assembly.²³⁸ If the JSC is sitting to hear a matter relating to a particular high court, the members of the JSC increases to include 'the Judge President of that Court and the Premier of the province concerned, or an alternative designated by each of them.'²³⁹ South Africa's JSC has been criticised for being dominated by politicians and a lot of members appointed by the President.²⁴⁰

4.3 Appointment procedures

4.3.1 Appointment procedures in Zambia

In Zambia, the Chief Justice, the Deputy Chief Justice and all the judges of the Supreme Court are appointed by the President subject to ratification by national assembly.²⁴¹ The puisne judges of the High court are appointed by the President who acts on the advice of the JSC subject to ratification by the national assembly.²⁴² The Chairman and Deputy Chairman of the Industrial Relations Court (IRC) are appointed by the President who acts on the advice of the JSC.²⁴³

In respect of the appointment of judges of the High Court, there are no specific procedures by the JSC that are gazetted or can be accessed by the public on how judicial officers are selected in practice. The JSC procedures are not open to the public or the media. There is nothing in the regulations that prohibits the JSC from publishing to the public its procedures of selecting judicial officers. However, members of the JSC and its staff are prohibited from publishing or disclosing documents, information or communication that comes to their notice during the course of their duties.²⁴⁴

Zambia's JSC used to advertise vacancies for suitable candidates to apply to be considered as judicial officers at the High Court and IRC but it no longer does.²⁴⁵ The procedure currently allows anyone who has the qualifications to apply to be considered for appointment

²³⁶Section 178(h) CSA.

²³⁷Section 178(i) CSA.

²³⁸Section 178 (j) CSA.

²³⁹Section 178(1)(k) CSA.

²⁴⁰Vijver (n 4 above) 123.

²⁴¹Article 93(1) & (2) Zambia Constitution.

²⁴²Article 95(2) Zambia Constitution.

²⁴³Article 95(2) Zambia Constitution.

²⁴⁴Regulation 9 Chapter 259.

²⁴⁵AW Chanda 'National integrity systems: TI country study report Zambia' 2003 27

<http://www.afmap.org/english/images/documents/file4265/c/74cd78.pdf> (accessed 23 September 2010).

as a judicial officer and often the judiciary has had to head hunt for people to be appointed as judicial officers.²⁴⁶ When the applications are lodged, the JSC interviews the candidates who have applied in private.²⁴⁷ The national assembly Parliamentary Committee on Ratifications also interviews the candidates before they are ratified by the national assembly and institutions such as LAZ, the Anti Corruption Commission, the Human Rights Commission, the Zambia Police Service and the Drug Enforcement Commission are then invited to comment on the candidates who have applied to be considered as judicial officers.²⁴⁸

Having unclear procedures which are not transparent in appointing judicial officers has led to the public having perceptions and allegations that the process is abused. For instance in April 2009, there were allegations from the public that the Chief Justice Ernest Sakala had made his own list of persons that he wanted to be considered for appointment to the high court.²⁴⁹ It was further alleged that the Chief Justice called LAZ for three emergency meetings compelling and pleading with LAZ to have his list approved.²⁵⁰ In order to avoid such perceptions and allegations from the public, Zambia's appointment procedures need to meet international standards. They have to be clear and transparent. Such unclear procedures of appointing judicial officers may allow people who have no integrity and dignity to be appointed and judicial independence might be undermined.

It raises concerns with the way the President appoints the Chief Justice, Deputy Chief Justice and the other judicial officers of the Supreme Court. This is because the President does not consult with anyone and no one knows what criteria the president uses to identify all those he appoints to the Supreme Court. It would be ideal that before the President makes such appointments, he consults with the JSC that is tasked with vetting of persons to be appointed to judicial offices so as to make the procedures stricter, clearer and transparent as required by international standards. One can argue that even though the Constitution does not provide for consultation, it provides for ratification by the national assembly and that ratification serves as a check because the national assembly can reject persons to be appointed as Chief Justice, Deputy Chief Justice or a judge of the Supreme Court. Such an argument is not realistic because most national assemblies have more members belonging to the ruling party and such appointments usually go unchallenged.

²⁴⁶ Email from Stephen Lungu LAZ president on 9 August 2010.

²⁴⁷ As above.

²⁴⁸ Chanda (n 245 above) 27; see also Vijver (n6 above) 229.

²⁴⁹ 'Court sets date for hearing of anti chief justice Sakala case'

http://kasiyampala.blogspot.com/2009_07_26_archive.html (accessed 23 September 2010).

²⁵⁰ As above.

It is worth noting that the draft Constitution bill is trying to cure the concern that has been raised of the President's lack of consultation in the appointments of the Chief Justice, the Deputy Chief Justice and the Supreme Court judges. The draft Constitution bill provides that the President shall appoint the Chief Justice, the Deputy Chief Justice and the Supreme Court judges after consultation with the JSC and ratification by the national assembly.²⁵¹

4.3.2 Appointment procedures of judicial officers in South Africa

The appointment procedures of judicial officers in South Africa at the Constitutional Court, the Supreme Court of Appeal and the High Court are open and transparent compared to Zambia. Information is easily accessible to the public on how the appointments are conducted in practice. Zambia has a provision that allows the JSC to determine its own procedures like in the case of South Africa. Such a provision can be used as a tool to improve its procedures and Zambia can learn from the way the South African JSC has been conducting its procedures of selecting judicial officers.

In South Africa the Chief Justice and the Deputy Chief Justice are appointed by the President after consulting the JSC and the leaders of parties represented in the national assembly.²⁵² The JSC interviews those nominated by the President to the positions of Chief Justice and Deputy Chief Justice.²⁵³ The President and the Deputy President of the Supreme Court of Appeal are appointed by the President after consulting the JSC.²⁵⁴ With regard to the appointments of judges of the Constitutional Court, the JSC prepares a list of nominees with an additional three names of the number required to be appointed and the list is submitted to the President.²⁵⁵ The President must appoint in consultation with the Chief Justice and the leaders of the parties represented in national assembly from the list of nominees prepared by the JSC.²⁵⁶ If the President does not accept any of the nominees, he or she should give reasons for not accepting some of the nominees on the list and the JSC will supplement the list with further names from which the president must appoint.²⁵⁷ The Constitutional Court must at all times have at least four members who were serving as judges at the time of their appointment to the Constitutional Court.²⁵⁸ The other judges of the

²⁵¹ Article 217(1) draft Constitution bill.

²⁵² Section 174(3) CSA.

²⁵³ Vijver (n 6 above) 123.

²⁵⁴ Section 174(3) CSA.

²⁵⁵ Section 174(4)(a) CSA.

²⁵⁶ Section 174(4) CSA.

²⁵⁷ Section 174(4)(b) & (c) CSA.

²⁵⁸ Section 174(5) CSA.

Supreme Court of Appeal and the High Court are appointed by the President acting in accordance with the advice of the JSC.²⁵⁹

Other than the procedures provided for appointing judicial officers in the Constitution, the JSC determines its procedures when selecting judicial officers and it sits as a body consisting of 23 permanent members but the number increases to 25 in many instances.²⁶⁰ The procedures adopted by the JSC for the selection of judicial officers are published in the gazette.²⁶¹ For the Constitutional Court, the JSC should be informed by the Chief Justice if there is a vacancy at the Constitutional Court or when the vacancy will occur.²⁶² The JSC then announces the vacancy publicly calling for nominations specifying the closing date for the nominations.²⁶³ The person making the nomination is required to write a letter to the JSC stating his or her name and the name of the candidate being nominated.²⁶⁴ This should be accompanied by the candidate's letter of acceptance of his or her nomination, the candidate detailed *curriculum vitae* and the JSC's questionnaire completed by the candidate.²⁶⁵ These are the requirements that have to be satisfied for any nomination but, if there is any further relevant information other than what has been stated above, both the person making the nomination and the candidate are free to provide such information.²⁶⁶ A list of all the candidates who have been nominated is circulated to each member of the JSC after the closing date.²⁶⁷

The JSC is invited to make further nominations which should comply with the requirements stated above and may inform the Screening Committee²⁶⁸ of any names of the candidates they feel should be included on those short listed to be interviewed.²⁶⁹ It is worth noting that the screening committee has the discretion of receiving and taking into account nominations after the closing date.²⁷⁰ The screening committee short lists all candidates who the members of the JSC and the Screening Committee view as having high probability of being recommended for appointment and the list is circulated to the members of the JSC.²⁷¹ If there is a candidate who was properly nominated but has been left out on the list by the

²⁵⁹Section 174(6) CSA.

²⁶⁰Section 178 (2);Vijver(n 6 above) 125

²⁶¹Vijver(n 6 above) 125.

²⁶²Para 2(a) Government gazette 24596 of 2003.

http://www.justice.gov.za/legislation/regulations/r2003/2003_r423_gg24596-jsc.pdf (accessed 20 September 2010); see also Vijver (n 6 above) 126 .

²⁶³Para 2(b) (n 262 above); see also Vijver (n 6 above) 126.

²⁶⁴Para 2(c) (n 262 above); see also Vijver (n 6 above) 126.

²⁶⁵Para 2(c) (n 262 above);see also Vijver (n 6 Above) 126.

²⁶⁶Para 2(c)(iv) (n 262 above).

²⁶⁷Para 2(d) (n 262 above); see also Vijver (n 6 above) 126.

²⁶⁸The Screening Committee under definitions of the government gazette 24596 of 2003 refers to 'an adhoc subcommittee of the commission constituted from time to time.'

²⁶⁹Para 2(d)(i) &(ii) (n 262 above); see also Vijver (n 6 above) 126.

²⁷⁰Para 2(e) (n 262 above).

²⁷¹Para 2(e)(ii) & f (i) (n 262 above); see also Vijver (n 6 above) 126.

Screening Committee, members of the JSC who strongly feel that the candidate should be included on the list of those to be interviewed may write within seven days of receiving the list to the secretary of the JSC to have the candidate included.²⁷² That candidate will be included to the list of those to be interviewed.²⁷³

The JSC circulates the list to institutions²⁷⁴ having an interest in the appointment and announces publicly for comments to be received on or before a specified date.²⁷⁵ The list of the candidates short listed and all the information received after the closing date from both institutions and the public regarding the candidates short listed is circulated to the members of the JSC which then interviews all the candidates that have been short listed.²⁷⁶ The interviews are open both to the public and the media.²⁷⁷ When the interviews have been concluded, the JSC then goes in a private meeting to discuss and the decisions are reached by consensus or by majority vote on which candidates should be recommended for appointment.²⁷⁸ The reasons for selecting the candidates for recommendation to be appointed are distilled and recorded by both the JSC Chairperson and the Deputy Chairperson.²⁷⁹ The JSC then forwards the names of all the candidates recommended for appointment to the President of South Africa stating the reasons for recommendation.²⁸⁰ The JSC then announces publicly all the names of the candidates that it has recommended to the President.²⁸¹

The appointment procedures of the judicial officers of both the Supreme Court and the High Court of South Africa are similar to those of the Constitutional Court. The only difference is that the President of the Supreme Court or the judge President of the High Court is the one who informs the JSC if there is any vacancy or when the vacancy will arise.²⁸² A case in point that illustrates that the JSC calls for application and nominations from the public is on

²⁷²Para 2(f) (n 262 above); see also Vijver (n 6 above) 126.

²⁷³Para 2(f)(iii) (n 262 above).

²⁷⁴Government gazette 24596 of 2003 defines the institutions as meaning 'Law Society of South Africa, the Black Lawyers Association, the Department of Justice and Constitutional Development, the General Counsel of the Bar of South Africa, the Magistrates Association of South Africa, the National Association of Democratic Lawyers, the Society of Teachers of Law and the Association of Regional magistrates in South Africa, and such other institutions with an interest in the work of the Commission as the Commission may identify from time to time.'

²⁷⁵Para 2(g) (n 262 above); see also Vijver (n 6 above) 126.

²⁷⁶Para 2(h) & (i) (n 262 above).

²⁷⁷Para 2(j) (n 262 above); see also Vijver (n 6 above) 126.

²⁷⁸Para 2(k) (n 262 above); see also Vijver (n 6 above) 126.

²⁷⁹Para 2(l) (n 262 above); see also Vijver (n 6 above) 126.

²⁸⁰Para 2(m) (n 262 above); see also Vijver (n 6 above).

²⁸¹Para 2(n) (n 262 above); see also Vijver (n 6 above).

²⁸²Para 3(a) (n 262 above).

12 January 2010, the JSC announced publicly calling for 31 nominations and applications to take up the positions of judicial officers in the High Court and the Labour Court.²⁸³

Although South Africa's appointment procedures are clear, transparent and for the most part conform to international standards, there are some flaws. The selection procedures of the JSC have been criticised because the Constitution simply provides that a person who is fit, proper and qualified may be appointed.²⁸⁴ It is not clear the criteria the JSC uses in selecting the candidates to be appointed. There are perceptions that the JSC focuses mainly on the 'candidates race and gender, and his or her attitude towards the transformation of the Bench.'²⁸⁵ It is also worth pointing out that the appointments procedures are not subject to ratification by the national assembly. The President merely relies on the recommendations of the JSC. International standards require that the procedures for appointment be very strict. In my view, in order to answer to the rational of international standards which provides that procedures must be strict, the names of the candidates should be ratified by national assembly. It is not enough to only consult the leaders of the parties represented in the national assembly and the JSC especially because the word consultation raises serious concerns as is discussed in the next subheading below. A further step should be taken that should engage the members of the national assembly especially because South Africa has many opposition parties represented in the national assembly and this is where different opinions are voiced out by members of the opposition political parties. The national assembly will serve as a further check of scrutinising the candidates.

Another flaw in South Africa is the deliberations of the JSC being held in private after the interviews have been conducted. Today's democracy and governance requires that all proceedings be transparent. In the USA for instance, all the deliberations are conducted in public sessions for candidates nominated at the Supreme Court beginning with all the hearings conducted by the judicial committee (JC) regarding the candidate, the voting by the JC on the candidate, senates debates and votes on the candidate and the media covers all the proceedings intensively on the news and millions of viewers watch them.²⁸⁶

4.4 Common flaws between Zambia and South Africa in appointment procedures

²⁸³AllAfrica.com business day 'South Africa: Judicial Service Commission looking for applicants to take up 31 posts' 2010 <http://www.allafrica.com/stories/201001130147.html> (accessed 23 September 2010).

²⁸⁴Section 174(1) CSA; see also Vijver (n 6 above) 122.

²⁸⁵Vijver (n 6 above) 122.

²⁸⁶D Steven 'Supreme court appointment process: Roles of the president, judiciary committee and senate' 2010 56 <http://www.fas.org/sqp/crs/misc/RL31989.pdf> (accessed 23 September 2010).

Appointments of judicial officers to courts such as the Supreme Court in the case of Zambia, or the Supreme Court and Constitutional Court in the case of South Africa in constitutional matters are an occurrence of major significance. This is because these are the highest appellate courts. There is a common factor that can be observed in Zambia and South Africa when it comes to appointments to these courts. The President selects and appoints the Chief Justice, the Deputy Chief Justice, the President and the Deputy President of the Supreme Court in the case of South Africa and all the Supreme Court judicial officers in the case of Zambia. The concern that is raised relates to the qualities or criterion that the President looks or uses when indentifying these judicial officers. International standards require that appointment procedures be conducted in a transparent manner.

Lessons can be drawn from the USA where presidents have been announcing publicly the nominee selected and 'the philosophical or ideological values that they look for in a Supreme Court nominee.'²⁸⁷ For instance when President Barak Obama announced his nomination of Judge Sonia Sotomayor on 1 June 2009, he gave one of his reasons for the nomination the 'mastery of the law, the ability to hone in on the key issues and provide clear answers to the complex legal questions and a commitment to impartial justice... experience.'²⁸⁸ There were also other reasons that the President cited to justify his nominations. This makes the whole process transparent and the public to have confidence in the people being appointed.

Problems arise as to the meaning of words advice or consultation when the President is making his or her appointments. These words are found in most constitutions of various countries including Zambia and South Africa. There are different views and debates by different constitutional scholars regarding the meaning of these words.²⁸⁹ Literature and jurisprudence indicates that the persons or bodies which are supposed to give the advice or whom the President should consult are constitutionally permitted to be consulted or to give their advice but the President is not bound by whatever advice is given to him or her.²⁹⁰ Consultation however has to be full, effective and it has to involve deliberation and meaningful participation of those consulted.²⁹¹

The word consultation raised serious concerns in 2009 when President Jacob Zuma nominated and appointed the Chief Justice Sandile Ngcobo. Three opposition parties

²⁸⁷ Steven (n 286 above) 5.

²⁸⁸ Steven (n 286 above) 11.

²⁸⁹ Steven (n 286 above) 6.

²⁹⁰ Steven (n 286 above) 6; *Kembol v The State Enga* (1990) PNGLR 67; *Sesana and Others v Attorney General* (2006) B WHC 1; *The State and the President of the Republic of Malawi ex Parte Dr Bakili Muluzi and John ZU Tembo* (Misc. Civil Cause No 99 2007) (Unreported).

²⁹¹ *Union of India v Sankal Chand Himatlala Sheth and Chand ANR* (1977) INSC 178; *Re Honoman (Carl)* (1999) 65 WIR 157.

namely the Democratic Alliance, the Congress of the People and the Independent Democrats alleged that the President had not fulfilled his constitutional obligations which required him to consult with the leaders of the opposition under Section 174(3) of the CSA.²⁹² However, Vincent Magwenya the President's spokesperson stated that appropriate consultations were made through the letters sent to the opposition parties but the opposition parties denied having been consulted.²⁹³ The opposition party's preferred candidate for Chief Justice was Deputy Chief Justice Dikgang Moseneke.²⁹⁴ The question therefore is, did the President's action in sending letters to the opposition as described above amount to full and effective consultation or not? Jurisprudence shows that letters are a form of full and effective consultation if there is exchange of views between the decision maker and those he or she consults but the decision maker is not required to accept their views as long as he or she takes the views into account.²⁹⁵ It is my view that, if there was no exchange of views through letters or other means, then the President's consultation was not full and effective.

It has also been observed in this chapter that when interviews are being conducted of candidates by the JSC of South Africa and the Parliamentary Committee on Ratification of Zambia, emphasis is placed on institutions to appear before the committees or forward their comments about the candidate and there is little²⁹⁶ or no²⁹⁷ emphasis on other interested parties such as interest groups. A best practice can be seen from the USA where representatives of powerful interest groups appear before the JC to testify on the candidates that have been nominated.²⁹⁸ Before the interest groups appear before the JC, they lobby at the grass roots and there is publicity to mount support or opposition on the candidate with the other interests groups to influence the way JC and senate will vote.²⁹⁹

A flaw can also be seen across Zambia and South Africa relating to the lack of the JSC conducting intensive and thorough background investigations on the candidates for selection because they rely mainly on the institutions to make comments on the candidates. In the USA for instance, background investigations are conducted at two main levels. One of the background investigation is conducted on the candidate's 'public and professional

²⁹² 'Opposition backs Moseneke for chief justice' *Mail Guardian online* 18 August 2010
<http://www.mg.co.za/article2009-08-18-opposition-backs-moseneke-for-chief-justice> (accessed 29 May 2010).

²⁹³ As above.

²⁹⁴ n 293 above.

²⁹⁵ *The State and the President of the Republic of Malawi* (n 290 above); *Sesana* case (n 290 above).

²⁹⁶ South Africa's JSC lists institutions that may comment on the candidates and it also opens to the public to comment but does not identify powerful interest group that should comment like it does with institutions.

²⁹⁷ Zambia does not open for comments from the public; its focus is only on institutions that appear before the parliamentary committee on ratifications.

²⁹⁸ Steven (n 286 above) 56.

²⁹⁹ As above.

credentials³⁰⁰ and the second background investigation is on the 'candidate's private background.'³⁰¹ The Federal Bureau of Investigations (FBI) is charged with the responsibility of investigating the candidate's private background.³⁰²

The FBI will investigate among other things the personal financial affairs of the candidate to be considered for judicial appointment.³⁰³ The High Justice Department officials or the White House aides is tasked and heads the investigations on the public record and professional credentials of the candidate.³⁰⁴ These two bodies can both investigate at the same time and emphasis is placed on investigating the professional abilities of the candidate.³⁰⁵ The White House office of the Press Secretary then releases the background information of the candidate which is also placed on its website.³⁰⁶ A case in point is on 26 May 2009; Judge Sonia Sotomayor's background information was released and it was also placed on the website of the White House office of the Press Secretary for the public to see what kind of a candidate she is when she was nominated by the President as a candidate to be appointed to the Supreme Court.³⁰⁷

4.5 Security of tenure and removal procedures

4.5.1 Security of tenure and removal procedures in Zambia

Zambia's retirement age for the judges is 65 years,³⁰⁸ however, the President may appoint a judge of the High Court or Supreme Court on the advice of the JSC for a further period of seven years as the President may determine under article 98(1)(b) of the Constitution. This provision has already been the subject of litigation. In the year 2009, a petition was brought before the High Court where the legality of the contracts of the Chief Justice and Judge Peter Chitengi's were being challenged in accordance with article 98(1) of the Constitution.³⁰⁹ The two judges were appointed to a term of seven years by the late President Mwanawasa after their retirement but the national assembly did not ratify their appointments.³¹⁰ Basing on this, the petitioners were arguing that their appointments were a violation of article 98 of the Constitution because the extension of the contract was an

³⁰⁰ Steven (n 286 above) 11.

³⁰¹ As above.

³⁰² Steven (n 286 above) 12.

³⁰³ Steven (n 286 above) 11.

³⁰⁴ As above.

³⁰⁵ Steven (n 286 above) 12.

³⁰⁶ The White House: Office of the Press Secretary' 2009 http://www.whitehouse.gov/the_press-office/Background-on-judge-sonia-sotomayor (accessed 23 September 2010).

³⁰⁷ As above.

³⁰⁸ Article 98(1) Zambia Constitution.

³⁰⁹ The petitioners in this matter were Aaron Chungu and Faustine Kabwe; see also n 10 above.

³¹⁰ n 10 above.

appointment and it needed the ratification of the national assembly.³¹¹ The petitioners lost the petition.

Article 98(1) of the Constitution gives the power to the President to renew the contract of both the High Court and Supreme Court when he or she determines. In my opinion, such a provision undermines judicial independence because the judicial officers are at the mercy of the president to have their contract renewed. There is a high probability of the judicial officers advancing the political agenda to please the President so that their contracts are renewed. To avoid this, the term of office of judicial officers should be non-renewable like in the case of Constitutional Court judges in South Africa. The draft Constitution bill is trying to cure this flaw. The Chief Justice and the Deputy Chief Justice is only allowed to serve for 10 years or when they reach the age of 70, whichever one occurs first.³¹²

The judges in Zambia may be removed from office before the retirement age on grounds of misbehaviour, inability to perform official duties or incompetence by the president.³¹³ The president appoints a tribunal to investigate the question of removal of a judge 'which shall consist of a Chairman and not less than two other members, who hold or have held high judicial office.'³¹⁴ The tribunal will then inquire into the allegations and make its findings on the facts to the President advising whether the judge should be removed or not.³¹⁵ Where the tribunal advises the President that a judge should be removed, the judge shall be removed from his or her office by the President.³¹⁶

It is worth noting that the procedures of removing judicial officers maybe subject to abuse by the President in Zambia because he or she is so much involved in the removal procedures. There is no further check by the national assembly once the tribunal finds the judicial officer is guilty on any of the grounds. The draft Constitution bill is trying to cure the concern raised because it reduces the involvement of the President in the removal procedures. The Judicial Complaints Commission is tasked under the draft Constitution bill to receive a complaint or a petition of removal procedures from anyone on the grounds stipulated in the draft Constitution bill.³¹⁷ The Judicial Complaints Tribunal then submits the petition to the

³¹¹ n 10 above.

³¹² Article 220 draft Constitution bill.

³¹³ Article 98(2) Zambia Constitution.

³¹⁴ Article 98(3)(a) Zambia Constitution.

³¹⁵ Article 98(3)(b) Zambia Constitution.

³¹⁶ Article 98(4) Zambia Constitution.

³¹⁷ Article 222(1) draft Constitution bill.

President within 21 days of receiving it and after having accessed whether or not it is frivolous, vexatious or malicious.³¹⁸

The President is given 14 days to refer the matter to the national assembly.³¹⁹ The speaker of the national assembly after receiving the petition sets up a committee of the national assembly to further check whether or not the petition is frivolous, vexatious or malicious.³²⁰ If the committee finds that the petition is not frivolous, vexatious or malicious, the speaker appoints a tribunal or a medical board in the case of a petition alleging grounds of physical or mental incapacity to investigate or conduct medical examination on the judicial officer.³²¹ The tribunal or medical board is given 30 days from the day it is constituted to submit a report with its recommendation to the national assembly.³²² The judicial officer is removed by the president if the tribunal or medical board recommends that he or she should be removed.³²³ The proceedings of removal are in camera and the draft Constitution bill specifically provides that the judicial officer is entitled to a defence and representation and this is inline with what international standards provide for.³²⁴ The draft Constitution bill still has a flaw in the removal procedures. It does not provide for a further check such as voting by the national assembly calling for the removal of the judicial officer like in the case of South Africa.

4.5.2 Security of tenure and removal procedures in South Africa

The CSA provides under section 176 for security of tenure for judicial officers. Constitutional Court judges retire after holding office for 12 years which is non-renewable or when they attain the age of 70.³²⁵ This depends on whichever occurs first.³²⁶ The Constitution further allows for Constitutional Court judges to have their term of office extended by an act of parliament.³²⁷ Currently the judges' Remuneration and Conditions of Employment Act extends the office of judicial officers.³²⁸ If a Constitutional Court judge has served for a term of 12 years but have not reached the retirement term of 15 years of active service, he or she

³¹⁸ Article 222(2) draft Constitution bill.

³¹⁹ Article 222(3) draft Constitution bill.

³²⁰ Article 222(4) draft Constitution bill.

³²¹ Article 222(5) & (7) draft Constitution bill.

³²² Article 222(8) draft Constitution bill.

³²³ Article 222(10) draft Constitution bill.

³²⁴ Article 222(9) draft Constitution bill.

³²⁵ Section 176(1) Zambian Constitution.

³²⁶ Section 176(1) Zambian Constitution.

³²⁷ As above.

³²⁸ Act 47 of 2001 <http://www.info.gov.za/view/DownloadFileAction?id=68148> (accessed 21 September 2010).

can continue performing his or her duties until they complete the 15 years of active service.³²⁹

If a Constitutional Court judge attains the age of 70 but he or she has not completed the 15 years of active service, he or she may continue performing the functions until the completion of 15 years of active service or when they attain the age of 75, whichever occurs first.³³⁰ At the completion of active service of 15 years, they are discharged from active service as judicial officers.³³¹ Section 176(2) of the Constitution provides that the judicial officers of the other courts retire when an Act of Parliament discharges them from active service. The judicial officers of the other courts retire at 70 years if they have completed 10 years of active service and if at 70 years they have not completed the active service of 10 years, they may continue to perform their functions until they complete the 10 years of active service.³³² A judicial officer who has attained 65 years and has completed 15 years of active service is given the discretion to write to the minister of justice that he or she should be discharged from his or her duties.³³³ The President may request a Chief Justice and the President of the Supreme Court who are eligible to continue performing their functions even after attaining retirement.³³⁴ The period for the extension is determined by the president and upon attaining the age of 75 the extension ceases.³³⁵ Such a provision may undermine judicial independence as was discussed under security of tenure and removal procedures of Zambia.

The judicial officers may only be removed from their office before their retirement on grounds of incapacity, grossly incompetent and gross misconduct.³³⁶ The JSC investigates the incapacity, gross incompetent or gross misconduct and if the judicial officer is found guilty and if the members of the national assembly votes and adopts a resolution of at least two thirds calling for his or her removal, the President must remove the judicial authority.³³⁷

In the year 2009, the JSC commenced investigations of gross misconduct against Judge John Hlophe a Western Cape Judge President.³³⁸ The investigations arose as a result of the Constitutional Court judges who filed a complaint before the JSC alleging that Judge Hlophe

³²⁹Section 4(1) Act 47 of 2001 (n 328 above).

³³⁰Section 4(2) (n 328 above).

³³¹Section 4(2) (n 328 above).

³³²Section 3(2)(a) (n 328 above).

³³³Section 3(2)(b) (n 328 above).

³³⁴Section 8(a) & (b) (n 328 above).

³³⁵Section 8(a) & (b) (n 328 above).

³³⁶Section 177 CSA

³³⁷Section 177(1)(a)(b) & (2) CSA.

³³⁸Politicsweb 'Split JSC lets Hlophe off the hook (again)' 2009

<http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71619?oid=141269&sn=Detail> (accessed 29 May 2010); allAfrica.com businessday 'South Africa: Divided JSC's ruling leaves damaging legacy for justice' <http://allafrica.com/stories/200909030249.html> (accessed 29 May 2010).

had attempted to influence them in the matter involving the corruption charges of President Jacob Zuma.³³⁹ Statements were filed in by the parties in support of and disputing the allegations.³⁴⁰ Judges Nkabinde and Jafta were alleging that in March and April 2008, Judge Hlophe in separate conversations with each one of them had wanted inappropriately to influence the two judges to decide the President's case in a way favourable to the President.³⁴¹ Judge Hlophe filed a counter complaint where he alleged a violation of his constitutional rights by the Constitutional Court judges for having made known to both the public and the media the complaint they had lodged with the JSC.³⁴²

It was submitted at the hearing by counsel representing the complainants that rule 5 of the JSC rules gives the JSC power to hold a full enquiry into the allegations and that such an enquiry should be held in this matter.³⁴³ Counsel submitted that only when a full enquiry and cross examination is conducted will the intention of Judge Hlophe be established.³⁴⁴

The decision of the JSC was split six to four.³⁴⁵ The majority found that the complaint by Constitutional Court judges did not warrant a full enquiry because such an enquiry would not take the matter further.³⁴⁶ The majority agreed that Judge Hlophe's actions were improper but that they did not amount to finding him guilty of gross misconduct and holding a full enquiry was unnecessary.³⁴⁷ The JSC in respect of the counter-complaint by Judge Hlophe found that his allegations were based on inferences and were not supported by evidence.³⁴⁸

In my view, the decision of the JSC rejecting to hold a full enquiry impacted negatively on the independence of the judiciary. Holding a full enquiry would have established the intention of Judge Hlophe because the JSC found that the actions of the Judge were improper.

Having discussed the removal procedures in both Zambia and South Africa, it has been observed that the President is involved in the appointment procedures. The USA provides a best practice in that the President of the USA is not part of the removal procedures and he or she has no power to remove judicial officers.³⁴⁹ Judicial officers 'may be removed by

³³⁹ Politicsweb (n 338 above).

³⁴⁰ n 338 above.

³⁴¹ n 338 above.

³⁴² n 338 above.

³⁴³ n 338 above.

³⁴⁴ n 338 above.

³⁴⁵ n 338 above.

³⁴⁶ n 338 above.

³⁴⁷ n 338 above.

³⁴⁸ n 338 above.

³⁴⁹ Steven (n 286 above) 2.

Congress, but only through the process of impeachment by the House and conviction by the Senate.³⁵⁰

4.6 Conclusion

This chapter has shown how Zambia's appointment and removal procedures are conducted and the kind of security of tenure judicial officers enjoy. The chapter has also shown best practices from South Africa where Zambia has flaws with security of tenure, appointment and removal procedures of judicial officers. Where South Africa has flaws, the chapter has relied on the USA to learn from some of its practices. The chapter has established that appointment and removal procedures are crucial in ensuring that the right people are appointed who can uphold judicial independence.

³⁵⁰Steven (n 286 above) 2.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATION

5.1 Summary of findings

This study set out to investigate whether security of tenure, appointment and removal procedures of judicial officers in Zambia was inline with international law and standards. South Africa was used as a model from which Zambia can learn from. Where South Africa fell short, the study relied on the USA for some of its practices. The result of this investigation show that judicial independence is an indispensable tool to a democratic government and it can only attain its full connotation in a democratic state. Societies necessitate it in ensuring that the rule of law is safeguarded and checks and balances are at play as prescribed by separation of powers. Securing and enhancing judicial independence is a fundamental part of every state and one way of doing it is through the appointment and removal procedures of judicial officers' inline with international law.

The study has also revealed that security of tenure and appointment procedures of judicial officers in Zambia are not inline with international law and standards. The result of the study show that long term or non renewable term of office is a more preferred form of security of tenure of judicial officers in international law in order to enhance and secure judicial independence. The study has revealed that in Zambia, the President has the power to renew judicial officer's term of office of the superior courts after their retirement age which is contrary to international standards and may undermine judicial independence.

The study has further revealed that for appointment procedures to conform to international law and standards, they should be clear, strict and transparent. The result of the study shows that the procedures adopted by the JSC of Zambia are not clear. The appointment procedures are as well not open to the public thus lacking transparency. Furthermore, there is lack of transparency by the President when appointing judicial officers of the superior courts. No one knows what criterion the President uses in appointing judicial officers.

In addition, the result of the study shows that the procedures of appointment of judicial officers in both Zambia and South Africa are not very strict because they lack through intensive background investigations of the candidates to be appointed. There is no background information that is released on the candidates before they are appointed as is the case in the USA. The results of the study show that in Zambia, removal procedures of

judicial officers maybe subject to abuse by the President because he or she can instigate removal procedures and he or she is so much involved in the whole process.

5.2 Conclusion

This study focused on constitutional provisions of security of tenure, appointment and removal procedures of judicial officers. The study also focussed on the procedures adopted by the JSC and the practice on the ground. It has been observed that South Africa has reformed its judicial appointments procedures in order to secure judicial independence. Unfortunately, Zambia which was colonised and inherited the main features of the judicial process of the country that colonised it has not reformed its appointments procedures, while the colonial power has reformed its procedures. The challenge therefore lies with how Zambia is going to reform its procedures in order to conform to international standards. Reforms of appointments and removal procedures of judicial officers should be a regular process in order to secure and enhance judicial independence. This study concludes that Zambia's security of tenure, appointment and removal procedures of judicial officers should conform to international law and standards. The study proposes recommendations in the next subheading on how best Zambia can conform to international standards. Recommendations have also been suggested for South Africa where it falls short.

5.3 Recommendations

1. The JSC of Zambia is given the authority by the law to determine its own procedures. It is therefore recommended that the JSC uses such a provision to reform its procedures to make them clear, transparent and accessible to the public. The procedures should also be gazetted like in the case of South Africa and open to public scrutiny because the individuals appointed serve the interest of the public. The South African JSC should also conduct all its deliberation in the open specifically when the JSC is deliberating on which candidate should be selected as a judicial officer. South Africa can learn from the USA on how it has all its proceedings transparent. The JSC of South Africa should make it clear on the criteria they use and follow in the selection of judicial officers.

2. Zambia's provision in the draft Constitution bill relating to the composition of the members of the JSC should be revised to make it a broader representation and include other stakeholders such as civil societies and members of the opposition. Civil societies and the members of the opposition will act as a check for all those appointments that the ruling party want to appoint in order to advance their political agenda.

3. Continuing education of the members of the JSC in Zambia would be useful in exposing them to other jurisdictions like the USA and South Africa on how they have made their procedures more transparent and clear. This is because USA and South African procedures have been commended for their procedures.

4. There should be consultative processes in Zambia by all the three arms of government and other stakeholders on how best to make the procedures more transparent in order to eliminate any suspicions that surround the appointment procedures of appointing judicial officers who lack integrity, dignity and advance the political agendas.

5. The provision in the Zambia draft Constitution bill in respect of removal procedures for judicial officers should be maintained in the final Constitution. This is because the provision lessens the probability of the President's abusing the whole process.

6. Non renewal of terms of office for judicial officers safeguards judicial independence. Zambia has included a provision for non renewal of the terms of office of the Chief Justice and Deputy Chief Justice. It is recommended that such a provision should be maintained in the final constitution and should also be extended to all other judicial officers of the superior courts.

7. The President in both Zambia and South Africa should also be transparent by stating why they are nominating and selecting judicial officers to positions like the Chief Justice, Deputy Chief Justice and the Supreme Court judges in the case of Zambia because they are the only ones who know why a particular individual is being appointed. The USA has been commended for its presidents announcing to the public why a candidate has been nominated. It is also further recommended that Zambia's draft Constitution bill should only allow the President to nominate judicial officers to positions of Chief Justice, Deputy Chief Justice and the names of the candidates should be sent to both the JSC and national assembly for vetting. The President should only appoint after transparent procedures of vetting have been covered by the media, the JSC interviews the candidate and there is a vote by the national assembly. This procedure has worked in the USA.

8. The JSC in Zambia and South Africa should conduct intensive through background investigations on the candidates to be selected in order to reduce the probability of candidates who are not worthy of being appointed as judicial officers.

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