



The Dearth of Judicial Independence in Zambia's New Constitutional Dispensation

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ABSTRACT

The Judiciary is considered the vanguard of human rights protection through the enforcement of individual liberties enshrined in the Constitution. Since time immemorial, the legitimacy of decisions by the courts has been anchored, to a very large extent, on the impartiality and independence of the court. Judicial independence entails that the Judge has not, in his decision in a matter, been influenced by either his will or interest in the case's outcome or by other persons, entities or authorities other than the law. This implies that the decision made by a Judge should be based on predetermined normative standards embedded in the law. Since the attainment of political independence, the Judiciary in Zambia has undergone scrutiny with most scholars concluding that it was bereft of independence. Although the majority of these conclusions were based on the provisions of the Constitution of 1991 (as amended in 1996), the amendments to the Constitution (in 2016) have done little to guarantee judicial independence. It is argued in this article that the provisions on judicial independence under the Constitution (amendment Act 2 of 2016) Act are not only a façade but have also been crafted in a disguised manner to extend executive powers.

Key Words : Judicial Independence, Judicial Confidence, Judiciary, Judicial Authority, Zambia.

I. INTRODUCTION

The resolution of disputes between parties has been done since time immemorial. It is part of mankind. Over time, institutions called the 'judiciary', have been developed to administer the processes involved. The term 'judiciary' has two aspects— a court system, and the judges of such courts— which collectively form the institution mandated by law to administer justice. In Zambia, the judiciary, established under the *Constitution* and administered by the *Judiciary Administration Act 23 of 2016*, comprises Judges, Magistrates, Commissioners and Justices who dispense justice in one of the seven courts— the Supreme Court; Constitutional Court; Court of Appeal; High Court —and in the Subordinate Courts; Small Claims Courts; and Local Courts. The judiciary is significant in curtailing the arbitrary acts of government. Depending on its performance, the judiciary instils confidence in the public who may approach the courts when their rights have been violated by the government and other entities. In a democratic state like Zambia, the judiciary is strongly rooted in the principle of independence which is essential in upholding the rule of law and emanates from the doctrine of separation of powers. The doctrine of separation of powers does not allow the arms of government (i.e. legislature, executive, and judiciary) to interfere with each other's operations as they each have a distinct role to play i.e. the legislature is there to make the law while the executive ensures that the law is enforced. The judiciary is there to interpret the law and oversee the legislature and the executive's actions. In its interpretation, the judiciary intervenes in the operations of the executive or legislature but only to the extent of ensuring that the two do not overstep their legal boundaries. In this way, the court patrols the constitutionally delineated borders.

The *Constitution (Amendment Act 2 of 2016)* guarantees the independence of both the individual judge and also autonomy of the Institution. Independence of the Institution entails the ability to manage its funds and govern itself without the interference of any person or authority. For individual judges, independence implies the ability to discharge professional duties without influence from any branch of government. The goal is to ‘guarantee the right of an individual to have his/her rights and freedoms determined, protected and implemented by an independent and impartial judge’. This entails that the judiciary, in its dispensation of justice, is expected to act without regard to the station in life, political affiliation or indeed any other consideration other than the law. Where the judiciary is truly independent, public confidence in the institution is instilled for the cradle of public confidence lies in the nurturing, protecting and promoting the independence of the judiciary. As espoused by Garry Watson, ‘it assures to the public, not for what it grants to judges themselves’ and ultimately, the public is assured that their matter will be heard by a judge who is free of governmental or private pressures that may infringe upon his/her ability to render a fair and unbiased decision following the law.

The real challenge, however, is whether the promotion of judicial independence continues with the spirit that underscores the observance of the rule of law and good governance. For the judiciary to act in this manner, it needs to have some level of autonomy which requires it to be ‘divorced’ from the political or other influences. Enonchong reiterates that a judiciary ‘extricated from the control of political branches or other parties to a case is less likely to be motivated by political considerations or personal interest in deciding disputes’. Beyond questions surrounding political interference in the operations of the judiciary as an Institution, the calibre of those who sit to judge has also been questioned. The attitude of individual judges themselves asserting their independence, particularly in politically sensitive cases is the fulcrum upon which democracy rests. Godfrey Miyanda posits thus:

As a young lawyer, how can you be proud to stand before a judge, to fight for your client, when the same judge has decided the case outside the courtroom due to the interference of one form or another? As a judge how can you have a free conscience when you have convicted or found liable a person who is not guilty or liable, simply because you are compromised or intimidated? Do you legal people still believe that the Blind lady standing in front of our Courts, blindfolded, is still blind? Or is the Lady's blind-fold a see-through? How can you as lawyers proudly stand before a judge who has already made up their mind and argue a case that is predetermined? How can you stand the situation where Big Brother is breathing down the necks of judges to do the bidding of the Executive? What is the difference between you and a party cadre who shouts praises in support of wrong decisions just because of partisan or party loyalty?

The irony of this expression is that the ‘sight’ of the court can be veiled or blinded notwithstanding the number of glaring issues in front of them to properly decide on. Where there is no interference, a judge can act with a free conscience and properly articulate and apply the law in tandem with the facts and evidence presented to him/her. In this way, judges are vanguards of rights and the freedoms of people endowed with an inescapable responsibility of ensuring protection from arbitrary executive actions.

The principle of judicial independence, though present under the Constitution, does not seem to apply in reality. According to Mumba Malila, ‘it is as though the Judiciary has never been designed to function independently and effectively in this country’. He attributes this to many factors such as ‘the appointment of judges, their promotion, appointment on contract after retirement, appointment in retirement to committees, commissions and tribunals, funding to the Judiciary, the individual factors that could influence a judge in terms of career progression. This ideally implies that, despite the Constitutional guarantee of independence, it appears to be a long journey before one can say that Zambia has attained an acceptable level of judicial independence.

Arising from the aforementioned, the article argues that the provisions on judicial independence under the *Constitution* (amendment Act 2 of 2016) *Act* are not only a façade but have also been crafted in a disguised manner to extend executive powers.

II. Judicial Authority

The *Constitution* (amendment 2 of 2016) *Act* defines “judicial authority” as the power and right to perform functions in the Constitution. In other words, it is the authority that a judge has to hear, determine, settle, or adjudicate a matter in favour of a party(s). This authority is derived from the people and is to be exercised in a manner that promotes accountability. Article 118(2) of the Constitution lists 6 principles to govern the exercise of judicial authority, namely: (a) justice done to all without discrimination; (b) justice shall not be delayed; (c) adequate compensation, where payable, shall be awarded; (d) alternative forms of dispute resolution shall be promoted; (e) justice shall be administered without undue regard to procedural technicalities; and (f) the values and principles of the Constitution shall be protected and promoted. There is a further requirement that such authority shall be exercised in consonance with the Constitution and other applicable laws and it is incumbent on the courts to hear matters that are either civil or criminal or relating to the Constitution.

III. PRINCIPLE OF JUDICIAL INDEPENDENCE

International instruments under the aegis of the United Nations promote and encourage judicial independence. For instance, the Universal Declaration of Human Rights (UDHR) provides that “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations.” Furthermore, the Seventh United Nations Congress on the Prevention of Crime and Treatment of Offenders adopted the Basic Principles on the Independence of the Judiciary (1985) providing thus:

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

From the foregoing, it is postulated that judicial independence requires the courts, in the performance of their duties, to act without external influence that may come from the executive arm of government, political and civic leaders, or among themselves. As a principle, judicial independence is twofold: *first*, the existence of judicial power independently and separate from the power of the executive and legislative, and *second*, the judiciary is endowed with judicial power and has persons that are independent and different from those in the executive and legislature. Concerning the first tenet, individual judges must, in exercising their judicial power, be independent and shielded by the law from reprisals that may instil fear thereby affecting their decision-making. Also, the criteria for the selection of judges must be such that they curtail the threat of compromise and external influence. Regarding the second tenet, the judiciary, as an institution, must be independent of external influence by the other branches of government.

The Chief Justice of the Canadian Court, Robert Dickson CJ, explaining the principle of judicial independence in *The Queen v Beauregard*, stated that the judiciary must be ‘completely separate in authority and function from all other participants in the justice system, in particular, from the executive and the legislative branches of government’. This gives judges the liberty to decide matters before them without undue influence. Peter Russell describes ‘judicial independence’ in this manner:

...the judiciary's essential function derives from two closely related social needs. First, in civil society, we want some of our relations to be with each other and without government to be regulated by reasonably well-defined laws setting out mutual rights and duties. Second, when disputes arise about these legal rights and duties, we want a mutually acceptable third-party adjudicator to settle the dispute.

In Russell's view, the independence of the judiciary is seen as a mechanism that ensures that rights and duties, as defined in the law, are well regulated. Where disputes arise, as a consequence of a breach of these rights and duties, they should be resolved by a neutral third party. In this way, judicial independence aims to serve the needs of society. Sir Gerard Brennan augments that judicial independence 'exists to serve and protect not the governors but the governed' who are to be governed 'by the rule of law'. An assertion can be made that judicial independence seeks to protect a society whose governance must be by the rule of law. Expounding on the rule of law and the power it requires to be exercised, Mogoeng CJ in *Economic Freedom Fighters and Democratic Alliance v Speaker of the National Assembly and Others* opined that the rule of law requires not to 'pick and choose which of the otherwise effectual consequences of the exercise of constitutional or statutory power will be disregarded and which given heed to.' This is because the foundational value of the rule of law requires law-abiding people to respect the decisions handed down by those clothed with legal authority to make them in a manner they deem appropriate given the facts and law involved.

In recent years, the general understanding of the principle of judicial independence has grown and been transformed to respond to modern needs. It may well be said that today, the principle is far broader encompassing both individual and collective aspects. Le Dain J in *Valente v The Queen* expresses the view that judicial independence involves both individual and institutional relationships 'the individual independence of a judge, as reflected in such matters as security of tenure, and the institutional independence of the court or tribunal over which he or she presides, as reflected in its institutional or administrative relationships to the executive and legislative branches of government'. Deciphering the court's words, one would argue that independence should be seen beyond an individual who sits to hear and determine a matter. The justification for this double-barrelled approach lies in the recognition that courts are not only obliged to settle matters brought by individuals but also as a protector of the Constitution. In other words, judicial independence is essential for fair and just dispute resolution in individual cases while also being the lifeblood of constitutionalism in democratic societies.

The principle's success is fortified by the presence of the rule of law in a jurisdiction. This would mean that there should be appropriate law in place that governs the functions of the judiciary. This would allow matters to be decided purely on facts presented and appropriate law and without fear or favour. In this way, the court would be able to act unrestricted and without external influences, inducements, or threats, whether direct or indirect.

IV. INSTITUTIONAL INDEPENDENCE

Institutional independence of the judiciary generally focuses on the principle of separation of powers between the government's three arms. According to Justice Cameron, the separation of powers principle 'gives the judiciary insulation from the other branches of government, allows judges to do their job which is to serve as an effective check on the exercise of power.' This also guards the judges against being drawn into politics by declaring some disputes non-justifiable. Justice Chaskalson opines that the judiciary is a co-equal arm of government and Institutional independence is directed to this issue. Like the core value of judicial independence, it is required to ensure that courts are not subject to constraints through pressure from other arms of government. It is improbable that the judiciary can exercise its authority if it is open to the control of the legislature or executive or other institutions or persons, whether directly or indirectly. It is

essential and indispensable that, in exercising the authority granted to it by the law, it should be, and should be seen to be, independent. Undoubtedly, judicial independence is significant to the dispensation of justice. The public is entitled to insist on its observance by the judges and on its protection by the Parliament and the Executive.

A truly independent judiciary must possess three characteristics: (i) impartial; (ii) respect for judicial decisions; and (iii) freedom from interference. An important aspect of judicial independence is shielding the judges from the influence of the executive or other governmental wings. This is the more reason why the Constitution has attempted to put in numerous provisions relating to the mode of appointment of judges, conditions of service, security, tenure, removal from office, financial resources etc.

i. Appointment of judges

The Constitution gives authority to the President to appoint judges on the recommendation of the Judicial Service Commission (JSC). The JSC, before recommending a person to be appointed as a judge, conducts interviews to ascertain the experience and suitability of candidates before recommending to the President for the appointment. In carrying out this process, the JSC is required to consider two main criteria: first, a person's proven integrity; and second, the period for which they have practised law. With regards to the first criteria, the selection procedure does not state what amounts to 'proven integrity' and most importantly to what it must relate. This creates suspicion in the public who mostly criticize the identification of possible appointees as having a political connection or that those in higher authority endorse their candidature. On the second criterion, the number of years at the Bar would seemingly demonstrate the wealth of experience that an appointee has. This poses a challenge in that, having many years at the Bar does not prima facie denote experience in legal practice. Except for the Constitutional Court, the other courts do not have competence in a specific field as a requirement, however, by practice, appointees to the High Court must possess relevant expertise for that court.

Although by law the JSC is required to 'vet' the persons to be appointed by the President, the weight of their advice is cursory in that they do not hold a final say. This would mean that where the JSC recommends a person who may not be the one 'approved' by the executive, such a person may not be appointed and vice versa. This issue goes to the operations of the JSC which are said to be shrouded in mystery. Linda Kasonde expresses the view that 'there seems to be some sort of a mystery as to what the process is'. This casts doubts on the independence of the JSC and raises the question— how can an entity that may not be independent recommend a person who is expected to act independently?

ii. Tenure of judges

The security of tenure for judges assists their independence by not allowing them to yield to pressure from the executive to guarantee their stay in office. The tenure of judges must be entrenched in the Constitution and explicitly stated. According to the Constitution, where a person has been appointed a judge, the person will serve in that capacity unless they resign either: (i) on their own accord; or (ii) upon accepting to be assigned to another office outside the judiciary. Article 142 of the Constitution provides two instances under which a judge holding office may retire: *first*, on attaining the age of seventy years; and *second*, with full benefits, on attaining the age of sixty-five years.

Article 142(1) uses the words 'shall' and 'may' in sub-article 2. The word 'shall' in its natural meaning denotes a mandatory obligation or undertaking while the 'may' is optional or discretionary. Article 142(1) places a mandatory obligation on a judge to retire upon reaching the age of seventy. Under Article 142(2), the judge is given liberty to either retire, upon attainment of sixty-five years or continue. Examining these two seemingly dichotomous provisions, one would reach an inescapable conclusion that a judge's retirement is optional at sixty-five, and mandatory at seventy and that the tenure is not contractual. Article

142(4) has enhanced the independence of the judge as he/she is not eligible for appointment following retirement as had been the case under the repealed article 98 of the Constitution as amended in 1996. This appears to have brought to an end judges seeking contracts or re-appointments after attainment of the retirement age.

iii. Security of office

Security of office relates to the procedure and the grounds upon which a person serving as a judge may vacate office. Article 143 provides the grounds, namely: mental or physical disability that makes the judge incapable of performing judicial functions, incompetence, gross misconduct; or bankruptcy. The procedure is stated in Article 144:

- (1) The removal of a judge may be initiated by the Judicial Complaints Commission or by a complaint made to the Judicial Complaints Commission, based on the grounds specified in Article 143.
- (2) The Judicial Complaints Commission shall, where it decides that a *prima facie* case has been established against a judge, submit a report to the President.

Sub-article (1) provides that the procedure can be initiated in two ways either by (i) the Judicial Complaints Commission (JCC); and (ii) a complaint made to it. This provision is flawed in that, whereas JCC is given the power to initiate a complaint, there are dangers that it can be a complainant, prosecutor and judge at the same time. In sub-article (2), where a *prima facie* case has been established against a judge, a report shall be submitted to the President who suspends the judge within seven days. Sub-article (2) should have expressly provided for the judge to be heard before establishing a *prima facie* case. As it stands, JCC may hold that a *prima facie* case has been established merely based on the complaint and/or the representations made by the complainant. A judge may, therefore, be suspended without a hearing. This becomes probable especially when one considers the fact that Article 144(4)(a) provides for a hearing. In the case of *Joshua Ndipiyola Banda v Attorney General*, the petitioner was ratified as a High Court Judge while facing complaints for gross misconduct which made the petitioner believe that the ratification entailed the complaints had been considered and cleared by the ACC and JCC. Further, there was no adverse report made by any of the institutions involved in the ratification process. The petitioner was removed from office without the JCC providing a report of a *prima facie* case to the president and was also not subjected to suspension and a hearing which was contrary to Article 144. His removal was based on a question of integrity for acts done when he was not a high court judge which begs the question: who is to blame for the lack of integrity or lack of public trust in the judiciary's independence? It can be opined that JCC and other institutions were trying to save face when they did not follow constitutional provisions for the removal of a judge as the investigation was not thorough. It is worth noting that once a judge is suspended, the effects on that judge and the judiciary as a whole, can be detrimental even if that judge is later cleared and re-instated. The fear of being suspended can scare some judges from standing against the executive or persons connected to the executive.

The Judicial (Code of Conduct) Act (as amended by Act No. 13 of 2006) establishes the Judicial Complaints Authority (JCA) whose primary function is to receive any complaint or allegation of misconduct and to investigate any complaint or allegation made against a judicial officer. The JCA consists of five members who have held or are qualified to hold high judicial office. The members are, subject to ratification by the National Assembly, and appointed by the President. The Act is, however, silent on who should be a member of the JCA save that such a person must qualify to hold a high judicial office. It is argued that the composition of the JCA may also pose some challenges where the members (or some of them) are actively

practising lawyers as they would be appearing before a judge on a given day, yet on another day, they are sitting to hear a complaint against a judge. Judge Mwila Chitabo expressed the view that:

...judges should only be tried by their peers or superiors-brothers and sisters in service or who have held the high judicial office of a Judge. It is a serious mischief that members of the Bar, which is lower to the Bench, should be the prosecutors and triers of honourable members of the Bench.

Clearly, where a judge is tried by lawyers who are members of the JCA, such a judge would be tempted to avoid creating a 'bad' relationship with lawyers who sit on the JCA by not passing judgments against clients of such lawyers for possible fear of retaliation by lawyers.

iv. Exercising of judicial authority

A judge, in carrying out duties assigned to him by law, is not subject to the control of a person or authority. Article 122(1) requires that the exercise of judicial authority is 'subject only to this Constitution and the law and not be subject to the control or direction of a person or an authority'. By this provision, the judiciary is only subject to the Constitution and the law and not to the control or direction of another person or authority. This does not, however, mean that the courts have unlimited powers. The call is for the courts to carry out their agreed-upon functions in an atmosphere of freedom from interference by the executive or the legislature, yet without giving it impunity to act in an uncontrolled and arbitrary fashion.

Interference in the proper functioning of the judiciary can come from outside (e.g. from the executive or legislature or other persons or entities) or within (e.g. a judge may interfere with how another judge should decide a particular matter). It does not, however, seem so under the Constitution which envisages outside interference. According to article 122(2), a 'person and a person holding a public office shall not interfere with the performance of a judicial function by a judge or judicial officer'. This provision does not allow 'a person' including one that holds a public office to interfere with the function of a judge. A public officer is defined as a 'person holding or acting in a public office, but does not include a State officer, councillor, a Constitutional office holder, a judge and a judicial officer'. A president is also a public officer and as such should not interfere with the function of a judge or the judiciary as an institution. The supposed 'interference' of the president in the functioning of the judiciary has drawn controversies. At one particular meeting, President Edgar Lungu was quoted as saying:

To my colleagues in the judiciary, my message is just do your work, interpret the law without fear or favour; look at the best interest of this country...Those people who don't like peace and freedom will say 'President Lungu is intimidating the courts of law'. I am not intimidating my colleagues in the judiciary. I am just warning you that I have information that some of you want to be adventurous. Your adventure should not plunge us into chaos, please.

The judges were seemingly being implored to interpret the law without fear or favour, however, fear is what was being instilled through 'intimidation'. Notwithstanding the emphasis placed on 'I am not intimidating my colleagues in the judiciary', a stern warning was issued against those judges who may be 'adventurous' i.e. those who would not interpret the law in a manner expected by those likely to be affected. It is such sentiments that would, notwithstanding the true motive of the executive, be regarded as interfering with how judges carry out their functions.

A judge, however, cannot be said to be interfering with the function of another judge. This is evident from provisions of the Constitution that allow the Chief Justice to (a) be responsible for the administration of the Judiciary; (b) ensure that a judge and judicial officer perform the judicial function with dignity, propriety and integrity; (c) establish procedures to ensure that a judge and judicial officer independently exercise judicial authority following the law; (d) ensure that a judge and judicial officer perform the judicial function without fear, favour or bias; and (e) make rules and give directions necessary for the efficient and

effective administration of the Judiciary. These responsibilities, bestowed on the Chief Justice, cannot be said to be interference as they merely ensure efficient management of the judiciary by ensuring that there is independence in the manner in which the office of judge operates.

v. *Performance and financial resources*

The operations of the judiciary, including payment of salaries and emoluments, are the responsibility of the executive. The provision of sufficient financial resources on time ensures the smooth operation of the judiciary. The opposite is also correct, that is to say, where the judiciary is not adequately funded, it cannot perform its functions properly. A key component of institutional independence is financial independence which relates to how the institution budgets for, accesses and disburses funds for the performance of its functions. This requires that each State organ should have reasonably sufficient control and freedom from interference from the other two State organs. This independence must be apparent from both the legislation and policy measures to be objectively viewed as such. As Chief Justice Mahomed put it, where the judiciary lacks financial resources, it ‘could be reduced to paper tigers with a ferocious capacity to roar and to snarl but no teeth to bite and no sinews to execute what may then become a piece of sterile scholarship’. Similarly, where finances have been appropriated to the judiciary, the executive should not control or direct the management of financial affairs. Article 122(3) provides that the Judiciary ‘shall not, in the performance of its administrative functions and management of its financial affairs, be subject to the control or direction of a person or an authority’. This provision, while recognising that funding for the operation of the judiciary stems from the executive, does not permit any person or authority (including the executive) to control or direct the management of the financial affairs. The control or direction appears to only be in instances where a person or an authority instructs regarding the utilisation of finances. According to article 123(1), the ‘Judiciary shall be a self-accounting institution and shall deal directly with the Ministry responsible for finance in matters relating to its finances’.

The United Nations obliges its Member State to ‘provide adequate resources to enable the judiciary to properly perform its functions’. The Constitution in Article 123(2) obligates the executive to adequately fund the Judiciary to enable it to effectively carry out its functions. Former Chief Justice Ernest Sakala observed that, though the judiciary still depends on the executive for its funding, it ‘does not rank very high on the list of priorities where budget allocation is concerned’ and this ‘can severely impair judicial independence and undermine the performance of the functions which the independence of the judiciary is intended to preserve....’ Thus, where there is inadequate funding, it could be a source of judicial compromise consequentially impinging its autonomy. Keith Rosen suggests that the judiciary ‘should have an autonomous judicial budget as that allows scope for it to function without the external threat of alteration of its financial status’. This would imply that the budget for the judiciary must be secured by charging it to a consolidated fund or determined as a fixed percentage of the government’s annual budget.

The funds appropriated to the judiciary are administered per the Judiciary Administration Act 23 of 2016. The Act also makes provision for financial resources of the Judiciary. According to section 17, the forms of funds for the judiciary shall be those appropriated by Parliament, other payments, and accruals from any investment made by it. The funds from Parliament shall be paid out from the Consolidated Fund. The purpose of the funds is to cover salaries, allowances, and administrative expenses, including emoluments as may be determined by the Emoluments Commission. The Chief Administrator of the Judiciary is required to keep proper books of account and other records on the accounts of the Judiciary and have the same annually audited by the Auditor General. The Chief Administrator shall, after that, submit to the National Assembly a report containing: (a) an audited statement of financial position; (b) an audited statement of comprehensive income; and (c) such other information as the National Assembly may require.

The adequacy of funding does not only pertain to meeting administrative costs but also emoluments belonging to judicial officers and judges. Article 265 of the Constitution requires adequate remuneration of a public office to enable it to effectively perform its functions. Where emoluments are payable under the Constitution or as prescribed, this shall be a charge on the Consolidated Fund which has been established to make payments in terms of salaries, allowances, and benefits that are payable to judges. It is argued that payment of adequate emoluments to judges is imperative in the dispensation of justice. Lord High Chancellor reiterates thus:

...without judicial independence there is no rule of law. It is central to maintaining a fair and just society....If judges depend on the goodwill of the government for their continuing employment, they may find themselves unable to resist political or other improper interference in individual cases.

This signifies that judicial independence is inseparable from guaranteeing a judge's emoluments. Such emoluments are not to be varied to the detriment of the judges. Kenya, unlike Zambia, explicitly prevents negative variation emoluments payable to a judge. Section 160 of the Kenyan Constitution states:

- (4) Subject to Article 168(6), the remuneration and benefits payable to, or in respect of, a judge shall not be varied to the disadvantage of that judge, and the retirement benefits of a retired judge shall not be varied to the disadvantage of the retired judge during the lifetime of that retired judge.

This provision grants constitutional protections for the emoluments payable to a judge, whether actively serving or retired. The absence of a similar or equivalent provision opens up the entitlements of a judge to the whims and caprices of the executive.

V. CONFIDENCE IN THE JUDICIARY

Judicial independence in Zambia has undergone scathing attacks and threats. The basic principles on the independence of the judiciary (1985) place a duty on all governmental and other institutions to respect and observe the independence of the institution and the individual judges and magistrates. The different entities also have to collaborate in a way that would necessitate judicial independence. The different actors, who must understand their role in promoting judicial independence, must not exert pressure on their judiciary due to their influential position or strong financial advantage in a bid to obtain favourable outcomes. Lawyer independence and self-regulation are integral in upholding the rule of law. The independence of a lawyer contributes to the proper functioning of a legal system. A lawyer must be able to advise and defend the interests of a client independent of any interference from the client's self-interest, fellow counsel or their self-interests. A lawyer must refrain, therefore, from uttering words that will render the public to lose confidence in the judiciary, in a bid to try to satisfy the interests of a client. In *Masiye Motels Limited v Rescue Shoulders and Estates Agents Limited*, the lawyer and his litigant faced charges of contempt of court after they insulted the court following the loss of an appeal. The litigant wrote insulting letters to the Chief Justice and in one of the letters he quoted the words uttered by his counsel: 'It is a stupid judgment by stupid judges'. Justice Mambilima, as she then was, lamented that counsel abandoned his role and was the fuel that propelled the litigant to write insulting letters.

Suffice it to state that no court is free from criticism, however, what is decisive is that such criticism is aimed at enhancing how the court functions. The independence of the judiciary is not only for probity but more importantly, for efficient and effective performance and engendering public confidence in itself. Muna Ndulo argues that there is 'decay and decline in public confidence in the judicial system'. His argument is anchored on what he perceives to be the lack of 'protection of the rule of law and the protection of human rights and freedoms' by the judiciary. It is asserted that the independence of the court thrives on the

confidence that is accorded to it by the public. In the words of Ghana's Chief Justice, Georgina Wood, the 'critical virtues of trustworthiness, respect, honour, integrity etc., all of which are vital to the promotion and sustenance of public confidence, are virtues that must be worked for, toiled for and earned. They are not matters of a right that can be demanded or foisted down people's throats'. It is, therefore, incumbent on the judiciary and its members to 'act responsibly and with candour and comport themselves with the highest professional and ethical standards, in a manner that will win the public trust, respect and confidence'.

The confidence of the public in the judiciary rests: *first*, on judges and their conduct; *second*, timely rendering of decisions; and *third*, on the quality of those decisions. The then Acting Honourable Chief Justice, Madam Justice Lombe Chibesakunda, stated thus: 'your knowledge of the law must be up to date... avoid laziness, fear, favour, corruption, nepotism, tribalism and other similar vices, at every cost. If people think your judgment is biased, is coloured, or is partial, they would doubt the judicial process and the river of justice would stand contaminated'. It must be added that, where the public feels that the judiciary has not done what is expected of it, it leads to despondence ultimately eroding public confidence in it. Thus, the ability to instil confidence lies within itself.

Rendering of decisions timely is also crucial. Such decisions must explain the reasoning of the court in arriving at a particular conclusion. John Sangwa posits that 'respect cannot be won through the imposition of severe punishment against anyone who demeans the judiciary. It's the quality of the decisions or judgments that will win the judiciary respect, reverence and acceptance among the people'. In his commendation to the Chief Justice, John Sangwa also postulated that a well-reasoned judgment can 'earn the Judiciary respect nationally and internationally' where it 'illuminates the independence, integrity and professional standing of the Supreme Court'. A judgment cannot be said to be of quality or well-reasoned where the court that renders it has not provided reasons for the decision made. As Justice Chirwa once stated, 'generally speaking, a judgment can be said to be a decision of the court on a dispute presented to it by litigants consisting the reasons for that decision and the law'. Further, section 169(1) of the Criminal Procedure Code, Chapter 88 of the Laws of Zambia makes it mandatory, in criminal matters, for the court to render reasons for its decisions. In addition, reasoning in the judgment is cardinal in the event of an appeal as this would assist the appellate court to appreciate how the lower court arrived at its decision.

While a well-reasoned judgment earns the court respect, a bad one brings it into ridicule and condemnation. Although judges are expected to deliver well-reasoned decisions and as such, are provided with interpretive tools, they do not undergo formal training as judges. It has been dangerously assumed that by the training they undergo, before they become judges, they are endowed with research and as such, know how to write judgments. Thus, the process of reasoning must be such that all concerned understand the principles, the practice of law and the logic guiding the court. This, in turn, protects against any tendency to judicial autocracy and erroneous suspicion of judicial wrongdoing.

There is no doubt that, as defenders of the law, a huge responsibility has been placed on the shoulders of the court. Executing this responsibility with integrity would inevitably earn them the confidence of the public. Misconduct by a judge undermines society's perception and willingness to accept judicial decisions. Where misconduct occurs, disciplinary procedures must be credible, effective and swiftly implemented. *In re Nigel Mutuna and Charles Kajimanga v Attorney General*, three judges were suspended by the President and a tribunal was set to inquire into the allegations levelled against them. However, while they remained suspended, the inquiry never took off. On appeal to the High Court, it was stated that '...it will be grossly unjust and unfair to the applicants if the suspensions were allowed to remain in force when the tribunal to which the question of their removal has been referred has no capacity to inquire into the matter'. It is argued that, where it becomes necessary to remove a judge from office, it must be done in a transparent and timely manner.

VI. CONCLUSION

The article sought to argue that the provisions on judicial independence under the *Constitution* (amendment Act 2 of 2016) *Act* are not only a facade but also have been crafted in a disguised manner to extend executive powers. It has found that the independence of the Judiciary is a topic that has been embroiled in controversy since time immemorial. Academic works based on the Constitution amendments of 1996 reveal that frailties existed in the law. Although the Constitution amendments of 2016 attempt to guarantee the operational and financial independence of the judiciary, still fall short of the required standards. This has led to a continued impugning of the provisions and scathing attacks on either the process of appointment or decisions made by the courts. The courts have also, in their defence, cited ‘attackers’ for contempt. Care must be taken by all to not utter unwarranted statements that could erode the confidence of the public in the judiciary.

Given the foregoing, we recommend two things: *first*, that the office of the Chief Justice and Deputy Chief Justice should be chosen by an election process in which magistrates and judges also take part. This will ensure public scrutiny of the process and forestall the executive’s decision to hand-pick persons who may not instil confidence or uphold the independence of the institution they are to head. *Second*, judicial councils composed of lawyers, members of the judiciary and civil society must be created. Such a council will be responsible for policy-making and ensuring the impartial, independent and administration of justice. This will, in effect, remove the oversight role that the Ministry of Justice has over the judiciary. It will also enhance public confidence by managing social and media pressures exerted on the judiciary whenever they issue a judgment which is perceived by the public to be in bad taste.

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